



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)

Case No. : WA/15/2022

Union of India and 6 Ors.
New Delhi

2: Director General of Border Security Force
New Delhi

3: Additional Director General
Confirming Authority
SDG(Eastern Command)
Kolkata

4: Head Quarters Special Director General
BSF
New Delhi

5: The Inspector General of Border Security Force
FTR HQ BSF
Assam

6: The Commandant
1st Bn
BSF
Mellteram
Lunglei
Mizoram
Lunglei
Mizoram

7: The Assistant Commandant
1st Battalion
BSF
Melteram
Lunglei
Mizoram
Lunglei
Mizora

VERSUS

Sh. Zakaria Ahmed, No. 990065375
New Delhi

Advocate for the Petitioner : Ms Zairemsangpuui
Advocate for the Respondent : Mr B Lalramenga

Linked Case : I.A.(Civil)/131/2022

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VERSUS

Sh. Zakaria Ahmed

No. 990065375
Lakhiganjm Dhubri
Assam

Advocate for the Petitioner : Ms Zairemsangpuii
Advocate for the Respondent :

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VERSUS

Sh. Zakaria Ahmed
No. 990065375 Constable (GD) 1st Bn
BSF
Lakhiganj
Dhubri
Assam

Advocate for the Petitioner : Ms Zairemsangpuui
Advocate for the Respondent :

Linked Case : I.A.(Civil)/161/2022

H.Lalnunthluangi
Durtlang Leitan
Mizoram

VERSUS

State of Mizoram r/b the Chief Secretary and 5 Ors.
Govt. of Mizoram
Aizawl

2:Secretary to the Govt. of Mizoram
Home Department
Aizawl

3:Director General of Police
Govt. of Mizoram
Aizawl

4:Assistant Inspector General of Police-I
Mizoram
Aizawl

5:Deputy Inspector General of Police (Hqrs)
Govt. of Mizoram
PHQ
Aizawl

6:The Commandant
3rd Bn MAP
Mizoram
Aizawl

Advocate for the Petitioner : Mr A.R. Malhotra
Advocate for the Respondent : Mr C Zoramchhana

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGEMENT

Date : 27.01.2023

Heard Ms. Zairemsangpuii, learned CGC for the appellants and Mr. B. Lalramenga, learned counsel for the respondents.

2. This appeal has been filed against the Judgment & Order dated 25.02.2022 passed by the learned Single Judge in WP(C) No. 150/2019, which had set aside the impugned order of dismissal dated 01.03.2019, issued by the Commandant, 1st Battalion BSF, on the ground that the General Security Force Court (GSFC) Order dated 07.12.2018, which came to a finding that the respondent was guilty of the charge punishable under Section 10 of the POCSO Act, 2012 did not convict the appellant, as the word "convicted" was absent in the impugned order. The learned Single Judge followed the judgment of a Co-ordinate Bench of this Court in the case of *Rajib Choudhury Vs. Union of India & Ors.*, reported in *2015 (1) GLT 185*, wherein it held that the finding recording the opinion of the Court that the accused was guilty of the charge did not crystalize into an order of conviction, unless there was an order of conviction.

3. The brief facts of the case is that the respondent, who was a Constable in the Border Security Force (CSF), was found to have molested a 12 year old girl by forcibly touching her breast. Thereafter, on the basis of a complaint and an enquiry conducted,

proceedings were initiated against the respondents before the GFSC. The GFSC came to a finding that the respondent was found guilty of the charge under Section 10 of the POCSO Act, 2012. However, without convicting the respondent and using the word "convicted" the respondent was sentenced to suffer imprisonment for 5 years and also dismissed from service. The respondent filed a pre-confirmation petition dated 12.12.2018 against his sentence by the GSFC. The pre-confirmation petition was rejected on 06.02.2019 by the Confirming Authority. Thereafter, the impugned Order dated 01.03.2019 was issued by the Commandant, 1st Battalion, BSF sentencing the respondent to suffer imprisonment for 5 years and to be dismissed from service.

4. Being aggrieved by the impugned Order dated 07.12.2018 passed by the GSFC, Confirmation Order dated 06.02.2019 and impugned Order dated 01.03.2019, the petitioner filed WP(C) No. 150/2019.

5. WP(C) No. 150/2019 was allowed vide Judgment & Order dated 25.02.2019 by the learned Single Judge, by setting aside the impugned Orders dated 07.12.2018, 06.02.2019 & 01.03.2019, by taking recourse to and applying the judgment of another learned Single Judge of this Court in *Rajib Choudhury (Supra)*, wherein it held that the finding recording the opinion of the Court that the accused was guilty of the charge did not crystalize into an order of conviction, unless there was an order of conviction. The learned Single Judge in this case held that though the GFSC had found the respondent to be guilty of the charge under Section 10 of the POCSO Act, the respondent was not convicted by the GFSC. The learned Single Judge was thus of the view that though the

respondent was guilty of the charge, the same did not crystalize into an order of conviction. As the view of the GFSC not being the final, formal and conclusive determination of guilt, any punishment imposed under Section 48 of the Border Security Force Act would be illegal and untenable in the absence of the respondent being convicted by the GFSC. Thus, the learned Single Judge, by relying upon the judgment in the case of *Rajib Choudhury Vs. Union of India & Ors.*, reported in *2015 (1) GLT 185*, directed the appellants to reinstate the respondents, vide the impugned judgment and order passed in WP(C) No. 150/2019.

6. Being aggrieved by the impugned Judgment & Order dated 25.02.2019 passed by the learned Single Judge in WP(C) No. 150/2019, the appellants have approached this Court.

7. The learned CGC submits that the absence of the word "convicted" in the GSFC Order dated 07.12.2018, while coming to a finding that the respondent was found guilty against the charge under Section 10 of the POCSO Act, cannot vitiate or negate the sentence imposed upon the respondent. The learned CGC submits that as the GFSC has held that the whole charge was proved against the respondent, there was a declaration that the respondent was guilty of the charge and as such, there was no infirmity with the Order dated 07.12.2018 passed by the GFSC along with the subsequent orders passed thereon. She also submits that hyper technical interpretations should not have been taken by the learned Single Judge and in support of the above submission, she has relied upon the judgment of the Apex Court in *Union of India & Ors. Vs. Mudrika*

Singh, Civil Appeal No. 6859/2021, wherein it was held that hyper technical interpretations of service rules should not be made.

8. The learned counsel for the respondent, on the other hand submits that there is no infirmity with the judgment of the learned Single Judge, inasmuch as, no sentence could have been imposed upon the respondent, without convicting him. He submits that an accused who is found guilty of the charge does not crystalize into an order of conviction, unless there is an order of conviction. He also submits that Section 48(1) of the Border Security Force Act, 1968 hereinafter referred to as the "BSF Act, 1968" provides that punishment may be inflicted in respect of offences committed by persons subject to the BSF Act, 1968 and convicted by Security Force Courts. He submits that the word "convicted" is specifically mentioned in Section 48(1) of the BSF Act and unless there is a conviction of the accused against the charged offence, no sentence can be imposed.

9. We have heard the learned counsels for the parties.

10. The issue that has to be decided is as to whether the absence of the word "convicted" in the Order dated 17.12.2018 passed by the GFSC, would vitiate or made nugatory the sentence and penalty imposed upon the respondent. Thus, the issue to be decided is as to whether an accused can be said to be convicted of the charge and/or sentenced, if the General Security Force Court concludes that the charge is proved against the accused and/or the accused is found to be guilty of the charge.

11. Section 48(1) of the Border Security Force Act, 1968 states as follows:-

"48. Punishments awardable by Security Force Courts.—

*(1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and **convicted** by Security Force Courts according to the scale following, that is to say,—*

(a) death;

(b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from the service;

(d) imprisonment for a term not exceeding three months in Force custody;

(e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;

(f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion

(g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(h) fine, in respect of civil offences;

(i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;

(k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good."

12. Section 48(1) of the BSF Act, 1968 states that punishments may be inflicted in respect of offences committed by persons subject to the BSF Act, 1968 and convicted by Security Force Courts.

13. In the impugned Judgment & Order dated 25.02.2022, the learned Single Judge came to a decision that though the respondent was found guilty of the charge, he was

not convicted by the GSFC and that the case of *Rajib Choudhury (Supra)* squarely covered the facts of this case. Para 15 & 16 of the impugned Judgment & Order dated 25.02.2022 of the learned Single Judge is reproduced below:-

"[15] Finally, coming to the contention of the learned counsel for the petitioner that the petitioner upon being found guilty was not convicted by the GSFC and therefore, the ultimate penalty imposed upon him cannot be sustained. From a perusal of the relevant records produced by the learned CGC, it can be seen that the announcement of finding against the petitioner was recorded on 07.12.2018, where he was found guilty of the charge. The impugned Order dated 01.03.2019 by which the petitioner was sentenced to suffer imprisonment for 5 years and was also dismissed from service also states that the petitioner was sentenced as such on being found guilty of the charge made against him under Section 10 of the POCSO Act.

*[16] In this connection, it may be seen that a co-ordinate Bench of this Court in *Rajib Choudhury Vs. Union of India & Others (Supra)*, in the given facts of that case which is similar and if not identical to the instant case at paragraph Nos. 30 & 34 held as follows:-*

"30. This now leads to the important question as to what is conviction as the word conviction has assumed critical importance since without conviction there can be no punishment. What then is conviction? "Conviction" has been defined in the Black's Law Dictionary, Sixth Edition as the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. It is the final judgment on a verdict or finding of guilt but does not include a final judgment which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory. It is that stage of a criminal proceeding where the issue of guilt is finally determined. The word "verdict" is derived from the Latin word "veredictum" which means a true declaration. It is the formal decision or finding. Conviction therefore would mean the outcome of a criminal prosecution Page

No.# 9/10 which concludes in a judgment that the accused is guilty of the offence for which he was charged. It is that stage of a criminal proceeding where the question of guilt of the accused is finally ascertained. Thus, conviction is the final determination of guilt of the accused by the competent Court. In other words, conviction is the formal and final declaration/finding of guilt of the accused. All deliberations preceding such formal and final determination/declaration of guilt would be the opinion or view of the Court. Such opinion or view must crystallize into a formal and final determination/declaration of guilt which would then be legally construed as conviction.

31.

32.

33.

34. Two things are quite apparent from the case record. Firstly, there is no order of conviction of the petitioner by the Summary Security Force Court. Though finding has been recorded that the Court was of the opinion that the accused (petitioner) was guilty of the charge, such an opinion did not crystallize into an order of conviction. There was no order of conviction. After all, an opinion is an opinion. An opinion is not the final, formal and conclusive determination of guilt. Therefore, an opinion cannot be equated with a conviction. This though appears to be a technical point, it has a significant bearing because as already discussed above, it is based on the conviction that Page No.# 10/10 punishments as prescribed in sub-section (1) of section 48 of the B.S.F. Act are imposed. In the absence of conviction, any punishment imposed under section 48 of the B.S.F. Act would be illegal and untenable."

14. As can be seen in the case of *Rajib Choudhury (Supra)*, conviction has been defined in Black's Law Dictionary, 6th Edition as the result of a criminal trial, which ends in a judgment or sentence that the accused is guilty as charged. It is the final judgment on a verdict or finding of guilt. In Cambridge Advanced Learner's Dictionary, 4th Edition,

conviction has been defined as the fact of officially being found to be guilty of a particular crime, or the act of officially finding someone guilty. In Oxford Advanced Learner's Dictionary, 8th Edition, conviction has been defined as the act of finding a person guilty of a crime in court. In the present case, the findings of the GSFC in the Order dated 07.12.2018, with regard to the first and second charge shows that the court came to a finding and concluded that the respondent had sexually assaulted the victim and that the charge had been proved. The relevant extracts of the findings of the GSFC in its Order dated 07.12.2018 is reproduced below:-

"FINDINGS

Court is Closed

The Court is closed for the consideration of the findings

*The Court finds that No.990065375 CT (GD) Zakaria Ahmed of 01st Bn BSF is "**Guilty**" of the charge.*

BRIEF REASONS IN SUPPORT OF FINDINGS

FIRST ISSUE OF THE CHARGE

"That the accused on 05-03-2018 at about 0700 hrs, at village Tablabagh (Lamthai-I), Mizoram, with sexual intention touched any of the body parts, mentioned in sec 7 of the protection of children from sexual offences act, of Miss Suchana Chakma, aged 12 years, D/o Shri Siji Chakma r/o Tablabagh (Lamthai-I), Mizoram i.e sexually assaulted the child."

Considering the act of the accused and series of events/actions unfolding after the incident, the Court concludes that the accused was having sexual intention and has sexually assaulted the victim. The Court considers this issue of the charge as proved.

SECOND ISSUE OF THE CHARGE

"That the said sexual assault was aggravated sexual assault"

In view of the above, the court concludes this

issue of the charges as well as the whole charge is proved against the accused.

*Hence, the accused is **Guilty** of the charge."*

15. Another factor which has to be considered is the fact that in the case of *Rajib Choudhury (Supra)*, the issue therein was with regard to the procedure to be followed by SSFC, which is enumerated in Chapter XI of the Border Security Force Rules, 1969, hereinafter referred to as the "BSF Rules, 1969". On the other hand, the procedure for Security Force Courts, which includes the GSFC is provided in Chapter IX & X of the BSF Rules, 1969. Rule 101 provides the procedure to be followed on conviction of an accused and states that if the finding on any charge is guilty, then the court shall, whenever possible, take evidence of and record the general character, age, service, rank, any recognised acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused either by Security Force Court or a criminal Court, any previous punishments awarded for the guidance of the Security Force Court for determining its sentence and also for the confirming authority in considering the sentence.

16. Rule 101 thus clearly provides that if an accused is found guilty by the Security Force Court, then a sentence can be awarded provided certain conditions are fulfilled for its guidance, while awarding the sentence. There is nothing provided in Rule 101 that the word "convicted" has to be used, for making a formal declaration or determination that an accused is found guilty of the charge or that the charge is proved against him. It is enough if there is a finding of guilt against the accused on any charge. Rule 101 of the BSF Rule, 1969 is reproduced herein below:-

"101. Procedure on conviction.—*(1) If the finding on any charge is "Guilty", then, for the guidance of the Court in determining its sentence, and of the confirming authority in considering the sentence, the Court before deliberating on the sentence, shall, whenever possible, take evidence of and record the general character, age, service, rank, any recognised acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused either by Security Force Court or a criminal Court, any previous punishments awarded to him by an officer exercising authority under sections 53 or 55 as the case may be; the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or reward, of which he may be in possession or to which he is entitled.*

(2) Evidence on the above matters may be given by a witness verifying a statement which contains a summary of the entries in the service books respecting the accused and identifying the accused as the person referred to in that summary.

(3) The accused may cross-examine any such witness and may call witnesses to rebut such evidence; and if the accused so requests, the service books or a duly certified copy of the material entries therein, shall be produced and if the accused alleges that the summary is in respect not in accordance with the service books or such certified copy, as the case may be the Court shall compare the summary with those books or copy and if it finds that it is not in accordance therewith, shall cause summary to be corrected or the objection of the accused to be recorded.

(4) When all the evidence on the above matters has been given, the accused may address the Court thereon and in mitigation of punishment."

On going through the original records, we find that after the GFSC had come to a finding that the charges were proved against the respondent and that he was found guilty of the charge. A statement certified under the signature of the 2IC, Officiating

Commandant, 1st Battalion BSF, which is exhibited as Exhibit S (1) was produced before the GSFC in terms of the BSF Rules, 1969. The evidence of the witness shows that the statement of the 2IC, Officiating Commandant, 1st Battalion BSF had been compared with the service records of the respondent and it was recorded that the statement was a fair and true summary of the entries in the service/battalion records.

17. Thus, in terms of the judgment of *Rajib Choudhury (Supra)*, Black's Law Dictionary, 6th Edition, the Cambridge Advanced Learner's Dictionary, 4th Edition and the Oxford Advanced Learner's Dictionary, 8th Edition, the definition of conviction is that a person has been found guilty of a crime in court. In the present case, the GSFC has given a verdict and/or finding of guilt against the respondent, holding that the respondent was guilty of the charge of aggravated sexual assault and that the charge was proved against the respondent. As the GSFC has given a finding that the respondent was guilty of the charge which has been proved against him, we are of the view that the absence of the word "convicted" cannot vitiate or make nugatory the sentence and penalty imposed upon the respondents, as there has been a formal declaration and determination of the guilt of the accused by the GSFC.

18. The definition of conviction in the various dictionaries clearly show that conviction is the final judgment on a verdict or finding of guilt. Besides the above, Rule 101 of the BSF Rules, 1969 clearly provides that a sentence can be awarded to an accused found guilty of a crime and there is no requirement that the word "convicted" has to be used in the final judgment. As such, in our view as the respondent has been found guilty of the charge and that the charge has been stated to be proved against the respondent,

the absence of the word "convicted" does not mean that the respondent has not been convicted of the charge.

19. The second issue to be decided is whether the facts in this case and the facts in *Rajib Choudhury (Supra)* case are similar.

20. In the case of *Deepak Bajaj Vs. State of Maharashtra & Anr.*, reported in (2008) 16 SCC 14, the Apex Court has held that it is well settled that the judgment of a court is not to be read mechanically as a Euclid's theorem nor as if it was a statute. It has been held by the Apex Court in *Ambica Quarry Works Vs. State of Gujarat*, reported in (1987) 1 SCC 213 that the ratio of any decision must be understood in the background of the facts of that case and that it is only an authority for what it actually decides, and not what logically follows from it. In *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd.*, reported in (2003) 2 SCC 111, the Apex Court has held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

21. Keeping in view the decisions of the Apex Court referred to above, we find that there is a difference between the facts of this case and the case of *Rajib Choudhury (Supra)*. In our view, the learned Single Judge in the impugned judgment and order, has over looked the fact that in the case of *Rajib Choudhury (Supra)*, the Summary Security Force Court (SSFC) had recorded a finding that the SSFC was of the opinion that the accused/petitioner therein was guilty of the charge. The said "opinion" of the SSFC could not have crystalized into an order of conviction, as there was no definite finding/decision or subsequent order of conviction. According to Black's Law Dictionary,

opinion is a court's written statement explaining its decision in a given case. However, in *Rajib Choudhury (Supra)* there is nothing to show that the SSFC had made any decision in the facts of that case. In the present case, the GSFC had recorded a definite finding/decision that the respondent was guilty of the charge and that the charge had been proved against the respondent. There was no opinion of the GSFC that the respondent was guilty of the charge. There was a definite finding/decision of the GSFC, which can be said to be a formal and conclusive determination of guilt of the respondent against the offense with which he had been charged with.

22. In view of the reasons stated above, we are of the view that the word "convicted by Security Force Courts" reflected in Section 48(1) of the BSF Act, 1968 has been complied with, once the Security Force Courts comes to a finding that the respondent has been found guilty of the charge and that the charge was proved against the respondent. We are also of the view that hyper technical interpretation should not be resorted, when the word "convicted" pertains to a formal and conclusive determination of guilt which is made by a positive finding/decision of the Court that the charge was proved against the accused and he was found guilty of the charge.

23. Accordingly, we are of the view that the judgment of the learned Single Judge of this Court in *Rajib Choudhury (Supra)* is not applicable to the facts of this case, as the facts therein and the facts in this case are different. The impugned Judgment & Order dated 25.02.2022, passed by the learned Single Judge in WP(C) No. 150/2019 is accordingly set aside. The writ petition is dismissed.

JUDGE

JUDGE

Comparing Assistant