IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

T.A NO. 417 OF 2010
WRIT PETITION (CIVIL) NO. 433 OF 2008

ALD. SATYAVIR SINGH
NO. 15463482P
(EX. 50 ARMD. REGT.)
S/O. SH. SARDAR SINGH
VILLAGE & P.O. ANDHHIYAR
TEH. ANUP SHAHAR
DISTTT. BULANDSHAHR (U.P.)

THROUGH: SH. D.S. KAUNTAE, ADVOCATE

...APPELLANT

VERSUS

1. **UNION OF INDIA**
   THROUGH ITS SECRETARY
   GOVERNMENT OF INDIA
   MINISTRY OF DEFENCE
   SOUTH BLOCK
   NEW DELHI-110011.

2. **CHIEF OF THE ARMY STAFF**
   SOUTH BLOCK, ARMY HEADQUARTERS
   NEW DELHI-110 011.

3. **COMMANDING OFFICER**
   50, ARMED REGIMENT
   C/O. 56 APO

4. **BRIGADIER/COMMANDER**
   16 (I), ARMED BRIGADE
   C/O. 56 APO

5. **OFFICE IN CHARGE**
   RECORDS THE ARMED CORPS,
   AHMED NAGAR,
   (MAHARASHTRA)

6. MISS BANDANA AUL
DAUGHTER OF MAJOR GENERAL AN AUL,
C/O. STATION HEADQUARTERS,
MAMUN CANTT. (PUNJAB)

THROUGH: SH. ANKUR CHIBBER, ADVOCATE
LT COL NAVEEN SHARMA

... 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
09.07.2010

1. This Writ Petition under Article 226 of the Constitution of India was filed in Delhi High court challenging the Summary Court Martial (SCM) proceedings initiated against the appellant for offence under section 69 of the Army Act read with Section 354 IPC and whereby he was convicted for the said offence and was awarded punishment for dismissal from service. Thereafter, this case was transferred to this Tribunal and was treated as an Appeal under Section 15 of the Armed Forces Tribunal Act.

2. It is said that the entire proceedings were initiated against accused/appellant without any basis. He was not caught at the spot. Whatever evidence was brought by the prosecution that was all

fabricated under the pressure of Senior Officers as the victim is the daughter of Maj. General. It is also said that correct procedure for the identification of accused/appellant was not adopted in view of the arrangement made under Regulation 406 of the Defence Service Regulation. It was obligatory on the part of the prosecution to have taken care as provided under the Regulation. Merely picking one person and put up to identification could not have any legal sanctity. It is also said that there was no eye-witness of the incident and the witnesses who were said to have reached at the spot soon thereafter, could not be relied upon merely because they managed the production of the accused/appellant for the purposes of identification.

3. It is also contended that the accused/appellant was not awarded fair opportunity for redressing his grievance. Even the Defending Officer of his choice was not provided to him. It is further said that the entire record was manufactured, even the 'plea of guilt' was wrongly recorded. The Court ought to have put up the question or the evidence appearing against him and recorded the proceedings in the manner of questions and answers. In the absence of such procedure, the plea of guilt cannot be considered to be absolute. Moreover, in view of the

arrangement under Army Rule 180, it was obligatory on the part of the Authorities to have initiated Court of Inquiry. Straightaway proceeding to record evidence under Army Rule 22 were not in accordance with law and it would vitiate the entire trial.

4. The appeal is resisted from the side of Union of India, contending that soon after the incident when the alarm was raised by the victim woman, some of the persons from close vicinity came and verified about the incident. The victim narrated the incident to those persons and also disclosed her identity. She also narrated that from Garages of 50 Armoured Regiment, a Jawan came out and followed her. When he came near her, she felt uncomfortable and to avoid any unfortunate incident, went to the other side of the road. He again followed her and after uttering the words "Excuse me, excuse me" assaulted her on her breast. There was ample evidence to fix the guilt of the accused/appellant. It is also said that the accused/appellant was brought before the Prosecutrix soon after the incident and she identified him at the spot. It is also submitted that in the course of trial, full and fair opportunity was given to the accused/appellant to defend himself but he did not prefer to cross-examine the witnesses produced by the Prosecution. The testimony of Prosecutrix remained

unchallenged as also those of the other three witnesses. Appellant/ accused made confession before the witnesses, whose testimony also remained unrebutted. Apart from it, the accused/appellant also pleaded guilty in the course of the trail. Caution was also given to him in pursuance to the Army Rule 115 (2) that 'plea of guilt' would be read against him. It is also said that all the necessary precautions were taken. Even care was taken for ensuring compliance of Sub-Section 2 of Section 120.

5. In order to appreciate the salient points raised by learned counsels for the parties, it shall be useful to make a brief narration of facts. The accused/appellant was tried for the offence under Section 69 of Army Act for 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 IPC. The allegation against the accused/appellant is that he at Mamun Cantt., Punjab on 02nd October, 2004 at about 1945 hours used criminal force to Ms. Bandana Aul by putting his hands on her breasts with intent to outrage her modesty. The woman reported this matter to the authorities. They proceeded to locate the person who was said to have committed the mischief with the Prosecutrix. It is also said that PW-2 Risaldar Major Tarsem Singh of 50 Armoured Regiment who was at the relevant time at

the site of Peer Baba, after hearing the screams of the Prosecutrix came at the spot and verified about the incident. Victim woman made narration of the sequence of the incident and made it clear that the miscreant came from the side of the Garages of 50, Armoured Regiment. Search was made. Accused/appellant was brought before the Prosecutrix who identified him. Subsequently, the Senior Officers also came and they also presented accused/appellant for identification. He was again correctly identified.

6. Before appreciating the evidence adduced by the Prosecution, some of the legal points raised from the side of the accused/ appellant may be taken into consideration. Emphasis has been laid that it was obligatory on the part of the authorities to have resorted the provisions as contained in Army Rule 180 for holding Court of Inquiry. In that regard, reliance has been placed on the case of ***Rajiv Arora Vs. Union of India, (2009) 3 SCC (Cri.) 977.*** Suffice is to mention that soon after the incident when the accused/appellant was caught and brought before the Prosecutrix, there could be no occasion to ascertain the involvement of the individual by holding a Court of Inquiry. In that situation, if the authorities proceeded to frame the tentative charge and recorded the Summary of Evidence, there appears to be no legal fallibility.

7. It has next been argued that the accused/appellant was presented before the Prosecutrix at the spot which would not be termed as an "identification parade". The procedure for identification as contemplated under Regulation 406 of the Defence Service Regulation was not complied with. Suffice it to mention that immediately after the incident, the accused/appellant was caught after having ascertained his exit from Garage 50 Armoured Regiment soon before the incident. Appellant/ accused was identified at the spot by the Prosecutrix/victim woman. The prosecution has examined victim woman as a witness before SCM and she has also identified the accused/appellant at that place. Under such circumstances, her testimony with regard to the identification of the accused/appellant in the course of SCM proceedings is substantial piece of evidence. However, it is submitted by the learned counsel for the accused/ appellant that mere dock identification is no identification in the eye of law unless corroborated by previous test identification parade before the court. It has further been argued that in any case, even identification in court is not enough and there should be something more to hold the accused/ appellant liable. Here in this case the arrest of the accused/appellant soon after the incident and the first person brought at the spot before the victim woman, making confession and pleading guilty before the court would

strengthen the prosecution version. Even in the case of *Munshi Singh Gautam Vs. State of M.P. (2005) 9 SCC Pg.631, it was held by the Hon'ble Supreme Court* that where there is no previous test identification parade, the court may appreciate the dock identification as being above board and held that to be conclusive. The law as it stands today are reproduced here under:

> **16. As was observed by this Court in Matru Vs. State of U.P. 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 Vs. Izhar Hussain) 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 eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Coe 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 is 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 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 Vs. Delhi Admn., Vaikuntam Chandrappa Vs. State of A.P., Budhsen Vs. State of U.P. and Rameshwar Singh Vs.State of J & K.)

19. In *Harbajan Singh Vs. State of J& K*, 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 call 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 :

"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 Vs. State of U.P.* 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."

8. It has further been submitted that the Commanding Officer himself was the witness of the second inning of the identification and he also presided over Summary Court Martial and so in view of the Regulation 449 (b), he ought not to have tried the accused/appellant unless the option was given to the accused/appellant. It is submitted that an objection was raised from the side of the accused/appellant before the Court, a photocopy of the application moved before that Court was also shown in that regard. But the Commanding Officer proceeded to take the evidence without taking the note of the applications moved by the accused/appellant. It may be mentioned that these applications are not

part of the record of Summary Court Martial. It was also argued by Counsel for respondents that the so called application of the accused/appellant is dated the same day when initial hearing under Army Rule 22 was conducted by the CO. Therefore, the accused/appellant had three clear and specific opportunities wherein he could have put across the contents of his so called application which he has failed to do. These three stages are at the hearing of charge under Army Rule 22, recording of Summary of evidence under Army Rule 23 and the SCM per se. Therefore, at this stage to harp on same so called application is infructuous. Now, at this stage to say that these were the applications moved from the side of the accused/ appellant, cannot be accepted unless from the material on record it is established that such step was taken from the side of the side of the accused/appellant before SCM. Even from the other materials, such moving of the application is not proved. In the absence of such reference in the Court Proceedings, it cannot be accepted that such objection was made from the side of the accused/appellant. When such objection was not made in the course of the proceedings, now, the same cannot be permitted to be raised at the appellate stage.

9. It has next been argued that when this offence is of the civil nature, he was to be tried by the Civil Court and there is a procedure for initiation of Criminal Proceedings if at all the person subject to the Army Act is to be tried by Summary Court Martial or General Court Martial. From the bare reading of Section 120 (ii) of the Army Act, it is clear that neither any request was made to the Civil Authorities in view of Section 120 (i) nor any cognizance was taken by the Magistrate at any point of time.

10. Learned counsel for the accused/appellant now remained confined to Regulation 541 (i) and (iii) of the Defence Service Regulations. The first argument from the side of the accused/appellant is that when the matter came to the notice of the Military Authorities, it was expected to have been referred to the Civil Authorities. On such expectation part, the provision of Regulation 541 (ii) cannot be resorted to. Reference to Section 120 (ii) of the Army Act was also made that where personnel subject to the Army Act are going to be tried by Summary Court Martial, the Commanding Officer cannot at his own proceed for the trial unless reference was made to the higher authorities. It may be mentioned that there is an endorsement of the higher authorities (Brig., 16, Independent Armoured Brigade) that such approval was accorded. Further

the record shown from the side of the Prosecution, there appears to be a reference whereby the approval was accorded. Further on such technicalities, proceedings are not going to be vitiated.

11. Next, arguments were advanced that when the Commanding Officer himself was a witness, he ought not to have proceeded for holding SCM. Option ought to be given to accused/appellant whether he would like to be tried by him. Reliance has been placed on the case of *Ranjit Thakur vs. Union of India – AIR 1987 SCC 2386*. As referred above, no objection was raised from the side of the accused/appellant for being tried by the Court. Whatever the photocopy or the slips of the application which have been annexed with the Writ Petition, would not lend any support to the accused/appellant when they were not part of the Court Proceedings.

12. We now come to the evidence adduced by the Prosecution. The Prosecution examined **PW-1 Ms. Bandana Aul** who is material witness of the Prosecution in this case. She made a narration of the entire incident by mentioning that on 02nd October, 2004 between about 1900 hours and 2000 hours, she was returning from the residence of

Brigadier J.S. Mann at New Officers Colony Mamun Cantt. and was going to her residence (the Flag Staff House, 29, Infantry Division). At about 19.45 hours when she crossed Peer Baba Shrine, she noticed that from the Entrance of the Garages of 50, Armoured Regiment, a Jawan was coming. When he was approaching her, she felt uncomfortable and to avoid him, she moved from left to the right of the road but he came to her and made utterance and said "Excuse Me". Soon thereafter he assaulted her by putting his hands on her breasts. She pushed him away but any how in the scuffle, she fell down and received scratches. She raised an alarm and on hearing her voice, a Sentry from the Garages from 50 Armoured Regiment reached the place. He also chased the miscreant but could not catch him. In the meantime, Risaldar Major Tarsem Singh came to her and he was told about the incident which had taken place. She narrated the incident to him and asked him to find out as to who was the person who came from the Garages. It was communicated by the sentry on duty that No.15463482 P Acting Lance Dafadar Satyavir Singh was the only one who came out of the Garage in the last few minutes. Sentry was asked to locate him and he soon after brought the accused/appellant before the Prosecutrix who correctly identified him. The testimony of that witness remained unrebutted as no cross-examination was preferred against her.

13. **PW-2 Risaldar Maj. Tarsem Singh** who was present during the identification, has also given the identical version and stated that after hearing the alarm raised by the Prosecutrix, he was near to that place and asked the Sentry of Garages of Main Gate No. 50, Armoured Regiment as to who was the person. He gave whereabouts of the last person who left the Garage. On that basis, an identity of the person was fixed. Anyhow, accused/appellant was paraded for identification and victim correctly identified him.

14. PW3 who was the sentry of that gate also gave identical statement and stuck to the prosecution version that accused/appellant was the only person who left that gate soon before the incident. It may be mentioned that the case is not only based on the direct evidence when the victim woman identified accused/appellant, but even circumstances would support the prosecution case. He stated that appellant was the last person coming out from Gate No.50. Human agencies fault in expressing picturisation of the incident, but circumstances cannot fail. Here there are definite circumstances that accused/appellant was seen before the incident leaving that gate and that would be sufficient to fix the identity of the accused/appellant person. Therefore, many times it is said that a man can

lie but circumstances cannot lie. These circumstances fix up the guilt of the accused/appellant.

15. PW4 also supported prosecution version. The important evidence in this case is that the accused/appellant confessed his guilt before two persons. That part had also come in the statement of PW2 who also supported the prosecution version but no cross examination was preferred.

16. Further, it may be mentioned that the provisions as contained in Section 115(2) of the Army Act were directly adhered to before recording the plea of guilt of the accused/appellant. There is a certificate to that effect as enjoined under Section 115(2) and it bears the signature of the accused/appellant.

17. We do not find any reason to disbelieve the version of Prosecutrix when it was also not controverted from the side of the accused/ appellant. Essential ingredients for the offence under section 354 IPC are proved and it is established that the accused/appellant used criminal force

to the woman with intent to outrage her modesty. The culpable intention of the accused/appellant is also established from the side of the victim woman. The testimony of the victim woman is also corroborated by the statement of other witnesses who were in close proximity of the place and time and before whom the victim woman made the narration of the whole incident and accused/appellant was also caught without any loss of time. There appears no reason as to why the victim woman would make false acquisition when she comes from a respectable family and had no animosity with the accused/appellant, in fact she had never even met/seen the appellant before this incident.

18. In view of the above discussions we do not find any merit in the appeal and accordingly the appeal is dismissed.

S.S.DHILLON
(Member)

S.S.KULSHRESTHA
(Member)

PRONOUNCED IN THE OPEN COURT
TODAY ON DATE 09.07.2010