

ARMED FORCES TRIBUNAL REGIONAL BENCH, KOCHI

T.A.NO.1 OF 2015

FRIDAY, THE 6TH DAY OF NOVEMBER, 2015/15TH KARTHIKA, 1937

CORAM:

HON'BLE MR. JUSTICE S.S.SATHEESACHANDRAN, MEMBER (J)

HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER (A)

APPLICANT:

NO. 14827795-A SEP/DVR (MT) SANOBAR. S,
ASC BN. (M.T), C/O. 56 APO, S/O.HAMEED ALI,
RESIDENT OF VILLAGE ZAMODRI, POST PANTHA,
TEHSIL AND P.S.NAYYAR DAM,
DISTRICT TRIVANDRUM, KERALA.

BY ADV.T.R.JAGADEESH.

Versus

RESPONDENTS:

1. UNION OF INDIA, THROUGH ITS
SECRETARY, MINISTRY OF DEFENCE,
CENTRAL CIVIL SECRETARIAT,
NEW DELHI.
2. GENERAL OFFICER COMMANDIG (GOC) IN CHIEF,
CENTRAL COMMAND CANTT., LUYCKNOW.
3. COMMANDING OFFICER, 5685 ASC BN (MT),
C/O.56 APO.

BY ADV.MR.K.M.JAMALUDHEEN, SENIOR PANEL COUNSEL.

O R D E R

VAdm.M.P.Muralidharan, Member (A):

1. The Transferred Application filed as Writ Petition No.1563 of 2009 at the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, was transferred to the Armed Forces Tribunal, Regional Bench, Lucknow on 04 March 2011 and, later to this Bench as the applicant is now a resident in its area of jurisdiction and was re-numbered as T.A.No. 1 of 2015.

2. The applicant Sepoy/Driver (MT) Sanobar S, No.14827795 A, was enrolled in the Army in August 2001 as Driver (Mechanical Transport) in ASC. While serving with 681 Transport Platoon, ASC, Lucknow and performing duties of school bus driver at Army Public School, Lucknow in December 2006, complaints were received against the applicant for misbehaving with two girl students of the school, hereinafter referred to as Prosecutrixes 1 and 2. A Court of Inquiry was convened and eventually the applicant

was tried by Summary Court Martial (SCM) on two charges. The first charge was under Army Act Section 63, an act prejudicial to good order and military discipline for improperly holding Prosecutrix 1 while she was alighting from the school bus. The second charge was under Army Act Section 69 for committing a civil offence, contrary to Section 354 of the Indian Penal Code (IPC) for using criminal force against Prosecutrix 2 by pressing her breast intending to outrage her modesty. While the applicant had pleaded not guilty to the charges, the SCM found him guilty of the above charges and he was awarded the sentence of six months Rigorous Imprisonment (RI) in civil jail and dismissal from service. A petition was submitted by the applicant against the SCM proceedings and the sentence awarded, which was considered and rejected by the GOC in C of the Command. This Transferred Application has been filed by the applicant to quash the order passed by the SCM and for reinstatement in service.

3. Mr.T.R.Jagadeesh, the learned counsel for the applicant submitted that the applicant since his enrolment into the Army had always carried out the duties assigned to him with full devotion and dedication. His work as driver had always been appreciated. He was assigned the duties of driver in the Army Public School bus No.26 with effect from 23 November 2006. The applicant was falsely implicated in a fabricated complaint lodged by two fathers of victims, Prosecutrixes 1 and 2 respectively, that he had misbehaved with their daughters. While the applicant had categorically denied any misbehaviour on his part, his Commanding Officer without considering the facts summarily tried him and awarded RI for six months and dismissal from service. The applicant had preferred an appeal to the GOC in C, Central Command but the same was rejected. The applicant's request for bail was also not granted.

4. The learned counsel also submitted that the complainants viz., Prosecutrixes 1 and 2 were not Army

personnel and were civilians and hence the applicant should not have been tried under the Army Act. He further submitted that there was no direct evidence against the applicant for committing the alleged offence as his co-driver who was with the applicant on the date of the alleged incident had denied that any such incident took place. As per the learned counsel, while the applicant was driver of bus No.26, Prosecutrix 2 was not travelling by that bus. He further submitted that there was no FIR filed nor was the statement of the Principal of the school recorded. As per the learned counsel, there was no proper investigation carried out. The dates indicated also differ and in Summary of Evidence Prosecutrix 1 has not even been able to state the date of the incident. Further even the identification parade was not carried out correctly. The learned counsel therefore submitted that the case was a fabricated one and hence prayed that the entire proceedings against the applicant be quashed and the applicant be reinstated in service with all consequential

benefits.

5. Mr.K.M.Jamaludheen, the learned Senior Panel Counsel for the respondents, on the other hand, submitted that on receipt of complaint of Prosecutrixes 1 and 2 in December 2006 regarding misbehaviour of the applicant, a Court of Inquiry was convened by Station Headquarters. Based on the findings of the Court of Inquiry, tentative charges were framed and hearing of charge was held on 27 April 2007 in accordance with Army Rule 22. The Commanding Officer thereafter ordered for Summary of Evidence to be recorded. All pre-trial documents were forwarded to the competent authority, who directed that the applicant (as accused) be tried by SCM. SCM was held in August 2007 by the Commanding Officer of the Unit. The applicant was charged under Army Act Section 63 and under Army Act Section 69 for contravening Section 354 of the IPC. He was found guilty and awarded RI for 06 months and dismissal from service. All actions and

procedures followed were in accordance with Army Act, Rules and Regulations. The applicant's appeal against the verdict of the SCM was duly considered by the General Officer Commanding in Chief of Central Command who rejected his petition as there was sufficient and reliable evidence on record to support the findings of the Court. Learned counsel further submitted that the punishment awarded to the applicant, was commensurate with the seriousness of the charges and no injustice has been done to the applicant.

6. Heard rival submissions and perused records.

7. The primary contention of learned counsel for the applicant is that since the complainants were not subject to Army Act, the applicant should not have been tried under the Army Act. The applicant was tried by SCM under

Sections 63 and 69 of the Army Act and being relevant are re-produced below:

“63. Violation of good order and 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 military 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.”.

“69. Civil Offences.-- Subject to the provisions of Section 70, 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 the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.”.

8. Section 63 of the Army Act does not make any exception as to place or act for which a person may be exempted from being tried under the Act. Similar is the case for civil offences under Section 69 except as provided for under Section 70. Section 70 being relevant is reproduced below:

“ 70. 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 Central Government by notification in this behalf.”

9. Section 70 specifies that offences of murder or of culpable homicide not amounting to murder or rape if committed against a person who is not subject to military, naval or air force law shall not be tried by Court Martial under Section 69, unless the said offences are committed on active service, or outside India or at a frontier post specified by a Government notification. In the instant case, the applicant has not been charged for the above three exempted offences. So even though the Prosecutrixes were not subject to the Army, Naval or Air Force laws, as the charge against the applicant was under Section 69 of Army Act read in conjunction with Section 354 of IPC, he is not liable to receive any exemption under Section 70 of the Army Act. Hence we do not find any legal infirmity in ordering of trial of the applicant under Army Act for the offences alleged. Further, even though

the subject was not raised by the learned counsel, it is observed that under Section 120 of the Army Act certain restrictions have been placed on the powers of SCM for trial of offences under Section 69. The section being relevant is re-produced below:

120. Powers of summary courts-martial :--

(1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.

10. Under Section 120, unless there is grave reason for immediate action, reference is to be made to a higher competent authority before a person is tried by SCM under Section 69. In the instant case it is observed that the

Commanding Officer had submitted the case to the Commander of the Uttaranchal Sub Area who had in turn referred the matter to GOC, Uttar Bharat Area before directing that the applicant be tried by SCM. Therefore we do not see any merit in the contention of the learned counsel that the applicant should not have been tried by a SCM for the alleged offences and consequently on the issue that an FIR was not recorded.

11. It is also observed from records that the initial complaint against the applicant was made by the fathers of two victims, Prosecutrices 1 and 2 respectively, based on which a report was made by the Army Public School authorities to Officer Commanding of the applicant. A Court of Inquiry was ordered and the Court examined 5 witnesses including Prosecutrices 1 and 2 and the applicant. During examination of the Prosecutrices, the Court observed that the character and military reputation of the applicant was likely to be affected and therefore in accordance with Army

Rule 180, he was given the opportunity of being present throughout the enquiry, making statements for giving evidence and of cross examining the witnesses. It is observed that he cross examined the Prosecutrixes but declined to cross examine the other two witnesses. It is also observed that despite being given the opportunity to sit through, he did not co-operate with the Court and walked out in between proceedings and came back thereafter. It is also observed that the Court, when he came back, gave him an opportunity to cross examine and also peruse the materials.

12. Based on the findings of the COI, a tentative charge sheet was prepared by the Commanding Officer and hearing of charge held by him under Army Rule 22. Four prosecution witnesses including both the Prosecutrixes were questioned by the Commanding Officer. The applicant, as accused, was given an option to cross examine each of them but he declined to do so. While he did not produce

any witness in his defence, he submitted that he did not indulge in the acts alleged. The Commanding Officer thereafter directed that evidence be reduced to in writing and Summary of Evidence was recorded. It is observed that during recording of Summary of Evidence, 05 prosecution witnesses were examined including both the Prosecutrices. While the applicant cross examined Prosecutrices 1 and 2, he declined to cross-examine the other three witnesses. The applicant made a statement in which he denied any misbehaviour with the Prosecutrices. The applicant also produced the Conductor of the bus as a defence witness. The defence witness did not bring out any specifics about the incident, but only indicated that he had generally observed the applicant to be a well behaved person and that he was unlikely to have done any such activity. It is observed that the Summary of Evidence was recorded in accordance with Army Rule 23, and recommendation of the Commanding Officer for disciplinary action against the applicant by SCM was approved by

competent authority, viz., Commander, Uttaranchal Sub Area.

13. During the SCM, the applicant pleaded not guilty and 06 prosecution witnesses including the two Prosecutrixes were examined. The applicant, as accused, was given the opportunity to cross examine the witnesses but apart from two Prosecutrixes he declined to cross examine the other witnesses. The Conductor/co-driver of the bus being driven by the applicant was examined as a defence witness. The accused also made a statement that he had not misbehaved with the Prosecutrixes. The SCM found the applicant guilty and awarded him 06 months RI and dismissal from service. It is also observed that the applicant's petition to the GOC in C, Central Command, was considered and rejected as he observed the findings to be legally sustainable and the punishment commensurate with the seriousness of the charges (Annexure 1).

14. While the learned counsel for the applicant has not raised any legal infirmities in the convening of the COI and subsequent procedures leading to the SCM, we also observe from records that all provisions of Army Act, Rules and Regulations have been complied with.

15. The applicant had joined duties as a driver of the school bus only on 23 November 2006 and the alleged incidents took place in the first week of December. There is nothing on record to indicate that the Prosecutrixes or their family members had any previous grievance or ill feeling towards the applicant to concoct an incident of misbehaviour by him. It is also unlikely that the parents of the Prosecutrixes, even if they had any ill feeling towards the applicant, would involve their daughters in any incident which would tarnish their image. As seen from records, the Prosecutrixes were unaware of the applicant till they faced the incident. Further, both the Prosecutrixes were no way connected as they were in different classes in the

school, travelled normally by different school buses and the military hierarchy of their fathers did not place them in same social group. The applicant had been identified independently by the Prosecutrixes in the identification parade conducted by the Principal of the school.

16. It is also observed that during the COI, recording of summary of evidence and at the SCM, the Prosecutrixes held firm in their testimony about the misbehaviour of the applicant. The applicant has also not questioned them on the incidents per se, but has only queried them on issues such as not raising alarm. Therefore we do not find any reason to disbelieve the version of the two Prosecutrixes that there was improper behaviour against them by the applicant.

17. The learned counsel for the applicant had also raised issues of variance in dates and that the statement of the Principal of the school was not recorded. We observe

that while the evidence of the Principal was not taken, the Administrative Officer of the school has been called to do so. It was upto the COI or the Officers recording the summary of evidence or for the SCM to call any person they desired as prosecution witness. The applicant who was given an opportunity to call witnesses could have called the Principal if he desired. While we observe that there are some variances in dates mentioned, we do not consider it so crucial in this case as the Prosecutrixes have indicated time and days and have been firm in their testimony on all occasions even when cross questioned.

18. The learned counsel for the applicant had raised the issue of there being no witnesses to the incident. It is well known that such incidents are carried out when there are no onlookers, unless it is a case of gang misbehavior. As regards lack of witnesses, the Hon'ble Apex Court in the case of **Amal Kumar & Anr. vs. State of Haryana, (2004) 4 SCC 379** (no doubt a case of rape) held that the

victim is not an accomplice and so her testimony was sufficient to record conviction without corroboration. In the instant case, it is observed that both Prosecutrices had reported the incidents to their parents and to the school authorities. As brought out earlier, no material has been placed before us to indicate that the Prosecutrices were in any way aggrieved or prejudiced against the applicant so as to bring false charges against him. Therefore, in our view, lack of witnesses cannot be taken as a ground to discard the case set up against the applicant. More recently the Hon'ble Apex Court in the case of **Mohd. Ali alias Guddu vs. State of Uttar Pradesh, (2015) 7 SCC 272** held that conviction can be based on the sole testimony of a Prosecutrix, if it is unimpeachable and beyond reproach. It was further held that the law permits that the testimony of a Prosecutrix can be accepted without any corroboration and without material particulars provided her testimony inspires confidence. As brought out earlier, we do not find any

reason for the Prosecutrixes or their parents or school authorities to concoct stories against the applicant, within a fortnight of his joining, especially as it would also harm the reputation of the Prosecutrixes and the school. So we do not find any reason to disbelieve the statements of the Prosecutrixes.

19. The applicant was charged under Section 63 on the first charge for improperly holding Prosecutrix 1 and in the second charge under Section 69 in conjunction with Section 354 of the IPC for using criminal force with intention to outrage modesty of Prosecutrix 2. What constitutes 'outrage to the modesty of a woman' has been examined by the Hon'ble Apex Court in **Rupan Deol Bajaj (Mrs) & Anr vs. Kanwar Pal Singh & Anr., (1995) 6 SCC 194.** and expressed thus:

15. ".the ultimate test for ascertaining whether modesty has been outraged is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman. . . ."

20. Based on the evidence provided by Prosecutrices 1 and 2 and the principles enunciated by the Apex Court, in our view, there was sufficient evidence to prove the charges against the applicant and therefore we do not find any legal infirmity in the SCM finding the applicant guilty of the charges. As regards punishments awarded to the applicant, it is observed that under Sections 63 and 69 of the Army Act imprisonment may extend upto 07 years and under Section 354 of the IPC it is 02 years (at the time of trial). The Hon'ble Apex Court in **Ranjit Thakur v. Union of India (1987) 4 SCC 611** dilating over the question of quantum of punishment has stated thus:

"25. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.

21. The quantum of punishment while not unduly harsh, should be commensurate with the gravity of offence. Considering the charges against the applicant, and more so as his misbehaviour was against two minor school girls, in our view, the SCM has been extremely considerate and liberal in awarding the sentence against the applicant. The quantum of punishment awarded by the SCM to the applicant was in no way excessive considering the gravity of the offence committed and found guilty.

22. In view of the reasons stated herein above, we do not find any legal infirmity or bias or any other reason to set aside the findings of the SCM.

23. The Transferred Application is dismissed.

24. There will be no order as to costs.

25. Issue free copy to the parties.

Sd/-

VICE ADMIRAL M.P. MURALIDHARAN,
MEMBER (A)

an.

(true copy)

Sd/-

JUSTICE S.S.SATHEESACHANDRAN
MEMBER (J)

Prl.Pvt.Secretary