

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

TA No.219 of 2010

(W.P.(C)No.14176/05 of the High Court of Karnataka, at Bangalore)

MONDAY, THE 9TH DAY OF SEPTEMBER, 2013/18TH BHADRA, 1935

CORAM:

HON'BLE MR. JUSTICE SHRIKANT TRIPATHI, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

APPLICANT/Petitioner:

EX.LAC GK SINGH (656393), TRADE – MED/ASST.
AGE 42 YEARS, PRESENTLY RESIDING AT
OLD DOOR NO.89, NEW DOOR NO.12,
1ST MAIN, THIMMA REDDY LANE, NEAR TO
GANGURA HOTEL, MURUGESHPALAYA,
POST VIMANAPURA, BANGALORE – 560 017.

BY ADV. SRI. CHANDRAJEET YADAV

versus

RESPONDENTS/Respondents:

1. UNION OF INDIA, MINISTRY OF DEFENCE,
BY ITS DEFENCE SECRETARY, SOUTH BLOCK,
NEW DELHI – 110011.
2. CHIEF OF AIR STAFF, AIR HQ, VAYU BHAVAN,
RAFFI MARG, NEW DELHI 110 011.
3. AIR MEN PERSONNEL , DIRECTORATE OF PERSONNEL,
AIR H.Q., VAYU BHAVAN, RAFFI MARG,
NEW DELHI 110 011.
4. AIR OFFICER COMMANDING,
AIR FORCE CENTRAL ACCOUNT,
SUBROTO PARK, NEW DELHI.
5. A.O.C.-IN-C , HQ, EAC,
IAF, C/O.99 APO.
6. AIR OFFICER COMMANDING,
5 AIR FORCE HOSPITAL, C/O.99 APO.

BY ADV. SRI. K.M. JAMALUDEEN, SR. PANEL COUNSEL.

ORDER

Shrikant Tripathi, Member (J):

1. The applicant, G.K.Singh, Ex.Lac. No. 656303, filed Writ Petition No.14176 of 2005 before the Honourable High Court of Karnataka at Bangalore challenging the verdict of the District Court Martial whereby he was sentenced to undergo rigorous imprisonment for three months. In addition to the sentence of rigorous imprisonment, he was dismissed from service and also reduced to the ranks.

2. In this order, the applicant will be referred to as the accused and the victim will be referred to as the prosecutrix.

3. The accused was tried by the District Court Martial for two charges. The first charge was under Section 71 of the Air Force Act, 1950 for committing a civil offence, that is to say, using criminal force to a woman intending to outrage her modesty punishable under Section 354 of the Indian Penal Code. The second charge was under section 65 of the Air Force

Act, for an act prejudicial to the good order and Air Force discipline. The applicant pleaded not guilty to the charges.

4. The prosecution story leading to the instant appeal is that on 18th November, 2009 at about 10.15 hrs, the prosecutrix along with her mother went to the eye department of 5 AFH for her eye checkup. The accused while checking up her eyes dilated pupils of both eyes with eye drops. As the dilation of the prosecutrix's eyes was to take much time, her mother went to the CSD canteen. The accused, in absence of the prosecutrix's mother and the lady medical attendant, molested the prosecutrix by placing stethoscope on her chest and when she asked, "Uncle, what are you doing?", the accused replied that it was related to her eyes and he wanted to check her heart beat. The accused then kept the stethoscope aside and started pressing the prosecutrix's chest (breast) with his hand. She again asked the accused as to what is the relation of pressing chest with eyes. The accused then replied that he was checking the reaction in her eyes by pressing her chest and he

continued to harass the prosecutrix by asking her whether she was having regular menstrual period after every 28 days and when was her last period. The accused asked two or three more questions relating to menstruation. The activities of the accused scared the prosecutrix, therefore, she requested him to conduct further test only on return of her mother. The accused replied that he was busy and did not have much time. So he told the prosecutrix to lie down on the bed for further test, but the prosecutrix due to being apprehensive of the ulterior motive of the accused moved out of the examination room. When her mother came, the prosecutrix tried to convince her by telling that it was late and they would go home, but her mother could not understand the intention of the prosecutrix, therefore, insisted that they should complete the examination. Accordingly, the accused proceeded to hold further examination, after arrival of the prosecutrix's mother from the canteen. The accused again administered eye drops in the eyes of the prosecutrix and told her mother to instruct her to lie down on the bed. After that the accused asked the prosecutrix to sit

and read the board. But she could not read the last two lines of the words on the board as they appeared to be hazy. The accused continued to molest the prosecutrix by spreading her thighs with his hand time and again and putting his leg between her thighs. When the prosecutrix did not allow separation of her thighs by the accused, he told her to lie down on the bed for further test. After the prosecutrix laid herself on the bed, the accused switched off the light in the opposite room and closed all the curtains in the examination room to make it totally dark. The accused, taking advantage of the darkness in the room, proceeded to examine the prosecutrix and while doing so, he came so close to her that she could feel his mustaches touching her face. Besides this the accused sat near to the prosecutrix on a stool and told her to identify the location where he was to flash the light from an instrument (fundoscope). While flashing the light from the fundoscope at different places in the room including on the face of the prosecutrix's mother at interval, the accused kept his hand on the stomach (abdomen) of the prosecutrix and then moved his

hand from the stomach (abdomen) and placed the same under her pyjama. The prosecutrix immediately shouted "What are you doing uncle?". On hearing the shouting, the accused took his hand off the prosecutrix's body, switched on the light and asked for the case sheet from her mother. The prosecutrix and her mother noticed that the hand of the accused while holding the case sheet had been trembling. The accused asked from the prosecutrix whether she had any kind of tension but she did not reply, so the accused told her not to feel tensed and not to think about her future and suggested the prosecutrix to come the next day either all alone or with younger brother, sister or an aunty.

5. It is further alleged that when the prosecutrix came out of the eye department she narrated the whole incident to her mother. On hearing this, the prosecutrix's mother wanted to go back and lodge a complaint against the accused but as her daughter was very scared and did not want to return back to the 5 AFH, they decided to go home. The

prosecutrix's father PW3 B.B.Singh had been performing his duties at 49 Sqn AF in November 2003, he came for the first time after the incident on 21st November 2003. It is also alleged that the prosecutrix's mother did not tell her husband from 18th November 2003 to 20th November 2003 regarding the incident because it was a case of a girl, and her family reputation was at stake. More so, the prosecutrix's mother did not know how her husband would react and there was much possibility of adopting aggressive steps by him on hearing the incident. The prosecutrix's mother anyhow thought it proper to inform her husband regarding the incident on 21st of November, 2003 during lunch. On hearing about the incident, the prosecutrix's father met the same day Sqn Ldr (Mrs) Arti Trehan and lodged an oral complaint against the accused. On 22nd November 2003, President of 5 AFH was approached with a written complaint but he refused to take the complaint and advised to give it to the airman. On 24th November 2003 the prosecutrix's parents met the President of 5 AFH and handed him over the written complaint against the accused. But on 25th

November 2003, the prosecutrix's mother received back the complaint as the complaint was required to be lodged through the unit. On 27th November, 2003 at about 23 00 hours, the accused along with JWO AK Singh, WO J Singh, JWO SK Singh, and Sgt Singh H, went to the residence of the prosecutrix's father – JWO BB Singh, and tried to apologise the incident by touching his feet and by saying, "*Main jaanwar ban gaya tha, mere bal bacchon ko iski saza nahi milna chahiye*". At that time the accused wanted to touch also the feet of the prosecutrix's mother and even requested her to call the prosecutrix so that he could touch her feet also and apologise to her. But the prosecutrix's mother expressed her inability to provide any help. Even the prosecutrix's father told the accused that since he had already lodged a complaint to the authorities, he could not provide any help to him. The aforesaid persons requested the prosecutrix's father not to give any statement during the Court of Enquiry which was scheduled to be held on 29th November, 2003. They further persuaded the prosecutrix's father to withdraw the complaint but he declined

to do so. It is also alleged that the accused along with JWO AK Singh had visited also the residence of Sqn.Ldr. P Suresh and to the office of Sqn. Ldr. (Mrs) Arti Trehan and requested for their help in compromising the incident with the prosecutrix's father. On the same day, the accused went also to Flight Lt. GP Chaturvedi and said that, "*Mere se galti ho gaya tha, mere ko jaanwar pan aah gaya tha*" and accordingly requested him to help in the withdrawal of the application(complaint) given by the prosecutrix's father.

6. To prove the aforesaid charges against the accused, in all, twelve witnesses were examined during the trial. PW1 is the prosecutrix herself. She supported the prosecution story in its entirety in the witness box. The statement of the prosecutrix proves the following facts:

- (i) The accused placed stethoscope on prosecutrix's chest and when she objected to the act, the accused replied that it was related to her eyes and he wanted to check her heart beat. After keeping the stethoscope aside,

the accused pressed the prosecutrix's chest (breast) with his hand, and when she objected to such act by saying "uncle what are you doing", the accused told that he was checking the reaction in her eyes by pressing her chest.

- (ii) The accused asked the prosecutrix as to whether she had a regular menstrual period after every 28 days and when was her last period and also put two or three more similar questions to the prosecutrix.
- (iii) The prosecutrix requested the accused to conduct further test only on the return of her mother, but he replied that he was busy otherwise and had no much time and asked the prosecutrix to lie down on the bed for further test. Due to being apprehensive of the accused's act, she moved out of the examination room.
- (iv) After the return of the prosecutrix's mother, the accused in the garb of further examination, continue to molest the prosecutrix by separating her thighs

with his hand and putting his leg between her thighs. Apart from this, the accused switched off the light in the opposite room and closed all the curtains in the examination room and made the same totally dark. After that he proceeded to conduct the examination and in the garb of examination, he came so close to the prosecutrix, that she could feel his mustaches touching her face. Besides this, he flashed light with fundoscope on the eyes of the prosecutrix's mother and other places in the room at intervals in the garb of the test and while doing so he put his hand on the stomach (abdomen) and then moved his hand from the stomach (abdomen) and placed the same under the pyjama of the prosecutrix. But when the prosecutrix asked as to "what are you doing uncle"?, the accused took his hand off and switched on the light and asked for the case sheet.

(v) The accused did not make any attempt to call a

lady personnel for the examination though according to the evidence on record such personnel were available.

PW2, Mrs.Urmila Singh is the mother of the prosecutrix. She has supported the prosecution story that she took the prosecutrix to the Eye Department of 5 AFH for the check up of her eyes. On 18th November, 2003 at about 10 15 hours, the accused examined the prosecutrix's eyes after administering drops. As the accused informed that dilation of the eyes of the prosecutrix would take time, so she went to the CSD Canteen leaving the prosecutrix there all alone. She further stated before the Court Martial that after her return from the canteen, the accused switched off the light of the adjacent room and also closed the curtains and switched off the lights of the examination room and started flashing lights at regular intervals at her face. So, she could not notice the movements of the hands of the accused, but she noticed that the hand of the accused was on the bed. When the accused switched on the

lights of the room, she noticed that his hands were trembling. This witness further stated that the accused said that the eyes of the prosecutrix were not dilated properly, so she had to come for 2 to 3 times more for the examination. The witness next stated that when she came out in the corridor (verandah) along with the prosecutrix, the prosecutrix started crying and narrated the incident that had taken place in her absence. This witness lastly stated that the prosecutrix clearly informed her regarding the aforesaid incident that took place in her absence. In this way, PW2 Urmila Singh has corroborated the statement of the prosecutrix.

7. PW3 B.B.Singh, JWO, is the father of the prosecutrix. This witness proved the fact that PW2 Urmila Singh informed him on 21st November 2003 at about 15.00 hours regarding the entire incident including the entire activities of the accused. This witness has further stated that on hearing about the incident, he went to the room of JWO A.K.Singh and requested him to come to his house. Accordingly he came there and PW2

Urmila Singh again narrated to him the entire incident that had occurred against the prosecutrix. He has further supported the story of lodging of the complaint with various authorities including PW.12 Sqd.Ldr.(Mrs) Arti Trehan and has also supported the story of persuasions made by the accused in having the matter settled.

8. PW4 A.K.Singh, JWO has corroborated the statement of PW3 B.B.Singh. This witness has stated that PW3 B.B.Singh had come to him, and on his request he went to his residence where PW2 Urmila Singh narrated the entire incident that had taken place against the prosecutrix, to him.

9. PW5 W.O. J. Singh, PW6 JWO S.K.Singh and PW7 Sgt. Singh H have almost given evidence to the same effect. According to them the prosecutrix informed them that she had given application against the accused. They have further stated that the accused told that the charges were that he had misbehaved with the prosecutrix, but he did not do anything

wrong with the prosecutrix.

10. PW8 Sqn.Ldr.P.Suresh stated that on 20th November 2003 at about 7.15 hours JWO A.K.Singh (PW4) and the applicant G.K.Singh had come to his house. PW4 A.K.Singh requested him that the application given by the prosecutrix's father against the accused may be withdrawn. This witness further stated that he informed PW4 A.K.Singh that he should discuss with the prosecutrix's father about the withdrawal of the application. After that, both PW4 A.K.Singh and the accused went together.

11. PW9 Flt Lt.G.P.Chaturvedi has stated that on 28th November 2003 at about 7.15 hours PW4 A.K.Singh and the accused had come to his office. PW4 A.K.Singh told him that the accused wanted to apologise for the incident with regard to which the prosecutrix's father had given an application. PW4 A.K.Singh further told that the accused had been requesting for the withdrawal of the application. The accused told at that

time "Mere se galti ho gaya tha, mere ko jaanwarpan aah gaya tha". On hearing this, the witness informed the accused that it was the prosecutrix's father who could withdraw the application.

12. PW10 Maj Binodinee Pati was Nursing Officer in charge of the Family Ward of 5 AFH. She had detailed ward sahayikas and safaiwalis to Physiotherapy Department who were also given dictation to cover the eye and the ENT Department. She further stated that she had detailed one ward sahayika to Physiotherapy Department who had been instructed to look after the lady patients in the Physiotherapy Department as well as the lady patients of the eye and the ENT OPDs, as and when required. She produced the list of duty roster during her statement.

13. PW11 Sqn.Ldr.H.S.Trehan was posted on the strength of 5 AFH with effect from the 21st of April 2003 and had been performing the duties of Graded Specialist (Ophthalmology).

This witness was not present on the date the incident took place, but according to him, as per the O.P.D Records of the Eye Department, prosecutrix was examined on 14th November 2003 and again on 18th November 2003. He produced the OPD register along with a photocopy of the relevant page. He further clarified that he was the Head of the Eye Department and there were three other Optometrists, namely, Sgt.Khanna.R.K., Sgt.Thapa and Sgt.Singh.G.K (accused). This witness has further clarified that on the date of the occurrence, the accused had been performing the duties of Optometrist in the Eye Department. He further clarified that as and when a lady patient was to be examined, the presence of a lady attendant was required to be ensured.

14. PW.12, Sqn.Ldr.(Mrs) Arti Trehan was the Head of Department of Pathology, 5 AFH. On 21.11.2003, JWO AK Singh told her that he wanted to discuss something and then introduced JWO BB Singh. At that time, JWO AK Singh and JWO BB Singh made oral complaint against the accused

regarding the misbehaviour he committed against the prosecutrix. The witness further stated that she advised the prosecutrix's father to report the matter in writing to the authorities. At that time, he was in an agitated mood. So, she advised him if he wished, he could bring her daughter and wife for counselling. This witness further stated that on 22.11.2003, the prosecutrix's mother (wife of PW3 BB Singh) came to her office. She advised her that the application she had carried with her may be given to the authorities. This witness further stated that she informed the matter to Wing Commander S.M.Gupta, the Commanding Officer of 5 AFH. This witness further stated that on 28.11.2003, the accused and JWO AK Singh had come to her office, to inform that the complainant had agreed to withdraw the application against the accused and wanted to know the procedure. She advised them to approach the Adjutant of 5 AFH to know the procedure for withdrawal of the complaint.

15. It is also significant to mention that Mr.P.K.Thakur,

Advocate had appeared as defence counsel for and on behalf of the accused before the Court. In this way the applicant had the benefit of proper legal assistance of an Advocate during the proceedings of the Court, who cross-examined prosecution witnesses, adduced defence evidence and made arguments for and on behalf of the accused.

16. After the close of the prosecution evidence, the Court enquired the accused whether he wished to make any statement as to the facts of the case. The accused replied affirmatively. Accordingly, the accused submitted an unsworn statement which is on record as Ext.W. After receiving the statement Ext.W, the Court proceeded to put relevant questions to the accused as per Rule 64(4) of the Air Force Rules. During the interrogation with regard to various evidence and circumstances appearing against the accused, he admitted that PW2 Urmila Singh had come for the eye test of the prosecutrix on 18th November 2003. He further stated that PW2 Urmila Singh went to CSD Canteen at about 10.50-10.55

hours and during the absence of PW2, the prosecutrix sat in the corridor of the Eye Department. At about 11.15 hours PW2 Urmila Singh came back to the eye department. The accused further stated that he did not examine the prosecutrix in absence of her mother. With regard to the incident of outraging the modesty of the prosecutrix, the accused denied the entire incident and stated that the case was concocted due to the reason that he had scolded the prosecutrix and her mother for not coming in time and also for not bringing the dependent certificate. So, they felt annoyed and concocted the entire story.

17. The accused examined DW1 Deveswar Bordoloi who was posted as a Clerk in the Kendriya Vidyalaya 5 AFH, Jorhat. He produced the original admission form dated 20th June 2001 of the prosecutrix relating to Class XI, and with the permission of the Court compared the same with the attested copy of the admission form. The Presiding Officer of the Court also compared the attested photocopy of the admission form with

the original and certified the same to be the true copy. It is also significant to state that the Court observed that a certificate that the prosecutrix was the daughter of JWO B.B.Singh had been issued by WO MT Thomas, Assistant Adjutant of 49 Sqn 5 AFH on 27th June 2001. Apart from the aforesaid witness, the accused examined DW.2 D.K.Pandey, JWO, who was posted at that point of time as JWO in charge of Library at 5 AFH. This witness stated that JWO A.K.Singh told him that accused should pay some compensation in order to settle the issues and accordingly informed that the same may be conveyed to the accused. This witness further stated that when he enquired as to the amount of the compensation, JWO A.K.Singh told that amount may be Rs.One Lakh. This witness further stated that he informed the accused accordingly.

18. The Court, after hearing both the sides and also after perusal of the entire evidence on record found that the charges levelled against the accused were fully proved and accordingly held him guilty of the charges.

19. We have heard Mr.Chandrajeet Yadav for the accused and Mr.K.M.Jamaludheen for the respondents and perused the original record.

20. The first submission of the learned counsel for the accused was that there was a delay of 08 days in lodging the FIR which was not explained, therefore, the delay resulted in creating reasonable doubts regarding the veracity of the prosecution story.

21. In reply to the aforesaid submission learned counsel for the respondents submitted that the prosecution story fully supported by the prosecutrix and her mother could not be discarded only on the ground of delay in lodging the report. The prosecutrix narrated the incident to her mother immediately after the incident when they came out in the corridor. The learned counsel for the respondents further submitted that it was a case of sexual harassment of an unmarried girl belonging to a family having no poor family background, so there was much possibility of taking time to think over the matter with regard to the course of action to be

adopted in the matter, especially when there had been an attempt from the side of the accused for negotiation and conciliation.

22. With regard to the question of delay, it may be mentioned that according to the prosecution the occurrence took place on 18th November, 2003 and on that day, the prosecutrix's father was not available as he had been performing duties at 49 Squadron, Air Force, in November, 2003. After the incident, he came on 21st November, 2003 for the first time. PW 2, Urmila Singh stated that since the reputation of the prosecutrix and even the entire family was at stake, so, she did not consider it proper to inform her husband immediately on his arrival on 21.11.2003. She took some time to think over the matter and to decide as to how the incident is to be conveyed to her husband. Ultimately, she disclosed the incident to her husband on 21.11.2003 itself during the lunch. On hearing the incident from his wife, PW-3, B B Singh (father of the prosecutrix), went in search of the accused, but he could

not locate him. So, he went to the room of JWO AK Singh, who is his distant relative. After that he along with JWO AK Singh came to his house, where his wife (PW.2 Urmila Singh) narrated the whole incident. PW 3, BB Singh, clarified that, after hearing the incident in the presence of AK Singh, he went to 5 AFH to lodge the complaint. He met PW12 Sdn.Ldr.Arta Trehan, who asked him to come on 22.11.2003 along with his wife. PW 3 BB Singh, further stated that on 22.11.2003 he and his wife went to PW.12 Sdn.Ldr.Arta Trehan, to whom his wife narrated the entire incident that had taken place with the prosecutrix on 18.11.2003 in the Eye Department of 5 AFH. He further stated that his wife met the same day AFWWA (L) President of 5 AFH, but she refused to take the complaint against the accused and instructed that the complaint be given to Sgt. Ishwar Singh at AFWWA shop of 5 AFH. But, PW2 Urmila Singh, did not hand him over the complaint. PW.3 further stated that on 24.11.2003, he along with his wife again went to AFWWA(L), President of 5 AFH and narrated him the whole incident along with the written complaint against the accused. In the night of

the same day, Wing Commander SM Gupta and Flt.Lt. GP Chaturvedi had called him and his wife to 5 AFH. Before them too, PW2 Urmila Singh narrated the whole incident. On hearing the incident, Wing Commander SM Gupta told PW3 BB Singh that the proper channel for making the complaint against the accused was through his unit. It was also stated by PW3 BB Singh, that on 25.11.2003 he submitted a General Application through his unit. After obtaining the remarks of his Section Commander and Commanding Officer, on the same day, he handed over the General Application to Flt. Lt. GP Chaturvedi, Adjutant of 5 AFH. The General Application given by the applicant is on record as Ext. O. In this way, the prosecution has categorically explained the reasons behind the delay in lodging the complaint. In our view, the statement made by PW2 Urmila Singh and her husband, PW3 BB Singh, regarding the delay appears to be quite natural, probable and consistent, hence are liable to be accepted. It is well settled that, the prosecution story cannot be discarded only on the ground that there was a delay in lodging the report, especially when the

delay is properly explained by the prosecution. What so ever incident had taken place, was informed to the authorities immediately on receiving the information by PW 3, BB Singh, therefore, whatsoever delay occurred, it occurred due to the avoidance of the authorities in entertaining the complaint and directing him to follow the rule procedure by submitting the complaint through the unit. Consequently, the delay, in our view, stands properly explained and as such, the same cannot be taken as a ground to discard the most clinching, trustworthy and reliable evidence of the prosecutrix.

23. In the matter of **State of Himachal Pradesh v. Prem Singh**, (2009) 1 SCC 420, the Apex Court held that the delay in a case of sexual assault cannot be equated with a case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the

prosecution case merely on the ground that there is some delay in lodging the FIR.

24. A similar view was expressed in the matter of **KPS Gill v. State and another** (2005) 6 SCC 161. In that case, the Apex Court noticed that there was some delay in filing the complaint, but that by itself was not sufficient to reject the complaint. The prosecutrix therein lodged the complaint with the Chief Secretary and other Officers and raised objections and also sought for stringent action, but when she failed in all such attempts, she filed the complaint. In this view of the matter, the delay was held immaterial to discard the prosecution case.

25. In the matter of **Vidhyadharan v. State of Kerala**, (2004) 1 SCC 215, the Apex court held that delay in lodging FIR is quite natural in a tradition bound society to avoid embarrassment which is inevitable when reputation of a woman is under concern.

26. In view of the aforesaid, we do not attach any significance to the alleged delay in lodging the report and as such the same cannot be taken as a ground to discard the prosecution story.

27. The second submission of the learned counsel for the accused was that, the Court wrongly concluded that the second charge under section 65 of the Air Force Act 1950 was made out. Even if it is proved that the accused failed to ensure the presence of a female attendant while examining the prosecutrix, which was contrary to the medical ethics on the privacy of a female, the offence under section 65 of the Air Force Act was not made out. Only the offence under section 42(e) could be said to have been made out if the case is treated as correct. Therefore, conviction of the accused under Section 65 of the Air Force Act 1950 was not proper.

28. In order to appreciate the aforesaid submissions, we have to give due consideration to the statutory provisions on the subject. Section 65 of the Air Force Act 1950 deals with the

matters pertaining to violation of good order and Air Force discipline, which may be reproduced as follows:

“65. Violation of good order and air force discipline.- Any person subject to this Act who is guilty of any act or omission which though not specified in this Act, is prejudicial to good order and air force discipline shall, on conviction by court martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.”.

Section 65 of the Air Force Act, therefore, provides that if any person, subject to the said Act, is guilty of any act or omission, which is prejudicial to good order and air force discipline, and is not specified elsewhere in the Act, such act or omission would be an offence punishable under section 65 of the Air Force Act. Whereas Section 42 of the Air Force Act deals with insubordination and obstruction. In the said section 42, seven categories of offences in clauses (a) to (g) have been specified. Clause (e) of Section 42 specifies the offence regarding neglect to obey any general, local or other order. To put it otherwise, if any person subject to the Air Force Act, neglects to obey any

general, local or other order, he commits an offence under Section 42(e) of the Air Force Act. The learned counsel for the accused submitted that there had been an order to call a female attendant while examining a female patient but the accused failed to do so, then, the act of the accused would fall within the category of the offence described in Section 42(e) of the Air Force Act, 1950. In this connection, learned counsel for the respondents submitted that the omission on the part of the accused to call a lady attendant was prejudicial to good order and air force discipline, therefore, such omission falls within the category of the offence punishable under section 65 of the Air Force Act. In our view, in order to attract the provisions of Section 42(e) of the Air Force Act, 1950, it is to be shown that there was a general, local or other order, which is alleged to have been violated by the accused. If there is no order, there does not arise any question of violation thereof. In this case, we do not find any written general, local or other order making a necessity of a lady attendant during the course of medical examination of a lady patient. But, even in absence of any such

order, the responsibility of the accused to ensure the presence of a lady attendant at the time of examining the prosecutrix's eyes did not come to an end as it was inherent and inbuilt therein with a view to maintain good order and the Air Force discipline. More so, the necessity of calling a female attendant at the time of examination of the prosecutrix's eyes was not disputed in this case. But, the submission on behalf of the accused was that there was no availability of a lady attendant, so the accused did not call any such person. In this connection, the stand of the accused does not appear to be correct. PW.10, Binodini Pati, has proved that she had deputed one ward sahayika to Physiotherapy Department, who was also directed to look after the lady patients in the Physiotherapy Department as well as lady patients of the Eye and ENT Departments. During her examination in the witness box, she produced a copy of the duty roster. In this view of the matter, the stand of the accused that there was no availability of a lady attendant does not appear to be acceptable. In our view, the act of the accused failing to ensure the presence of a lady attendant

before proceeding to hold the examination of the eyes of the prosecutrix, was nothing except a violation of the good order and air force discipline. So, the second charge under Section 65 of the Air Force Act was not only made out but was also proved beyond all reasonable doubts.

29. The next submission on behalf of the accused was that the District Court Martial had no jurisdiction to try the offence under Section 354 IPC as it was triable by the regular criminal court. In this connection Mr.Chandrajeet Yadav tried to contend that according to the provisions of Section 72 of the Air Force Act, 1950, the trial ought to have been held by the criminal court and not by the Court Martial. In order to appreciate the submission we consider it just and expedient to re-produce Sections 71 and 72 of the Air Force Act, which read as follows:

"71. Civil offences:-Subject to the provisions of section 72, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a court-martial and, on conviction, be punishable as follows,

that is to say,--

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned, for the offence by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by any law in force in India, or imprisonment for a term which may extent to seven years or such less punishment as is in this Act mentioned.

72. Civil offences 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 said Government by notification in this behalf."

30. Section 71 of the Air Force Act, in our view, deals with the civil offences, according to which if any person subject to

the Air Force Act commits any civil offence within India or beyond India, he shall be deemed to be guilty of an offence against the said Act and if charged therewith under Section 71 of the Act, shall be triable by a Court Martial and on conviction will be punishable as per clauses (a) and (b) of Section 71. To put it otherwise, if a person, subject to the aforesaid Act commits a civil offence either within India or beyond India, it has two consequences, firstly, he shall be deemed to be guilty of an offence under the aforesaid Act, secondly, he shall be liable to be tried by a Court Martial, but subject to the condition that he is charged for committing the civil offence along with the charge under Section 71 of the Air Force Act. Therefore, what is required to bring a case within the domain of the Court Martial is to show that the accused has been charged for the civil offence along with the offence under Section 71 of the Air Force Act, 1950, and he committed such offence while being subject to the Air Force Act. So far as Section 72 is concerned, it deals with a case where trial shall not be held by the Court Martial. According to which, if a

person commits an offence of murder or of culpable homicide not amounting to murder or rape against a person not subject to military law, Naval or Air Force law, he shall not be deemed to be guilty of an offence under the Air Force Act and will be tried by the competent criminal court unless the offence or offences had been committed by him while on active service or at any place outside India or at a frontier post specified by the Government by notification. In our view, Section 72 of the Air Force Act is not attracted in the present matter due to the simple reason that the accused was not charged for committing the offence of murder or culpable homicide not amounting to murder or rape. Rather he was charged for committing the civil offence under Section 354 of the Indian Penal Code read with section 71 of the Air Force Act, which does not come within the category of the offences specified in section 72 of the Air Force Act, so there was no question of the trial of the accused by the competent criminal court.

31. We are, therefore, of the view that the trial of the

accused by the Court Martial was perfectly legal and valid and requires no interference.

32. The last submission on behalf of the accused was that the girl who was alleged to have been subjected to the outraging of her modesty was not examined during the trial. The prosecutrix (PW1) was not the daughter of the complainant B.B.Singh and PW2 Urmila Singh. Their daughter had studied in Kendriya Vidyalaya, Jorhat where she had submitted an admission form with photograph, but the photograph so submitted with the admission form was not of the prosecutrix (PW1) examined in the court. In this connection the learned counsel for the applicant submitted that the defence counsel showed the photocopy of the admission form and the photograph to the prosecutrix during cross examination, but the Court did not allow to put any question on the basis of the photocopies, so the hearing was adjourned and the defence counsel was required to produce a certified copy of the admission form. Accordingly, the defence counsel obtained and showed a certified copy of the application form and

confronted the prosecutrix with that document. The original application form was also summoned and produced before the Court at the stage of defence, but the Court did not make any attempt to recall the prosecutrix nor provided any opportunity to the defence to confront the prosecutrix with the original application form, therefore, the defence was seriously prejudiced which resulted in depriving the accused an opportunity to show that the prosecutrix was not the daughter of B.B.Singh and PW2 Urmila Singh.

33. With regard to the identity of the girl (victim), the learned counsel for the respondents replied that if the accused wanted to confront the prosecutrix with her alleged original admission application form, he should have himself requested from the Court to recall the witness but he did not do so and felt satisfied on the production of the original application form, therefore, the accused could not be said to be justified in raising the grievance at the stage of appeal.

34. We are constrained to observe that the prosecutrix (victim) very clearly stated in the witness box that it was she who had gone to the Eye Department of 5 AFH for examination of her eyes along with her mother. She further stated that the accused examined her eyes and molested her in the manner already stated in the preceding paragraphs. Her statement in this regard is fully corroborated by her mother (PW.2) in the witness box. The identity of the girl who was subjected to the offence committed by the accused is, therefore, fully established. If there had been a difference in the photograph affixed in the admission form given to the school authorities with the actual face of the prosecutrix, it had no relevance due to the simple reason that the court was required to see whether the prosecutrix who appeared before the Court had been subjected to the crime committed by the accused or not. The Court was not required to see whether the prosecutrix was the daughter of BB Singh (PW.3) or not. For arguments sake, if it is assumed that the prosecutrix went to the eye department and wrongly pretended that she was the daughter of PW3, BB

Singh, and obtained medical assistance, even then, the crime committed by the accused subsists against the victim, and as such, it was not material as to whose daughter was the girl who had come to the eye department for examination of her eyes. As in this case, it is fully established that the girl who had been subjected to the offence committed by the accused, appeared before the court as witness No.1, the question whether she was the daughter of PW3 BB Singh or not, does not appear to have any relevance. In this view of the matter, we do not agree with the last submissions of the learned counsel for the accused.

35. After considering various submissions of the learned counsel for the parties, we consider it expedient to examine the merits of the case. The prosecution story rests on the sole testimony of the prosecutrix, who was the victim of the crime. She narrated the entire incident in the witness box and fully supported the charges levelled against the accused. As it appears to be a case of presence of no other witness during the

incident, the prosecutrix's statement which is quite natural, probable and consistent, is believable, especially when neither the prosecutrix nor any other member of her family had any animosity or illwill whatsoever against the accused and there was no other reason to set up a false case against him. The learned counsel for the applicant tried to contend that the prosecutrix and her mother came late in the hospital and they had also not brought dependent card, so the accused scolded them, due to which the instant case was concocted. In our view, such scold of the prosecutrix by the accused could not be said to be sufficient to prompt the prosecutrix and her mother to concoct a false case against the accused, especially when the accused had provided her medical assistance to certain extent. Mere alleged scold made by the accused, in our view, was not in any way instrumental in bringing out this case. More so, the prosecutrix had been subjected to cross examination at length but nothing material could be extracted to discredit her testimony. The statement of the prosecutrix finds corroboration from the statement of her mother (PW2

Urmila Singh). There was no presence of any other witness at the time of the incident. The learned counsel for the applicant tried to contend that PW2 Urmila Singh nowhere stated that accused put his hand on the prosecutrix's stomach and placed the same under her pyjama. She did not state as to whether the accused separated the prosecutrix's thighs with hands or not. So, the incident was doubtful. In our view, no doubt, at the time of examination of prosecutrix's eyes, PW2, Urmila Singh, was in the room, but was at a distance from the prosecutrix and the accused, so, the possibility that she could not notice and pay attention to the activities of the accused while separating the prosecutrix's thighs, could not be ruled out. At the time of putting the hand on the stomach of the prosecutrix and also under her pyjama, the room was dark as the light had been switched off, curtains had been closed and the accused had been flashing lights at different places in the room including on the face of PW2. So, the accused made all attempts to deprive the PW.2, Urmila Singh, to notice the occurrence. Due to the darkness and periodical flashing of light

on the face of PW2 Urmila, it was quite impossible to notice the activities of the accused. In such situation, the statement of PW.2 Urmila Singh cannot be made as the basis to discard the statement of the prosecutrix. In our view, the sole testimony of the prosecutrix was sufficient to hold the accused guilty of the charges. As held by the Apex Court in **Premiya v. State of Rajasthan**, (2008) 10 SCC 81, in para 10, a victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. The case of **Aman Kumar v. State of Haryana**, (2004) 4 SCC 379, was no doubt a case of rape, but, in that case, the Apex Court held that victim is not an accomplice, so her testimony was sufficient to record conviction without corroboration.

37. It has also come in evidence that the accused tried to persuade the prosecutrix's father and other persons to have the matter settled and even an offer to pay a compensation was allegedly made. This conduct of the accused can also be taken

as a corroborative piece of evidence and it can be inferred therefrom that if nothing had happened what was the reason for the accused to apologize the matter and offer the compensation and settle the dispute.

38. The act of the accused as proved by the prosecution, undoubtedly come within the category of the civil offence punishable under Section 354 IPC. The various activities of the accused during the course of prosecutrix's eye test amount to an assault to the prosecutrix with an intention to outrage her modesty. In the matter of **State of Punjab vs. Major Singh**, AIR 1967 SC 63, the Apex Court observed that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is attributable of her sex. Accordingly, the Apex Court further held that when any act done to or in the presence of a woman is clearly suggestive of sex, according to common notions of mankind, that act must fall within the mischief of Section 354 IPC. In that case, a female child of 7½ months was allegedly subjected to outraging of her modesty. Relying upon the decision in **Major Singh's case** (supra), the Apex Court held in **Rupan**

Deol Bajaj v. Kanwar Pal Singh Gill and another (1995) 6 SCC 194, that slapping on the posterior of prosecutrix amounted to "outraging of 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 - "sexual overtones" or not, notwithstanding. While holding so, the Apex Court took into account the dictionary meaning of the word 'modesty' and held in paragraph 14 as follows:

"14. Since the word '*modesty*' has not been defined in the Indian Penal Code we may profitably look into its dictionary meaning. According to **Shorter Oxford English Dictionary** (3rd Edn.) modesty is the quality of being modest and in relation to woman means "*womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct*". The word '*modest*' in relation to woman is defined in the above dictionary as "*decorous in manner and conduct; not forward or lewd; shamefast*". **Webster's Third New International Dictionary of the English Language** defines modesty as "*freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct*". In the **Oxford English Dictionary** (1933 Edn.) the meaning of the word '*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*'."

39. It may not be out of context to mention that the aforesaid case of **Rupan Deol Bajaj v. Kanwar Pal Singh Gill and another** (supra) had come before the Apex Court out of a proceeding instituted under Section 482 Cr.P.C. The matter was, however, tried later on as per the law and after the final decision, the matter was brought again before the Apex Court in appeal as **Kanwar Pal S. Gill v. State and another**, (2005) 6 SCC 161. The Apex Court held in para 4 that the accused (KPS Gill) slapped on the posterior of the prosecutrix in the presence of some guests. The court further held that the act on the part of the accused would certainly constitute the ingredients of Section 354 IPC.

40. The aforesaid principles have been reiterated in **Ramkripal v. State of Madhya Pradesh**, (2007) 11 SCC 265. In that case, the Apex Court held that modesty in section 354 IPC is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. While laying down so, the Apex Court opined that the ultimate test for ascertaining whether modesty has been outraged is

whether the action of the offender is such, as could be perceived as one which is capable of shocking the sense of decency of a woman.

41. If the present case is decided on the touchstone of the aforesaid principles it would appear that the applicant, by pressing the prosecutrix's chest (breast) with his hand and also with stethoscope, and by separating her thighs with his hand and by putting his leg between her thighs and by coming close to her face so as to allow her to feel his mustaches touching her face and also by putting his hand on her stomach (abdomen) and also under her pyjama, committed an act which constitutes the offence of outraging the modesty of the prosecutrix punishable under Section 354 IPC. The manner in which the accused behaved and did all acts against the prosecutrix clearly support the contention that he did so with the intention to outrage her modesty. In our view, the Court rightly concluded the matter with the finding that the charge under Section 71 of the Air Force Act read with Section 354 IPC (Charge No.1) was proved beyond all reasonable doubts against the accused. We, therefore, affirm the finding of the Court on the said charge.

42. It is fully proved that there was availability of female personnel for providing assistance during the examination of a lady patient in the Eye Department. The statement of PW 10, Binodini Pati, is very specific on this point. The accused did not try to ensure the presence of a lady attendant before carrying out the examination of the prosecutrix's eyes. According to PW.11, Sqd.Ldr. H.S.Trehan, the presence of a lady attendant was required before examination of a lady patient. This act of the accused was not in any way in good order and air force discipline, so, the second charge under Section 65 of the Air Force Act was rightly found by the Court as proved beyond all reasonable doubts. We do not find any reason to interfere with the finding of the Court on the second charge also.

43. So far as the quantum of punishment is concerned, it does not appear to be excessive or unreasonable. The applicant was not expected to behave with a girl in the aforesaid manner while carrying out examination of her eyes, particularly when the prosecutrix was like his own daughter and there was much a disparity in their age. As an Air

Force personnel, the applicant was not only required to behave properly with diligence in discharge of his duties but was also duty bound to observe the discipline and good order of the Air Force. Keeping in view the nature and the gravity of the crime, complicity of the accused and other facts and circumstances of the case, we find that the punishment imposed against the accused was not in any way excessive or unreasonable, rather absolutely proper, which requires no judicial interference.

44. In view of the aforesaid, the T.A.(appeal) has no merit and is dismissed.

45. There will be no order as to costs.

46. Issue free copy of this order to both side.

Sd/-
LT. GEN. THOMAS MATHEW,
MEMBER (A)

Sd/-
JUSTICE SHRIKANT TRIPATHI,
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary