

Union of India and Others

Vs

Anand Singh Bisht

Criminal Appeal No. 633 of 1987

(G. N. Ray, B. L. Hansaria JJ)

28.08.1996

ORDER

1. The judgment dated 30-9-1985 passed by the Division Bench of the Calcutta High Court in Criminal Miscellaneous Case No. 1072 of 1985 arising out of a writ petition for a writ of habeas corpus made by the respondent Anand Singh Bisht is under challenge in this appeal. Anand Singh Bisht was a Naik in the Border Security Force. For injuring one cadet Raj Kishore Singh, he was tried under the Border Security Force Act, 1968 and was convicted for the offence under Section 307 of the Indian Penal Code and was sentenced to suffer one year's rigorous imprisonment. In execution of such sentence, he was lodged in the Behrampur Central Jail. The respondent Anand Singh Bisht moved the habeas corpus petition before the Calcutta High Court inter alia contending that as he had undergone pre-trial detention by the Border Security Force authorities for about one year he was entitled to set-off his sentence of one year's rigorous imprisonment under Section 428 of the Code of Criminal Procedure and he should, therefore, be forthwith released from detention. By the impugned judgment, the High Court came to the finding that the beneficial provision of Section 428 of the Code of Criminal Procedure is applicable in the case of the respondent even though he was tried by a court-martial under the Border Security Force Act and Section 5 of the Code of Criminal Procedure has not taken away such benefit. Accordingly, an order was passed on 30-9-1985 to release the respondent from detention. Against the said decision of the High Court of Calcutta, the Union of India has preferred the instant appeal.

2. It appears that on the question as to whether the benefit of Section 428 of the Criminal Procedure Code providing for set-off of the period of detention undergone by an accused person during investigation, enquiry or trial against the term of imprisonment is applicable when an army personnel is convicted by the court-martial under the Army Act, 1950, the High Courts gave different decisions. One of such decisions came up for consideration before this Court in *Ajmer Singh v. Union of India* [(1987) 3 SCC 340 : 1987 SCC (Cri) 499 : (1987) 3 SCR 84]. The decision of the Calcutta High Court passed in the said habeas corpus petition concerning the respondent, Anand Singh Bisht was also cited before this Court in *Ajmer Singh* case [(1987) 3 SCC 340 : 1987 SCC (Cri) 499 : (1987) 3 SCR 84]. In *Ajmer Singh* case [(1987) 3 SCC 340 : 1987 SCC (Cri) 499 : (1987) 3 SCR 84] this Court has held that the provision for set-off contained in Section 428 of the Code of Criminal Procedure is not attracted in the case of persons convicted and sentenced by court-martial under the Army Act. It has been indicated by this Court that the Army Act, the Navy Act, 1957 and the Air Force Act, 1950 constitute special laws in force conferring special jurisdiction and powers on courts-martial. They embody a completely self-contained comprehensive code specifying the various offences (sic offences) and prescribing the procedure for detention, custody, investigation and trial of the offenders, the punishment to be awarded, confirmation and revision of the sentences to be imposed, the execution of such sentences and the grant of pardons, remissions

and suspensions in respect of such sentences. Section 5 of the Code renders the provisions of the Code inapplicable in respect of all matters covered by such special law. It has also been indicated in the said decision that the distinction made in Section 475 of the Code between trial by a court to which this Code applies and by a court-martial conclusively indicates that Parliament intended to treat the court-martial as a forum to the proceedings before which the provisions of the Code will have no application. It has also been held in the said decision that there is also intrinsic indication contained in the very wording of Section 428 of the Code that it cannot have any application in respect of persons tried and sentenced by court-martial. There is no investigation conducted by any police officer under the Code by any person authorised by the Magistrate in that behalf in the case of persons tried by the court-martial. No enquiry is conducted under the Code by any Magistrate or court in respect of offences committed by persons who are tried by the court-martial. The trial is also not conducted by the court-martial under the Code but only in accordance with the special procedure prescribed by the Army Act. There is, therefore, absolutely no scope for invoking the aid of Section 428 of the Code of Criminal Procedure in respect of prisoners convicted by court-martial under the Act. The decision of the Calcutta High Court rendered in the case of the respondent Anand Singh Bisht was expressly overruled in the said decision of Ajmer Singh case [(1987) 3 SCC 340 : 1987 SCC (Cri) 499 : (1987) 3 SCR 84]. We may indicate here that the decision made in Ajmer Singh case [(1987) 3 SCC 340 : 1987 SCC (Cri) 499 : (1987) 3 SCR 84] has subsequently been followed by this Court in the case of Ajit Kumar v. Union of India [1987 Supp SCC 493 : 1988 SCC (Cri) 101 : (1988) 2 SCR 40] and Bhuneshwar Singh v. Union of India [(1993) 4 SCC 327 : 1994 SCC (Cri) 1]. This appeal, therefore, should be dismissed.

3. Mr Amrish Kumar, the learned counsel appearing for the respondent, has however submitted before us that admittedly the respondent had undergone pre-trial detention for almost one year and even though he is not entitled to set-off under Section 428 of the Criminal Procedure Code, as held by this Court, he is entitled to get compensation for such long detention at the pre-trial stage. In support of such contention, he has relied on the decision of this Court in Bhuneshwar Singh case [(1993) 4 SCC 327 : 1994 SCC (Cri) 1]. Bhuneshwar Singh was tried by court-martial under the Army Act and was convicted by court-martial, but he was detained for more than three months as undertrial prisoner by the Army authorities in violation of the mandate under Rule 27 of the Rules framed under the Army Act and Rs 1000 was awarded by the trial court as compensation for such detention beyond the period of three months, without taking the approval of the Central Government under Rule 27 for keeping the undertrial in detention exceeding three months. Considering the inadequacy of such compensation of Rs 1000, this Court enhanced such compensation in Bhuneshwar Singh case [(1993) 4 SCC 327 : 1994 SCC (Cri) 1].

4. So far as the Border Security Force Act is concerned, there is no similar provision as in the Army Act and the rules framed thereunder, but under Rule 39 of the Border Security Force Rules, 1969, a delay report is required to be furnished. Sub-rule (2) of Rule 39 provides that where the accused is kept under arrest for a period exceeding three months without being brought to trial, a special report regarding the action taken and the reasons for the delay shall be sent by the Commandant to the Director General with a copy each to the Deputy Inspector-General and the Inspector General concerned. There is no provision under the Border Security Force Act or the Rules framed thereunder to get approval from the Central Government or by any higher authorities if the undertrial accused is kept in detention during the court-martial proceedings exceeding three months. Only the delay report is required to be furnished. It is only desirable that suitable provision is made in the Act and the Rules requiring to take approval from higher authorities if an undertrial member of the Border Security Force is to be detained for more than three months for good reasons, before conclusion of court-martial proceedings as in the Army Act.

5. We may also indicate here that the Army Act has been amended in 1992 and Section 169-A has been incorporated in the Army Act which is a similar provision for set-off under Section 428 of the Criminal Procedure Code. It will be appropriate to refer to the provisions of Section 169-A of the Army Act :

"169-A. Period of custody undergone by the officer or person to be set off against the imprisonment. - When a person or officer subject to this Act is sentenced by a court-martial to a term of imprisonment, not being an imprisonment in default of payment of fine, the period spent by him in civil or military custody during investigation, enquiry or trial of the same case, and before the date or order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person or officer to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him."

6. The learned counsel appearing for the appellant-Union of India, on our enquiry, has not been able to apprise the Court as to whether there is any active consideration for incorporating similar provision in the Border Security Force Act, 1968. In our view, a provision similar to Section 428 of the Criminal Procedure Code or Section 169-A of the Army Act should be incorporated in the Border Security Force Act so as to safeguard the interest of the undertrial accused in the Border Security Force, because a member of the Border Security Force when subjected to court-martial is not entitled to the benefit of Section 428 Criminal Procedure Code. It is only desirable that such amendment should be made without delay.

7. Mr Amrish Kumar, the learned counsel for the respondent, has submitted that although within the scope and ambit of this appeal, the prayer for compensation does not arise but in order to give complete justice in the case, this Court can give direction for giving suitable compensation to the respondent in exercise of the power under Article 142 of the Constitution of India. We have taken into consideration the justification of such claim for compensation. But in the facts and circumstances of the case, it appears to us that the respondent had made an application for taking note of the mitigating circumstances in the matter of awarding suitable punishment against him by indicating the period of detention as undertrial accused before court-martial. He was convicted under Section 307 of the Indian Penal Code and was awarded the sentence of imprisonment for only one year presumably by taking into consideration the mitigating circumstances. We may indicate here that for an offence under Section 307 of the Indian Penal Code, imprisonment up to a period of ten years can be given. Hence, we are not inclined to give any direction for monetary compensation for long detention as undertrial accused.

8. Mr Amrish has lastly submitted that the respondent had a brilliant service record as a member of the Border Security Force. He had participated in the India-China War in 1962 and also in the Indo-Pakistan War in 1971. Mr Kumar has submitted that the respondent did not cause injury to the cadet Raj Kishore Singh intentionally, but as it has come out in the evidence that both the said Raj Kishore Singh and a respondent Anand Singh Bisht were intoxicated at the time of the incident and not being in his full senses, the respondent had fired one shot from his rifle injuring the leg of the said cadre Raj Kishore Singh with whom he was quarrelling for a long time. We have looked into the records relating to the court-martial proceedings in this case. It appears from the evidence given by the prosecution witnesses in the court-martial that the respondent Anand Singh Bisht was otherwise quite friendly with Raj Kishore. They, on the date of the incident started quarrelling. Shri Anand shouted to the cadet Raj Kishore Singh to move away from him and he had also given warning that otherwise Raj would be shot. It has also come out in evidence that Raj Kishore Singh

did not move away and even when the rifle was raised with finger on the trigger Raj Kishore rather pressed the barrel and then he was shot at the leg. The officer-in-charge of the camp where the incident had taken place, in his preliminary investigating report sent to the Commandant of the Unit indicated that the cadet Raj Kishore Singh and the respondent were in the best of terms and most likely he did not intend to shoot at him but because of the altercation he had fired one shot at the spur of the moment when he must have lost his temper.

9. Considering the aforesaid mitigating facts and also considering the fact that Shri Anand had suffered long detention as undertrial accused and has also suffered imprisonment at the Behrampur Central Jail in execution of the sentence for about six months, we feel that justice will be met if his sentence is reduced to the period already undergone. We order accordingly.

10. The appeal is accordingly disposed of.