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

+ **W.P.(C) 9326/2006**

EX.CONST. KRISHAN KUMAR DUBEY Petitioner

Through: Mr. Ranbir Singh, Advocate.

versus

UOI & ORS.

..... Respondent

Through: Dr. Ashwani Bhardwaj, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

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15.11.2018

Dr. S. Muralidhar, J.:

C.M. Appl No. 18359/2018(restoration)

1. The affidavit filed by counsel for the Petitioner has been perused.
2. For the reasons stated therein, the application is allowed.
3. The order dated 4th April, 2018 is recalled and the writ petition is restored to file.

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4. The Petitioner challenges the proceedings dated 20th November, 2004 of the Summary Security Force Court (SSFC) and the decision

communicated to the Petitioner vide letter dated 27th October, 2005 rejecting his statutory petition against his conviction by the SSFC and the sentence of 'dismissal from service'.

5. The petitioner joined the Border Security Force (BSF) as a Constable in 1990. The Petitioner claims to have been suffering from sensory neural deafness with near total loss of hearing in right ear and partial deafness in left ear since 1999.

6. The incident for which the petitioner was arrayed before the SSFC took place when he was serving at the Border Outpost (BOP) between West Bengal and Bangladesh on 31st August, 2004.

7. The precise charge against the Petitioner was that whilst he was deputed at BOP Matiyari and was detailed for On Post (OP) duty on 31st August, 2004 at Gate No.16 from 1200 hrs to 1800 hrs, he had at about 1500 hours allowed some cattle heads to cross from India to Bangladesh by giving safe passage to smugglers from Gate No.8, as there were no corresponding entries of the relevant cattle heads found in the Gate Register which was to be maintained by the Petitioner. The charge further reads that the special ambush party laid by Sub Inspector Dharma Singh managed to catch hold of 15 such cattle heads ahead of fencing near Gate No. 16. At that point of time, in order to cover his lapse, the Petitioner fired 5 rounds from his personal weapon towards the special ambush party.

8. When the charge was read out to the Petitioner, he pleaded guilty. He was

informed by the SSFC of the effect of that plea and the procedure to be followed subsequently. When asked whether he wished to make any statement, his answer was that it was his first mistake and as such that he may be pardoned. He apparently declined to call any witness.

9. One of the main grounds on which the SSFC proceedings have been challenged is that there were no signatures of the Petitioner on the arraignment where he has purportedly pleaded 'guilty'. Learned counsel for the Petitioner draws attention to Rules 142 and 143 of the Border Security Force, 1969 (BSF Rules) and submits that although the proviso to Rule 142 (2) requiring signatures of the accused pleading guilty to be obtained was inserted only from 29th November 2010, the judgments of this Court have held that the Court is bound to explain to the accused the consequences of pleading guilty and that the failure to do so would vitiate the entire proceedings. It is submitted that in the instant case there is nothing to indicate that the SSFC applied its mind to the charge to decide whether it was of the nature which required a guilty plea. Further, there was nothing to indicate whether the SSFC explained to the Petitioner the consequences of the plea of guilt. Reliance is placed on the decisions of this Court in ***Devender Kumar v. Union of India*** (decision dated 14th May, 2012 in Writ Petition (Civil) No. 1532/1999), ***Vimal Kumar Singh v. Union of India 171 (2010) DLT 261***, and the decision dated 23rd August 2012 in Writ Petition (Civil) No. 4099/2000 (***Ex. Const. Umesh Prasad v. Union of India***). Reliance is also placed on the decision in the ***Mahender Singh (Ex. Const) v. Union of India 2008 (104) DRJ 749 (DB)***.

10. It must be noticed that as far as the decision in ***Mahender Singh*** (*supra*) is concerned, there were as many as four charges for which the Petitioner there was arrayed and he was alleged to have pleaded guilty to the first three out of four charges while pleading not guilty to the fourth charge. It was found on facts that “the caution should have been extended to the petitioner at the threshold itself before recording the plea of ‘guilty’ of the petitioner and not in the form of a formality post-facto after recording, if any, the evidence in respect of the fourth charge where the petitioner pleaded ‘not guilty’.” It was further found that the stand of the petitioner in that case as is reflected on the record and the findings in the ROE as well as his written statement also appear to belie with the stand of the Respondents that the petitioner pleaded ‘guilty’ to the first three charges. As will be seen presently, the situation here is quite different.

11. In ***Ex. Constable Umesh Prasad*** (*supra*), the Division Bench of this Court explained the legal position after referring to the earlier decision of the Court in ***Anil Kumar v. Union of India*** (decision dated 6th August, 2012 in Writ Petition (Civil) No. 2681/2000) as under:

“But, prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we had hastened to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment. Posing the question: What would the surrounding circumstances be? We had opined that the Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence

the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial.”

12. The Court in *In Ex. Constable Umesh Prasad (supra)*, further took note of the fact that

“various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as *Subhas Chander v. UOI 2008 (152) DLT 611* the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as *2004 (110) DLT 268 Choka Ram v. UOI* holds to the converse. We had further noted that neither decision took note of the jural principle that a default in procedure, unless it hits at the very root of the matter, would not vitiate a decision making process.”

13. Keeping in view the above legal position, this Court has examined the original records in the present case. At the outset, it must be noticed that unlike certain other cases, for instance the decision in *Devender Kumar v. Union of India (supra)* and *Vimal Kumar Singh v. Union of India (supra)*, here it does not appear that there is a pre-printed cyclostyled sheet in which the plea of admission of guilt was inserted by hand.

14. Secondly, the Court finds that the SSFC did care to note that it had read and explained to the accused the meaning of the charge to which he was pleading guilty and ascertained that the accused understood the nature of the charge to which he had pleaded guilty and the subsequent procedure to be followed. The SSFC satisfied itself that the “accused understands the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, an in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be followed consequent to the plea”

15. This Court therefore is unable to agree with the learned counsel for the Petitioner that the SSFC did not actually follow the requirement of the law as mandated by Rule 142 and 143 of the BSF Rules. Ultimately, each case has to be decided in its own peculiar facts and as pointed out by this Court in *Ex. Constable Umesh Prasad (supra)*, by taking into account all the surrounding circumstances and the other relevant considerations. Here, the ROE reflects that the accused did not want to lead any evidence and only asked that since it was his first mistake, he should be pardoned. Therefore, unlike the other decisions which we have noticed earlier, this is not a case where a stand taken by the accused in the ROE is inconsistent with his plea of guilt.

16. Consequently, the Court rejects the submission of the Petitioner that a procedural illegality has been committed by the SSFC which vitiates the trial or consequential sentence awarded to the Petitioner.

17. Now, turning to the question of proportionality of the sentence, learned counsel for the Petitioner sought to place reliance on the decision dated 2nd January, 2014 of this Court in Writ Petition (Civil) 117/2011 (*Jai Ram v. Union of India*), where the Court was considering the case of a Constable who had rendered 9 years, 6 months and 8 days of service and was involved in an unfortunate incident where he was wielding a rifle in an allegedly drunk condition and a colleague of his pounced upon him and pushed the barrel of the gun towards the sky. The Court was therefore of the view that notwithstanding the dismissal from service, his case would be one deserving of ‘compassionate allowance’.

18. In the first place, it should be noticed that the above case was not one of actual intentional firing. Further there the Court took note of the fact that the Petitioner there was ‘mentally depressed’; had even run away from service and been brought back by his brother. He was drunk and even before he could load the weapon, he was pounced upon as a result of which the barrel of the gun was pushed towards the sky and discharged without causing harm to anyone. Therefore, the accidental pressing of the trigger did not cause any harm or damage to any person.

19. The facts in the present case are entirely different. Being at the BOP, which is a sensitive post, it was an extremely serious matter that the Petitioner allowed 15 cattle heads to cross over and after it was detected by the ambush party, he fired 5 rounds from his personal weapon towards the special ambush party to cover his lapse.

20. In the circumstances, the Court is unable to agree that the punishment awarded to the Petitioner is disproportionate to the act for which he was charged and pleaded guilty.

21. The writ petition is accordingly dismissed.

S. MURALIDHAR, J.

NOVEMBER 15, 2018

SANJEEV NARULA, J.

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