

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

T.A NO. 676 OF 2009
(WRIT PETITION (CIVIL) NO. 4430 of 2000)

EX. HAV. NAR SINGH

.. APPELLANT

V.

UNION OF INDIA AND OTHERS

.. RESPONDENTS

ADVOCATES

MR. C.M KHANNA, ADVOCATE FOR THE APPELLANT

MS. VERONICA MOHAN, ADVOCATE
WITH
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
20.09.2010

1. The challenge in this writ petition filed before the Delhi High Court is directed against the order of the Summary Court Martial dated

10.5.1999, whereby the petitioner (Hav Nar Singh) was found guilty of having committed the offence under Army Act Section 46(a) and sentenced him to be reduced to ranks and dismissed from service. On formation of this Tribunal, the above writ petition has been transferred for disposal. Under Section 15 of the Armed Forces Tribunal Act 2007, appeal lies against any order, decision, finding or sentence passed by a Court Martial or any matter connected therewith or incidental thereto. Since, in this case, the petitioner 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 leading to the case, in brief, are: The appellant was enrolled in the Army in September 1980. In 1998, while the appellant was serving at Bengal Engineering Group and Centre, Roorkee, he was served with a charge sheet alleging offence under Army Act Section 46(a), in that, on 28.2.1998, between 0700 hours and 0730 hours, he committed an unnatural offence on the person of Rect. Tapan Kumar Barik. On pleading not guilty, summary of evidence was recorded and the appellant was tried by the SCM. After sifting the evidence, the SCM found the appellant guilty of the charge under Section 46(a) and sentenced him as aforesaid.

3. Counsel for the appellant has contended that the trial of the appellant by the SCM is without jurisdiction. Carnal inter-course against the order of nature is an offence falling under Section 377 of the Indian Penal Code. Therefore, the charge against the appellant under Section 46(a) as such is totally misconceived. The sentence awarded is strikingly disproportionate to the gravity of the offence.

4. To the contrary, learned counsel for the respondents resisted the appeal contending, inter alia, that on 28.2.1998, a complaint was received from one of the recruits stating that the appellant had committed an offence of an unnatural kind with the recruit. The recruit was medically examined on 4.3.1998. On 7.3.1998, a Court of Inquiry was convened to inquire into the allegations made against the appellant. After inquiry, the appellant was found to have committed the unnatural act upon the recruit as alleged. Thereupon, the charge sheet was issued and after initial hearing under Army Rule 22, a summary of evidence was ordered. On 3.5.1999, the SCM was held, which found the appellant guilty. All procedural formalities were followed and there was no violation of any of the statutory rules. The appellant took part in the proceedings at all stages and there was no violation of the principles of natural justice.

5. To appreciate the rival contentions, it would be appropriate if we refer to the evidence adduced by the witnesses. In support of its case, the prosecution examined **Lt. Col. SS Mann**, Senior Regimental medical Officer (**PW 1**). On medical examination, he found certain aberrations on the person of Rect. Tapan Kumar Barik, which was substantive of anus coitus done on the individual. He also proved his report vide Exhibit A. In cross examination, PW 1 made it clear that there could be possibility of bleeding at that time. The testimony of this witness could not be assailed. The medical evidence clearly established that sodomy was committed on the victim. We do not find any reason to disbelieve the testimony of this witness. Nothing tangible has been brought on record to discredit the version that the victim was subjected to sodomy. **PW 2 Rect. Tapan Kumar Barik**, who is the victim, gave categoric narration of the facts. Report was made to his superior officers soon after the incident. He was horrified by the unnatural act committed by the appellant. We have gone through the testimony of PW 2. The SCM, which had occasion to see his demeanour, found cogent reason to believe PW 2, because his evidence was free from any blemish. There is sign of truth around his statement and he has given a totally unscathed evidence from the test of cross

examination. There is no reason for him to falsely implicate the appellant as he had met the appellant only during the training period and had no enmity. The testimony of this witness is fully corroborated by the medical report and the evidence of PW 1 Lt Col SS Mann. **PW 3 Spr Gunai Kalita** has stated that on 28.2.1998, he, along with PW 2 Tapan Kumar Barik, were detailed for sentry duty by the appellant in ARA Barrack after completion of the luggage shifting. When he left for breakfast, he saw Tapan Kumar Barik in the ARA Barrack. At about 0700 hours, he saw the appellant in the ARA Barrack. This witness supported the prosecution version that at the relevant time the appellant was there in the ARA Barrack. **PW 4 Spr Dev Singh** has also stated that, when he was staying in the ARA Barrack on 28.2.1998, he knew Tapan Kumar Barik who was in the OT team and he used to stay in the OT Barrack. On the day when the OT team was leaving for Bareilly, the appellant ordered PW 2 Tapan Kumar and PW 3 Kalita to shift the OT team luggage to ARA Barrack. By 0630 hours, most of the luggage had been shifted and all other recruits, except PW 2 Tapan Kumar and PW 3 Kalita were left in the barrack. Thereafter he left for bringing breakfast for the ARA barrack. From his statement, the presence of the victim there at the barrack is established. But his

statement that he had not seen the appellant would not in any way be construed to be false. The material witness, **PW 5 Sub Bhawan Singh**, to whom supposedly the incident was reported by PW 2 Tapan Kumar without any loss of time, has stated that at about 0830 hours, the victim came to his room crying that the appellant had forcibly carried out unnatural act on him in the bathroom of ARA Barrack. After getting details of the incident, PW 5 told him to go to SM's office and he would reach there soon. After reaching SM's office, PW 5 reported the matter to the SM and PW 2 Tapan Kumar also narrated the incident to him. The testimony of this witness remained in tact. We do not find any reason to disbelieve his testimony.

6. The appellant has stated that Sub Bhawan Singh was inimical towards him and he fabricated the story to wreak vengeance. There is nothing on record to show that Sub Bhawan Singh, who asked PW 2 Tapan Kumar to go to SM's office, had any enmity with the appellant. Merely by such statement of the appellant, the testimony of the victim cannot be repelled. On the defence side, **DW 1 Hav Rajinder Singh** was examined. He has stated that around 6.00-7.00 a.m, the appellant was with him while they were having breakfast in Ghuznee Coy Langar. He has also stated that

when he was in the ARA Barrack, the appellant was also present. This was around 0700 hours. From his evidence, it is not clear till what time the appellant remained with him. Therefore, it cannot be inferred that the appellant was with him when the alleged incident took place. Such testimony of the witness would not be sufficient to discredit the sworn version of the victim PW 2.

7. Viewed in the above background, we do not find any justified reason to interfere with the findings and sentence of the SCM. In the result, the appeal is dismissed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER