IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

T.A NO. 284 OF 2009
(WRIT PETITION (C) NO.4295 OF 1996)

NB SUB YOUNAS MASIN ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. M.K JHA FOR THE APPELLANT

M/S. ASHWANI BHARDWAJ & ROMIL PATHAK
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
23.03.2011

1. The petitioner (Nb Sub Younas Masin) approached the Delhi High Court by filing W.P (C) No. 4295 of 1996 challenging the General Court Martial (GCM) proceedings commenced on 16.5.1994, whereby he was held guilty of having committed an offence under

Army Act Section 46(a) and sentenced to be dismissed from service. On formation of the Armed Forces Tribunal, the writ petition was transferred to this Bench and is being disposed of by this judgment treating it as an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. The prosecution case, in a nutshell, is: On posting to 2 Signal Training Centre for instructional duties, the appellant joined on 3.2.1992. On 28.10.1993, at about 1930h, he asked the newly appointed Recruit Uday Bhan, who was standing in the verandah of C Company to check the bathroom lights. When Recruit Uday Bhan went inside the bathroom, the appellant followed him and got himself masturbated from the recruit. On 30.10.1993, at about 0900h, when Uday Bhan was working in C Company Mess, the appellant asked to accompany him to his room for polishing his shoes. When the recruit reached his room, the appellant drew all the curtains, bolted the door of the room from inside and asked the recruit to hold his penis. When the recruit refused, he caught hold of him and started kissing him on his cheeks and embraced him till he had an orgasm and his semen fell

on the recruit's shorts. The appellant then warned the recruit not to tell anything to anyone. On his way back to the Company Lines, the recruit met Hav K.R Sharma, who was performing the duties of Company Hav Maj of C Company and narrated the incident to him. He took the recruit to Sub Bikar Singh, the then Senior JCO of C Company, who was also told about the incident by the recruit. Sub Bikar Singh did not report the matter to his officer Commanding till the matter was brought to the notice of the Unit Sub Maj. In the meantime, the appellant had proceeded to other HQs and returned to the unit on 17.11.1993. On 19.11.1993, a Court of Inquiry was convened to investigate into the matter. The appellant was charged with the offence of "disgraceful conduct of an indecent kind" and brought before the Commanding Officer for hearing the charge under Army Rule 22 on 28.12.1993. On 30.12.1993, a summary of evidence was recorded. The appellant was tried by the GCM for two charges viz.

FIRST CHARGE
ARMY ACT SEC. 46(a)

DISGRACEFUL CONDUCT OF AN INDECENT KIND,

in that he,

At Margao, on 28 October 1993, at about 1930 hours, with indecent intent got himself masturbated from No NYA Recruit Udai Bhanu of the same Regiment.

SECOND CHARGE
ARMY ACT SEC. 46(a)

DISGRACEFUL CONDUCT OF AN INDECENT KIND,

in that he,

At Margao, on 30 October 1993, at about 0930 hours, with indecent intent kissed and embraced No NYA Recruit Uday Bhanu of the same Regiment till ejaculated on his shorts.

He was found not guilty of Charge No.1 and found guilty of Charge No.2 and sentenced to be dismissed from service. Both his pre and post confirmation petitions were rejected. Hence this appeal.

3. Counsel for the appellant has pointed out that there is no direct evidence, except the statement of the complainant, PW 1 Uday Bhanu. No reliance could be placed on his statement as it was not corroborated by the evidence of any other witnesses. The shorts of PW 1 Uday Bhanu, which contained the stains of semen, was not sent

for chemical analysis. The material witness, Senior JCO Bikkar Singh, who narrated the incident, was not examined by the prosecution at the trial. Further, the uncle of the complainant, Sub Parkash Chand, was also not examined during the summary of evidence, which deprived the appellant of his valuable right under Army Rule 23. The appellant is the victim of a fabricated story by PWs 1 and 7, who wanted to cover up the fact that PW 1 was enrolled by giving a bribe of Rs.16000/-. The GCM found the appellant guilty on Charge No. 2 merely on conjectures and surmises, that too without taking into account the fact that the appellant was charge sheeted only to wreak vengeance. Finally, it was stated that the sentence awarded by the GCM was not commensurate to the gravity of the offence.

4. Learned counsel for the respondents, on the other hand, has pointed out that the GCM found the appellant guilty of Charge No. 2 on the basis of the evidence adduced in the case and therefore the sentence awarded was commensurate to the gravity of the charge against the appellant. The evidence adduced by the prosecution clearly proved the charge against the appellant and the allegation of

not sending the shorts worn by the complainant for chemical examination does not have much importance. During trial, the appellant was represented by a counsel, who was issued with the necessary documents, complying with Army Rule 33(7).

5. The prosecution examined PWs 1 to 8. DWs 1 to 3 were examined from the side of the defence. We have heard learned counsel for the appellant Mr. M.K Jha and learned counsel for the respondents, Mr. Anil Srivastava.

6. The incident took place on 30.10.1993 at about 0930h. Soon after the incident, PW 1 Recruit Uday Bhanu reported the matter to PW 2 Hav K.R Sharma, who took him to PW 3 Hav Mohan Singh. It has come out from the evidence of PW 1 Uday Bhanu that the appellant behaved in an indecent manner towards him, which is corroborated by the evidence of PW 2 Hav Sharma, PW 3 Hav Mohan Singh, PW 4 Rect Devendra Kumar Tripathi, PW 5 Rect Om Pal Singh, PW 6 Rect Parmeshwari Dayal and PW 7 Nb Sub Parkash Chand. PW 8 Sub A D'Souza is a formal witness.

7. The appellant himself appeared as a defence witness (DW 1) and stated that on 30.10.1993 he had called PW 1 complainant to his room to polish his shoes. While polishing the shoes, PW 1 started packing the luggage. While packing, the appellant asked him about the procedure by which he was recruited. PW 1 told him that he had given Rs.16000/- to his uncle for getting him recruited. All this time, his back was towards PW 1. When he turned around, he saw PW 1 sitting on his cot holding his family photograph, which he had picked up from the bedside table. The appellant then scolded him. It was also stated by him that he would report about his having been recruited by paying money. PW 1 then started crying and went out of his room. DW 2 Sub Harmal Singh has stated that normally the door would be kept closed when the sahayak remained in the room as the rooms were on the roadside and the recruits used to keep passing in front of the rooms. DW 3 Hav Vijender Singh has deposed the fact that PW 1 was recruited by paying illegal gratification.

8. Before analysing the evidence, it would be useful to answer the point whether the recruitment of PW 1 to the Armed

Forces allegedly by bribes is a ground to reject his testimony and the evidence of other witnesses? Be it noted, the appellant took this stand for the first time when he gave evidence as a defence witness. There was no cross examination of PW 1 with regard to his getting recruitment by bribes. In such a situation, his defence on this point taken up for the first time while giving evidence as a defence witness is no reason to reject the testimony of the prosecution witnesses as untrustworthy. The recruitment of PW 1 supposedly made on bribes would not demolish the charge against the appellant.

9. The appellant has denied the charge framed against him and took the plea that he has been falsely implicated by PWs 1 and 7 to hush up the fact that PW 1 had obtained employment on bribes. Further, it was mentioned that the testimony of the prosecution witnesses, particularly that of PW 1, was disbelieved by the GCM while deciding on Charge No.1 and once the witnesses were disbelieved, their evidence should not have been taken into account while finding the appellant guilty of the second charge. We do not agree with this contention raised by learned counsel for the appellant. The maxim

falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim came to occupy the status of the rule of law. (see **Takki alias Selvaraj** v. **State** (2007(9) SCC 589). It is the duty of the Court to scrutinise the evidence carefully and in terms of the felicitous metaphor, separate the grain from chaff. But it cannot obviously disbelieve the substractum of prosecution case or material point of evidence.

10. We have gone through the evidence of PW 1 and we do not find any reason, whatsoever, to disbelieve the version given by PW 1. There is nothing unnatural and unusual in PW 1 stating the details of the incident in his evidence. From a bare reading of the evidence of PW 1, we do not find anything artificial in it. It cannot be said to be a contrived one brought into existence after due deliberations, as contended by learned counsel for the appellant.

10. We do not find any fallacy or error in the reasoning of the GCM. The findings arrived at by the GCM are supported by acceptable evidence and there is no reason to take a different view. However, in order to satisfy ourselves, we have looked into the evidence of PWs 1

to 7 and we are satisfied that the GCM was justified in finding the appellant guilty of Charge No.2. The defence did not elicit anything in the cross examination casting any doubt about the complaint made by PW 1. PW 1 gave a detailed version as to the manner of indecent behaviour of the appellant. Be that as it may, there was not even a suggestion to PWs 1 and 7 that they had animosity towards the appellant and there was no reason for them to speak against the appellant.

11. For the aforesaid reasons, we find no merit in this appeal. The appeal is accordingly dismissed.

(Z.U SHAH)
MEMBER

(S.S KULSHRESTHA)
MEMBER