

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

Reserved on: 10.09.2015
Pronounced on: 07.12.2015

+ WP(C) No.7850/2011

G.M. GOUZAMING KUKI @ G.M. KUKI Appellant

Through: Mr. S.R. Kalkal, Amicus Curiae and Mr.
Pukhranbam Ramesh Kumar, Advocate.

Versus

UOI & ORS. Respondents

Through: Ms. Saahila Lamba, Advocate and Mr.
Arvind Sharma, Dy. Comdt. (BSF).

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE DEEPA SHARMA**

MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioner, a Lance Naik in the Border Security Force (“BSF”) is aggrieved by the order of dismissal issued to him on 16.01.1996 pursuant to a trial by the Summary Security Force Court (SSFC). He seeks directions for quashing of the proceedings and the order of dismissal.

2. The petitioner, a Lance Naik was attached to the 96th Battalion in the BSF. On 08.07.1993, he was on duty as a driver at Subji Mandi, Bala Mura Road, Srinagar when there was a militant attack. The attack was conducted with bombs and grenades, as a result of which splinters entered his head. It was pointed out that one colleague died immediately in the ambush. The Petitioner was admitted to the Army hospital in Srinagar for several weeks, and he proceeded on Medical leave for two months. During this leave, the Petitioner was treated in the District Hospital, Churachandpur, Manipur. The treating doctor certified on 05.01.1994 that the Petitioner was no longer fit for active service, and that he was suffering from '*permanent conduction of deafness of left ear and nervous breakdown*'. The documents pertaining to his treatment at the Army Hospital, Srinagar are, however, not before us today.

3. On the expiry of his medical leave, the Petitioner reported to his Battalion and submitted the Medical Certificate. He claims that he was retained in service instead of being discharged with 'invalid pension' under Rule 38 of the Central Civil Service (Pension) Rules. In May 1994, he was treated again at the BSF Hospital in Jammu and Kashmir due to continuing problems with his hearing and mental state. He was referred to the Psychiatry Department of Medical College in Jammu. On 05.01.1995, the Petitioner was examined by a Medical Board. The Board opined that he was suffering from '*effect of splinter injury head with anxiety somato-form disorder*'. The Board considered the Petitioner unfit to remain in category AYE and recommended that he be kept under medical category CEE(T) for a year.

4. The Petitioner recounts of an incident that occurred in the same year when he was thrown inside quarter guard for an hour on being observed to not participate in the Physical Training. He states that although the Commandant was made aware that he was not fit for the P.T., the Commandant responded with hostility. The Petitioner was given two months' leave by the new Commanding Officer. The Petitioner came back from leave to find that his medical documents were missing (which he ascribes to the respondents), and that he faced Summary Security Force Court proceedings for an offence under S. 21(2) of the Border Security Force Act ("disobeying the lawful command given by his superior officer"). The offence alleged against him was that he disobeyed his superior officer's order to 'fall in' for maintenance of the Headquarter area. The SSFC proceedings resulted in him being dismissed from service by order dated 16.01.1996. This order of dismissal is impugned in the present writ petition.

5. It is contended that after his dismissal, the Petitioner's mental illness consumed him. He underwent treatment in the District Hospital, Churachandpur in Manipur since 30.04.2008 as an out-patient. The treatment has been taking effect and in one year, the Petitioner was assessed to have fully recovered and fit to resume normal duties (certificate dated 08.05.2009). He approached this court, seeking redressal in the circumstances. The Petitioner's explanation for the long delay in filing the writ petition is that he was of unsound mind during the intervening period and that he was unable to take recourse to any legal remedy until 08.05.2009 when he had fully recovered from unsoundness of mind. Today the Petitioner seeks that

his dismissal be set aside and that he be allowed to enjoy 'Invalid Pension' from the time he was kept out of service. He also claims compensation of ₹80 lakhs for the mental agony and distress that he underwent.

6. Counsel for the Petitioner argues that a Medical Board had on 05.01.1995 assessed the Petitioner to be suffering from '*effect of splinter injury head with anxiety somato-form disorder*' and that he was placed in Medical Category CEE(T) for a year. The SSFC trial was conducted during this period, and yet no Medical Board examined the Petitioner to determine if he was fit to undergo trial. Only a medical certificate was issued by the unit doctor at the enquiry stage, based on the opinion of another civil medical college two months previous examination. Counsel argues that this certificate cannot be sufficient to satisfy the duty the Court has in ensuring the accused's fitness to stand trial under Section 100 of the Border Security Force Act, and that the trial is consequently illegal. For the same reason, the plea of guilty taken by the petitioner in the SSFC trial should not be valid. Learned counsel also points to the medical board's opinion that the anxiety and the disability that the petitioner has suffered is directly attributable to his service. Counsel argues that the punishment of dismissal from service that was ultimately imposed was so disproportionate as to shock the conscience of the Court.

7. The BSF relies mainly on a report issued on 21.11.1995 to contend that the Petitioner was mentally fit. This report which was issued by the Professor & Head of the Psychiatry Department, PBM

Medical College, Bikaner to the Chief Medical Officer, BSF Sector Hospital, Bikaner reads as follows:

“The above patient was admitted on D/5 dated 12/11/95. Daily observations & mental state examinations does not show any active features suggestive of Psychiatric illness.

This Report is for your official use.”

BSF further contends that the unit’s medical officer examined the petitioner on 16.01.1996 and on the basis of the report dated 21.11.1995 certified him to be medically fit to stand trial.

It is stated by the Respondents that the accused was afforded a fair trial in all respects. He declined to cross examine the witnesses when the Record of Evidence was being prepared. On arraignment, the accused pleaded guilty to the charge and refused opportunity to make a statement as to mitigation of sentence. It also points out that three punishments had been imposed upon the petitioner in his service prior to his dismissal. These were:

1. “Severe reprimand” by the Commandant after summary trial on 16.04.1993 for an offence u/s 40 of BSF Act (Driving vehicle negligently and causing damage to the living barrack).
2. “Severe Reprimand” by the Commandant after summary trial on 15.04.1994 for an offence u/s 19(b) of BSF Act (Overstay of leave without sufficient cause).
3. “Severe Reprimand” by the Commandant after summary trial on 09.12.1995 for an offence u/s 19(b) of BSF Act (Overstay of leave without sufficient cause).

BSF therefore contends that the punishment handed out to the Petitioner was proportionate.

Findings of the Court

8. Considering the gravity of the Petitioner's state as evidenced by the medical documents, this Court heard the matter on merits. There is no doubt that the Writ Petition comes before us belatedly, but in the opinion of this Court, that can only affect the extent of the relief, not the merit of the matter itself.

9. The principal issues in the present writ revolve around the Petitioner's mental fitness. This Court must determine if Petitioner was fit to stand trial, and if so, if the resultant punishment was proportionate. This Court has had the benefit of perusing the original records pertaining to the Petitioner. While it is true that the Petitioner was put in a lower medical category for a year on account of the Medical board proceedings in January 1995, subsequent reports issued more contemporaneously at the time of the trial establish his mental and medical fitness to stand trial.

10. The BSF's Medical Officer relies upon a report issued two months prior by the Professor and Head of Psychiatry at the PBM Medical College, Bikaner to establish the Petitioner's mental fitness. There is no reason to dismiss the civilian college's expert certification as unreliable. He also seems to have been otherwise medically examined by the unit's medical officer and thereafter declared medically fit on 16.01.1996 to stand the SSFC trial. It is true that given the history of the patient, a more recent mental health check-up would have put all fears at rest, and the report of 21.11.1995 is a perfunctory two lines; however, on a balance of probabilities, given

that the last medical report was issued after keeping the Petitioner under observation, the Court holds that the Petitioner was mentally fit to stand the SSFC trial. For the same reasons, the Court also rejects the allegations that the Petitioner did not actually intend to make a plea of 'guilty' or refuse to cross-examine witnesses that were produced against him. It is therefore held that the SSFC trial was correctly convened and carried out.

11. The proportionality of the punishment that was ultimately imposed, however, leaves much to be desired. BSF does not deny that the Petitioner suffered injuries in an incident that was directly attributable to his service. Indeed the medical board proceeding that was carried out on 05.01.1995 is clear that his disability was contracted in service, was directly attributable to his condition of service and was contracted in circumstances over which he had no control. The certificate also records that the stress and strain of service had aggravated his condition. The Board had therefore recommended that he continue treatment as advised by a psychiatrist and that his medical category be downgraded.

12. The BSF therefore was fully aware of the causes and consequences of the Petitioner's state of mind (as it also forms part of the record in the trial proceedings). The report of 21.11.1995 cannot entail that the Petitioner's medical history (and its causes) be ignored altogether in sentencing, yet that is precisely what has happened here. All relevant evidence in this regard was already available on file, yet there is no mention of any effort taken by the SSFC in determining if

this would have an impact on the petitioner's trial. One would imagine that a personnel who has suffered serious injuries in an attack while in service and on active duty would be celebrated and always taken care of. However, it is clear from the petitioner's hospital visits that the attack of 1993 has had a long term effect on his well-being.

13. The complaint recorded in the OPD slip at the BSF Hospital in May 1994 is telling:

“states that about 9 months ago he sustained injury over his head [illegible] a grenade blast & had become unconscious-remained admitted in [] for [] days- since then says that his head becomes hot- becomes angry, can not hear properly, forgets everything, unable to concentrate, [], can not sleep at night, lost interest in his work.

Refd to AD (Med) for favour of referring the pt. to Psychiatry Deptt. Of Medical College, Jammu”

Yet again, the Referral to the PBM Bikaner in 1995 shows the Petitioner's troubles:

“The pt is a follow up case of anxiety depression somato form disorder since July 93 getting the splinter injury in head during militant action in Kashmir valley. His behaviour is violent and does not obey any order. He also does not have any interest in surroundings and always [illegible] heaviness in the head. He always states that he is not able to do any duty in BSF. He took the consultation of Sr. Surgeon at [] Hospital, Churachandpur on 5th June 94 who examined him and opined that the pt is suffering from permanent conduction deafness of left ear and nervous breakdown and he is no longer fit for active services.

Wef 16th May 95 he is taking [names of medicines]... irregularly

The pt shows abnormal behaviour and violent excitement periodically for few minutes.

So the pt is being referred to you for further opinion please.

9/11/95

Ref to Psychiatrist, PBM Hospital Bikaner...

11/11/95

Case Reviewed

Patient need admission for observation and management with attendant round the clock.

Sd (11/11/95)”

14. BSF seeks to justify the Petitioner's dismissal on the ground that the most recent offence (of refusing to fall in) was preceded by three 'serious reprimands'. These reprimands had been issued for two cases of overstay of leave and one case of negligent driving. Yet is it so difficult to observe that the two reprimands for overstay pertain to leave that was taken *after* the 1993 attack that the Petitioner suffered? Perhaps the Petitioner has played truant. But it is not difficult to observe that the petitioner's troubles seem to all begin from the day of the ambush. While his medical condition does not excuse him from punishment for these incidents, it does not take a long leap of logic to see that his mental condition was at least partly responsible for his overstaying leave twice. To use these incidents to justify the extreme punishment of dismissal for an otherwise insignificant offence (refusal to fall in) but then refuse to go into the context of these incidents is cavalier. Courts have long recognised that sentencing is a balancing

act that lends context to guilt. It is clear from the record that the sentencing and thereafter the revisionary authority have entirely omitted to take into account the effect of the attack (and the fact that it was fully attributable to the petitioner's past service). It is this omission that renders the final punishment to be so shockingly disproportionate and without context that we are compelled to interfere in an area otherwise left to the disciplinary authority.

15. The doctrine of proportionality is a tool in the repertoire of basket of reliefs available in judicial review of administrative or executive action. It is a facet of fairness, often invoked where the penal administrative action is disproportionate or grossly incommensurate to the offence alleged or found. In *Ranjit Thakur v. Union of India & Ors.* (1987) 4 SCC 611, the petitioner had represented about his maltreatment, directly to the higher officers and was sentenced to rigorous imprisonment for one year for that offence. While serving the sentence he declined to eat food. The summary court martial assembled the next day sentenced him to undergo imprisonment for one more year and dismissal from service. The Supreme Court held that the punishment imposed upon the delinquent was totally disproportionate to the gravity of the offence committed by him. In *Ex-Naik Sardar Singh v. Union of India & Ors.* (1991) 3 SCC 213 instead of a bottle of brandy authorized to him, the delinquent was found carrying four bottles while going home on leave. He was sentenced to three months rigorous imprisonment and dismissal from service. The Supreme Court found the penalty to be disproportionate to the gravity of the offence proved against him. In

Coimbatore District Central Coop. Bank v. Employees Assn. (2007) 4 SCC 669 the Supreme Court declared that the doctrine of proportionality arrived in our legal system and has come to stay. The court held that any action taken by an authority contrary to law, improper, irrational or otherwise unreasonable, can be interfered with in exercise of judicial review. At the same time the Supreme Court has cautioned time and again that judicial review should not be exercised unless the penalty is so severely disproportionate as to shock the conscience. In *Union of India v. R.K. Sharma*, AIR 2001 SC 3053 it was observed that:

"It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a court should not interfere".

16. Recent decisions too, have reiterated the principle of proportionality. It was observed in *Charanjit Lamba v. Commanding Officer, Southern Command* 2010 (11) SCC 314 that:

"the punishment imposed upon a delinquent should commensurate to the nature and generally of the misconduct is not only a requirement of fairness, objectivity, and non-discriminatory treatment which even those form quality of a misdemeanour are entitled to claim but the same is recognized as being a part of Article 14 of the Constitution. It is also evident from the long time of decisions referred to above that the courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. Having said that we need to remember that the quantum of punishment in disciplinary matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate

as to be suggestive of lack of good faith.”

17. In the present case the BSF had a wide variety of punishments it could have imposed upon the Petitioner. It could have reduced him to the ranks, it could have forfeited his services for a particular period or forfeited his pay and allowances. From the past incidents, it is discernible that the Petitioner was having trouble at work. Given that his mental condition could all be traced to the hazard he encountered *on duty*, a more humane policy could have been adopted. Yet in shocking disregard towards the Petitioner's wellbeing and future prospects, the last misdemeanour was taken as an opportunity to dismiss him from service altogether.

18. The sentence and penalty is therefore so disproportionate in its impact that it deserves to be set aside altogether. However, we are also mindful of the fact that the Court was first seized of the matter in 2011, nearly 15 years after the original sentence. Much water has flown under the bridge now, and there is no realistic chance of the petitioner being rehabilitated into the BSF. The bulk of the delay in this case is attributable to the Petitioner himself - we notice that he was able to move a revision petition before the BSF authorities in the same year as his dismissal- and therefore we find it appropriate that the relief that the Petitioner is entitled to be limited to 3 years before he approached this court.

19. The impugned order dismissing the Petitioner from service is therefore affirmed subject to the following directions:

- 1) The Respondents shall disburse to the Petitioner 'Compassionate Allowance' under Rule 41 of the Central Civil Services (Pension) Rules, 1972. This allowance will accrue to the Petitioner with effect from January 2008.
- 2) The Respondents shall pay an additional lump sum amount of ₹ 5,00,000 (Rupees Five Lacs) to the Petitioner to offset the mental agony he has undergone and medical expenses he has likely borne.
- 3) The Respondents shall secure for the Petitioner health insurance that covers mental health care to the cost of ₹ 5,00,000 annually or provide him access to mental health care in BSF Facilities.
- 4) Orders fixing the compassionate allowance and provision of mental health care shall be made in 8 weeks. Arrears of allowance and the lump sum payment shall be disbursed in 12 weeks. An affidavit to that effect shall be filed with this court.
- 5) Registry to list for compliance review after 14 weeks.

The writ petition is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

DECEMBER 07, 2015