

1. The challenge in this writ petition, which was filed before the Delhi High Court, is directed against the Summary Court Martial (SCM) dated 19.11.2001, whereby the petitioner (Ex Swr Dharinder Kumar) was held guilty of the offence under Section 69 of the Army Act read with Section 354 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for six months and to be dismissed from service. Subsequently, on formation of this Tribunal, the above writ petition has been transferred and by virtue of Section 15 of the Armed Forces Tribunal Act 2007, this case has been treated as an appeal.

2. Counsel for the appellant has pointed out that the appellant was falsely implicated in the case. The findings of the SCM are merely on conjectures and surmises. There is no evidence worth credence to fix the culpability of the appellant. No independent witness was examined by the prosecution. The case is full of contradictions. That apart, the SCM was not

authorised to hold trial of the appellant for the offence under AA Section 69 read with Section 354 IPC without making a reference to the higher authority, which is mandatory under DSR 459. If the SCM wanted to proceed with the trial of the appellant, it ought to have drawn a memorandum to that effect under AR 130. In the absence of such reference to the higher authorities contemplated under AA Section 120(2), the entire trial stood vitiated.

3. The appeal is resisted by the respondents contending, inter alia, that there is sufficient evidence to prove the offence against the appellant. The prosecutrix gave a detailed account of the incident as PW 1. There is no justified reason to reject her testimony. She also stated how the appellant inspired the confidence of her husband, being his old friend. The evidence of the prosecutrix is adequate to prove that she was molested by the appellant on 16.11.2001 between 1700 and 1730 hours. The charge sheet was sent to the higher authorities for approval, which would amount to reference as contemplated under AA Sec. 120(2). The charge was drawn by the Commanding Officer of 5 Armoured Regiment and was approved by Commander, 23 (Independent) Armoured Brigade on 15.12.2001. This could

be construed to be reference by the CO to higher authorities. Therefore, there was total compliance of AA Sec. 120(2). As regards the contradictions pointed out in the appeal, it is submitted that the appellant has not been able to point out any contradiction. Even the so called statement of the prosecutrix was not referred in cross examination against the witnesses in the course of trial.

4. In support of its case, the prosecution examined PWs 1 to 5 and the defence chose not to examine any witness, except the appellant himself. **PW 1 Reena Devi**, the prosecutrix, has narrated the entire incident and how she came in contact with the appellant. According to her, on 16.11.2001, at about 0600 hours, she got a message that her husband was admitted in the Military Hospital at Amritsar having complained of pain while on guard duty. She reached the hospital at about 0845 hours and met her husband in the surgical ward. At that time, his condition was stable. As he was feeling well, her husband suggested they take their breakfast on the nearby lawn. When they reached the lawn, her husband introduced her to his friend, the appellant. When her husband suggested to him to have breakfast together, he initially refused but after sometime he joined in and had breakfast with them.

During breakfast, she was told by her husband about their having served together in 4 RR in 1998-99 and of having done a course together in Ahmednagar in 1997. After getting back to the ward, PW 1 told her husband that the festival of "Bhaiya Dooj" was nearing and she had to purchase sweets from the market. At that time, the appellant came there and said that he was going to the market as he wanted to purchase a 'mangal sutra' for his wife and she could come with him. Initially she refused as she did not like the idea, however, on insistence of her husband, she went to the market with the appellant on his scooter. After purchasing sweets, the appellant took PW 1 to an artificial jewellery shop to purchase the mangal sutra. But the appellant did not like any of the jewellery shown to him. He therefore suggested going to another nearby jewellery shop, but instead, he took her to a Gymnasium. On coming to know about his ill-intention, she ran out to get an auto-rickshaw, but the appellant insisted on dropping her at the hospital. After reaching the hospital, she told her husband about what had transpired, however, her husband assured her of the appellant having no such ill-intention. He then told her to go home by bus. She reached home at about 1330 hours and went

to sleep after having lunch. At about 1700 hours, she woke up hearing a knock at the door. Though she asked loudly "kaun hai", there was no response. When she opened the door, she saw the appellant standing on the verandah. She tried to close the door. But the appellant forcibly opened the door and entered into the room and held PW 1 from her waist. PW 1 struggled and asked him to leave the room; otherwise she would call for help. She again tried to release herself from him and shouted "Bachao Bachao". In the process, she saw some articles falling down from the pocket of the appellant. Thereafter he released her and she ran towards the verandah. The appellant also came out and went away on his scooter. On coming back to her room, she found his wrist watch, one ring and one 'kadah', which fell from the pocket of the appellant during the struggle. She then told her husband the entire incident after reaching the hospital. **PW 2 ALD Pradeep Kumar**, husband of the prosecutrix PW 1, gave an identical statement and further deposed that on 16.11.2001, at about 0845 hours, after having breakfast, he introduced the appellant to his wife. After breakfast when they came back to the ward, his wife wanted to purchase sweets for the festival from the

market. At that time, the appellant told them that he also wanted to go to the market to make some purchase. So PW 2 requested the appellant to take his wife also to the market and at about 1100 hours, they left for Putlighar Market. Next day, i.e. on 17.11.2001, at about 0900 hours, his wife came to the hospital with breakfast. When he suggested calling the appellant to have breakfast together, she refused and started crying. She then told him what had transpired the previous day. The testimony of both these witnesses remained intact and we do not find any reason to discard their evidence. **PW 3 ALD Prasad** stated about having seen the appellant at the Amritsar Railway Station ticket counter on 16.11.2001 at about 1500 hours. **PW 4 LD Dhulappa** has stated that between 1630 and 1700 hours, he saw the appellant in a locality near the house of the prosecutrix. From his statement, the presence of the appellant near the house of the prosecutrix is established and he corroborated the prosecution version. Other formal witnesses were also examined by the prosecution.

5. As already stated, PW 1 gave entire narration of the incident. There appears to be no reason to disbelieve her testimony. We do not think it

necessary to discard the testimony of the prosecutrix (PW 1). It is also to be noted that a married woman never likes to defame her family by making false allegation of this nature. Further, there is no justification from the side of the appellant as to why PW 1 made such a false allegation against him. The prosecutrix gave the narration of the incident without any delay. Even from the evidence of PW 2, her husband, it is clear that he was having good relationship with the appellant and on account of such cordial relationship; he introduced the appellant to his wife and persuaded him to have breakfast together. Nothing has come out in cross examination to show that PW 2 had enmity towards the appellant to falsely implicate him in the case. As has already been stated, at about 1700 hours, PW 4 Dhulappa saw the appellant near the house of the prosecutrix. Such evidence would also corroborate the prosecution version.

6. It has next been contended by counsel for the appellant that such testimony of the witnesses cannot be believed. There are a lot of contradictions in the Court of Inquiry and whatever be the findings recorded; it is not free from doubt. Suffice to say that the report given by the Court of

Inquiry has no relevance in view of AR 180 and such findings of the Court of Inquiry could be used for contradiction purposes, in view of AR 182. Now, at the appellate stage, no reliance could be placed. The appellant has not contradicted on such aspects. In the given circumstances, whatever be the findings recorded in the Court of Inquiry, it would not dispel the testimony of the witnesses, which categorically supported the charge levelled against the appellant.

7. It is further submitted by learned counsel for the appellant that in view of the provisions contained in AA Section 120(2), the CO could not proceed with the trial of the appellant in the SCM. As there was a serious charge, for which the appellant was tried under AA Section 69 read with IPC Section 354, there ought to have been reference to the higher authorities. We have gone through the records. Though there is no separate document from which it could be construed that a reference was made, but from the charge sheet itself, it is clear that it was endorsed by the higher authority (Commander, 23 (Independent) Armoured Brigade). The endorsement by the Commander "to be tried by a Summary Court Martial" itself shows that there

was some reference and on that reference, the authority concerned directed the trial of the appellant by SCM. There appears to be no irregularity in the conduct of the trial by the SCM and it adhered to the provisions contained in AA Section 120(2).

8. It has next been contended that in view of the provisions contained in DSR 459 and AR 130, the SCM ought to have drawn a memorandum whereby, in case of urgency, for want of other reasons, if it decides to proceed for the trial of the appellant for the offence under AA Section 69. In view of the above argument, it would be appropriate to refer to AR 130, which reads:

"130. Memorandum to be attached to proceedings.—An explanatory memorandum is to be attached to the proceedings when a summary court martial tries, without reference, an offence which should not ordinarily be so tried."

A plain reading of this rule makes it clear that on its own compelling reasons, the SCM proceeded to make trial of the appellant. In that situation, it was required to place the memorandum on record. But, here in this case, reference was made to the higher authorities who permitted the trial of the appellant by SCM. We do not find any illegality in the conduct of the SCM. At the most, it may be an irregularity which is curable.

10. In the result, we do not find any merit in this appeal. It is accordingly dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER