

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

% *Judgment Reserved On : July 18, 2016*
Judgment Delivered On : July 25, 2016

+ **WP(C) 9103/2006**

EX-HC BRIJ KUMARPetitioner
Represented by: Mr.A.K.Gautam, Advocate

versus

UNION OF INDIA & ORS.Respondents
Represented by: Ms.Saahila Lamba, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. On November 26, 2001 S.S.Chatrath was the Commandant of the 63rd Bn. BSF which was stationed at Kumarpur to guard the Indo-Bangladesh border. He took cognizance of an offence report alleging that on October 02, 2001, while performing the duties of Post Commander at the BoP Kumarpur the petitioner accepted ₹1,000/- as illegal gratification to facilitate smuggling of 16 cattle and that on the same date he gave ₹1,000/- to HC Balbir Singh as his share to facilitate the smuggling of the cattle. Hearing HC Balbir Singh the Commandant directed record of evidence to be prepared.

2. Assistant Commandant G.R.Singh was deputed to record the evidence. The charge pertaining to which evidence had to be recorded was drawn up, and suffice it to record that the charge was drawn up in terms of

the offence report and was served upon the petitioner before the recording of evidence commenced before Asstt.Cmdt. G.R.Singh.

3. Only one witness : HC Balbir Singh was examined and he deposed that on October 02, 2001, he along with Ct. Jhabar Singh was detailed for OP duties at OP No.1 at BoP Kumarpur and that the petitioner was the Post Commander. At about 11:30 Hours one Sabar, a cattle smuggler came to the OP point and said that the anti-crime NCO was at the post and that he be permitted to take the cattle across the gate. He i.e. HC Balbir Singh consulted with his OP partner Ct. Jhabar Singh and both agreed to help the cattle head cross through the fence gate No.1. He opened the fence gate and gave safe passage to the cattle head. It was raining very heavily. After about 15 minutes HC Jailal from the anti-crime NCO came and asked him regarding giving safe passage to the cattle head. He denied. But HC Jailal asked him to open the fence gate. He showed him the hoof marks of the cattle. He thereupon confessed having given safe passage to 16 cattle head. After his confession, HC Jailal told him not to keep the illegally collected money with him and donate the same in the temple. On April 04, 2001 HC Jailal came to him at 18:30 Hours and demanded the money received by him from the smugglers on October 02, 2001. He informed said fact to the Post Commander SI Tilla Ram and also to the petitioner. SI Tilla Ram directed him to send HC Jailal to him. HC Brij Kumar i.e. the petitioner gave him ₹1,000/- to be handed over to HC Jailal through SI Tilla Ram which he did.

4. Suffice it to state that the testimony of HC Balbir Singh admits of the fact that it was he who took ₹1,000/- from Sabar, though said fact has not been stated by him in express terms but it apparent from the fact when he said : *“after my confession HC Jailal told me not to keep the money of cattle smuggling with me but instead donate the same to the temple. After*

that he went away. On 04.10.2001 HC Jailal came to BoP Kumarpur at about 18:30 Hours. He demanded the amount received by me from the smugglers for the favour of crossing 16 cattle heads on 02.10.2001. I informed about the same to the then Post Commander SI Tilla Ram and also to HC Brij Kumar. SI Tilla Ram directed me to send HC Jailal to him which I did.” But surprisingly in the same breath he went on to state “after that I was handed over an amount of ₹1,000/- by HC Brij Kumar in lieu of crossing 16 cattle heads on 02.10.2001 for being further handed over to HC Jailal through SI Tilla Ram.”

5. The Record of Evidence was placed before the Commandant who decided that case was made out to try the petitioner for having committed an offence under Section 7 of the Prevention of Corruption Act, 1988, punishable under Section 12 thereof. He drew up the charge, and required by law to be sent to the DIG of the Station Headquarter, he did so. Surprisingly, in his capacity as the officiating DIG, Commandant S.S.Chatrath accorded approval to his own decision. The charge-sheet reads as under:-

“The accused No.770011859 HC Brij Kumar B Coy of 63 BN BSF is charged with :-

BSF ACT
UDER SEC – 46

COMMITTING A CIVIL OFFENCE
THAT IS TO SAY ABETMENT OF
COMMISSION OF AN OFFENCE
BY A PUBLIC SERVANT UNDER
SECTION-7 OF THE
PREVENTION OF CORRUPTION
ACT PUNISHABLE U/S 12 OF THE
PREVENTION OF CORRUPTION
ACT 1988

in that he, at BOP Kumarpur on 02.10.2001 while performing the

duties of Post Comdr paid ₹1,000/- collected from smugglers to No.974335055 HC Balbir Singh as his share of an illegal act of crossing 16 cattle heads on 01-10-2001.

BSF ACT

UNDER SECTION-40 AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

In that he, at BOP Kumarpur while performing the duties of Post Comdr connived with the smugglers for smuggling activities on the border, collected money from them and further distributed the same among the BOP personnel.”

6. The petitioner was thereafter served with the charge-sheet drawn up by the Commandant and was directed to appear before the Summary Security Force Court, which was presided over by the Commandant himself. The arraignment took place on May 04, 2002. The petitioner pleaded not guilty.

7. HC Balbir Singh was the sole witnesses examined at the trial and he deposed facts at variance with what he deposed at the recording of evidence concerning ₹1,000/-. Speaking in harmony with what he said at the recording of evidence he said that on October 02, 2001, he along with Ct. Jhabar Singh were on OP duty at OP No.1 of BoP Kumarpur at the Indo-Bangladesh Border and that at 11:30 Hours a civilian named Sabar approached him with a request to allow him to cross 16 cattle heads from India to Bangladesh. In consultation with Ct. Jhabar Singh he agreed to give safe passage to smuggle 16 heads of cattle. He thereafter deposed

facts totally different to what he had said during recording of evidence. He said that they did not charge ₹100/- per cattle which was the past practice. He thereafter deposed in sync with his testimony during recording of evidence of having opened the fence gate to permit the cattle to cross and that it was raining at that time. After about 15 minutes Anti-Crime NCO HC Jailal reached and asked him why had he permitted cattle to cross. He denied having permitted so. HC Jailal showed him the hoof marks of the cattle heads, at which he confessed having permitted 16 cattle to cross the border. Thereafter HC Jailal went away. He deposed facts concerning what happened on October 04, 2001 in sync with what he had said during recording of evidence. He deposed further facts that members of the post never used to collect cash from smugglers. HC Brij Kumar used to do so and pay the money to SI Tilla Ram. He said that the practice started when one SI Gurdeep Singh was the Post Commander.

8. The petitioner made a statement denying any involvement in the smuggling activities.

9. Finding him guilty and noting that in the past four penalties were inflicted upon the petitioner and nine rewards had been earned by him and the service rendered was 24 years, 11 months and 02 days, the penalty of dismissal from service was inflicted upon the petitioner.

10. Statutory appeal filed has been rejected.

11. Two points arise for consideration in the backdrop of the aforementioned facts. Firstly, whether the proceedings are vitiated on account of the fact that the Commandant of the Battalion who took the decision to try the petitioner before the Summary Security Force Court accorded approval to his decision in his capacity as the Acting DIG. Secondly, whether on the uncorroborated testimony of HC Balbir Singh, who would obviously be an

accomplice keeping in view his testimony, the conviction and the resultant penalty imposed upon the petitioner can be sustained.

12. Concededly, a decision taken by a Commandant to try a member of the force at a Summary Security Force Court requires approval from the DIG In-charge of the Battalion. This is a procedural safeguard. In the facts of the instant case the procedural safeguard has resulted in a valuable right of the petitioner being infringed.

13. The apparent contradiction in the testimony of HC Balbir Singh during recording of evidence, which we have noted in para 3 above warranted a proper decision to be taken while granting approval to the decision of the Commandant that the petitioner should be tried at a Summary Security Force Court. It was the duty of the DIG to consider whether HC Balbir Singh, who was virtually caught red-handed in facilitating the cattle to cross over established by the fact that fresh hoof marks were noted along the track leading to the gate at the border and further ahead, made up a story to minimize his involvement and try and implicate others to deflect the real issue. On the one hand he said that after he confessed to HC Jailal to have allowed the cattle to be smuggled across, HC Jailal told him not to keep the ill-gotten money and donate the same in the temple. He claims that after two days HC Jailal demanded the illegal money collected by him and he was handed over ₹1,000/- by the petitioner to be handed over to HC Jailal. Now, any reasonable decision by a superior officer would have required the following questions to be posited : (i) whether at all the testimony of HC Balbir Singh, which was self-contradictory, warranted petitioner to be tried at a Summary Security Force Court; (ii) whether the testimony of HC Balbir Singh would be sufficient to sustain even the maintainability of the charge; (iii) what was the effect of HC Jailal not making any entry in the log book of the incident

in question; (iv) what was the effect of the department not quizzing SI Tilla Ram because as per HC Balbir Singh he gave the money handed over to him by the petitioner to HC Jailal.

14. It is not without significance that before recording of evidence commences a charge is drawn up. The purpose thereof is akin to a pre-charge evidence recorded under the Code of Criminal Procedure. It is a safeguard in favour of the accused. If the pre-charge evidence is full of contradiction and is inherently uncreditworthy, the accused is not sent for trial by framing a charge. The fact that the Commandant, in his capacity as the officiating DIG accorded approval to his own decision would obviously attract the principle of bias. It is obvious that the Commandant in his capacity as the officiating DIG did not pose aforesaid four questions and obviously did not answer them. Any reasonable and prudent person would have at least directed additional recording of evidence requiring SI Tilla Ram and HC Jailal to be examined. We conclude on this issue by holding that a valuable right of the petitioner has been violated.

15. Turning to the trial, as noted in para 6 above, HC Balbir Singh was once again the sole witness and we find that he has tried to overcome the inherent contradiction in his testimony during recording of evidence concerning ₹1,000/- statedly received as the bribe money, by saying that he did not collect the money from Sabar because the practice was that the Post Commander used to receive the money and then distribute it to other members of the force.

16. The proceedings are concededly governed by the BSF Act 1968 and the BSF Rules 1969. As per Section 87 of the Act the Indian Evidence Act 1872 applies to proceedings before a Security Force Court. These proceedings are judicial proceedings within the meaning of Sections 193 and 228 of the IPC. The Security Force Court is a court within the

meaning of Sections 480 and 482 of the Cr.PC. The procedure at the Summary Security Force Court has been laid down in Chapter XI of the Rules. A perusal of Rules 138, 139, 140, 142, 143 to 145 and 147 would evince that a trial as contemplated by the Code of Criminal Procedure has to be conducted. In a case of the kind where the sole evidence is that of an accomplice, though the testimony of the accomplice, as would be at a criminal trial, be relevant and admissible evidence, but would be subject to the same rule of prudence as required at a criminal trial, with the exception that in exceptional cases the testimony may inspire confidence of the highest degree.

17. In the instant case the testimony of HC Balbir Singh, who was an accomplice as per his testimony, is full of contradictions vis-à-vis what he deposed during recording of evidence and before the Court on the material aspect of collecting bribe money from Sabar. The prosecution has not led any evidence that on October 02, 2001 HC Jailal made any entry in the log book maintained at the BoP of having noted cattle having crossed the border. If the incident was true, it was indeed the duty of HC Jailal to have so recorded in the log book and further to have drawn up a report pertaining to the incident and then forward the same to the competent authority. Assuming that what HC Balbir Singh said was true, it is obviously a case of large conspiracy and the involvement of superior officers looms large. The involvement of SI Tilla Ram was much more deep rooted. Grave prejudice has been caused to the petitioner by the department not probing the matter properly, assuming that cattle smuggling in the area as deposed by HC Balbir Singh was with the blessings of everybody at the BoP. Such a racket could not have escaped the attention of the Deputy Commandant and the Commandant of the Battalion. On said assumption i.e. of an organized racket operating in the border outposts, it is

apparent that the petitioner, a junior ranking officer of the level of a Head Constable has been made a scapegoat. It is also important to note that the offence report submitted was that the petitioner had accepted ₹1,000/- as bribe from smugglers to facilitate passage of cattle through the gate at the BoP on October 02, 2001 and gave said amount to HC Balbir Singh. Same was the charge drawn up during recording of evidence. But at the trial the charge was of conniving with smugglers and paying ₹1,000/- to HC Balbir Singh. It is in this connection it become relevant that at the first stage i.e. during recording of evidence HC Balbir Singh said, albeit blurred, that he was told by SI Jailal to donate the illegal gratification collected by him in the temple and said that two days after when he was to pass on the illegal gratification to HC Jailal, he took the money from the petitioner and gave it to SI Tilla Ram. Meaning thereby that as per HC Balbir Singh it was he who had collected the illegal gratification, which is at complete variance with the final charge that the petitioner had collected the money from the smugglers and gave ₹1,000/- to HC Balbir Singh as his share of the illegal gratification.

18. For both reasons i.e. prejudice caused at the stage when decision was taken to charge-sheet the petitioner and also for the reason that on the facts of the instant case the rule of prudence requiring corroboration to the testimony of an accomplice witness has been breached, we allow the writ petition and quash the penalty of dismissal from service imposed upon the petitioner and direct that the petitioner shall be reinstated in service with 25% back wages to be paid and to be accorded all other benefits of continuity of service by treating the period post-dismissal of service till reinstatement of service as spent on duty.

19. The petitioner is held entitled to costs in sum of ₹10,000/- which shall be paid by the respondents.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JULY 25, 2016
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