

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

T.A NO. 373 OF 2010
(WRIT PETITION (C) NO.4198 OF 2007)

LT COL HARDEV SINGH

...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS

...RESPONDENTS

ADVOCATES

MR. S.K SANAN FOR THE APPELLANT
MR AJAI BHALLA 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
24.05.2011

1. In this writ petition, the challenge is against the General Court Martial proceedings, whereby the appellant (Lt Col Hardev Singh) was held guilty of having committed the offence under Section 69 of the Army Act read with Section 354 of the Indian Penal Code and

sentenced to be dismissed from service. The writ petition stood transferred to this Tribunal and was treated to be an appeal under Section 15 of the Armed Forces Tribunal Act 2007.

2. The allegation against the appellant is that while serving as a doctor in the Dental Corps of the Indian Army at Shillong, he committed a civil offence using criminal force to four women with intent to outrage their modesty. A charge sheet on four counts was issued to him on 8.4.2004. The appellant pleaded not guilty to the charges. He was put to trial by the GCM, which held him guilty and sentenced to be dismissed from service. His pre and post confirmation petitions ended in dismissal. Hence the appeal.

3. Learned counsel for the appellant has pointed out that the GCM had no jurisdiction to try the appellant and only a Court having criminal jurisdiction could try him, as the offence was of a civil nature. The entire proceedings were vitiated, in that Army Rule 22 had not been complied with. The detailment of the Judge Advocate was contrary to law, as he was neither an officer of the JAG Department nor

was he detailed by JAG or Dy JAG. Moreover, the Judge Advocate was junior to the appellant.

4. On the other hand, learned counsel for the respondents has contended that there is no irregularity or illegality in the trial by the GCM as the case had been fully established against the appellant. The appellant was attached to Assam Regimental Centre by GOC-in-C, Eastern Command, who was the competent authority in terms of Army Instruction No.30/86. The hearing of the charge was carried out under Army Rule 22. Since an officer of the rank of the appellant was not available to act as Judge Advocate at his trial, an officer of lower rank was detailed and a certificate to this effect had been issued by the convening authority. The appellant was afforded full opportunity to cross examine the witnesses. Therefore, the entire court martial proceedings were in accordance with law.

5. It would be useful to evaluate the evidence of material witnesses. PW 2 Bhakti Maya Gurung gave a categorical narration of the incident that had taken place on 14.5.2003 when she visited the Military Dental Centre for the treatment of PWs 6 and 7. Exts. 12 and

13 further proved that the appellant had treated them on 14.5.2003. The evidence of PWs 2 and 7 established the fact that the appellant had used criminal force to PW 2 by embracing her from behind, pressing her breasts, inserting her hand into his trousers and rubbing his private parts. The evidence of PWs 2 and 7 corroborated in material particulars the evidence of PW 6, who had stated that after his treatment was over, he was asked to go out of the surgery room by the appellant and while he was waiting outside, he heard PW 2 calling out for him. When he reached the surgery room, PW 2 told him to stand beside her since the appellant had misbehaved with her.

6. PW 4 Sandhya Thapa has categorically stated that the appellant used criminal force on her by caressing her fore-arms, breasts and private parts near thighs, which is corroborated by the evidence of PW 5, to whom she narrated the incident soon after the occurrence. According to PW 5, Sandhya Thapa (PW 4) had told him on reaching home that the appellant misbehaved with her by rubbing his groin against her hand, caressed her breast and private parts near her thighs.

7. PW 8 Binati Mohanty has stated that when she went to Military Dental Centre on 14.1.2004, the appellant used criminal force on her by holding her hand and moving it towards the front side of his trousers, which is corroborated by the evidence of PW 9 Sub RN Mohanty, who went along with PW 8 to the Military Dental Centre.

8. PW 10 Juna Maya Gurung was categorical when she deposed that the appellant had used criminal force on her by pressing her breasts, inserting her hand into his trousers and rubbing his penis with her hand. PW 10 reacted immediately when the appellant used criminal force against her.

6. The GCM, on a careful scrutiny of the evidence adduced by the prosecution, came to the conclusion that the appellant had committed the offence. The charges against the appellant are that with intent to outrage the modesty of four women, he used criminal force against them on different dates. So far as the offence under Section 354 of the Indian Penal Code is concerned, intention to outrage the modesty of a woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence. Before

we proceed to discuss the issues that arise for our consideration, it would be relevant and appropriate to quote the observations made by the Apex Court in the decision reported in **Tarkeshwar Sahu v. State of Bihar (now Jharkhand)** (2006(8) SCC 560). They are:

“40. The essence of a woman’s modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

41. ‘Modesty’ is given as “womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct” (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions” (*Raju Pandurang Mahale v. State of Maharashtra* (2004(4) SCC 371 p. 377, para 13).

42. The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady (*Rupan Deol Bajaj v. Kanwar Pal Singh Gill* (1995(6) SCC 194))”

It is in this context, the statements of PWs 2, 4, 8 and 10 are to be scrutinised.

7. All the victim women were categoric that the appellant had outraged their modesty, which is corroborated by the evidence of other witnesses. Their evidence remained unimpeached. It is a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible.

8. It has next been contended by counsel for the appellant that there was delay in reporting the matter. There is direct evidence about the incidents. In that situation, the delay in lodging the report is of no significance.

9. It has also been contended by counsel for the appellant that the attachment of the appellant to Assam Regimental Centre was improper. It may be mentioned that GOC-in-C was the competent authority in terms of Army Instruction No.30/86. Further, there was compliance of Army Rule 22 as well. It has come on record that the appointment of the officer from JAG, under Army Act Section 129, was in order, since the officer of the rank of the appellant was not available to act as Judge Advocate during trial.

10. Lastly, it has been pointed out that the trial of the appellant was not in accordance with the Army Act. It was admittedly a civil offence and it should have been tried by a civil court and the provisions of Section 69 of the Army Act were illegally applied in this case.

11. This was responded to by counsel for the respondents by stating that the provisions contained in Army Act Section 125 are not discriminatory and they give discretion to the authority to decide as to which Court should try an accused. It is not for the accused, in any situation, to question the provisions contained in Army Act Section 125. In order to answer the rival contentions made by learned counsel for the parties, it would be useful to quote Army Act Sections 125. It reads:

125. Choice between criminal court and court-martial.— When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

Though AA Sec. 125 does not contain any guidelines for the exercise of discretion, the variety of circumstances which may influence the decision as to whether the offender is to be tried by the court martial or by an ordinary criminal court and, it becomes inevitable that the

discretion to make the choice as to which court should try the accused is left under the Act to the responsibility of the officer under whom the accused is serving. Such discretion under AA Sec. 125 refers to the stage at which the proceedings are instituted in a court and not to the jurisdiction of the ordinary criminal court and the court martial to decide the case on merits. Section 475 of the Code of Criminal Procedure should also be construed in the light of AA Sec. 125. In **Delhi Special Police Establishment v. S.K Loraya** (AIR 1952 SC 2548), it was held by the Apex Court that both the provisions have in mind the object of avoiding collision between the ordinary criminal court and the court martial. So, both of them should receive a similar construction. In **Joginder Singh v. State of Himachal Pradesh** (AIR 1971 SC 500), while considering the provisions of AA Secs. 125 and 126, whereby an offence was triable by the court martial and the ordinary criminal court, it was held by the Apex Court as under:

“After holding that the Act does not expressly bar the jurisdiction of the criminal court in respect of the acts or omissions punishable under the Act if they are also punishable under any other law in force in India, this Court held that Sections 125, 126 and 127 excluded any inference

about prohibition regarding jurisdiction of criminal courts and those sections in express terms provide not only resolving conflict of jurisdiction between a criminal court and a court martial in respect of the same offence, but also provide for successive trials of an accused in respect of the same offence. This Court has further laid down that Ss. 125 and 126 provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation. This decision, in our opinion, lays down that there is no exclusion of jurisdiction of the ordinary criminal courts in respect of the offences which are triable also by the court martial.”

We do not think there is any irregularity in the trial of the appellant by the court martial.

12. In view of the aforesaid discussion, we do not find any merit in the appeal. In the result, it is dismissed.

(Z.U SHAH)
MEMBER

(S.S. KULSHRESTHA)
MEMBER