IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH NEW DELHI

O.A NO. 352 OF 2010

HAV. TEJ SINGH SAINI ...APPLICANT

VERSUS

UNION OF INDIA & OTHERS ...RESPONDENTS

ADVOCATES

M/S. K. SINGHAL & J.S GAUTAM FOR THE APPLICANT

MR. AJAI BHALLA
WITH
LT. COL. NAVEEN SHARMA FOR THE RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T
30.09.2010

1. This application has been brought for quashing the SCM proceedings dated 23.3.2008, whereby the applicant was held guilty of having committed the offence of using criminal force to a woman with

intent to outrage her modesty under AA Sec. 69 read with Sec. 354 IPC and was sentenced to be dismissed from service.

2. The brief facts leading to the case are: On 3.5.2008 at about 1600 hours, while one Bandana Kar and her daughter were at their house – Qr. No. 799/9 Range Line, they heard somebody knocking at the door. She opened the door since she was told it was CHM of B Coy (appellant), who came in. The appellant told her that he had come to enquire about her well being. She asked him whether her husband, who was away in connection with a training programme, told him to check about their well being, for which the applicant replied in the negative. The applicant then asked the telephone numbers of her brother-in-law NK (Retd) PK Biswas and of herself. Her husband had written the telephone numbers behind the door of the TV room. When she was reading out the numbers, the applicant suddenly caught hold of her and kissed her on the cheeks and then took her hand and kissed it. On 4.5.2008, when her husband came back, she told him that the CHM, B Coy had come home and forcibly kissed her. In the afternoon, her husband reported the matter to Maj. Pankaj Modgil, Coy Commander, B Coy over phone. After recording

the statements of Bandana Kar and others, he gave a charge sheet to the applicant under AA Sec. 69 read with Section 354 IPC and the applicant was tried by SCM. The charge sheet issued to the applicant reads as under:

> **ARMY ACT SECTION 69**
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> **COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT TO OUTRAGE HER MODESTY, CONTRARY TO SECTION 354 OF INDIAN PENAL CODE.**
>
> **in that he,**
>
> **at Roorkee, on 03 May 2008, used criminal force to Mrs Bandana Kar, wife of Number 14922588Y Nk Lakshmi Kanta Kar, 20 Mechanised Infantry, by grabbing her from behind and kissing on her cheeks, intending thereby to outrage her modesty.**

After about ten months, the SCM commenced on 24.3.2009, which ended on 27.3.2009. The applicant pleaded "not guilty" to the charge. The SCM, finding the applicant guilty of the charge, sentenced him to be dismissed from service. A statutory petition under AA Sec. 164(2) was submitted by the applicant and allegedly no action has been taken thereon so far. Hence this O.A.

3. Counsel for the applicant contends that the SCM arbitrarily held the applicant guilty of the charge levelled against him when there was no evidence to prove his culpability. The evidence

adduced by the prosecution is not worth credence. The prosecutrix could not identify the applicant. The trial took place after about ten months. Further, the testimony of the child witness cannot be relied upon, as she was not capable of understanding the questions put to her. The appellant had more than twenty years of service and was holding the rank of CHM at the time when the alleged incident took place. His conduct was appreciated throughout and because of his service profile; he was promoted to that rank. The appellant was made a scapegoat as he questioned the prosecutrix, who was found in the company of a boy. He told her that the matter would be reported to her husband. This resulted in the false complaint against the appellant.

4. The application was resisted by the respondents contending, inter alia, that there was no reason for the prosecutrix to falsely implicate the applicant. In a civilised society, no woman would make false accusations thereby bringing defame to herself, and to her family. Further, the appellant, when her husband was not at home, caught hold of the prosecutrix and kissed her on the cheeks and on her hand, which has come out in evidence of the prosecutrix, coupled

with the evidence of child witness, who was present there at the time when the incident took place. The child's IQ level and intelligence and whether the child properly understood the questions put to her were ascertained by the Court before recording her statement. The question of identification does not arise once it has come out from the statement of the prosecutrix that it was the CHM who misbehaved with her as he was the only CHM in the company. Therefore, no identification of the accused was necessitated, either before or in the course of trial.

5. In support of its case, the prosecution examined PW 1 Bardana Kar, whose modesty was allegedly outraged by the applicant. According to her, on 3.5.2008, while she was in her house and her husband was away at Purkazi for training, she heard a knock at the door. When she asked from inside who it was, there was a reply that it was CHM of B Coy. She opened the door and he came in. She was told that he came to enquire about their well being. She enquired whether her husband had told him to enquire about their well being. He replied in the negative. He then asked her for her telephone number as well as of her brother in law, Nk. (Retd) P.K Biswas. As she was reading out

the numbers from behind the door of the TV room, he suddenly caught her and kissed her on the cheeks and then kissed her hand also. Her daughter, who was present there, started crying. He then told her not to report this to anybody and that he would come back in the evening with the required medicine and left. PW 2 Aradhna Kar is the daughter of the prosecutrix. She was aged approx. 2½ years at the time of the incident. Before recording her statement, the Presiding Officer of the SCM ensured whether she was capable of understanding the questions put to her and was telling the truth. The child witness identified the applicant in the Court and confirmed the facts of the incident. Other formal witnesses were also examined by the prosecution.

6. The material point raised by counsel for the applicant is that the identity of the applicant was not established. In this regard, evidence of the prosecutrix was referred to. She simply stated that the CHM of B Coy came to her house. But the identity of the applicant was not established. No effort was made to identify him in the Court. The prosecution simply asked the designation of the applicant to identify him. When the applicant was questioned, he denied having gone to

the house of the prosecutrix. In this situation, identification of the appellant was unnecessary. In this regard, it would be appropriate to refer to the decision in **Sidhartha Vashisht alias Manu Sharma** v. **State (NCT of Delhi)** (2010(6) SCC 1). As regards the child witness, PW 2, emphasis has been laid that she has correctly identified the applicant. In **Munshi Singh Gautam and others** v. **State of M.P** (2005(9) SCC 631), the apex Court held thus:

> **"16. As was observed by this Court in *Matru* v. *State of U.P* (1971(2) SCC 75), identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court (see *Santokh Singh* v. *Izhar Hussain* (1973) 2 SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye witnesses of the**

crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

17. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely

rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration (see *Kanta Prashad* v. *Delhi Admn.* (AIR 1958 SC 350), *Vaikuntam Chandrappa* v. *State of A.P* (AIR 1960 SC 1340), *Budhsen* v. *State of U.P* (1970(2) SCC 128) and *Rameshwar Singh* v. *State of J & K* (1971) 2 SCC 715).

19. In Harbajan Singh v. State of J & K (1975(4) SCC 480), though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll cal and when they were arrested on the night of 16.12.1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held (SCC p. 481, para 4):

> 'In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the investigating officer

ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true. As observed by this Court in *Jadunath Singh* v. *State of U.P* (1970(3) SCC 518) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villagers only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.'

Here, reliance is placed on such dock identification made by the child witness. In this case, the identification was done after about ten months from the date of the incident, meaning thereby the child witness was hardly 2½ years at the time of the incident. It is contended that a child of her age cannot be expected to remember an incident, which had taken place about ten months back, to correctly identify the applicant, especially when her mother was not in a position to identify the applicant. Reliance may be placed on the decisions in **State of Andhra Pradesh** v. **Dr. M.V Ramana Reddy** (AIR 1991 SC 1938).

7. It has next been contended learned counsel for the appellant that the the testimony of PWs 1 and 2 is not corroborated by any independent evidence. Their evidence, therefore, cannot be relied upon. It may be mentioned, in this regard, that the statement of the prosecutrix does not require any corroboration. It was stated by the applicant before SCM that the prosecutrix was a woman of loose morals. When the applicant found her in the company of a boy in the dark, he objected to it and that was obviously the reason for falsely implicating him in the case. As regards the child witness, her capability of properly understanding the questions put to her was not fully ascertained by the Presiding Officer of the SCM. He was required to ascertain such capability of the child witness before putting questions to her.

8. In the given circumstances of this case, we are of the view that since identity of the applicant was not established, prosecution failed to prove its case against him and the evidence adduced by prosecution are inadequate to fix his culpability. In this background, we have no hesitation to exonerate him of the charges levelled against him. The application deserves to be allowed.

9. The order of the SCM is set aside. We direct that the applicant shall be deemed to have been discharged from service from the date he was convicted and he shall be entitled to all pensionary benefits.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER