

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

**T.A NO. 519 OF 2009
(WRIT PETITION (CIVIL) NO.5685 OF 1998)**

MOHD. ILYAS

...APPELLANT

V.

UNION OF INDIA AND OTHERS

...RESPONDENTS

ADVOCATES

MR. N.L BAREJA FOR THE APPELLANT

**MR. ANIL KUMAR SRIVASTAVA
WITH**

**MR. AMIT KUMAR & 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
09.12.2010**

1. In this writ petition – W.P No. 5685 of 1998 – the appellant challenges the findings and sentence awarded by the Summary Court Martial of 23.12.1997, which was held by Lt. Col. R.K Myer, Officer Commanding, Administrative Battalion, Maratha Light Infantry Regimental Centre, Belgaum, Maharashtra. By this SCM, the appellant was sentenced to rigorous imprisonment for six months and dismissal from service. On formation of this Tribunal, the said writ petition was transferred and is being disposed of by this judgment treating it as an appeal under Section 15 of the Armed Forces Tribunal Act, 2007.

2. Learned counsel for the appellant argued that the SCM was held without jurisdiction and suffers from many legal infirmities. The officer conducting the trial was biased against the appellant and was, therefore, vindictive in his approach resulting in gross miscarriage of justice, and a disproportionately harsh and vindictive

sentence. It was urged that by such arbitrary trial, the Commanding Officer had very abruptly and arbitrarily demolished the future of a sincere and dedicated soldier at the prime of his career within barely 30 minutes of trial and with utter disregard to the statutory provisions. The appellant, who was enrolled in the Army in March 1993, was posted to Maratha Light Infantry. As part of the ongoing training in the Army, the appellant was detailed to undergo a Drivers Training Course at the Maratha Regimental Centre for duration of four months from 4.8.1997 to 11.12.1997. While the training was being conducted by the Training Battalion of the Centre, the appellant and other soldiers, who had come for similar training, were attached with the Duty Company of the Administration Battalion.

3. On 8.11.1997, the appellant was detailed as a Sentry amongst a total of nine Sentries, who were required to perform duty at two locations i.e. Shivneri

Gate and BC 47. These posts are barely 100 metres apart and the detailment of the duties was such that one soldier along with one recruit would give duty at Shivneri Gate while one recruit would give duty at BC 47. As per the appellant, since the Guard Commander was at some distance from these posts, the soldier who was on duty at Shivneri Gate was also required to oversee the performance of duty of the recruit deployed at both the posts. The purpose was to ensure that the recruits while on sentry duty do not sleep. Accordingly, when the appellant was on duty from 0001 to 0200 hours on 9.11.1997, he went to BC 47 post where he found recruit Sawant Dashrath Vakoba sleeping at his post. The appellant warned him twice to be alert and not to sleep, otherwise he would be severely punished if caught sleeping by the Duty Officer during his rounds. Thereafter, when he saw recruit Dashrath Vakoba sleeping for the third time, the appellant punished him.

While meting out such punishments, recruit Dashrath Vakoba supposedly did not execute such punishment to the satisfaction of the appellant and in fact, also warned the appellant that he was well acquainted with the lower rung of the hierarchy in the Centre and would give him a befitting reply in the morning. Thereafter recruit Dashrath Vakoba hatched a conspiracy alongwith other staff members known to him and implicated the appellant in a false case. The concocted false allegations against him were for having committed an unnatural offence against recruit Dashrath and of leaving his post without orders from his superior officers. The appellant also suggested that since he was a Muslim and belonged to a minority community, he was being punished by the majority community by obviously implicating him in the case. The appellant also went on to state that he was badly beaten up and thrashed by the staff members in order to extract a confession from him for supposedly

having committed an unnatural offence against recruit Dashrath. Even the officers i.e. Col. Vinod Thomas, Training Battalion Commander and Capt. Sandeep Singh, Adjutant wanted the appellant to confess his guilt. When the appellant pleaded not guilty in the office of the Adjutant, he was asked to go out and think it over and come back again. When he went out, he was threatened and severely beaten by the staff members standing outside the office of the Adjutant and warned of dire consequences if he did not confess his guilt before the Adjutant and the Training Battalion Commander. Therefore, the appellant went back to the office and confessed his guilty because he was left with no other alternative. Immediately thereafter, the appellant was placed under closed arrest and remained so till the completion of his trial by SCM on 23.12.1997, after which he was sent to Civil Jail, Belgaum. The appellant stated that he was under detention in the Quarter Guard

of the Regimental Centre from 9.11.1997 to 23.12.1997. He also vehemently reiterated the fact that the confession from his was extracted under threat and pressure and that no preliminary hearing under Army Rule 22 was conducted. The jurisdiction of the SCM was contested by stating that Col. Myer had no authority to try the appellant because he was not his Commanding Officer and that only the CO of 8 Maratha could have tried him in accordance with Army Act Section 116 and Para 381 of the Regulations of the Army. Notwithstanding his pleas and the legal infirmities that were pointed out to the respondents, the respondents tried the appellant by SCM on 23.12.1997 and sentenced him to six months rigorous imprisonment and dismissal from service. He also argued that he had not pleaded guilty and that the plea of guilt was extracted by inducement and threat and that the proceedings of the SCM were typed in advance thereby indicating a

foregone conclusion about the trial and was indicative of the bias and arbitrariness of the conduct of the court martial. Even then, the contents of the summary of evidence do not prima facie establish any case against the appellant and there is lack of evidence in his trial. The "friend of the accused" detailed for him was arbitrarily imposed on him and was ignorant of various provisions and procedures of law and was not the choice of the appellant for performing the duties of "friend of the accused". The fact that the trial commenced at 1130 hours and was completed by 1200 hours indicated that it was a mockery of trial and the entire proceedings could not have been completed in 30 minutes, especially the reading of the summary of evidence. It is, therefore, indicated that it was a pre-determined trial with a view to dismiss the appellant from military service for no fault of his. It was also argued that the SCM proceedings were counter-signed by the Commandant of the Maratha

Centre, whereas, in actual fact, the proceedings ought to have been counter-signed by Sub Area/Area Commander, who only had the legal powers to counter-sign such proceedings.

4. The brief facts of the matter are that on the night of 8/9.11.1997, while the appellant was on training with the Maratha Regimental Centre and was detailed on sentry duty, he attempted to sodomise recruit Dashrath, for which he was tried for the following two charges:-

**FIRST CHARGE
ARMY ACT SECTION 46(a)**

**DISGRACEFUL CONDUCT OF AN
UNNATURAL KIND**

in that he,

at Belgaum, on 09 Nov 97, committed an unnatural offence on the person of No 2794905X Rect Sawant Dashrath Vakoba of A Coy, the Maratha LIRC.

**SECOND CHARGE
ARMY ACT SECTION 36(d)**

**LEAVING HIS POST WITHOUT ORDERS
FROM HIS SUPERIOR OFFICER**

in that he,

at Belgaum, between 0100h and 0230h on 09 Nov 97, when on sentry duty at Shivneri Gate Post, quitted his post without orders from his superior officer.

5. Counsel for the respondents stated that it was a clear cut case wherein the entire proceedings had been conducted in a very transparent, legitimate and meticulous manner and there was no legal inconsistency, whatsoever. The fact is that a full-fledged summary of evidence was conducted, wherein as many as 12 prosecution witnesses gave their testimony. Sub. Bhiku Sankar Padamker (PW 1), who was a formal witness, merely gave the details of the sentries who were detailed at Shivneri Gate and BC 47 on the night of 8/9.11.1997. Recruit Sawant Dashrath Vakoba (PW 2)

was the individual whom the appellant attempted to sodomise and he has given a detailed narration of the events of that evening, in that he has categorically stated that he was not found sleeping at any time during the night by the appellant and that when the appellant came to check him, he asked him some provocative questions such as whether their Platoon Havildar took the recruits to the toilet to sodomise them. When he objected to such questions, he was punished by the appellant, who took him a few feet away from the main road on to the bylanes and thereafter asked him to remove his belt and pant. Since he was a raw recruit, he thought that the appellant wanted to kick him or beat him on the bottom and, therefore, he pulled down his trousers. It was only when he heard the appellant opening the zip of his trouser that he realized the appellant's intention and pleaded with him not to do anything. Thereafter he has given narration of the

unnatural offence and the fact that he felt ashamed and shocked after the incident and in fact, wanted to leave the Army. When he went back, one of his colleagues, recruit Bhutade Satish Umakant (PW 12) asked him why he was crying. But he did not say anything at that time as he was ashamed to admit to the facts of the night. However, on completion of duty, when he went back to his lines at 0530 hours, he confided the facts of the incident to his friend recruit Nitin Somavanshi (PW 5) and stated that he wished to go on discharge. He was advised by his friend recruit Somavanshi to report the matter to Platoon Havildar and at 0600 hours on 9.11.1997, he reported the matter to Hav. Belu Muchundikar. Recruit B. Srinivasalu (PW 3) was the sentry alongwith the appellant at Shivneri Gate on the night of 8/9.11.1997. At 0045 hours, the appellant told him that he was going to the toilet. But, when he did not return till 0130 hours, the witness went to investigate as

to why he had not returned. He saw some movements on the road near BC 47 and on looking carefully saw the appellant sodomising the recruit who was standing on duty at BC 47. The witness felt embarrassed and returned to his post. Thereafter the witness reported the matter to the Duty Guard Commander, Hav. Kumar Biranje at 0600 hours in the morning. Hav. Biranje Kumar Shankar (PW 4) has validated the testimony of PW 3 and confirmed that PW 3 told him that he had witnessed the incident of sodomisation of the recruit by the appellant. However, as the matter had not been reported to him, he did not pursue the incident any further. Subsequently at 0700 hours, when the identification parade of the Guard duty personnel was carried out, recruit Dashrath identified the appellant as the person who sodomised him. Recruit Nithin Somawanshi (PW 5) has stated that he is occupying the neighbouring bed of recruit Dashrath and that on the

morning of 9.11.1997, recruit Dashrath told him about the incident on the night of 8/9.11.1997 wherein the appellant attempted to sodomise him and that he felt ashamed and wanted to leave the Army. It was the witness who advised recruit Dashrath to report the matter to the Platoon Havildar which Dashrath subsequently did. Nk Hiremath Shashi Gadigeppa (PW 6) has stated that he was called by the Platoon Havildar of A Company and told about the incident of the preceding night of 8/9.11.1997 and instructed to go with recruit Dashrath and investigate the matter. He accompanied recruit Dashrath to the drivers training area, wherein the personnel who had given duty night before were paraded. Recruit Dashrath identified the appellant as the person who sodomised him. Immediately thereafter, the appellant fell on his knees and confessed that he had performed the sodomy on recruit Dashrath and begged forgiveness. This confession was made in the presence

of Hav. Kumar Biranje, Hav. Krishna Patil, Hav. Yenare Dattatrey Vitthal, Sep. Baba Apubhai and Sep. Rajiv Yadhav. The witness also confirmed that the appellant confessed the crime again at 1000 hours before Col. Vinod Thomas. Sep. Rajiv Jadhav (PW 7) has also testified to the same facts as PW 6 about the identification parade and confirmed the fact that the appellant fell on his knees and confessed the crime and begged forgiveness. Sep. Babu Appubhai (PW 8) has also confirmed the same facts as PWs 6 and 7 with regard to the identification of the appellant by recruit Dashrath and the confession and pleading by the appellant begging forgiveness for his crime. This witness went on to state that no physical violence was committed on him nor was any inducement or promise made to the appellant. Capt. Sandeep Singh, Adjutant, Maratha Centre (PW 9) has stated that on 9.11.1997 he was informed about the incident at approximately 1030

hours and he called the appellant into his office while Col. Vinod Thomas, Training Battalion Commander was also present. Before this, both these officers had called recruit Dasharat, who narrated the complete incident to them and thereafter the appellant was called and asked if he was guilty of sodomising the recruit. The appellant replied that he was not guilty, to which Col. Vinod Thomas told him to go out for five minutes, think it over and come back. After approximately five minutes, when the appellant returned, he confessed his guilt. Sub. Patil Laxman Shankar (PW 10) was the Company Senior JCO to whom the incident was reported on the morning of 9.11.1997. When he went to the Company lines to enquire, he was informed that the appellant had confessed the crime. However, when the witness spoke to the appellant, he denied having committed the act. The matter was reported to the Subedar Major and thereafter to the Adjutant. The witness was present

outside the office of the Adjutant when the appellant was marched in and when he was given five minutes to 'think it over'. He has stated that in this interval of five minutes before the appellant went back to the office of the Adjutant, the appellant went to the room opposite the place where all the witnesses were seated and after some time, he marched back into the office of the Adjutant and confessed his crime. The witness testified that the appellant was in his direct vision from the time when he got out of the Adjutant's office till he re-entered and that during this period, nobody threatened, induced or beat up the appellant. Col. Vinod Thomas, Training Battalion Commander (PW 11) has stated that he came to the office of the Adjutant at 1015 hours on 9.11.1997, wherein he was informed about this incident. All the witnesses were lined up and their verbal statements taken, after which the appellant was called and on being told to truthfully narrate the happenings,

he said he was not guilty. Thereafter the witness told the appellant to go out of the office, think about what he wanted to say and come back. After about five minutes, the appellant entered the office of his own and confessed to the crime and requested to be pardoned. Recruit Bhatade Satish Umakant (PW 12) was on sentry duty alongwith recruit Dashrath on the night of 8/9.11.1997 and had seen recruit Dashrath weeping.

6. Counsel for the respondents urged that the plea of the appellant that all this was a concocted and fabricated story to implicate the appellant was a figment of imagination, as nobody in his right senses would concoct such a story and defame himself for posterity purely "fix" the appellant. Getting sodomised was a slur on any Indian male and nobody would willingly take on such a slur purely to implicate a colleague. The appellant has tried all sorts of pleas, including that of his religion, which only shows the extent of his desperation. The

Armed forces are above caste and community considerations and attempting to cast such aspersions only indicates the depth to which he can stoop in fabrication of such lies. He further went on to state that there was not a shred of evidence at any place to indicate that the appellant had ever been coerced, threatened or so called 'mercilessly thrashed' in order to obtain a confession. There is no evidence, whatsoever, of his having been beaten and neither is there any medical examination or any other witness having seen any marks of injury on the appellant. It is inconceivable that the appellant was beaten mercilessly and not even an injury mark was visible on his body and that he had done normal duties with full vigour after such 'merciless thrashing'. In any case, at no stage of the proceedings, i.e. either at the hearing under Army Rule 22 or at the summary of evidence or at his trial has the appellant ever stated that he was beaten or threatened or

induced to make a confession. This is a vague defence that he is taking in this writ petition for the first time and is indicative of the weakness of his plea.

7. With regard to the Commanding Officer of the appellant, it was vehemently stated that the appellant was attending a Driver Training Capsule with effect from 4.8.1997 and that the Administrative Battalion Commander was his legal Commanding Officer at the time of committing the offence and, therefore, had full jurisdiction over the appellant. The appellant was legally attached to the Administrative Battalion in terms of Para 420 of the Regulations for the Army and Army Order No. 89/81. In fact, HQ 7 Infantry Brigade, under whom 8 Maratha Battalion is serving, have accorded sanction vide Letter No. 1016/1/A dated 1.12.1997 and Station HQ, Belgaum Station Order No. 100/97 of 2.11.1997 under the authority of Army HQ Letter No. A/73006/GS/MT 12(B) dated 8/20.9.1985. Therefore,

there was no ambiguity at all with regard to the Commanding Officer of the appellant.

8. Counsel for the respondents stated that the testimony of these twelve witnesses corroborated the complete facts and there were no loose ends in the evidence. The incident was reported immediately after occurrence and the same day by 1030 hours, i.e. within a few hours of the commission of the offence, the report had been made to the higher authority, an identification parade held, the appellant identified and his confession made in the office of the Adjutant. Counsel also went on to state that the plea of guilty has been signed by the appellant on the original record as well as on the certificate showing compliance of AR 115(2). The hearing under AR 22 has been held on 11.11.1997 and the fact that the trial lasted 30 minutes is of no consequence, since there have been no legal infirmities in the trial and neither has the appellant been able to

indicate how he had been prejudiced by the trial being completed in 30 minutes. Similarly, counsel for the respondents urged that there was no bar about typing some portions of the SCM proceedings because the essential aspects which had to be concluded at the time of court martial had all been written in manuscript. In any case, such advance typing was only to reduce the time and had caused the appellant no prejudice. Maj. H.D Sharma, who had 12 years of commissioned service and was an experienced officer, had been detailed as "friend of the accused" and had performed his duties to the best of his abilities. In any case, there was no objection to his detailment by the appellant at any stage. It was also strongly urged by the respondents that the appellant had never been instructed to check the recruits as to whether they were sleeping or not. This was the sole prerogative of the Guard Commander and the appellant could not take on this duty by himself.

In any case, he has not shown any authority or any other evidence by which he has abrogated to himself the authority to check the recruits on night duty. In any case, other than the appellant and recruit Dashrath, there is the eye witness testimony of PW 3 recruit Srinivasalu, who had witnessed the act of sodomy as a totally independent witness. There is, therefore, no doubt about the facts and circumstances of the case. It was also vehemently stated by the respondents that the appellant was lodged in the Quarter Guard only on 23.12.1997 and not from 9.11.1997 to 23.12.1997, as has been stated by the appellant. In any case, no evidence or any other document has been produced to substantiate such baseless allegations. Lastly, it was urged that the Commandant of Maratha Centre is a prescribed officer under AR 200 for review of the punishment. The Commandant is a holder of B1 warrant issued under the authority of Para 6(4) of the Manual of

Military Law and is duly authorised to counter sign the proceedings of the SCM vide HQ Southern Command Letter of 8.1.1998. All in all, counsel for the respondents stated that it was a very meticulously conducted trial wherein the guilt had been proved to the hilt without any inconsistencies and without any legal infirmities.

9. Keeping in view the above, we do not find any justified and justifiable ground to interfere with the proceedings, findings or sentence of the SCM of 23.12.1997. The appeal is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER