

**COURT NO.3, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

1.

OA 150/2013

**Ex Sep Ravi Kumar Budashetti
Versus
UOI & Ors**

..... Petitioner

..... Respondents

**For Petitioner : None.
For Respondents : Ms.Barkha Babbar, Advocate**

CORAM

**HON'BLE MR. JUSTICE R.C. MISHRA, MEMBER
HON'BLE LT GEN S.K. SINGH, MEMBER**

**ORDER
19.03.2015**

Judgment dismissing the OA pronounced, signed and dated.

**(R.C. MISHRA)
MEMBER (J)**

**(S.K. SINGH)
MEMBER (A)**

**COURT NO. 3, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA 150/2013

**Ex Sep(Opr& Dvr) Ravi Kumar
Budashetti**

.....Petitioner

Versus

UOI & Ors

..... Respondents

For Petitioner:

Mr Ashok Kumar & Mr Rohit
Kumar, Advocates

For respondents:

Ms Barkha Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE R.C.MI SHRA, MEMBER.

HON'BLE LT GEN S.K. SINGH, MEMBER

**JUDGMENT
19.03.2015**

As per JUSTICE R.C. MISHRA Member (J)

This is an OA, under Section 15 of the Armed Forces Tribunal Act 2007, for quashing of the proceedings of Summary Court Martial (for short 'the SCM') held at Field as well as the order dated 07.08.2012, passed by the Chief of Army Staff (Annexure A-1), rejecting petition, under Section 164(2) of the Army Act, 1950. However, in essence and substance, it is an appeal against the final order passed on 21.05.2011, by the SCM, convicting the petitioner under Section 354 of the Ranbir Penal Code and sentencing him to suffer rigorous imprisonment

for one month and fifteen days and to be dismissed from service.

2. This is the second round of litigation. Earlier, highlighting the fact that the Statutory Complaint, submitted on 30.06.2011, had remained undecided even after expiry of the period of six months, as prescribed for the purpose, by Para 365(j) of the Regulations for the Army 1987 (herein after referred as Regulations), the petitioner moved this Tribunal by filing a Petition, that was numbered as OA 235/2012, for appropriate direction to the respondent no. 1 to decide the Complaint by a reasoned order. The Tribunal, by way of its order dated 26.07.2012, directed the respondent no.1 to dispose of the Complaint preferably within a time frame of 2 months.

3. In view of the provision of Section 228 A of the IPC, we do not propose to mention name of the victim, who shall hereinafter be described as 'the prosecutrix'.

4. After being enrolled in the Indian Army on 23.03.2008, the petitioner was assigned/earmarked to Corps of EME. At the relevant point of time, he was posted as Sep/Opr & Dvr (Recovery) to 16 Corps Zone Workshop and was working as the store-in-charge in Shaurya Army Pre School Nagrota. He was tried upon the following charge:

Army Act
Section 69

Committing a Civil offence, that is to say, using criminal force to a woman with intent to outrage her modesty, contrary to Section 354 of the Ranbir Penal Code

In that he,

At Nagrota, on 05.04.2011, used criminal force to the prosecutrix, daughter of No. 15662284F Havildar Umesh Chandra of 16 Corps Op Sig Regt, by putting her hand in his trouser, inserting his finger in her vagina, pinching on her thigh, putting her mouth in his mouth and biting her lips and tongue, intending thereby to outrage her modesty.

5. The prosecution case may, briefly, be stated thus:-

(i) On 05.04.2011, sometime between 5 and 6 p.m., in the premises of Shaurya Army Pre School, noticing that the prosecutrix (PW2), a girl aged about 8 years and student of Class IV in the Army School at Nagrota, was playing on the Swing along with Anshu (PW8), 6 year old daughter of Naik Rajbir Singh (PW7), the petitioner, wearing a white T-shirt and Olive Green pants, persuaded them to accompany him up to a room of the school, known as "my play room" to learn computer. Soon after entering the room, he handed over a ball to Anshu and asked her to play outside. He then switched on the computer and told prosecutrix to paint something. At the time when the prosecutrix was working on the computer, he made her to sit on his lap; put her hand inside his trousers, and then inserted his

finger into her vagina; pinched on her thigh; put her mouth in his mouth and bit her lips and tongue. Meanwhile, the prosecutrix was also able to extricate herself and slid out of the room. While she was going out, the petitioner made prosecutrix swear by her mother and asked her not to tell all this to anybody. The prosecutrix then returned home. On the following day only, she narrated the aforesaid incident to her parents.

(ii) Ultimately, on 07.04.2011, at around 1300 hours, her father Havildar Umesh Chandra(PW1), reported the matter to Regiment Subedar Major Ashok Kumar(PW3) and also requested for a meeting with the Officiating Commanding Officer, Lt Col BC Baunthiyal (PW4). On being informed about the incident, Lt Col BC Baunthiyal asked Umesh Chandra to give a complaint in writing.

(iii) Upon the written complaint so lodged, Lt Col BC Baunthiyal gave direction to conduct a Test Identification Parade as per Para 406 of Regulations. At the Parade conducted by Major Anil Bahuguna (PW5) in the hall of Dilkush Institute at around 2000 hours on 07.04.2011, the prosecutrix was asked to identify the offender amongst as many as nineteen persons including a civilian all wearing T Shirts, Olive Green Pants and jungle caps. She clearly identified the petitioner as the person who had subjected her to sexual harassment in the room on 05.04.2011. He was placed under close arrest with effect from 2115 hours on 07.04.2011.

(iv) After due investigation, on 04.05.2011, the charge-sheet for the offence was served on the petitioner.

6. The petitioner pleaded not guilty and claimed to be tried. To bring home the charge the prosecution examined as many as ten witnesses namely: -

- 1) Hav Umesh Chandra
- 2) Prosecutrix
- 3) Sub Major Ashok Kumar
- 4) Lt Col BC Baunthiyal
- 5) Major Anil Bahuguna
- 6) Ankit.
- 7) Naik Rajbir Singh
- 8) Anshu
- 9) Ajay
- 10) Naik Arjun Nagda

7. No evidence was led in defence. On being called upon to enter on his defence, the petitioner stated

"I have been working in the Shaurya Army Pre School since 12.02.2011. Myself, Naik Arjun Nagda, Ajay and Ankit used to play cricket in the premises of Shaurya Army Pre School from 1730 hours to 1845 hours. On 05.04.2011, I was watering the plants from 1600 hours to 1730 hours and I had tasked Naik Arjun Nagda to cut the grass in the park adjacent to the bathrooms of school children. I heard Naik Arjun Nagda cutting the grass from 1630 hours to 1730 hours because of the noise of bush cutter machine. During the cricket match on 05.04.2011, Ajay was in my team and Ankit was in Naik Arjun Nagda's team.

Prosecutrix, Anshu and Prosecutrix's brother came to play at around 1745 hours and they were playing on jhulla. I told them to move to the other side, near the wall of Dilkush Institute, where rabbits have been kept lest they might get hit by the cricket ball. After playing for 15-20 minutes, I went away to water the plants. I watered the plants till 1830 hours. At 1830 Hours I told them (all the children) to leave and I saw them going home."

8. As indicated already, upon consideration of the entire evidence on record, the SCM, proceeded to hold the petitioner guilty of the offence charged with and sentenced him as indicated hereinabove.

9. Legality and propriety of the impugned conviction have been challenged on various grounds. Learned counsel for the respondents, however, while making references to the relevant legal provisions and pieces of incriminating evidence on record, has submitted that the conviction and sentences are well merited. We have gone through the record of the SCM proceedings and the corresponding pleadings. For the sake of convenience and in order to avoid repetition and cross references, the rival contentions may be discussed under the following headings: -

A. SCM's jurisdiction to try the petitioner for the offence.

10. The first and foremost contention raised by learned counsel for the petitioner is focused at the jurisdiction of the SCM. According to him, the trial by the SCM was beyond jurisdiction as the offence under Section 354 of the RPC carries punishment of RI for 2 years whereas the SCM may pass sentence of imprisonment for a term not exceeding one year. He is further of the opinion that in view of the nature of allegations made, the competent authority ought to have convened a DCM for trial of the petitioner.

11. However, the object and purpose behind SCM is immediate action in the interest of maintenance of discipline. A SCM can legitimately be convened where there is grave and compelling cause which would be defeated if reference to a DCM or SGCM is made. The exercise of discretion to convene a SCM is to be governed by factors like exigency of service, maintenance of discipline in the Army, speedier trial, the nature of offence and the person against whom the offence is committed and not by quantum of punishment it attracts. Needless to observe that being a Sepoy, the petitioner was amenable to jurisdiction of the SCM presided by his Commanding Officer.

12. The objection as to jurisdiction of the SCM to try the petitioner for the offence, therefore, deserves to be rejected as misconceived.

B Violation of principles of natural justice due to non-compliance with pre-trial procedural

requirements

13. Elucidating the contention, learned counsel for the petitioner has submitted that the principles stood violated due to:

(a) Non setting up of a Col (Court of Inquiry). (b) Non-compliance with Rule 22 of the Army Rules 1954 (for brevity 'AR 22'). (c) Contravention of para 459 of the Regulations for the Army, 1987. (d) Non-compliance with AR 130.

14. As explained by the Supreme Court in **Lt Col PPS Bedi Vs. UOI & Ors. AIR 1982 SC 1413** and reaffirmed in **Union of India v. Sanjay Jethi, (2013) 16 SCC 116**, before remanding a person subject to Army Act for his trial by Court Martial, holding of Col is not mandatory or *sine qua non*, except where it is specifically so provided in the Act and Rules; for example under Sections 89 (collective fine for loss of arms) and 106 (illegal absence) of the Army Act, 1950.

15. Purpose of a Col, as contemplated under AR 177 is merely to collect evidence and if so required to report with regard to any matter which may be referred to the assembly of officers described in sub rule (1). In other words, it is in the nature of a fact finding inquiry {See **Suresh Chandra Mehta (Major) Vs. Defence Secretary AIR 1991 SC 483**}. Obviously, proceedings before a court of inquiry are not adversarial proceedings and are also not part of pre-trial investigation {**Inder Jeet Kumar (Major General) Vs Union of India (1997) 9 SCC 1** relied on.}. Such Courts of Inquiry

are usually set up whenever an incident occurs of which the true and the correct facts are immediately not detectable.

16. Coming to the facts of the case, it may be observed that a Court of Inquiry was not at all necessary as the facts constituting the offence within the meaning of Section 3 (xvii) of the Army Act, and the identity of the offender were already discernible to the CO. Non-convening of a Court of Inquiry, therefore, assumed no significance.

17. Since no Court of Inquiry was necessary, the CO had no other option except to proceed to investigate the charge under AR 22 in order to make up his mind whether to proceed with the alleged charge for further action or not and if so, in what manner. Sub-rule (1) of AR 22 empowers, and, at the same time, makes it a duty of the Commanding Officer to hear every "Charge" against a person subject to the Army Act in the presence of the accused with liberty given to the accused to cross-examine the witnesses produced against him and also to call such witnesses as he may require and he may make such statement as may be necessary for his defence. At the stage of AR 22(1) the accused is only required to be informed about the charge or the accusation against him, and opportunity has to be given to him to cross-examine any witness or to call any witnesses and make statements in his defence. The word "charge" occurring in AR 22 does not mean charge as contained in the charge-sheet and means nothing more than an "accusation" against a person. AR 22(1) provides for the holding of what can be called, a preliminary inquiry. If after the hearing, the Commanding Officer is of the opinion that the

charge ought to be proceeded with, he shall take further action postulated by cls.(a), (b), (c) or (d) of sub-rule (3) of AR 22. One of the orders which can be passed by the Commanding Officer under AR 22(3)(c) is to adjourn the case for the purpose of the evidence being reduced in writing. This obviously means that prior to the passing of the said order the evidence which is heard by the Commanding Officer under AR 22(1) is not to be recorded in writing (**Gian Chand vs. Union of India 1983 Cri L J 1059** referred to).

18. A bare perusal of the record would reveal that:

(i) On 09.04.2011, the hearing of charge was conducted in the presence of the accused and only three witnesses viz. Umesh Chandra, his daughter and Major Anil Bahuguna were examined and the petitioner had declined to cross examine them, and to produce any witness in defence .

(ii) On 19.04.2011, a tentative charge-sheet for the offence punishable under Section 69 of the Army Act, 1950, read with section 354 RPC was served upon the petitioner.

As such, there was no violation of the mandatory provisions of AR 22.

19. The para 459 of the Regulations reads: -

“Reference to The Judge Advocate General’s Department before trial - In all cases for trial by General Court-Martial, and all cases under the Army Act, of indecency, fraud, theft, except ordinary theft, and civil

offences except simple assaults, the charge sheet and summary of evidence, and all the exhibits will be referred by the convening officer to the deputy JAG of the command or deputy/assistant JAG of the Corps, as the case may be, before trial is ordered. The convening officer should also refer for advice any other cases of doubt or difficulty. In all cases the doubts or difficulties and the matters on which advice is required will be specifically stated in the applications."

20. As rightly pointed out by learned counsel for the respondents, the trial was conducted only after obtaining the pre-trial advice from DJAG 16 Corps (Discipline and Vigilance) vide letter dated 06.05.2011.

21. Placing implicit reliance on decision of the Apex Court in **Ranjit Thakur Vs Union of India and Ors (1987) 4 SCC 611**, learned counsel for the petitioner has urged that SCM proceedings suffered from bias and prejudice in as much as the petitioner was not asked whether he had any objection to be tried by the Commanding Officer presiding the SCM.

22. However, a close reading of the decision would reveal that the ratio was based on the assumption that Section 130 of the Army Act, 1950, is applicable to SCM also but noticing the error the Supreme Court proceeded to issue notice for review of the finding that provisions of Section 130 were attracted to a SCM. [See **Union of India Vs Ranjit Thakur 1988 Suppl. SCC**

525].

23. In this view of the matter, the argument based on non-compliance with the provision of Section 130 has no substance. Moreover, the other arguments advanced to non adherence to pre-trial procedure are also devoid of merit.

D Non-compliance with sub-rule (3) of AR 90

24. Learned counsel for the petitioner has next contended that provisions of AR 90, though relatable to GCM and DCM are applicable *mutatis mutandis* to SCM. In reply, making reference to the relevant part of the record, learned counsel appearing on behalf of the respondents has pointed out that the corresponding provisions of ARs 46 and 109 mandating administration of oath to the short hand writer were duly complied with. The contention, therefore, also does not hold any water.

E Non-reporting of offence to Civil Police.

25. The next contention urged on behalf of the petitioner is that the complainant viz. father of the victim was under legal obligation to inform the local police about the commission of offence with the girl child. He is further of the view that in absence of an FIR, there could have been no valid investigation into the offence.

26. As pointed out already, the investigation into the offence had commenced in consequence of the information given in writing(Annexure R2) by Umesh Chandra (PW 1), the father of

victim. In such a situation, the omission to send/forward information to the local police could not vitiate the investigation or trial conducted under the Army Act, 1950 and the Army Rules, 1954.

F Non-subjection of the prosecutrix to Medical Examination.

27. The record reflects that the prosecutrix could not be referred to examination by medical expert for want of consent of her father, who had expressed his disinclination in writing (Annexure R1). However, lack of medical evidence, by itself, would not rule out the sexual abuse in question. If evidence of victim of sexual exploitation inspires confidence, non-conducting of her medical examination would not be fatal to the prosecution case. Testimony of the prosecutrix has to be appreciated in the background of the entire case and the Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. (See **State of Punjab Vs Gurmit Singh AIR 1996 SC 1996**)

G Appreciation of evidence

28. As highlighted already, the prosecution had examined 10 witnesses in all. The prosecutrix (PW-2) vividly described as to how she was subjected to sexual abuse and harassment by the petitioner. According to her,

-- at the time when she was working on the computer, the petitioner put his hand on her thigh, opened zip and put her hand forcibly into his pants and also inserted his finger

into her private part; as she asked not to do such an act, the petitioner said OK but put her on his lap and pinched her thigh with his finger nails. At this juncture, she tried to run outside, the petitioner asked her not to tell about the incident to anyone. He then made her to sit on a chair, put his mouth in her mouth and bit her tongue and made her swear by her mother not to disclose the incident to any one

29. Testimony of the prosecutrix drew ample support from the statements of :

(i) Anshu (PW8), who came forward to depose that the petitioner had given her a ball to play and at the time she was playing with the ball, the prosecutrix was doing colouring work on the computer when the petitioner was there in the computer room.

(ii) Arjun (PW10), who while contradicting the defence version, asserted that on 05.04.2011 at about 5.00 p.m. in the School's Zoo area, the petitioner after advising him to give a pause to the grass cutting machine to prevent frequent heating had gone away and had returned to his living room at about 7.00 p.m.

(iii) Her father Umesh Chandra (PW1), who was emphatic in saying that he and his wife were apprised of the incident by her in the evening of 06.04.2011.

(iv) Sub.Major Ashok Kumar (PW3) who corroborated the fact that after being informed about the occurrence he had taken Umesh Chandra to the Officiating CO.

(v) Lt.Col. BC Baunthiyal (PW4), who admitted to have given instruction to conduct a Test Identification Parade.

(vi) Major Anil Bahuguna (PW5), who testified that, on 07.04.2011, at the Test Identification Parade conducted by him at Dilkush Institute, the prosecutrix was able to identify the petitioner as the person who had sexually abused her.

30. It is relevant to note that amongst these witnesses, only Arjun (PW10) was subjected to cross-examination but nothing could be brought on record to show that anyone of them was nurturing any grudge or animosity against the petitioner. Moreover, the petitioner clearly admitted his presence at the scene of the offence.

31. Under these circumstances, it is not possible to hold that the appreciation of the incriminating evidence suffered from any illegality or perversity.

32. To sum up, none of the contentions raised against validity of the SCM proceedings has any merit or substance. It is manifestly clear from the record that the provisions of the Act and the Rules were scrupulously followed in the conduct of the Court-Martial proceedings.

33. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed the High Court or for that matter any court must stay its hands. It has been rightly said that court martial remains to a significant degree, a specialized part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function, and to a great extent, is a court where provisions of the Evidence Act are applicable when there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is non-jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and it is within its powers to award punishment. (**Union of India and Ors. vs. IC 14827, Major A. Hussain AIR 1998 SC 577** referred to).

34. In the light of a cogent, consistent and creditworthy incriminating evidence, the SCM did not commit any illegality in holding that the petitioner's guilt for the offence charged with, was proved beyond a reasonable doubt.

35. It is also well settled that the scope of judicial review of punishment upon the delinquent employee is limited. The Tribunal is not empowered to set aside the punishment altogether or impose some other penalty unless it finds that there has been a substantial non-compliance with the rules of procedure or a gross violation of rules of natural justice which has caused prejudice to the employee and has resulted in miscarriage of justice or the punishment is shockingly disproportionate to the gravamen of the charge. For this, reference may be made to the Wednesbury principles as explained by Justice N. Jagannadha Rao in ***Om Kumar and others vs. Union of India AIR 2000 SC 3689*** in the following terms :-

“When a statute gave discretion to an Administrator to take a decision, the scope of judicial review would remain limited. Interference was not permissible unless one or other of the following conditions were satisfied, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles known as Wednesbury principles were consistently followed in UK and in India to judge the validity of administrative action. It is equally well known that in 1983 Lord Diplock in Council for Civil Services Union v. Minister of Civil Service, 1983 (1) AC 768 (called the GCHQ case) summarized the principles of judicial review of administrative action as based upon one or other of the

following – viz. illegality, procedural irregularity and irrationality. He, however, opined that that 'proportionality' was a "future possibility".

36. Apparently, the misdemeanor attributed to the appellant was unbecoming of a member of the disciplined force. Taking into account the nature of offences found proved and considering the social impact thereof and other relevant aspects of the sentencing policy, it may be observed that there is no extenuating or mitigating circumstance justifying imposition of less punishment than what was awarded by the Court Martial. The decision in **Ex-Naik Sardar Singh vs. Union of India, (1991) 3 SCC 213**, being based on an altogether different set of facts, is of no avail to the petitioner.

37. In the result, the OA stands dismissed and impugned conviction and consequent sentences are hereby maintained. As an obvious consequence, the Order dated 07.08.2012 rejecting the statutory complaint also stands affirmed.

(R.C. MISHRA)
MEMBER (J)

(S.K.SINGH)
MEMBER (A)

New Delhi
19.03.2015
rv