REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2061 OF 2008
[Arising out of SLP (Criminal) No. 5439 of 2006]

EX-CONSTABLE RAMVIR SINGH … APPELLANT

VERSUS

UNION OF INDIA & ORS. … RESPONDENTS

J U D G M E N T

S.B. SINHA, J.

1. Leave granted.

2. Appellant is before us aggrieved by and dissatisfied with the judgment and order dated 23.5.2006 passed by the High Court of Punjab & Haryana at Chandigarh dismissing the writ petition filed by him questioning an order of the Summary Security Force Court dated 8.9.2002 whereby and whereunder a sentence of dismissal from service was imposed.

3. Appellant, at all material times, was working as a constable in the Border Security Force. At the relevant time, he was posted at 24 Bn. BSF at

Jodhpur. His duty, inter alia, was collection of official dak from Central Diary, FHQ BSF, New Delhi through SHQ BSF Amritsar. He was sent to SHQ BSF Amritsar along with one 'Kalipada Mandal'. He had been given an authority letter with an electricity bill. He was directed to collect bank draft prepared in respect of the said bill by PAD well in advance, otherwise to report to the Unit immediately. The Dak was collected from the Central Diary. They reached at their destination on 31.7.2000; collected the Dak from Central Diary, FHQ BSF New Delhi on 3.8.2000. Appellant informed the Second-in-Command on phone on 3.8.2000 that some unit drafts were to be collected from PAD. As 5th and 6th August, 2000 were holidays, appellant was directed to report back forthwith by boarding the evening train from Amritsar on 3.8.2000 as he had official Dak in his possession. He did not do so although he had already collected the official Dak.

He reported for duty on 7.8.2000. An enquiry was initiated. He could not give a satisfactory reply before the Commandant. He was awarded 7 days' Rigorous Imprisonment (RI) in the custody of the force for absence without leave. The said punishment was imposed as the offence was committed by him for the second time during service. According to respondents, earlier he had committed the following offences.

> "1. Disobeyed the lawful command of then 21C of his Unit.

2. Kept official Dak with him for 4 days.

3. Absented himself from duty for 4 days."

While in the custody of the force, he is said to have committed the following offences:

"a. Refused to take meals w.e.f. 10/08/2000 to 11/08/2000 in protest of punishment.

b. Refused to do the pack drill on all seven days while undergoing RI, which is total defiance of authority."

He was put to trial before a Summary Security Force Court on the aforementioned two charges in terms of the provisions of the Border Security Force Act, 1968 (for short, "the Act") and the rules framed thereunder.

4. He pleaded guilty to both the charges. He was dismissed from service. A statutory petition filed by him under Section 117 of the Act was rejected by the Director General of Border Security Force by an order dated 28.6.2001. Legality and/ or validity of the said order came to be questioned by the appellant by filing a Writ Petition before the Punjab & Haryana High Court at Chandigarh which was marked as Criminal Writ Petition No. 872 of 2003.

5. Before the High Court, principally two contentions were raised, (1) he had not been given an opportunity to engage the services of a counsel, and (2) the punishment imposed is disproportionate to the gravity of the offence charged against.

6. Both the said contentions were rejected by the High Court by reason of the impugned judgment.

7. Mr. Shiv Prakash Pandey, learned counsel appearing on behalf of the appellant apart from the contentions raised before the High Court, urged:

i. As 'Kalipada Mandal', another constable of the Border Security Force having also absented from the duties and no action having been taken against him, the entire proceeding against appellant is vitiated in law.

ii. The purported misconduct having been committed by appellant while he was in prison, it does not come within the purview of 'misconduct' within the meaning of Section 22 of the Act.

8. Mr. A. Sharan, learned Additional Solicitor General, on the other hand, submitted:

i. Appellant being in uniform service, where discipline is considered to be of utmost importance, and in view of the

indisciplined conduct on the part of the appellant, it is not a case where he deserves a lesser punishment.

ii. The plea that he was not permitted to engage a counsel has never been raised by appellant and as admittedly, in terms of Rule 157 of the Border Security Force Rules, 1969, one Shri Ashim Biswas, Assistant Commandant was detailed as a friend of the accused in the trial, the same should not be allowed to be raised.

iii. Appellant pleaded guilty to both the charges; he did not adduce any evidence; he purported to have offered an explanation that he was suffering from stomachache and, therefore, he could neither take any food nor could participate in the pack drilling, which have been found to be incorrect, this Court should not interfere with the impugned judgment.

9. The question as to whether he was discriminated against vis-à-vis the aforementioned Kalipada Mandal having not been raised by him before the High Court, we are of the opinion that it is not possible for us to consider the said contention which has been raised for the first time. Mr. Pandey submitted that such a contention had been raised in the Writ Petition. It might have been raised but it does not appear from the impugned judgment

that the same was pressed before the High Court. This Court is bound by the Judge's record. If the High Court, as contended by Mr. Pandey, despite raising a contention in that behalf did not deal therewith, the only remedy available to him was to move the High Court drawing its attention thereto. Apart from the fact that the said procedure was not adopted by appellant, even before us, neither the counsel appearing in the High Court nor the appellant, affirmed any affidavit that such a contention, in fact, had been raised before the High Court. It is, therefore, not possible for us to accept that the contention as regards the discrimination against the appellant vis-à-vis the said Kalipada Mandal was raised.

10. In State of Maharashtra v. Ramdas Shrinivas Nayak [(1982) 2 SCC 462], this Court held:

> "4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena.

> 'Judgments cannot be treated as mere counters in the game of litigation.' (Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty.) We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain.) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

[See also Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111 and Dhanabhai Khalasi v. State of Gujarat, (2007) 4 SCC 241]

11. Appellant did not even raise any contention before the Summary Security Force Court that he intended to consult a lawyer or to select a friend of his choice as provided for in Rule 157 of the Rules. The High Court, therefore, in our opinion, has rightly opined that such a contention cannot be permitted to be raised.

12. So far as the question of imposition of disproportionate punishment on the appellant is concerned, suffice it to note that he pleaded guilty. It was an unconditional plea. He might have offered an explanation, but as it was not found to be correct; he should have proved the same. No medical record was produced to show that he had been suffering from any kind of ailment. Evidently, he refused to take meals only as a measure of protest when he had been imposed a sentence of seven days R.I. He was bound to follow the rules. He is presumed to know the consequences of violation thereof. It may or may not be that he committed acts of insubordination by not taking food but he did not even participate in the pack drilling, which, concededly, is imperative. It is, therefore, not a case where the High Court could come to the conclusion that the punishment imposed is shocking to the conscience.

The doctrine of proportionality in a given case may be invoked by the Superior Courts in exercise of its jurisdiction under Article 226 of the

Constitution of India. It was so held in Ranjit Thakur vs. Union of India & Ors. [(1987) 4 SCC 611], stating:

> "25. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review…"

13. In the facts of the present case, however, we are of the opinion that the said doctrine should not have been invoked. Appellant was in uniform service. BSF is a disciplinary force. Appellant pleaded guilty to both the charges. He could not show any mitigating circumstances. He had committed a similar offence earlier. He had been asked to report back to duty as he had been carrying a bank draft, which was necessary for payment of the electricity bill as it was required to be deposited by the due date. He not only disobeyed the said order but also in fact reported three days after

the date he was asked to arrive at Amritsar. In any event, we are not concerned with the justification of imposition of the sentence or the quantum thereof in the disciplinary proceedings. The order imposing the said sentence is not in question before us. The purported harsh punishment as submitted by Mr. Pandey is, therefore, not a matter of which we can take cognizance at this stage.

14. The question as to whether refusal to take food by itself would come within the purview of Section 41 of the Army Act, 1950, this Court in Ranjit Thakur (supra) held:

> "The submission that a disregard of an order to eat food does not by itself amount to a disobedience to a lawful command for purposes of Section 41 has to be examined in the context of the imperatives of the high and rigorous discipline to be maintained in the Armed Forces. Every aspect of life of a soldier is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that, a mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere in-action need not always necessarily be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be sub verse of discipline. Appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate

> punishment for airing his grievances before his superior officers."

It was not a case where the quantum of punishment for violating the regulation applicable to the inmates of a prison was involved. Therein the delinquent employee was sentenced to one year's R.I. and further dismissed from service with the added disqualification of being declared unfit for any future civil employment. The charge of misconduct that he refused to eat his food was found to be strikingly disproportionate.

15. A punishment of simplicitor dismissal from service, in a situation of this nature, cannot, however, be held to be disproportionate to the gravity of misconduct.

16. In Union of India vs. Narain Singh [(2002) 5 SCC 11], this Court held:

> "7. This Court has, in the case of Union of India v. Sardar Bahadur [(1972) 4 SCC 618], held that there are limits of the powers which can be exercised by a Single Judge under Article 226 of the Constitution and, similarly, there are limits to the powers of a Division Bench while sitting in appeal over the judgment of a Single Judge. This Court has held that where there are relevant materials which support the conclusion that the officer is guilty, it is not the function of the High Court to arrive at an independent finding. It has been held that if an enquiry has been properly held

> the question of adequacy or reliability of evidence cannot be canvassed before the High Court.
>
> 8. In the case of Apparel Export Promotion Council v. A.K. Chopra [(1999) 1 SCC 759], it has been held by this Court that it is within the jurisdiction of the competent authority to decide what punishment is to be imposed and the question of punishment is outside the purview of High Court's interference unless it is so disproportionate to the proved misconduct as to shock the conscious of the Court. It has been held that reduction of sentence by the High Court would have a demoralising effect and would be a retrograde step. It has been held that repentance/unqualified apology at the last appellate stage does not call for any sympathy or mercy."

17. Yet again in Union of India & ors. vs. Datta Linga Toshatwad [(2005) 13 SCC 709], this Court opined:

> "8. The present case is not a case of a constable merely overstaying his leave by 12 days. The respondent took leave from 16.6.1997 and never reported for duty thereafter. Instead he filed a writ petition before the High Court in which the impugned order has been passed. Members of the uniformed forces cannot absent themselves on frivolous pleas, having regard to the nature of the duties enjoined on these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the forces. In such forces desertion is a serious matter. Cases of this nature, in whatever manner described, are cases of desertion particularly when there is apprehension of the member of the force being called upon to perform onerous duties in difficult terrains or an order of deputation which he finds inconvenient, is passed.

> We cannot take such matters lightly, particularly when it relates to uniformed forces of this country. A member of a uniformed force who overstays his leave by a few days must be able to give a satisfactory explanation. However, a member of the force who goes on leave and never reports for duties thereafter, cannot be said to be one merely overstaying his leave. He must be treated as a deserter. He appears on the scene for the first time when he files a writ petition before the High Court, rather than reporting to his Commanding Officer. We are satisfied that in cases of this nature, dismissal from the force is a justified disciplinary action and cannot be described as disproportionate to the misconduct alleged."

18. The last contention raised on behalf of the appellant in regard to construction of Section 22 of the Act may now be considered.

Section 22 of the Act reads as under:

> "22 - **Insubordination and obstruction** - Any person subject to this Act who commits any of the following offences, that is to say,--
>
> (a) being concerned in any quarrel, affray or disorder, refuses to obey any officer, though of inferior rank, who orders him into arrest, or uses criminal force to or assaults any such officer; or
>
> (b) uses criminal force to, or assaults any person, whether subject to this Act or not, in whose custody he is lawfully placed, and whether he is or is not his superior officer; or
>
> (c) resists an escort whose duty it is to apprehend him or to have him in charge; or

> (d) breaks out of barracks, camp or quarters; or
>
> (e) neglects to obey any general, local or other order; or
>
> (f) impedes the Force Police referred to in section 63 or any person lawfully acting on his behalf, or when called upon, refuses to assist in the execution of his duty a Force Police or any person lawfully acting on his behalf,
>
> shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend, in the case of the offences specified in clauses (d) and (e), to two years, and in the case of the offences specified in the other clauses, to ten years, or in either case such less punishment as is in this Act mentioned."

19. It is wide in nature. It is neither in dispute nor doubt that even a person while in custody would be subject to the Act. The custody of the appellant was an internal custody, he having been imposed with punishment.

It is not a case where a prisoner is governed by a separate set of legislation. It is also not a case where a prisoner is sent to an independent authority. Even while he is in custody, he is a member of the force. He, therefore, in terms of clause (e) of Section 22 of the Act neglected to obey

any general, local or other order. Even while in custody a member of the force serving the sentence would still be an officer of the Force.

20. However, it is well known that except the cases where the punishment is shockingly disproportionate, the Superior Courts would not ordinarily interfere with the quantum of punishment.

21. In The Managing Director State Bank of Hyderabad & Anr. vs. P. Kata Rao [2008 (6) SCALE 575], this Court held:

> "18. There cannot be any doubt whatsoever that the jurisdiction of superior courts in interfering with a finding of fact arrived at by the Enquiry Officer is limited. The High Court, it is trite, would also ordinarily not interfere with the quantum of punishment..."

22. We, therefore, do not find any infirmity in the judgment of the High Court. The appeal is dismissed. However, there shall be no order as to costs.

……..……J.
[S.B. Sinha]

..……..……J.
[Cyriac Joseph]

New Delhi;

December 18, 2008