

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

**T.A NO. 637 OF 2009  
(WRIT PETITION (C) NO. 6838 OF 2000)**

RAMESH KUMAR RAY  
NO. I, 1438451M GNR (DMT)  
118 FIELD REGIMENT.

THROUGH: MR. LALTA PRASAD, ADVOCATE

**.. PETITIONER**

VS.

1. UNION OF INDIA THROUGH THE SECRETARY  
MINISTRY OF DEFENCE, SOUTH BLOCK  
NEW DELHI.
2. CHIEF OF THE ARMY STAFF  
AT THE ARMY HEADQUARTER, NEW DELHI.
3. PRESIDING OFFICER MAHABIR SINGH VERMA  
COLONEL AT JANGLOT (J & K)  
118 FIELD REGIMENT.
4. JUDGE ADVOCATE MAHENDER SINGH YADAV  
MAJOR, 118 FIELD REGIMENT  
JANGLOT, J & K.

THROUGH: LT. COL. NAVEEN SHARMA

**.. RESPONDENTS**

**CORAM**

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

**JUDGMENT**

**18.03.2010**

1. The petitioner is supposedly aggrieved by the Summary General Court Martial order of 22.6.2000, under which he was sentenced to be dismissed from service and to suffer rigorous imprisonment for seven years. He also seeks to be reinstated in service with backwages and consequential benefits.

2. The petitioner contends that he joined the Army, i.e. 118 Field Regiment, with the intention of serving the Nation. On 18.5.1991, he was performing the duties of Sahayak (Orderly) to Major Sumit Jain

his battery commander. On that fateful day, the wife of Maj. Sumit Jain supposedly asked the petitioner to give her a towel in the bathroom and asked him to come to the bedroom when the petitioner freed his hand and went away. To avenge such spurning, Deepali Jain, wife of Maj. Sumit Jain cooked up a story that while she was away in school, the petitioner took her daughter, the prosecutrix, to his room and pulled down her panty and pushed his genitals into her and supposedly urinated therein. This cooked up story was supposedly planted 24 hours late, based on which the petitioner was taken into custody and the charges for attempt to rape were framed and Court Martial proceedings commenced. The petitioner, during the supposed act on 18.5.1999, pushed his genitals into that of the girl child and after the act, supposedly wiped his as well as the girl's genitals with the bed sheet. Neither was the prosecutrix taken to a doctor and neither did she supposedly have any pain because the next morning she went to school and neither did anybody send the bed sheet for forensic examination. According to the petitioner, while the incident took place on 18.5.1991, it was reported to the concerned authorities only on 19.5.1991 after more than 24 hours.

3. The petitioner added that the statement of the prosecutrix about the nature of the offence shows that the whole case has been fabricated. Since he could not urinate in her genitals thrice and if she had felt any pain, she should have been taken to the doctor and neither was any medical examination done. It is contended that the prosecutrix has been tutored both by the mother (PW 1) as well as by the prosecutor. The petitioner draws attention to the questions put by the Court to the prosecutrix (PW 2) wherein, in response to one of the questions, the witness says: **“the witness point towards the prosecutor in the Court and states that he had asked her to say that the ‘shushu’ of the accused was like curd”**. In response to another question, the prosecutrix (PW 2) again states **“my mother told me to say in the Court:**

**Bhaiya ka ‘shushu’ Bara tha aur usne mere ‘shushu’ mein apna ‘shushu’ dala. Jab Bhaiya ne mere ‘shushu’ mein ‘shushu’ dala to mere ‘shushu’ mein dard aur pain hua. Phir Bhaiya ne mere ‘shushu’ par ‘shushu’ kar diya. Phir Bhaiya ne apna ‘shushu’ aur meri ‘shushu’ apni chadar se pounch diya.** (Bhaiya’s penis was big and he inserted his penis into my vagina. When he inserted his penis into my vagina I had pain.

Then he ejaculated in my vagina. Thereafter, he wiped his penis and my vagina with his bed sheet)”.

Therefore, the witness has been tutored and the sole prosecution case is based on the testimony of the prosecutrix since no FIR has been lodged, no medical examination of the prosecutrix has been done and neither have the bed sheets or any clothes been sent for chemical examination. Therefore, there is inadequate evidence and whatever evidence was produced does not disclose the commission of an offence under Section 511 of the Indian Penal Code and the petitioner has been put behind bars on the basis of a concocted story using inconsistent evidence. The petitioner contends that it was a concocted story and was the handy work of PW 1, the mother of the prosecutrix who stage managed the entire story in order to avenge the spurning of her carnal advances by the petitioner. The petitioner also contends that the Court Martial members were not justified in coming to their conclusion and have failed to appreciate the evidence in its correct perspective. The Presiding Officer of the SGCM ought to have appreciated

the fact that the chain of events in this case was not complete to attract the commission of offence of attempt to rape.

4. The background to the incident is that the petitioner was posted to 118 Field Regiment with effect from January 1991. At the time of the incident, i.e. on 18.8.1991, the main location of the unit was a family station called Janglot in Jammu & Kashmir. However, since the unit was out for operational duties, only a rear party of an officer and a minimum number of men were employed at Janglot and the rest were in their operational area which was a few hours journey by vehicle. The petitioner had been performing the duties of Sahayak to Maj. Sumit Jain from 21.7.1991 and was residing in the house of Maj. Jain i.e. in the servant quarter which was part of the house. On 18.8.1999, at approximately 1805 hours, Deepali Jain, wife of Maj. Sumit Jain left her house to take academic classes of children of JCOs/OR. While leaving for the classes, the lady left her daughter Ishitha (4 years old) and the son with the Sahayak (the petitioner). Normally, Deepali Jain used to take her daughter along with her. However, on that day, since her daughter was not feeling well and also

because it was raining, she decided to leave her behind at home with the Sahayak. On return at approximately 1930 hours, Deepali Jain reached home and asked the petitioner to get the details of expenditure incurred by him on vegetables. In the meantime, the prosecutrix, Ishitha, told her mother "**Bhaiya ne mere shushu mein shushu teen bar kiya**". The lady was in shock and went to her immediate neighbour, the wife of Lt. Col. S.P Sharma and narrated the complete events to her. Thereafter the ladies called for Maj. Vijai Bahadur of the same regiment who happened to be at Janglot. Maj. And Mrs. Vijai Bahadur reached the residence of Maj. Jain and enquired about the facts of the case. At 2100 hours itself, the petitioner was taken to the unit location in operational area by Maj. Vijai Bahadur and the matter was accordingly reported to the Commanding Officer by Maj. Vijai Bahadur.

5. In this background, the respondents contend that the fact that the petitioner took the child to his room has been amply proved by the prosecutrix (PW 2) and her mother (PW 1) in no uncertain terms while narrating the acts of sexual assaults on her by the accused. She has clearly

said that **“the accused took me inside his room by lifting from my waist. I was made to lie down on his bed. He removed my panty and then he removed his trouser. He shook his penis and tried to insert into my vagina. I told him to stop but he did not stop and did ‘shushu’ on my vagina. Thereafter the accused wiped off his penis and my vagina with his bed sheet. The accused then put on my panty and he also put on his trouser. He opened the door of his room and sent me to our house. The accused asked me not to narrate the said incident to my mummy otherwise he would not play with me and will keep me outside standing and he will also not give me tea and biscuits”**. The prosecutrix (PW 2) has also brought out that while her shushu is like water, that of the accused is like curd (dahi). She has also stated that the shushu of the Bhaiya was very big and erect and that he was shaking it and that he tried to insert it in her vagina. She has even given in her testimony that the colour of the underwear of the Bhaiya was blue and that of his trouser was brown. The prosecutrix has given cogent, consistent and accurate narration of the events of 18<sup>th</sup> May 1991. It, therefore, appears that the petitioner had attempted to put his penis in the vagina of the prosecutrix and when he

could not do so, he rubbed his penis against her vagina till he ejaculated. Coming from an inexperienced child, the counsel was vehement that this evidence was more than adequate to show that an attempt to rape has been committed.

6. Further, so far as the accusation of attempt to commit rape is concerned, the prosecutrix stood fully corroborated by the statement of her mother (PW 2), who soon after returning home was told about the incident by the victim. PW 2 also noticed reddish rashes close to the genitals of the child. On account of such close proximity of time, wherein the victim narrated all about the incident, which would lead to the irresistible conclusion that the accused should explain how and in what circumstances the victim had given such narration. No mother, especially in a conservative society, would involve her daughter to make false allegations against a third person (accused) of making attempt to rape her daughter, thereby exposing herself and the family to shame and ignominy in society. The statement of the victim girl in the given circumstances wherein she soon gave narration of the incident to her mother in an

immediate time-frame, would itself be sufficient to fix the culpability of the accused. The child witness has understanding and her evidence inspires confidence. No infirmity could be pointed out in her statement. Explaining questions to the witness by the prosecutor or the mother would not tantamount to tutoring. The totality of the circumstances appearing on record of the case discloses that the child (PW 1) had no motive to falsely implicate the accused. We have no hesitation under such circumstances to rely on the testimony of PW 1. Reliance may be placed in the cases of **State of Maharashtra v. Chandraprakash Kewalchand Jain** (1990 (1) SCC 550 at page 559); **Karnel Singh v. State of M.P** (1995 (5) SCC 518) and **Sri Narayan Saha and another v. State of Tripura** (2004 (7) SCC 775).

7. Counsel for the respondents contended that there was no question of tutoring the witness and that whatever questions may have been put by the prosecutor and the mother (PW 1), were more in the nature of attempting to extract from her a logical sequence of events of that fateful evening. Being a child witness (aged 4), she cannot be expected to narrate the sequence of events in the same manner as an adult.

8. Mere reference to some inconsistency in a few sentences in the entire testimony of the prosecutrix does not materially or substantively change the testimony of the witness, especially that of a child witness who cannot be expected to have the expertise, consciousness or intelligence of an adult, especially in such case of attempted rape. Moreover, the prosecutrix herself has given a complete narration of the events in the presence of the petitioner on the evening of 18<sup>th</sup> May itself. This narration of events was done in the presence of her mother, Mrs. S.P Sharma, wife of Lt. Col. S.P Sharma and the petitioner, barely two – three hours after this incident. Such testimony lends credence to the evidence of the prosecutrix and her statement can be taken as that of a ‘truthful witness’.

9. Counsel for the respondents vehemently denied the accusation of the petitioner that Deepali Jain, wife of Maj. Sumit Jain, attempted to lure him to her bed room on 17<sup>th</sup> May. Such malicious statement is unsubstantiated and uncorroborated. It is a baseless allegation being made by the petitioner to save his skin. Counsel for the respondents

was categoric that if any such incident had occurred on 17<sup>th</sup> May i.e. one day before this incident, why had the petitioner not brought it to the notice of the authorities at any point of time? Such false allegations are an afterthought and indicate a mischievous and cunning mind. It is merely an attempt to cloud the entire incident as some kind of vendetta being played out by Deepali Jain, wife of Maj. Sumit Jain. In the present circumstances, there is no evidence of any formal complaint of this nature being made by the petitioner to the Commanding Officer. This does not inspire any confidence in such accusation. Therefore, to suggest that this entire case was fabricated by Deepali Jain merely to take revenge on the petitioner is ridiculous. It does not appear logical nor reasonable or rational that an Army officer's wife, who is also the mother of a young four year old daughter, would deliberately make a false allegation of sexual assault on her daughter merely to take revenge for being spurned! Mere suggestions cannot be taken as evidence or at face value in the absence of any substantiation or corroboration.

10. It was clarified by the respondents that a FIR had not been lodged in this case since it was not mandatory and nor was it a legal requirement. However, with regard to the medical examination, PW 1 has clearly stated that when she examined the genitals of her daughter (the prosecutrix), there was a reddish rash close to the genitals and her daughter was complaining of some pain. However, the injuries were not so severe as to necessitate medical examination or treatment. Furthermore, the respondents contended that belonging to a socially sensitive environment, the parents of any young girl child so assaulted would not like to unnecessarily undergo such medical examination unless it was absolutely necessary, which, in this case, they obviously felt there was no need for such examination. However, the respondents admit that not sending the bed sheet or the clothes of the petitioner was admittedly an inconsistency that occurred at that time. The respondents also were specific that there was no delay whatsoever in reporting the incident. Within a few minutes of being informed about this incident, PW 1 informed Mrs. S.P Sharma and together they called Maj. Bahadur and informed him. Within approximately a few hours of this incident, the petitioner was taken by Maj.

Bahadur to the headquarters of the unit which was deployed in operational area and a formal complaint was lodged with the Commanding Officer. It is, therefore, absolutely false to suggest that the report was made 24 hours late, when in actual fact, the report was made within a matter of a few minutes only.

11. Considering that the charge is that of attempted rape and not rape per se, the testimonies of the witnesses that have been examined during the GCM are consistent and mutually corroborative. The intentions of the petitioner are evident and constitute attempt to rape.

12. The decision of the GCM is upheld. The petition is rejected.

**(S.S DHILLON)**  
**MEMBER**

**(S.S KULSHRESHTHA)**  
**MEMBER**