

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL
BENCH, NEW DELHI**

T.A NO. 369 OF 2010
(WRIT PETITION (C) NO.691 OF 2003)

SANDEEP KUMAR

...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS

...RESPONDENTS

FOR APPELLANT
MR. K.S BHATI, ADVOCATE

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

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
13.09.2010

1. The challenge in this writ petition, which was filed before the Delhi High Court, is directed against the order dated 5.9.2002, whereby the Summary Court Martial held the petitioner guilty of having committed

an offence under Army Act Section 69 read with Section 354 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for six months and to be dismissed from service. On formation of this Tribunal, this writ petition has been transferred for disposal. Since, in this case, the petitioner (the appellant hereafter) challenged the conviction by Court Martial by filing a writ petition, which has been remitted to this Tribunal, the same has been converted into an appeal under Section 15.

2. The facts, in brief, are: The appellant was arrested by the Military Police, Delhi Cantt. on 6.7.2002 for outraging the modesty of two women. The charges against the appellant read:

FIRST CHARGE

Army Act Section 69

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 THE INDIAN PENAL CODE

in that he,

at Delhi Cantt, on 05 Jul 2002 used criminal force to Mrs. Neelam Kataria, wife of Major R.S Kataria, by touching her at the back of her body, with intent to outrage her modesty.

SECOND CHARGE

Army Act Section 69

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 THE INDIAN PENAL CODE,

in that he,

at Delhi Cantt, on 06 Jul 2002, used criminal force to Ms. Paromita Ray Chaudhury, daughter of Colonel N. Rayachaudhury, by touching her at the back of her body, with intent to outrage her modesty.

Though the appellant pleaded guilty to both the charges, after going through the summary of evidence and the statement of the appellant during trial, the SCM, having found that the appellant did not understand the effect of the 'plea of guilty', altered the plea of guilty into "not guilty" to both the charges. The SCM found the appellant guilty of both the charges and sentenced him, as stated above.

3. Counsel for the appellant has contended that a full and fair opportunity was not afforded to the appellant to defend his case. The entire case was fabricated and there was no independent witness worth credence. His entire career was unblemished. The appellant was not provided the assistance of a legally qualified person as "friend of the

accused". Even the charge sheet was not issued to the appellant. His representation under AA Section 164 was rejected by non-application of mind and not giving reasons.

4. The appeal is resisted by the respondents contending, inter alia, that the appellant was arrested on the spot after the second incident took place and handed over to the police. Both the victim women supported the prosecution version. The other witnesses also proved the prosecution version. There appears to be no reason to assail the testimony of the witnesses, including that of the victim women.

5. In support of its case, the prosecution examined PW 1 Mrs. Neelam Kataria, who emphatically narrated the incident which took place on 5.7.2002. According to her, at about 1830 hours on 5.7.2002, when she was walking through the Polo Road (Delhi Cantt.), the appellant, who was identified by her in the Court, crossed her from the opposite side on a motor cycle and after going about 100 metres, he turned back and started following her at a slow speed. After reaching near her, he touched her on her back while riding on his motor cycle. When she shouted, the appellant sped away on his motor cycle towards the Parade Ground. On the same

day, she lodged a complaint to the Military police disclosing the registration number of the motor cycle (UP-13E0048). The testimony of this witness remained uncross examined. An identical incident was reported on 6.7.2002. While PW 2 Ms. Paromita Ray Chaudhury was coming from Gopinath Bazar, the appellant, who at that time was wearing a helmet, slapped on her back from behind riding the motor bike. But he could not go too far. He fell down with his bike in front of her a few steps ahead. She identified him in Court as the accused. The appellant was in Army uniform. PW 2 warned him of the dire consequences she being the daughter of a senior Army officer. Thereafter a civilian reached there for her help, who nabbed the appellant. On her request, the civilian informed this to her parents. The appellant was handed over to the police. PW 3 Col. N Raychaudhury gave an identical statement. According to him, when he reached the spot, the appellant was seen surrounded by a number of persons. His daughter was also present there. She told him about the incident. The testimony of this witness also remained in tact. PW 4 Hav. VS Tiwari has stated of having received report about the incident of 6.7.2002. When he brought the motor cycle to the Desk Room, NCO Hav

Pawan Kumar identified it as the same bike which had been referred to in the complaint given by PW 1 on 5.7.2002. This witness also identified the appellant as the person who was involved in both the complaints given by PWs 1 and 2. PW 5 Nk. Upadhyay, who was at the relevant time at the Desk Room, has stated about the involvement of the appellant in the incident. According to him, the appellant at that time was in a state of intoxication. The appellant was caught at the spot and handed over to the Military police. The report of this incident was lodged by the father of PW 2. On the other hand, the appellant in his defence stated that on both the dates in question viz. 5.7.2002 and 6.7.2002, he had taken liquor and was not in his senses and did not exactly remember as to what had happened on those dates.

6. The first and foremost argument advanced from the side of the appellant is that no incident as alleged had taken place and merely because the appellant preferred not to cross examine the witnesses, the offence alleged cannot be said to have been established. We have gone through the statements of both the victim women which related to the incidents which occurred on 5.7.2002 and 6.7.2002 wherein the identity

of the appellant was established and the motor cycle which was taken into custody at the spot. There is no challenge with regard to the identity of the appellant which was made at the time of the trial. The SCM correctly took into account the fact that during investigation, the appellant was identified by the victim women and also in the course of trial. Such identification in Court itself is sufficient to fix the culpability of the accused, as held by the apex Court in **Hari Nath and another v. State of U.P** (1988(1) SCC 14) and **Budhsen and another v. State of U.P** (1970(2) SCC 128 that “where there is no previous tip, the Court may appreciate the identification as being above board and more than conclusive”. Reliance may also be placed on the decision in **Munshi Singh Gautam and others v. State of M.P** (2005(9) SCC 631). PW 2 Ms. Paromita Ray Chaudhury also supported the prosecution version when she correctly identified the appellant in Court. So is the position of PW 3 Col. Raychaudhury, who is the father of PW 2 Ms.Paromita Ray Chaudhury. Further, the identification of the appellant remained unquestionable when the arrest of the appellant was made at the spot and his motor cycle was recovered from the place.

7. Next we come to the evidence of PWs 1 and 2 who are the victims of molestation and indignation. They have categorically narrated the incident and we do not find any reason to discard their evidence. There is nothing on record to show that the appellant was falsely implicated in the case. There is also no evidence to prove that the victim women had enmity towards the appellant to falsely implicate him in the case. It would be unusual in a conservative society to think that women would use this as a pawn to wreak vengeance. The testimony of both the victim women fully corroborated by the statements of other prosecution witnesses.

7. It has next been submitted by counsel for the appellant that mere touching on the back side of a woman would not amount to outraging the modesty. It needs to be emphasised that in **Vishaka and others v. State of Rajasthan and others** (1997(6) SCC 241), the apex Court defined that “sexual harassment” includes such unwelcome sexually determined behaviour (whether directly or by implication) as, (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually-coloured remarks; (d) showing pornography; and (e) any other

unwelcome physical, verbal or non-verbal conduct of sexual nature. In light of the aforesaid decision in **Vishaka's case** (supra), the offence of outraging the modesty of the women in this case is well established. The other witnesses, PW 4 V.S Tiwari and PW 5 A.K Upadhyay, have also proved the prosecution case. No cross examination was preferred against them. Whether they have been cross examined or not, it would not negate the statements of both victims.

8. It is further contended that the appellant was in a state of intoxication at the time of the incident, which is also clear from the statements of PW 4 Tiwari and PW 5 Upadhyay. The appellant gave a statement in defence that on both the occasions, he had excessively consumed liquor and was not in a position to understand as to what had happened. Suffice to mention that the onus rests on the appellant to prove that he was heavily intoxicated at the relevant time so as not to understand what had happened. In this regard, it would be relevant to place reliance on the decision in **Bablu alias Mubarik Hassain v. State of Rajasthan** (AIR 2007 SC 697). The appellant in this case could not discharge his onus. On 6.7.2002, when the appellant was brought to the

Desk Room and when PW 3, the father of PW 2 Ms. Paromita Ray Chaudhury, reached at the spot, the appellant was hesitant to disclose his identity. Only subsequently he disclosed his identity. Then he pleaded mercy of the witnesses, which would prove that he was not in a position to understand being in the state of intoxication. In **Bablu alias Mubarik Hassain's case** (supra), the apex Court held:

“37. The defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three propositions as regards the scope and ambit of Section 85 IPC are as follows:

(i) The insanity whether produced by drunkenness or otherwise is a defence to the crime charged;

(ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and

(iii) The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily give to some violent passion, does not

rebut the presumption that a man intends the natural consequences of his acts.”

In this case, the prosecution has been able to fix the identity of the appellant and further prove that he outraged the modesty of PW 1 Mrs. Neelam kataria and PW 2 Ms. Paromita Ray Chaudhury. He was arrested on 6.7.2002 immediately after the second incident. We find that the prosecution has been able to establish its case against the appellant.

9. In such a situation, after going through the material evidence on record, we do not find any merit in this appeal. In the result, it is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER