

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

T.A. 278 OF 2009

(Writ Petition (Civil) No.516 of 1999)

IN THE MATTER OF:

BALKAR SINGH

.....Applicant

Through : Mr. S. K. Sanan, counsel for the applicant

Versus

The Union of India and others

.....Respondents

Through : Mr. Ajai Bhalla, counsel for the respondents

CORAM:

HON'BLE MR JUSTICE S. S. KULSHRESTHA, MEMBER,

HON'BLE LT GEN Z.U.SHAH, MEMBER

JUDGMENT

Date: 19 May 2011

1. This Writ Petition, under Article 226 of Constitution of India was brought by the accused-appellant challenging the findings of the Summary Court Martial whereby the appellant was held guilty for the offence u/s 46 (a) and 65 of the Army Act and sentenced to undergo one year RI and dismissal from service. It is said that the case was fabricated against the accused-appellant. His conviction was recorded by the Summary Court Martial (SCM) without following the mandatory provisions of law. The trial court proceeded with the assumption as if the appellant had committed the offence. Moreover the decision is based on conjectures and surmises and is not sustainable.

2. The defence of the accused appellant that he gave directions to accused-appellant for shifting sugar bags and then he noticed some carelessness on the part of the victim Sh. Dharam Raj, one of the complainants, rebuked him. That appears to be the reason for imputing false allegations by him against the appellant. It is also said that the trial of the appellant for the offences u/s 46(a) is irregular and would vitiate the trial. Even if the allegations made in the FIR are accepted to be true on face value it would appear to be civil offence u/s 377 of IPC triable by the Civil Court. The jurisdiction of the SCM was wrongly

resorted for confining the offence to be u/s 46 (a) of the Army Act. It is also said that the second charge which was pertaining to making an attempt for doing unnatural offence is also not borne out from the evidence. There is nothing on record to justify the conviction of the appellant for the offence u/s 65 of the Army Act.

3. The appeal was resisted from the side of the respondents stating that there was ample evidence against the appellant. Both the victims made critical narration of the incident and there can be no reason on their part for falsely implicating the accused-appellant.

4. Full opportunity was given to the appellant to test the veracity of these witnesses but it could not be impeached. Moreover, the trial of the accused-appellant for the offence u/s 46(a) of the Army Act is made out and it was not necessary on the part of the authorities to have referred each and every matter of civil offence to the Civil Court.

5. In order to appreciate the salient points raised by the Ld. Counsels for the parties, a brief resume of the facts may be made. Recruit Dev Karan was taken inside the room of a Langar on 14.08.95 at about 1600 hrs. He was asked to remove his shorts which he declined. Thereafter the appellant forcibly opened the buttons of the short/pant and tried to remove his underwear. When the Recruit Dev Karan tried to get himself released from the clutches of the accused-appellant he told that "tere mein itni shakti nahi hai ke chhura sake". Recruit Dev Karan

thereafter stated that he would make hue & cry, on which the door was opened by the appellant.

6. There was another incident which was repeated in that Langar at about 1630 hrs with Rect Dharam Raj who was also asked to do the same but the accused-appellant could anyhow overpower him for doing unnatural offence with him. The report of this incident was made on 17 Aug 1995.

7. The accused appellant was tried for the charges as under :

First Charge

DISGRACEFUL CONDUCT OF AN UNNATURAL

Army Act Sec 46 (a) KIND

In that he,

At about 1600h on 14 August 95, committed an unnatural offence on the person of No. 14415589W Recruit (Soldier/General Duty) Dharam Raj Yadav of the same Regiment.

Second Charge

Army Act Sec 65

**ATTEMPTING TO COMMIT A DISGRACEFUL
CONDUCT OF AN UNNATURAL KIND AND IN
SUCH ATTMPT DOING AN ACT TOWARDS
THE COMMISSION OF THE SAME**

In that he,

At about 1400 on 14 August 95 called No 14415597P Recruit (Soldier/General Duty) Dev Karan of the same Regiment inside a room in the cook house, bolted the door from inside, pulled down his short pant and underwear forcibly and attempted to commit carnal inter-course against the order of nature on the person of the said recruit.

8. In support of this case, on charge no.2, prosecution examined Dev Karan as PW1 who made a categorical narration of the incident which had taken place with him on 14.08.95 around 1300hrs – 1400 hrs in a room at Langar. It was also stated by him how he was threatened by the accused to remove his short/pant. But on his not agreeing and thereafter giving warning that he would shout, he was allowed to leave. This was further clarified by him in his statement on oath that he was asked by the accused to go inside the room in the cook house. When he entered in the room he was followed by the accused. He bolted the room from inside and told him to remove his short/underwear which he refused on which he forcibly opened the button of his short and tried to remove his underwear. His short/pant and underwear came down upto his knees. He also threatened him to keep silent. Thereafter the witness said that he would make voice, on it he was relieved. The testimony of the witnesses remained intact throughout on the point of

mis-conduct of the accused-appellant. However, it was tried to assail that there is no corroboration on this incident from any of the independent witnesses. Suffice is to mention that sole and isolated testimony of the victim can not be discredited mainly on the ground of the non-corroboration. In the present case, there was no other person except the victim and what could be the possible corroboration of this incident except of the other PWs who stated that the accused-appellant came down of the room and was crying.

9. The testimony of the witness was further questioned that he did not report this matter till 17th of April, 1995. The entire false story was hatched again him in connivance with some of his rivals and such delay would itself show the improvement and embellishment in the version. Needless to say that a Rect who was to complete the entire training under the Senior Military Personnel and was afraid for non-approval, if preferred to make complaint.

10. In the cross-examination, this witness made it clear that he did not report the matter the same day to the Senior Officers as he felt humiliated. Victims normally feels shy reporting the matter as it would reflect to his character and would undermine his personality amongst his colleagues/co-recruit.

11. It has next been contended that no offence u/s 377 IPC r/w section 106 could be made out against the accused-appellant. No

carnal intercourse has taken place and for the purpose of proving the attempt, intention, preparedness etc. are to be proved from the side of the accused-appellant in that regard reliance was placed in the case of **KOPPULA VENKAT RAO V/S STATE OF A.P. (2004 VOL III SCC 602)**

wherein it was held as under :

“Section 511 makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”

12. In this case asking the accused-appellant to go inside the room then to remove his short and also threatening not to raise any voice, this would be considered to be preparedness and would very much fall within the definition of 'attempt' as was propounded in the case of

KOPPULA VENKAT RAO V/S STATE OF A.P.(supra). In support of this case it is strenuously argued by Ld.counsel for the appellant that the offence u/s 377 IPC is a civil offence and the appeal ought to have been tried and not to be tried u/s 69 of the Army Act and in no way the offence u/s 46 (a) could be resorted for the disgraceful conduct or unnatural kind of conduct on the part of the appellant. It is also said that the such proceedings were drawn by the Commanding Officer arbitrarily so as to avoid making of any reference u/s 120(2) of the Army Act which specifically provides that SCM shall not try any offence punishable u/s 34, 37 & 69 of the Army Act without making reference to the competent authority to convene SCM/DCM. Here, the offence appeared to be u/s 377 IPC. This is a civil offence and comes within the scope of section 69 of the Army act. In order to avoid any such reference the offence u/s 46(a) was shown for the charge sheet and he was arbitrarily tried for the such offence.

13. It shall be useful to appropriate an answer to this mute question raised from the side of the appellant, section 46 of the Army Act be quoted herein under :

“Any person subject to this Act who commits the offence is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind.”

14. The allegations against the accused-appellant appeared that he did disgraceful act and unnatural/carnal intercourse with PW2 Rect Dharam Raj. This would obviously come within the scope of disgraceful conduct/misconduct. The range of activities which may amount to acts which are inconsistent with the interest of establishment, discipline, not befitting the status, position and dignity of a public servant are so varied that it would be impossible for the prosecutor to exhaustively enumerate such acts and treat the categories of misconduct as confined to limited aspect. It is, therefore, to be noted that the word "misconduct" or "disgraceful conduct is not capable of precise definition. But at the same time though incapable of précis definition, the word "disgraceful conduct/misconduct on reflection receives its connotation from the context, the delinquency in performance and its effect on discipline and nature of duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.

15. In the case of **Union Of India & others v/s Harjeet Singh Sandhu** (2001) 5 SCC page 593, in the context of Army Rule 14, it was held that :

“any wrongful act for any act of delinquency which may or may not involve moral turpitude would be “misconduct”.

Identical view was taken by the Apex Court in the case of **BALDEV SINGH GANDHI V/S STATE OF PUNJAB & OTHERS** (2002 (3) SCC 667), in which it was held that :

the expression “misconduct” means unlawful behavior, misfeasance, wrong conduct, misdemeanour etc.

Conduct of the accused-appellant would also fall within the disgraceful conduct. Reliance may be placed in the case of **STATE OF PUNJAB AND OTHERS V/S RAM SINGH, EX. CONSTABLE** (AIR 1992 SC 2188) wherein it was held that

the term “misconduct” may involve moral turpitude.

16. The alleged conduct of the accused-appellant for doing carnal intercourse would not only come u/s 377 IPC but also this would amount to be a disgraceful conduct following u/s 46 (a) of the Army Act. The accused-appellant can not insist that he ought to have been tried for the major offence u/s 377 IPC and u/s 46 (a) of the Army Act by the Civil Court.

17. It has next been contended that no credence could be attested to the testimony of PW2 – Sh. Dharam Raj Yadav. It may be mentioned that testimony of witnesses remained consistent to the prosecution version. Some of the Rects saw him coming out of the room and they also smiled. He communicated the entire incident to the Co-Recruits and the matter was thereafter reported to the higher authorities. The testimony of this witness finds corroboration.

18. We do not find any reason to disbelieve his testimony. Other witnesses have also supported the prosecution version. In view of the aforesaid discussion, we do not find any merit and in the result, appeal is dismissed.

**Z. U. SHAH
(MEMBER)**

**S. S. KULSHRESTHA
(MEMBER)**