

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

Judgment Reserved on: July 12, 2016

% *Judgment Delivered on: July 18, 2016*

+ **W.P.(C) 19919/2005**

WATER CARRIER DAYA DHAR PRASAD Petitioner

Represented by: Mr.A.K.Trivedi, Advocate with
Mr.Abhishek Tiwari, Advocate

versus

UNION OF INDIA & ORS Respondents

Represented by: Ms.Saahila Lamba, Advocate with
Mr.Ashwani Bhardwaj, Advocate
and Mr.Arvind Sharma,
Dy.Commandant

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The petitioner, Daya Dhar Prasad Thapliyal was appointed as a Water Carrier with BSF and as of March, 2004 was attached to the S.HQ. BSF at Bhuj. For performing duties he was working with the 151st Battalion BSF at Bhuj.

2. March 07, 2004 was the date when the festival of Holi was to be celebrated. At around 13:00 hours a complaint was received by Deputy Commandant B.L.Gupta of the 151st Battalion that petitioner had

misbehaved with one Mansi Bhandari and her younger brother Vaibhav Bhandari, the former being 8 years of age and the latter 4 years.

3. As per the requirement of Rule 43 of the BSF Rules, 1969 an offence report was prepared listing three charges against the petitioner as follows:

- (i) Committing Civil Offence : That is to say house trespass punishable under Section 448 IPC,
- (ii) Voluntarily causing hurt to Kumari Mansi and Master Vaibhav, children of Ct.B.S.Bhandari, and
- (iii) Of being in a state of intoxication.

4. The petitioner was brought before the Commandant and as recorded in the proceedings held at 10:15 hours on March 12, 2004, two witnesses : (i) Ct.Abdul Hasnath and (ii) Ct.A.K.Dass, were examined with opportunity given to the petitioner to cross-examine the two, which opportunity was declined by the petitioner, the Commandant decided and hence ordered that evidence be recorded, for which Deputy Commandant Water Wing, BSF Bhuj (Gujarat) was deputed to do the needful.

5. On March 13, 2004, the proceedings for recording of evidence commenced in the presence of the petitioner and the department examined eight witnesses viz. Ct.Abdul Hasnath PW-1, Ct.Maharudrappa PW-2, SI/MT K.P. Pandey PW-3, Ct.A.K.Dass PW-4, Ct. B.S.Bhandari PW-5, Dy.Comdt.B.L.Gupta PW-6, Laxmi Bhandari PW-7 and Mansi Bhandari PW-8.

6. Succinctly stated the testimonies of the witnesses examined by the department bring out that on March 07, 2004, after the celebrations of Holi were over at the parade ground, Ct.Maharudrappa PW-2 along with

other SMT personnels went to HC Mohan Nair's residence, within the BSF campus. At about 12:00 hours, Ct.Maharudrappa stepped out to purchase a cigarette and saw the petitioner proceeding towards the house of Ct.Bhupendra Singh Bhandari. At the house of Ct.Bhupendra Singh Bhandari, his daughter Mansi and her younger brother Vaibhav were alone and she answered the doorbell assuming it would be her parents returning after celebrating Holi. As she opened the door, she saw the petitioner whom she told that her parents were not at home but the petitioner entered and misbehaved with her and since she protested he gave her beating as also her brother who tried to save her. The two children shrieked. Their mother Laxmi responded to the summons to rescue and the petitioner tried to strangle her using her chunni. She managed to free herself and picked up a broom which she used as a handy object to beat the petitioner who ran for his life, chased by Laxmi and this chase was witnessed by Ct.Maharudrappa. The petitioner confessed to Ct.Abdul Hasnath and Ct.A.K.Dass that he had consumed alcohol and that he had fallen on top of Mansi. Dy.Cmdt.B.L.Gupta, finding the petitioner dead drunk sent him under escort for being medically examined by the Medical Officer Dr.Parvinder Singh of the 48th Bn.BSF, whose report was exhibited as 'C'.

7. The record evinces that the petitioner was granted an opportunity to cross-examine the witnesses, which he declined save and except he cross-examined Ct.Maharudrappa.

8. Thus, we find that the procedure contemplated by Rule 48 of the BSF Rules, 1969 which embody an opportunity of fair hearing to be granted to the petitioner has been fully complied with in the instant case.

9. The record of evidence was placed before the competent authority who, on a perusal thereof found that Mansi and her mother Laxmi had simply stated that the petitioner had misbehaved with them and had not disclosed the particular acts committed by the petitioner which constituted misbehaviour and thus an order was passed on July 28, 2004 that additional evidence be recorded on said aspect of the matter i.e. to clarify as to what exactly was the misbehavior alleged by Mansi Bhandari against the Petitioner; to clarify as to what was the grave provocation which led Laxmi Bhandari to chase petitioner with a broom in her hand and during the chase hit him with the broom; and to ascertain whether the petitioner was intoxicated or otherwise at the relevant time.

10. At the additional Record of Evidence proceedings the department examined four witnesses : Ct.Maharudrappa PW-2, Ct. B.S.Bhandari PW-5, Laxmi Bhandari PW-7 and Mansi Bhandari PW-8.

11. The testimony of Ct.Maharudrappa remained the same; it had to be because he was not a witness to the molestation and had witnessed Laxmi chase the petitioner with a broom in her hand and during the chase hit him with the broom. Laxmi and Mansi elaborated with respect to their earlier statements wherein they had just stated that the petitioner had molested the two, by expanding upon the contours of the acts done by the petitioner, which as disclosed by the two were the ones we have succinctly brought out in paragraph 6 above. Mansi Bhandari expanded by saying that the petitioner fondled her breast. Laxmi Bhandari said that what infuriated her was the petitioner holding the breast of her daughter and when she intervened to rescue her daughter the petitioner pinned her against the wall, tried to gag her using her chunni.

B.S.Bhandari said that when he reached the house his wife and daughter told him the respective acts committed by the petitioner towards them.

12. The additional Record of Evidence was placed before the Commandant of the battalion and considering the same he opined that case was made out to try the petitioner at a Security Force Court and thus the Commandant drew up the following charge under Section 46 of the BSF Act on September 23, 2004 :-

“CHARGE OF BSF ACT SECTION 46 COMMITTING A CIVIL OFFENCE THAT IS TO SAY USING CRIMINAL FORCE TO A WOMEN INTENDING TO OUTRAGE HER MODESTY PUNISHABLE U/S 354 IPC in that he at BSF Campus Bhuj on 07.03.04 used criminal force to Miss Mansi Bhandari of No. 89988072 Ct. B.S. Bhandari of SMT WKSP BSF Bhuj intending to outrage her modesty by such criminal force.”

13. We are a bit surprised for the charge of being intoxicated was not framed against the petitioner for the reason the report of Dr.Parvinder Singh the medical officer attached to the 48th Bn.BSF who had examined the petitioner had in his report which was exhibited as ‘C’ during the testimony of Dy.Cmdt.B.L.Gupta at the recording of evidence had categorically opined that the petitioner was drunk and his behaviour was abnormal.

14. Be that as it may, the charge framed was served upon the petitioner on September 23, 2004 and the trial commenced on October 20, 2004. The Commandant of the Battalion, as required by the rules presided as the Court. At the arraignment the petitioner pleaded ‘Not guilty’ to the charge and thus the prosecution proceeded to lead evidence and at the trial examined seven witnesses : Laxmi Bhandari PW-1, Mansi Bhandari

PW-2, Maharudrappa PW-3, Ct.B.S.Bhandari PW-4, Ct.Abdul Hasnath PW-5, SI/MT K.P.Pandey PW-6 and Dy.Cmdt.B.L.Gupta PW-7.

15. Relevant would it be to note that at the trial the witnesses deposed in sync with their testimonies recorded during recording of evidence proceedings and the additional recording of evidence proceedings save and except with additional statements made by Mansi Bhandari, her mother Laxmi Bhandari and her father B.S.Bhandari to the effect that Mansi Bhandari claimed that after the petitioner ran away her parents saw bruise mark on her breast, shoulder and stomach, which fact was so stated by her parents.

16. At the trial the petitioner cross-examined : (i) Mansi, and (ii) Laxmi. To Mansi the only question put by the petitioner was whether the petitioner was having colour with him to which she responded in the negative; and sufficient would it be to highlight that the petitioner did not even challenge her testimony of he molesting her. To Laxmi two queries were put, as to how come she could enter her house in view of her statement that it was bolted from inside, to which she responded that it was obvious that the door was not bolted properly and whether she noted any outsider enter her house to which she replied that she did not see anyone enter the house but saw the petitioner inside the house holding her daughter when the cries of her son led her to the house.

17. As regards Dy.Cmdt.B.L.Gupta, the petitioner did not cross-examine him but the officer recording the evidence put questions eliciting clarifications regarding bruise injuries on the person of Mansi, Dy.Cmdt.B.L.Gupta said that when he saw Mansi who was brought to him by her mother Laxmi he saw bruise marks on her person which the

victim voluntarily showed to him treating him as a fatherly figure. To the question as to why he did not get Mansi medically examined, we find a vague answer given : because being a fatherly figure of the sub-unit he had seen the girl with the bruise marks. An answer which we find to be inchoate for the reason said perception of the Deputy Commandant have no connection with the reason why he did not send the young child to be medically examined.

18. Required by the mandate of the rules to be permitted to firstly make a statement in defence and then examine witnesses in defence if he so desired, the petitioner was granted an opportunity to do so. He only exercised his right to make a statement in his defence and said that he did not want to lead any witness in defence.

19. In his statement in defence the petitioner admitted to have consumed liquor during Holi celebrations at the parade ground. He said that thereafter when he was crossing the house of Ct.Bhandari he saw a few children celebration Holi. He claimed that on being hit by a stone he lost his balance and fell on top of a child who went away crying. Shortly thereafter Laxmi Bhandari came charging towards him with a stick like thing in her hand but he walked away and met Ct.Abdul Hasnath to whom he narrated the incident. The petitioner stated that he then went towards the Mandir and fell asleep when he woke up on being beaten by Ct.Maharudrappa, Ct.K.P.Pandey, and Ct.B.S.Bhandari who took him to the Dy.Cmdt.B.L.Gupta. He further said that he was medically examined and kept at the quarter guard.

20. Holding the petitioner guilty the penalty of dismissal from service was inflicted by the Court vide order dated October 21, 2004. The

statutory appeal filed by the petitioner to the Director General, BSF was rejected vide order dated June 14, 2005.

21. Aggrieved by the aforesaid penalty of dismissal from service being inflicted as well as the order rejecting the statutory appeal, the petitioner has filed the present writ petition.

22. At the hearing of the writ petition, learned counsel for the petitioner challenged the penalty imposed and urged the following grounds:-

i. That the proceedings commencing from the Commandant taking cognizance of the offence report were in violation of Rule 45 of the BSF Rules, 1969 (wrongly typed as Rule 46 in the petition) inasmuch as the petitioner was not allowed to produce defence witnesses when the Commandant took cognizance of the offence report.

ii. That the petitioner was falsely implicated on account of the prosecution witnesses having failed to establish any charges against the petitioner and there being subsequent improvements and contradictions in their testimony.

iii. That the timing of the incident as deposed by the prosecution witnesses are either contradictory or based on mere hearsay.

iv. That the penalty of dismissal from service is disproportionate to the gravity of the offence which is a minor vicarious lapse and keeping in view that the petitioner is a family man having no other source of income.

23. Concerning the first contention urged, as noted by us in paragraph 4 above, in compliance with Rule 45 of the BSF Rules 1969, taking cognizance of the offence report the Commandant of the Battalion to which the petitioner was attached had summoned the petitioner and in his

presence had examined two witnesses : Ct.Abdul Hasnath and Ct.A.K.Dass. In compliance with the Rule the petitioner was granted an opportunity to cross-examine the two witnesses and he declined to do so. We have perused the original record and find it being so recorded. It is not the case of the petitioner that the record is falsified. We further note that during record of evidence proceedings, as noted in paragraph 5 above, Ct.Abdul Hasnath and Ct.A.K.Dass were examined as PW-1 and PW-4 and were not cross-examined by the petitioner in spite of opportunity granted. At the trial whereas Ct.A.K.Dass was not examined, Ct.Abdul Hasnath was examined and in spite of opportunity granted the petitioner did not cross-examine him. Even otherwise assuming any infraction of procedure took place during hearing of the charge, it would make no difference because the verdict of guilt and the punishment imposed is by subjecting the petitioner to a trial and as held in the decision reported as (1998) 1 SCC 537 UOI Vs. Major A.Hussain, where there is sufficient evidence to sustain a conviction it becomes unnecessary to examine if at a pre-trial proceedings there was some deficiency or not.

24. As regards the second contention i.e. that the petitioner was falsely implicated and there were improvements and contradictions in the testimony of the witnesses, the argument was two-fold. Firstly that during recording of evidence, Mansi, her mother and her father did not state that the petitioner had fondled the breast of Mansi and in the process she had suffered bruise injuries. Secondly neither Mansi claimed at the stage of recording of evidence and at the stage of additional recording of evidence that she showed bruise marks on her breast, shoulder and stomach to her parents, nor the two had claimed having seen the same.

25. Now, from the facts noted hereinabove it is apparent that during recording of evidence stage Mansi and her parents simply said that the petitioner had misbehaved with Mansi as also Laxmi. What were the exact acts done by the petitioner which constituted misbehaviour was not elaborated by the witnesses. It does happen that a person volunteering information thinks that she has fully disclosed what had to be stated and it is for the recipient of the information to identify that full information is not being disclosed, in that, the person making the statement is not conscious of the fact that a particular wrong emerges only when the acts constituting the wrong are disclosed and thus is charged with the duty to tell the giver of the information to disclose as to what the acts were. The Deputy Commandant who recorded the evidence at the first stage overlooks this and the competent authority rightly noted the omission and hence directed additional recording of evidence. Highlighting that at the first available opportunity the witnesses against whom petitioner misbehaved stated that the petitioner misbehaved with them and the recipient of the information was casual, we do not find any worthwhile point in the first limb of the submission. As regards the second, suffice it to state that there are no material improvements at all. Witnesses do not speak as akin to a tape recorded conversation being replayed by pressing a button. Narrating same incident twice over with a gap of time would obviously result in different words being used. Whether Mansi's parents saw bruises on her body when they responded to the summons for rescue or whether Mansi showed it to them is hardly relevant with respect to the manner in which the witnesses have deposed concerning Mansi's body having bruises thereon.

26. As noted above with respect to the testimony of the witnesses the petitioner had not shown any courage to challenge them. We would be failing not to highlight that the testimony of Ct.Maharudrappa during recording of evidence and at the trial brings out that he saw the petitioner proceeding towards the house of Ct.Bhupender Singh Bhandari and after sometime he saw Laxmi chasing petitioner with a broom in her hand. Ct.Maharudrappa has not been cross-examined by the petitioner at the trial, but during recording of evidence Ct.Maharudrappa was cross-examined on the point whether petitioner accompanied him to the house of HC Mohan Nair from the parade ground, to which the witness answered in the affirmative. But what was the relevance thereof has not been explained by learned counsel for the petitioner. It is obvious that after petitioner and Ct.Maharudrappa went to the house of HC Mohan Nair from the parade ground, both proceeded to their further destination. We would be further failing not to note that Ct.Abdul Hasnath was not cross-examined at any stage and the defence put up by the petitioner, as noted by us in paragraph 17 above, was not put to Ct.Abdul Hasnath.

27. The second contention, having two limbs, is accordingly rejected.

28. As regards the third contention, the argument was that whereas Laxmi Bhandari stated that the time of the incident was around 11:45 AM, Ct.A.K.Dass, SI/MT K.P.Pandey and Ct.B.S.Bhandari stated that the time was around 12:30 Noon and Dy.Cmdt.B.L.Gupta stated the time to be around 1:00 PM and thus there was a serious contradiction, suffice it to state that as regards Dy.Cmdt.B.L.Gupta, his intervention came place after the incident was over and was reported to him and the time disclosed by him in his testimony is obviously when the petitioner was apprehended

and produced before him. There would thus be a time lag between the incident occurring and B.L.Gupta's participation in further proceedings thereto. As regards the difference in time disclosed by Laxmi Bhandari and Ct.A.K.Dass, SI/MT K.P.Pandey and her husband Ct.B.S.Bhandari the difference is only of 45 minutes. Witnesses do not look at their watch to note the exact time speaking of an incident in the past disclose time with a degree of approximation. The third contention is without any legal footing.

29. The facts noted hereinabove with reference to the testimony of the witnesses bring out that what happened inside the house was only witnessed by Mansi and her brother and thus all other witnesses were not witnesses to what transpired inside the house. Mansi's testimony of what happened inside the house is corroborated by events which were seen by others contemporaneous with the time when something happened inside Mansi's house. Mansi's brother came out crying. Laxmi was the first to respond. As she ran into her house petitioner ran out and Laxmi chased him with a broom in her hand. Hitting him with the broom. The conduct of Laxmi is evidence of a strong provocation for a woman would not dare attack a man who is physically stronger than her unless the provocation is grave. The gravity of the provocation is obviously the mother seeing her daughter being molested by the man. Independent witnesses have deposed to the aftermath of what happened inside and the conduct of Mansi's mother is proof of something grave transpiring inside the house of Ct.B.S.Bhandari. That something grave was provoked obviously by the petitioner who was seen running away from the house chased by

Laxmi. Deposition of said chase is by independent witnesses who have no motive.

30. On the gravity of the offence, suffice it to state that entering the house of a buddy and molesting his daughter is a serious offence and one cannot say that the penalty of dismissal from service inflicted is disproportionate to the gravity of the wrong. This deals with the fourth contention qua the penalty being disproportionate to the wrong.

31. Finding no merit in the writ petition we dismiss the same but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JULY 18, 2016
mamta