IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

O.A NO. 116 OF 2010

EX SEP/DVR RAKESH KUMAR ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. S.R KALKAL FOR THE APPELLANT
CAPT. SUNIL THAKUR FOR THE RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. Z.U SHAH, MEMBER

J U D G M E N T
25.2.2011

1. The challenge in this appeal under Section 15 of the Armed Forces Tribunal Act 2007 is against the Summary General Court Martial (SGCM) proceedings holding the appellant guilty of having committed the offence under Army Act Section 69 and sentencing him to undergo rigorous imprisonment for five years and to be dismissed from service.

2. The facts giving rise to this appeal, in a nutshell, are: The appellant, while attached on temporary duty to 8 Sikh Regiment located at Nagaland, was charge sheeted for having committed the offence under Section 376 read with Section 354 of the Indian Penal Code. He was put to trial by the court martial on 28.7.2008. Having found him guilty, he was sentenced by the SGCM. His pre and post confirmation petitions resulted in rejection. Hence the present appeal.

3. Counsel for the appellant has contended that the trial by the SGCM is against the statutory provisions of law as it did not comply with Army Rule 180 by not giving him the opportunity to cross examine the witnesses. The sample sent to the Forensic Science Laboratory did not contain semen spermatozoa of the appellant, which was not taken into consideration by the SGCM while finding him guilty of the charge. The finding by the SGCM is, in violation of the statutory provisions of law as it failed to comply with Army Rule 180 by not giving the appellant an opportunity to cross examine the witnesses. Furthermore, the appellant was charge-sheeted for an offence under Section 354 of the Indian Penal Code, whereas the trial was conducted under Section 376(1) IPC, which

was not informed to the appellant. It is trite that when the charge levelled against a person is wrong and he has been tried under a wrong charge, it would vitiate the entire trial. So also, the sample sent for forensic examination was found to contain no semen spermatozoa, which itself discredits the prosecution version. Therefore, the findings arrived at by the SGCM are on conjectures and surmises and there is nothing on record to prove the guilt of the appellant.

4. The appeal was resisted by the respondents contending, inter alia, that the SGCM was justified in convicting the appellant on the basis of the evidence adduced by the prosecution. Further, the appellant deserved conviction as he committed a heinous crime. The evidence of other witnesses supported the version of the prosecutrix also.

5. The appellant was charged for the offence under Army Act Section 69, which reads as under:

> **ARMY ACT SEC. 69**
>
> **COMMITTING A CIVIL OFFENCE THAT IS TO ATTEMPT TO COMMIT RAPE AND IN SUCH ATTEMPT DOING AN ACT TOWARDS THE COMMISSION OF THE SAME, CONTRARY TO SECTION 511 READ WITH SECTION 376(1) OF THE INDIAN PENAL CODE,**

in that he,

at field, while on active service on 25 Nov 2007, attempted to commit rape on Miss Mhabeni, aged about ten years, a civilian, and in such attempt caught hold of her, bit her on the cheek and face, removed her undergarment, raised her legs and tried to insert his penis into her vagina and ejaculated in the process on her thighs and legs.

In support of its case, the prosecution examined PW 9, the prosecutrix aged 10 year. She gave categoric narration of the incident, which reads thus:

> "On 25 Nov 07 my parents were not at home as they had gone to the church for offering prayers. I was playing along with my brother and sisters outside my house in the courtyard, at that time an army person came there and showed me money. The accused took me inside the house showing hundred rupee note and forcibly made me lie on the bed inside the room. The accused took out my underwear and when I shouted he kept his hand on my mouth. The accused then undressed himself i.e. took out his private part 'penis' and tried to penetrate in my vagina. He tried to penetrate but could not do so. His private part 'penis' was big, the accused touched me all over, he kissed and bit me on my right cheek. He pressed my lips and was misbehaving with me. While the accused was molesting me, one Sardar army man came there and told the accused not to misbehave with me. The accused did not listen to him. So he went away. The accused kept on misbehaving with me. The accused was rubbing his private part in my vagina and thigh. After some time, he left me. My

other brother and sisters who were present in the other room were also crying and shouting for help from the window. They were shouting for aunty to help.

The accused then kept hundred rupee note in my skirt pocket and then he threatened me not to tell this incident to anyone and left the room. ....."

Her testimony could not be impeached from the side of the appellant. The other witnesses also supported the prosecution version. PW 1 Hav Punjab Singh, who went along with the appellant to fetch water, stated to have seen the appellant with the prosecutrix in the room and at that time, the victim child was crying. PW 1 warned the appellant to leave the girl otherwise he would complain to the higher authorities. PW 3 Maj Dinesh Kumar, PW 4 Lotseno, W/o Chinio Lotha, PW 5 Ashok Rawat, PW 6 Thumgbeni, wife of Mhonchumo and PW 7 Capt Keshav Singh Jasrotia supported the prosecution version. The other witnesses are formal witnesses. Having meticulously gone through the entire evidence, we find no reason to disbelieve their versions.

7. Then what remains to be considered is whether the offence would fall within "rape" or "attempt to rape". Counsel for the appellant

was unambiguous in contending that there was no penetration. Before delving into this aspect, it is necessary to extract the relevant provisions of the Indian Penal Code. The offence of "rape" falls in Chapter XVI of the Indian Penal Code. It is an offence affecting the human body. In Chapter XVI, there is a separate heading for "sexual offence", which encompasses Sections 375, 376, 376A, 376B, 376C and 376D. "Rape" is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act 1983 and several new sections were introduced by the new Act, i.e. 376A, 376B, 376C and 376D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand. The offence of rape affects the dignity of a woman. The offence of rape in its simplest term is the ravishment of a woman, without her consent, by force, fear or fraud, or as the carnal knowledge of a woman by force against her will, "rape" or "raptus" is when a man hath carnal knowledge of a woman by force and against her will; or as expressed more fully, rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will. The essential words in an indictment for rape are *repuit* and *carnaliter cognovits*; but *carnaliter cognovits*, nor any

other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape (**Hale PC 628**). In the crime of rape, 'carnal knowledge' means, the penetration to any slightest degree of the organ alleged to have been carnally known by the male organ of generation (**Stephen's Criminal Law, 9th Edn. P. 262**). In **Encyclopaedia of Crime and Justice, Vol. 4, p. 1356**, it is stated: "..... even slight penetration is sufficient and emission is unnecessary." In **Halsbury's Statutes of England and Wales (4th Edition) Vol. 12**, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman – an outrage by all means. By the very nature of the offence, it is an obnoxious act of the highest order.

8. From the evidence on record, it appears to be a case of "attempt to rape". It is well established. We, therefore, do not think it necessary to interfere. Having been confronted with this position, counsel for the appellant turned around and solicited a lenient view with regard to the sentence. It was submitted by him that the appellant had already undergone over half of the sentence. As we have pointed out, the offence would fall under Section 69(b), for which the maximum sentence is seven

years. Section 69 is to be read in conjunction with Section 376/511 IPC. He had undergone half of the sentence. Viewed in this light, we are of the opinion that the sentence already undergone by the appellant would be sufficient to meet the ends of justice.

9. The appeal is dismissed. But the sentence is reduced to the period of sentence already undergone by the appellant.

(Z.U SHAH)
MEMBER

(S.S KULSHRESTHA)
MEMBER