**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

**T.A NO. 579 of 2009
(WRIT PETITION (CIVIL) NO. 2074 of 1999)**

IN THE MATTER OF:

Ex Sep Ram Kishan .....APPLICANT
Through : Mr. Pratap Singh, counsel for the applicant

Vs.

Union of India and Others ...RESPONDENTS
Through: Mr. Ajai Bhalla, counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 23.11.2011

1. The case was initially filed in the Hon'ble High Court on 09.04.1999 as WP (Civil) No.2074 of 1999 and was subsequently transferred to the Armed Forces Tribunal on 06.04.2009.

2. Vide this petition, the applicant has prayed for quashing the impugned order dated 16.4.1996 (Annexure P-2) and order dated 30.8.1998 (Annexure P-1) by which he was sentenced to undergo 30 months RI and dismissed from service by court martial and his appeal against that order was also rejected by respective orders. He further prayed for reinstating into service with all consequential benefits.

3. Brief facts of the case are that the applicant was enrolled in Army on 22.11.1984 as Sepoy. While serving in Army, on 18.01.1995 an incident took place in the family quarters of 26th Air Defence Regiment located at Gurdaspur. In this incident the applicant is alleged to have attempted to commit rape of Ms Poonam (11 years), daughter of Sub S.K. Tandon of 26th Air Defence Regiment.

4. Consequently, a GCM was held. The applicant was charged under Section 69 of the Army Act read in conjunction with Section 376 read with Section 511 IPC. The applicant was found guilty and was sentenced to severe RI for 30 months and to be dismissed from service. Vide order dated 16.4.1996 passed by GCM and than was upheld in appeal vide order dated 30.8.1998.

5. Learned counsel for the applicant argued that Gurdaspur was a peace station and in a peace station, if any incident had taken place than an FIR should have been lodged and police should have investigated the matter. This was not done in this case. He further argued that there is a bar to try an offence by court martial relating to rape/attempt to rape under Section 70 of the Army Act. As such, the GCM was not having the jurisdiction to try the applicant under this Section. In support of his contention, Learned counsel for the applicant cited (**2002) 10 SCC 185 titled Madan Lal Vs UOI & Others.**

6. Learned counsel for the applicant further argued that the GCM did not consider the evidence in its right and proper perspective. Therefore, the conclusion reached at by the GCM is illegal and incorrect. He argued that the incident is alleged to have taken place on 18.1.1995 in the forenoon hours. The family of Sub S.K. Tandon had gone to witness the ceremonial parade on that day. The daughter of Sub S.K. Tandon, Ms. Poonam (11 years) came home and was in the Verandah of her house. The applicant was a Sahayak with Sub Tandon and was performing the duties satisfactorily.

7. Learned counsel for the applicant argued that the prosecution postulated that the girl was taken forcibly inside the house where the applicant lowered his trousers and also the panties of the girl. He tried to force himself on the girl but meanwhile he ejaculated on the panties. The girl was crying and she also sustained some mark of injuries on her cheeks. It is further alleged that then the girl was forced by the applicant to wash the panties and she was also alleged to have been warned by the applicant not to disclose this incident to anyone. It was submitted that this incident has not been supported by witness PW-4 i.e. father of the girl, Sub S.K. Tandon. It is contended that he has given conflicting/different statements which does not align itself to the sequence of events as postulated by the prosecution. In his statement he stated that *" The accused immediately fell at my feet and said that he had made a mistake and begged for forgiveness. I asked the*

accused to leave the house. Since the accused did not leave, I ordered him to leave immediately. The accused then left the house. Since the Administrative Inspection was on I also left for the unit." PW-4 further continued to state that as per his information, *"The accused reprimanded his daughter and forced her to wash her panties. The accused himself cleaned the floor and washed the soiled portion of the bed sheet. Thereafter, the accused asked the girl not to talk about it to her parents."* He further added that when he took her to the medical officer Lt Col Punj, where she was examined by the doctor who wanted to know how she has sustained injuries on her face. "I *did not tell him the truth, instead, told him that she might have got injured while quarrelling with other children"*. He has further stated during the cross examination that *"it is incorrect to suggest that I did not report the matter since I wanted to suppress it*".

8. Ld. Counsel for the applicant argued that this statement clearly brings out that the father of the victim was not very sure as to how the incident had taken place, and was time and again wanted to hush up the matter. Thus, it was urged that his statement was not reliable.

9. Learned counsel for the applicant further stated that no forensic evidence was taken in terms of spots, semen on the panties and/or on the bed sheet. He stated that though the panties were alleged to have been washed by the girl herself, still some traces could have been used by the laboratory for obtaining forensic analysis.

10. Learned counsel for the applicant further pointed out that PW-2 Gunner Lal Singh of 26th AD Regiment who was the only person in that area at the time of alleged incident and was working in the neighbouring house of Sub Rajbir Singh did not support the prosecution story and clearly stated that "he *did not hear any cry or shouting for help from the house of Sub S.K. Tandon."*

11. Learned counsel for the applicant also stated that PW-6 Mrs. Sunita Devi W/o Sub Rajbir Singh and a neighbour has stated *"after two minutes of our arrival, on hearing the commotion, I went near the boundary wall separating our house to investigate. I repeatedly enquired from Mrs. Tandon as to what was the matter. However, she did not reply. I then noticed the accused standing in the Verandah with his head lowered. He was saying, "sorry Mem Sahib mujhe maf kar do, ainda se mein aisi galti nahin karunga*". This clearly indicates that the commotion was for some other reason which apparently did not related to the alleged victim i.e. daughter of Sub S.K. Tandon.

12. PW-7, Lt Col Suresh Punj, the Doctor in his statement has affirmed that *"the abrasion on the face (neck and cheek) could have been produced by rough mooching, kissing, slapping, pinching the skin or any rough surface of the wall. It could have also come because of the sharp finger-nails or sharp things like thorns. He has further stated that the scratch marks on the neck of the patient were probably caused when she was trying to move her neck away from some*

trauma. I do not recollect as to how old the injury was." When questioned by the Court, Lt Col Punj further responded that "*it is highly probable that the injury of the abrasion cheek and scratch marks on the neck of the patient could have been caused by an attempted molestation".* This clearly shows that though Lt. Col Punj was not clear in his mind and has not supported the prosecution story, it clearly creates a doubt in the story propagated by the prosecution. Thus, it was contended that the charge of attempt to rape is not found to be correct.

13. Ld. Counsel for the applicant argued that the PW-8 Miss Poonam, age 11 years, daughter of Sub S.K. Tandon herself gave a conflicting statement. Therefore, no reliance can be placed on such a statement and no finding can be based on it. The said statement is as under:-

> "*I was playing in the Verandah of our house. The accused came and said "your hair are untidy, I will comb it for you". I told him that my hair were alright. At that time, I was alone in the house. The accused then forcibly lifted me up, carried me into the bed room and put me on the bed. He then bolted the door from inside. He, thereafter started kissing me passionately. He lowered my panties and also lowered his trousers and underwear and lay on top of me. I started screaming. After a while the accused got up and then I saw some while fluid had fallen on the bed sheet, the floor and on my panties. The*

accused cleaned the bed sheet and the floor himself and made me wash my panties with soap. I put it outside for drying."

14. Learned counsel for the applicant further argued that the girl has also stated in her cross-examination that *"I noticed that the rear door was closed when I had tried to run away from the room."* While answering question No.20 in the Summary of Evidence which clearly asked, "*Was the rear door closed? No it was opened". "The witness states as far as she remembers this question was not put to her."* The said witness had also stated that "*the fluid which had soiled the bed sheet was of white colour like the bed sheet spread on the table of the Defence Counsel."*

15. The learned counsel for the applicant submitted that in the case the defence witness who was the accused himself postulated the real story. "*He said that after about an hour Mrs. Tandon also came back. While entering into the room* she *asked me to come inside. She went into the left most bedroom (adjacent to Sub Rajbir's house) and called me there. I went into the room. She pulled me towards her, held one of my hands, placed my other hand on my penis and said, "Aaa jao kar lo kam". I pulled my hand and come out in the Verandah. She continued to seduce me but I refused to be seduced. I told her that I would not do a wrong thing. I also informed her that my child was sick and I would like to proceed on leave. I also told her that I had never done such a wrong thing before. She then threatened me that she would ensure*

that I was punished and dismissed from service. Immediately thereafter, she called Miss Poonam inside the room. Then, I heard the sound as if someone was slapped. After about 02 minutes she called me and pointed out some bruises on the cheek of Miss Poonam. She then asked me why I had kissed Miss Poonam. I replied that I had done nothing to her and she had herself caused those bruises. I also pleaded that she should be afraid of God and should not bring in the name of her daughter. Then Mrs. Tandon called out for Mrs. Rajbir Singh and asked her to send Gnr Lal Singh, their Sahayak to call her husband. At that time, Mrs. Rajbir Singh was standing near the compound wall. She could see and hear me talking to Mrs. Tandon. I once again requested Mrs. Tandon with folded hands that she should not involve me in the case of her daughter to cover her own misdeeds." Thus, it was prayed that considering his statement, the applicant cannot be held guilty for attempting to rape Miss Poonam, as alleged.

16. Learned counsel for the applicant also argued that his statement is also supported by the statement of Mrs. Rajbir Singh's statement who had come near the boundary wall and was privy to what was going on in the Verandah of Sub S.K. Tandon.

17. Learned counsel for the applicant further stated that Sub S.K. Tandon had told the applicant not to discuss about the incident with anyone. Sub S.K. Tandon also told the applicant that he was ready to

touch his feet and requested with folded hands that he should not report the incident. Learned counsel further argued that this indicates that all was not well with the family and therefore, he was being made accused for no good reasons.

18. Learned counsel for the applicant further argued that no medical examination with regard to allegations of attempting rape of the victim was carried out. This could have been done after three days and in the absence of medical examination and laboratory analysis of the semen, there appears to be no case against the applicant. He deserves to be acquitted from all charges and be reinstated in service with all financial benefits.

19. In support of his contentions, learned counsel for the applicant relied upon the following judgments:-

(i) Priya Sharan Maharaj alias Yadavendra Parashar and others Vs State of Maharashtra reported at 1995 CRI.L.J. 3683 (Bombay High Court).

(ii) Chander Dev Rai Vs The State (NCT of Delhi) in Crl. Appeal No.204/2002 decided on 17.12.2008 (High Court of Delhi).

(iii) Kailash Laxman Khamar Vs State of Maharashtra in Criminal appeal No.159 of 2004 decided on 09.2.2010 (High Court of Bombay).

20. Learned counsel for the respondents submitted that the evidence given by PW-8 Miss Poonam, age 11 years, daughter of Sub S.K. Tandon was unambiguous. She very clearly was able to recall the sequence of events and also gave out as to the actions taken by her. There seems to be no infirmity in the statement to be exploited. It is also obvious that there was no enmity between the applicant and Sub S.K. Tandon and his family. Therefore, there is not a slightest chance of falsely involving the applicant in the said incident. The statement by DW-1, the applicant himself is far fetched because during the day when the doors are opened, the daughter is at home, no prudent person will try to seduce for sexual relations. Besides, there were neighbours who were also in the hearing vicinity. He further argued that PW-7 LT Col Punj's statement was unambiguous. In his statement Col Punj has clearly stated that the bruises suffered by the victim was consequent to someone forcibly kissing the cheeks and holding the shoulders and neck in a tight manner. Learned counsel for the respondents also drew our attention to the question put up by the Court to DW-1, the applicant in which he stated as under:-

> *"I had reported the incident regarding Mrs. Tandon having tried to seduce me on 18 Jan 95 to Sub N Upadhaya, Tp JCO of 10 AD Battery, Sub RD Sharma, Head Clerk, Offg Sub Maj, Sub (AIG) Abhilakhand, Sub Mahinder Singh and Capt Shamsher Singh Bijlani before the Court of Inquiry commenced, but I did not report the incident to the Commanding Officer, 2IC, any of the Battery Commanders or Battery BK.*

"*On 22 Jan 95, I did report to the Commanding Officer that I was beaten up by the Battery Commander on 21 Jan 95 in his office. However, the Commanding Officer did not respond."*

"Miss Poonam did not climb on my back or asked me to kiss her on 18 Jan 95. I also did not make such a statement at the Summary of Evidence. I do not know how it has been recorded there."

"When Mrs. Tandon had called me inside the room she was fully dressed. She was wearing the same suit in which she had gone to the Family Welfare meet."

21. Learned counsel for the respondents stated that it clearly shows that the applicant had been trying to improve upon his defence plea from the COI to the Summary of Evidence and the GCM. His statement itself made it clear that the story had he has propagated cannot be sustained in the absence of reliable evidence rather an unsuccessful attempt was made to face prosecution witnesses as evidence against him. No other person as stated by the applicant has confirmed that the said incident was reported by the applicant to them. No other person which are named by the applicant in his statement as DW-1 was brought forward in the defence of the applicant to say that the applicant has narrated this story to them immediately after the incident occurred. As such, no reliance can be placed on the story propagated by the defence and the applicant.

23. We have heard the arguments of both the parties at length and have also examined the documents and the GCM proceedings in

original. We are of the opinion that the respondents are well within their rights to try the applicant under Army Act Section 69 read in conjunction with Section 376 read with Section 511 of the IPC because the exclusion clause of Section 70 of Army Act does not come into play as it is only confined to murder, culpable homicide not amounting to murder and rape. In this case the sections used in conjunction with Army Act Section 69 are Sections 376 read with Section 511 of the IPC that of attempt to rape. For ready reference, Section 70 of Army Act is reproduced as under:-

"70. Civil offence not triable by court-martial. A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf."

In this respect, the judgment cited by the applicant given in the case of **Madan Lal Vs Union of India (Supra)** also does not support his contentions rather that support the findings. The relevant portion of the said judgment reads as under:-

> "A bare reading of Section 70 of the Army Act makes it cystal clear that a person who commits an offence of murder against a

person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person shall not be deemed to be guilty of an offence against this Act and cannot be tried by a Court Martial. But reading the charge against the appellant it appears that the charge was that he attempted to commit rape. Rape as defined under Section 375 of the Indian Penal Code, is different and distinct from attempting to commit rape. In this view of the matter the conclusion is irresistible that in respect of an offence of attempting to commit rape the jurisdiction of the Court Martial cannot be said to be ousted by virtue of Section 70 of the said Act. The decision of the learned Single Judge of the Allahabad High Court on which the learned counsel for the appellant placed reliance is not correct as it merely relied upon the provisions of the Schedule or to the Criminal Procedure Code. As has been stated by us earlier, the question has to be answered on an interpretation of the Army Act and not with reference to the provisions of the Criminal Procedure Code. We, therefore, see no infirmity with the impugned judgment of the Delhi High court so as to be interfered with by us. The appeal, accordingly, fails and is dismissed."

24. We have also gone through the evidence which was taken during the Court Martial. We have satisfied that the prosecution has been able to correctly identify and corroborate the evidence so given by the victim. The learned GCM after satisfying themselves about the understanding of the victim (PW-8) recorded the statement as she was aged 11 years. In her statement she has narrated the incident that is corroborated by her mother (PW-2) and father (PW-4). Furthermore, in

such type of cases where there is no motive to implicate a person, the sole statement of the victim is sufficient to hold charge proved. Circumstantial evidence is also heavily supported by other witnesses of the prosecution against the applicant. The judgments cited by the applicant are not supporting his contentions. The judgment in the matter **Priya Sharan Maharaj alias Yadavendra Parashar and others Vs State of Maharashtra (Supra)** relates to framing of charges under Section 376 IPC and in the case five offences of rape with different victims was not properly framed and the statements were not corroborated. The facts of judgment in the matter of **Chander Dev Rai Vs The State (NCT of Delhi)(Supra)** is all together different. There were allegation of rape with a two year old baby. That was not found proved. Likewise, in case of **Kailash Laxman Khamar (Supra)** allegation of Section 376 and 377 of IPC were there, but were not found proved. Here the case is of attempt to rape and in this case, statement of witnesses are supporting the prosecution. Thus these judgments are of no help to the applicant.

25. We have also considered the contention that incriminating material was not send to FSL for analysis. But looking to the charge that is attempt to rape, the sending of relevant material to FSL was not relevant. Thus, this contention of the applicant is not having any force.

26. On the other hand, the story put forward by the defence including the statement by the applicant himself lacks corroboration.

Besides this, the story put forward by the defence has been a kind of improvement from the COI stage to summary of evidence and finally the trial. Further, the defence version is also against all probability in the given facts and circumstances. As such, no reliance can be placed on that line of defence. It is also noted that no witness came forward to support the applicant during the trial. We also feel that the relationship of a Sahayak and that of his superior is a sacred one. The Sahayak is usually considered as a member of the family. Under such circumstances, any misconduct which prejudices the mutual faith and trust is a serious issue of military discipline as far as the Armed Forces are concerned.

27. In view of the foregoing, we feel that the GCM has correctly held the applicant guilty of charge so stated. The punishment that has been meted out to the applicant is also commensurate with the offence committed.

28. In view of the above discussion, the TA lacks merit and the same is hereby dismissed. No order as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 23rd day of November, 2011.