AFR

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transfer Application No. 75 of 2009

Wednesday this the 18th day of May, 2011

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'ble Lt. Gen. P.R. Gangadharan, Member (A)"

Ex. Sep. Rakesh Kumar
C/o Records Dogra Regimental Centre
Faizabad

..... Applicant

By Legal Practitioner Sri R.D.Singh

Versus

1. Union of India through Secretary
Ministry of Defence DHQ, P.O. New
Delhi

2 The Chief of the Army Staff
Army Headquarters
DHQ, P.O.New Delhi

03 The Commandant, IMA
Dehradun

04- GOC-In-C
Central Command Lucknow
Cantt.

05- OC Troops, IMA
Dehradun

----------Respondents

By Legal Practitioner Shri Alok Mathur,
Sr. Standing Counsel

ORDER

Hon'ble Mr. Justice Janardan Sahai"

1. The applicant Rakesh Kumar was charged for an offence under section 69 Army Act read with section 354 IPC. He was tried by Summary Court Martial, was found guilty and awarded punishment of dismissal from service on 26-2-2001. He filed a Petition under section 164 of the Army Act. He then filed a Writ Petition No.1099 (S/s) of 2001 in the Lucknow Bench of the Allahabad High Court stating that as the petition under section 164 has not been disposed of he is availing the remedy of writ petition. The papers of the writ petition have been transmitted to the Tribunal in view of the

provisions of Section 34 of Armed Forces Tribunal Act, 2007.

02- Heard Sri R.D.Singh, learned counsel for the applicant, Sri Alok Mathur, learned Sr. Standing, Sri R.K.Singh, Central Government counsel and Lt. Col. Anil Chandra, departmental representative on behalf of respondents

03- A large number of submissions have been advanced by learned counsel for the applicant. Before we deal with the legal submissions advanced by learned counsel for the applicant we shall deal with the submission in respect of the finding of guilt recorded by the SCM. The prosecution has sought to prove its case by two witnesses: PW1 Veena Devi, prosecutrix and PW2 Nk. Balam Ram. Smt. Veena Devi PW1 has deposed that in the night of 10/11th August 1998 at about 2130 hrs she retired to sleep. Her husband had gone out of station on exercise .At about 2330 hrs the applicant Rakesh Kumar, their Sahayak knocked the door and told her that her husband Sub Jagwant Raj Singh has

returned from the exercise and was sitting with Senior JCO Sub Bhim Singh and had asked her to keep his food ready. She opened the door and went into the kitchen and baked some Chapatis for her husband. When she came back in the room where she had left the applicant and asked him to find out as to why her husband had not come as yet, Rakesh kumar told her he had lied and caught her hand and tried to pull her towards himself in an attempt to embrace her .She pushed him away and went to the bed -room and locked herself inside. After about 5/10 minutes Smt. Prakasha Devi wife of their neighbour Bhim Singh alongwith another person whom she later on came to know was Balam Ram also came and Prakasha Devi started knocking the door asking her to open it. She refused saying that she will open it only in the morning. But on repeated requests by Smt. Prakasha Devi she opened the door. The applicant Rakesh Kumar in drunken state was lying motionless on the floor. She told Prakasha Devi that Rakesh Kumar is a shammer and the person who had offered him drinks should take him away. About

5/10 minutes thereafter Sub Bhim Singh came to her house and slapped Sep. Rakesh kumar and then they all took him away. She stated that her relations with Smt. Prakasha Devi were fairly cordial except that once they had some altercation over the common space for kitchen garden. In cross examination she denied the suggestion put to her by the applicant that she had asked Rakesh Kumar to come to her house after the party is over at Sub Bhim Singh's house. She stated that she had not met Rakesh Kumar earlier in the evening till he knocked the door in the late night.

04- PW2 Nk Balam Ram stated that Sub Bhim Singh Senior JCO who is related to him had called him at dinner on 10-8-1998. After finishing dinner at 1215 hrs Rakesh Kumar told him that he had to go to Sub Jaswant Raj Singh's house and when Balam Ram went to the side to ease himself Rakesh Kumar disappeared. He waited for about 20/25 minutes and did not know where Rakesh Kumar had gone and he went back to Sub Bhim Singh and informed Bhim Singh's wife about the disappearance of Rakesh Kumar. Since the

applicant had stated that he had to go to Jagwant Raj Singh's house, next door, she went there with her son. The door was locked . Smt. Prakasha Devi asked Veena Devi to open the door. Veena Devi shouted that she will open the door only in the morning. But on Prakasha Devi's repeated requests she opened the door and saw that Rakesh Kumar the applicant was lying on the floor and was not moving. Smt. Prakasha Devi's son waited outside the house of Sub Bhim Singh. Sub Bhim Singh came after five minutes and slapped the applicant and took him away.

05- Learned counsel for the applicant submits that the statement of the prosecutrix is unnatural and full of improbabilities and cannot be relied upon. It is submitted that the first description of the incident given by Smt. Veena Devi after she had opened the door on the request of Prakasha Devi was that the applicant was a shammer and the person who had offered him to take drinks should take him away and she did not say that the applicant had pulled her hand and tried to embrace her and the case about outraging her modesty is a

subsequent improvement. The complaint of the incident was for the first time made by Veena Devi after three days of the incident and the contents of the complaint are not known as the lady doctor to whom the complaint was made, has not been examined. The delay in reporting the matter was explained by the prosecutrix saying that her husband was not in station and it was a matter of her pride and she was puzzled what to do, but when she saw that Sr. JCO was trying to suppress the matter she decided to talk to the lady doctor. The explanation given by the prosecutrix is quite natural. The husband of the prosecutrix was out of station and in the circumstances she may not have disclosed the fact about the attempt to embrace her to Smt. Prakasha Devi. There are various other improbabilities pointed out namely that there were four children of the prosecutrix who were present in the house but none of them have been examined. It is also submitted that the witness had tried to improve upon her statement recorded in the summary of evidence where she has stated that she had pushed away the accused and had gone to the room

where her son was sleeping and she woke him up and her son came to the room where the applicant Rakesh Kumar was standing whereas in the deposition before the Court she has made no mention of these facts which is a material omission. A statement given at the summary of evidence, is a previous statement made by the witness and can be used for the purposes of cross examination. The omission is not in his statement at the Summary of evidence but in her deposition in court. No such question about this aspect was however put to the witness in her cross examination in Court. The credibility of the witness therefore, cannot be doubted on the basis of this omission.

06- Learned counsel for the applicant also submitted that the applicant was about 28 years old and it is improbable that he would have tried to outrage the modesty of the prosecutrix who was much older than himself and when she was having a grown up daughter. Also that if the applicant had any intention of committing the offence he would have chosen day time. This

argument does not carry any weight for the mind of an offender of such crime could work in many ways.

07- It is often said that the witness may lie but the circumstances do not lie. In the present case there are certain circumstances which go against the applicant. The husband of the prosecutrix was out of station, a fact which was known to the applicant who was their Sahayak. The applicant had gone to the house of the prosecutrix at the odd time of 2330 hrs in drunken state. The prosecutrix was so terrified by the act of outraging her modesty, that she locked herself in her bed room and on repeated request made by Smt. Prakasha Devi she had told Prakasha Devi, who was requesting her to open the door, that she will not open the door till next morning and only after assuring herself that a lady was there did she open the door.

08- Learned counsel for the applicant submits that it is not safe to rely upon the solitary evidence of the prosecutrix Smt. Veena Devi. In support of his contention he relied upon **Pandurang Sitaram Bhagwat**

Vs. State of Maharashtra, 2005 Crl. L.J.880 In that case it was held that ordinarily a lady would not put her character at stake and each case has to be determined on the touchstone of its factual matrix. In that case there was a discrepancy in the statement of witnesses, as to the place, manner and occurrence and viewed in the light of the evidence regarding conduct of the complainant and the prosecution witnesses, the accused was granted benefit of doubt. The other case relied upon is **Bondal Vs. State of M.P.** 1983 Cr.L.J.607. In that case the prosecution case was that Bedram and Gunjarilal caught her bodily lifted her and took her to the house of Bondal where she was wrongfully confined and Bedram attempted to outrage her modesty.Her statement was not corroborated by PW 10 Gyandas Kotwar. It was found that the house of Bondal was not lonely and women folk of the house were there. There was long standing dispute between the family of the prosecutrix and of the accused. In the peculiar facts and circumstances of the case the statement of PW1 Shantibai was not believed. The conviction under section

354 IPC was found not sustainable in absence of any corroborative evidence.

09- On the other hand learned Senior Standing counsel Sri Alok Mathur has relied upon the decision of the Apex Court in **State of M.P. Vs. Dayal Sahu** Criminal Appeal no .8 of 1998 .The learned Judges relied upon a previous decision of the Apex Court in **State of Punjab Vs. Gurmeet Singh** 1996 (2) SCC 384 and have quoted para 8 of that decision portion of which is extracted below:

> "In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking

corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury..."

In the present case we have found the statement of the prosecutrix to be borne out from the circumstances. While it is true that the evidence about the applicant having tried to outrage the modesty of the prosecutrix is supported only by the statement of prosecutrix herself but other circumstances have been corroborated by Balam Ram. For all these reasons we are of the view that there was sufficient evidence on record to establish the guilt of the accused beyond reasonable doubt.

10- We shall now consider the irregularities of procedure pointed out by the learned counsel for the applicant. It is submitted that before the summary of evidence was recorded in this case a Court of inquiry was held in which several witnesses including Sub Jagwant Raj Singh, Sub Bhim Singh, Balam Ram, prosecutrix Smt. Veena Devi etc. were examined but the provisions of Rule 180 of the Army Rules were not complied with and the statements were recorded behind

the back of the applicant and he was not permitted to cross examine them. A copy of the statement of the witnesses examined in the Court of inquiry has been annexed to the petition. The respondents in their counter affidavit sworn by Major Virendra Mohan have denied the averments. However, we find that there is no cross examination of any of the witnesses nor is there any note to the effect that the applicant had declined cross examination. Major Virendra Mohan has not stated that he was present in the Court of Inquiry. In the circumstances it is difficult to accept his stand and it appears that provisions of Rule 180 of the Army Rules were not complied with.

Rule 180 is a mandatory provision and Counsel submits that its non compliance would vitiate the trial as that material has been used by the prosecution for framing the tentative charge-sheet and hearing of charge under Rule 22 of the Army Rules. In support of his contention learned counsel for the applicant has relied upon R.P.Shukla Vs. Central Officer, Commanding in Chief, Lucknow AIR 1996 M.P. 233, Vinayak Daulat

Ram Nalawade Vs. Corps Commander Lt. Gen.GOC HQ 15 1987 LIC 860, Lt. Gen. S.K.Dahiya Vs. Union of India Mil.L.J.2007 (Del) 151, Lt.Gen.S.K.Sahni Vs. Union of India and others, TA/ 34/AFT/2009 (decided by the Principal Bench of the Tribunal on 03-9-2009), Maj. General R.K.Loomba Vs. Union of India and others,Mil. L.J 2008 (Del)150 . In all these cases it has been held that provisions of Rule 180 of the Army Rules are mandatory. In R.P.Shukla (supra) the conviction by the Court Martial was set aside on the ground of non-compliance of the mandatory provisions of Rule 180.

11- On the other hand the respondents have relied upon a decision of the A.F.T. Principal Bench Delhi in Brig (Retd) R.P.Singh Vs. Union of India and others T.A.274 of 2010 in which the argument regarding non-compliance of the Army Rules, 180 was repelled on the ground that the Court of inquiry is of no consequence at the stage when the matter has been referred to GCM and evidence had been adduced in the Court Martial proceedings. In view of the seeming conflict in the decisions relied upon by the learned counsel for the

parties we propose to examine the matter in some detail. Our exercise would cover three issues, first the nature of the Court of inquiry proceedings, second; nature of the proceedings under Army Rules 22 and 23. Third, the effect of non- compliance of Rule 180 and whether it would result in invalidation of the trial.

12- A Court of inquiry is constituted under Rule 177 of the Army Rules for the purposes of collecting evidence. Rule 177(1) is quoted below:

> "**177- Courts of inquiry- (1)** A Court of inquiry is an assembly of officers or of junior commissioned officers or of officers and junior commissioned officers, warrant officers or non- commissioned officers, directed to collect evidence, and if so required to report with regard to any matter which may be referred to them."

Rule 180 of the Army Rules is quoted below:

> "**180- Procedure when character of a person subject to the Act is involved-**
>
> Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give and of cross examining any witness whose evidence in his opinion affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified

receives notice of and fully understands his rights, under this rule."

Rule 182 of the Army Rules is quoted below:

> **"182- Proceedings of court of inquiry not admissible in evidence:**
>
> The proceedings of a court of inquiry or any confession, statement or answer to a question made or given at a Court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the Court be given against any such person except upon the trial of such person for willfully giving false evidence before that Court.
>
> Provided that nothing in this rule shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross examining any witness."

What emerges from these provisions is that the purpose of a Court of inquiry is to collect evidence in regard to any matter which may be referred to them. The words 'any matter' used in Rule 177 are of very wide amplitude. However, a statement made in the court of inquiry shall not be admissible in evidence against a person subject to the Army Act.

We shall now examine the nature of proceedings under Rules 22 and 23 of the Army Rules. Rule 22 and 23 are part of Chapter- V of the Army Rules which bears the heading "Investigation of charges and trial by Court Martial". One

difference which is to be noted here between a Court of inquiry under Rule 177 and inquiry under Chapter-V of the Army Rules is that while an inquiry under Rule 177 can be made in respect of any matter whatsoever, investigation under Chapter- V can be made only for the purposes of disciplinary action against a person for committing an offence.

13- Rule 22(1) of the Army Rules provides for hearing of charge which reads as under:

> **"22- Hearing of charge: (1)** Every charge against a person subject to the Act shall be heard by the commanding officer in the presence of the accused, The accused shall have full liberty to cross examine any witness against him and to call such witness and make such statement as may be necessary for his defence.
>
> Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule180 have been complied with in respect of that accused, the commanding officer may dispense with procedure in sub- rule (1)
>
> **(2)** The Commanding officer shall dismiss a charge brought before him if in his opinion the evidence does not show that an offence under the Act has been committed and may do so if, he is satisfied that the charge ought not to be proceeded with.
>
> **Provided** that the commanding officer shall not dismiss a charge which he is debarred to try under sub- section (2) of Section 120 without reference to superior authority as specified therein.

(3) After compliance of sub- rule (1) if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III, or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d)if the accused is below the rank of warrant officer, order his trial by a summary court martial."

Rule- 23 of the Army Rules is quoted below:

"23- **Procedure for taking down the summary of evidence : (1)** where the case is adjourned for the purpose of having the evidence reduced to waiting at the adjourned hearing evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused and of any other person whose evidence appears to be relevant shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs."

(2) The accused may put in cross examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness aftger it has been recorded as provided in the rule when taken down, shall be read over to him and shall be signed by him or if he cannot write his name shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked: "Do you wish to make any statement? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence." Any material statement thereupon made by

the accused shall be taken down and read to him but he will not be cross examined upon it. The accused may then call his witnesses if he so desires any witnesses as to character...."

What may be noted here in respect of Rule 22 is that although it bears the heading ;Hearing of charge but infact at this stage there is no formal charge, as we understand it in a trial before the ordinary criminal courts where the charge is drawn up by the court. The tentative charge sheet on which the hearing under Rule 22 is done is a mere accusation which is yet to be investigated. Unlike a charge sheet in a criminal case submitted by the police which is given after investigation a tentative charge sheet is issued before investigation as it is merely an accusation.

The manner in which the investigation is to be conducted has been laid down in Rules 22 and 23. The prosecution and defence witnesses are to be examined under Rule 22 itself and if that is done. The non compliance of Rule 180 where a Court of inquiry has been previously held would have no bearing upon the hearing under Rule 22 if the evidence in the court of inquiry is not relied upon in such cases. The examination of witnesses under Rule 22 can however be dispensed with by the Commanding officer under the proviso to Rule 22 and proceedings of the Court of inquiry can be used. In such cases non compliance of the provisions of Rule 180 in the

Court of inquiry proceedings would have a bearing upon the subsequent proceedings.

14- The evidence reduced into writing under Rule 23 is described as the summary of evidence. A point to be noted here is that although Rules 22 and 23 refer to the material collected under those proceedings as evidence the statements of the witnesses recorded under these Rules, is really not evidence in the strict sense of the term under section 3 of the Evidence Act. 'Evidence' as defined under section 3 of the Evidence Act means " statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry". Statement of witnesses made at the Summary of Evidence are not statements made before the court but in investigation proceedings. They are evidence in the limited sense being previous statements which can be used as evidence in certain circumstances such as under Sections 32 and 33 Evidence Act or for cross examination under section 145 Evidence Act. In cases where the accused pleads guilty such plea can be converted into a plea of not guilty if it appears from the summary of evidence that the accused did not understand the effect of the plea. In the case of a plea of

guilty the summary of evidence can be read to appreciate the circumstances on the point of mitigation of sentence. Barring a few exceptions some of which we have referred to above, the statements of witnesses recorded in the summary of evidence is not evidence within the meaning of section 3 Evidence Act and therefore a conviction cannot be based upon it. A statement of the accused at the summary of evidence if made voluntarily can also be put in evidence. After the summary of evidence is recorded one of the options open to the Commanding officer under Army Rule 24 (a) is to remand the accused for trial. A Court Martial is then convened and a formal charge sheet is issued under Rule 30 which is then followed by the trial. Remand for trial under Rule 24(a) can be ordered on the basis of the summary of evidence which is recorded under Rule 23. There is therefore no direct proximity between the proceedings of a court of inquiry and the remand for trial, ~~Which~~ which in view of Rule 24 can be ordered on the basis of the Summary of evidence. The formal charge sheet is issued at a still later stage. That apart even the summary of evidence not being evidence in the strict sense upon which conviction may be based does not have a direct proximity to the punishment awarded at the trial.

15- The question whether the non compliance of Rule 180 would vitiate the trial would have to be answered on the basis of analysis of the provisions of the Army Act and Rules and upon the proximity of relationship between the court of inquiry proceedings and the trial. We have therefore to determine the various situations in the Army Act and Rules in which non- compliance of Army Rule 180 would result in invalidation of subsequent proceedings. The finding of a Court of inquiry can directly result into certain adverse orders against a person subject to the Army Act. If Rule 180 is not complied with in such cases the adverse action would fall. The findings of a Court of inquiry may be used for the purposes of awarding reproof under Regulation 327 of the Regulations for the Army or for administrative action such as severe displeasure .In such cases non-compliance of rule 180 would result in invalidation of the order .Proceedings of a court of inquiry may also directly result in declaration of a person subject to the Army Act as a deserter in view of. Rule 183 where inquiry is made regarding illegal absence under section 106 of the Act.

In such cases however compliance of Rule 180 would not be possible as the absentee himself prevents opportunity being made available to him. The proceedings of a Court of inquiry can also result in collective fine being imposed under Rule 186 of the Army Rules. In such a case the identity of the offenders may not be known and it would be difficult to apply provisions of Rule 180.

16- The evidence in a court of inquiry may also be used as substitute for hearing of the charge under Rule 22 if the proviso to Rule 22 is applied. If the Commanding officer chooses to proceed under clause (a) of Sub rule (3) of Rule 22 for summary trial/ disposal of case on the basis of evidence in the court of inquiry by applying the proviso or proceeds under Clause (d) of sub- rule (3) of Rule 22 by ordering on the basis of the court of inquiry a trial by Summary court Martial against a person below the rank of Warrant Officer, the non- compliance of Rule 180 would have a bearing upon the validity of the proceedings. However, in the case of Court Martial where hearing of the charge has been done and statements of witnesses recorded under Rule 22 and the

statements of witnesses in the court of inquiry have not been used under the proviso to Rule 22, the trial would not be vitiated . In such cases there is no relationship even between the court of inquiry proceedings and the proceedings under Rule 22 and 23, the tentative charge sheet on the basis of which the hearing under Rule 22 is done being a mere accusation and not a charge sheet on which a trial is based . Moreover, from the fact that there has been a breach of a pre trial procedure it would not follow that the subsequent trial is vitiated. The effect of the special provisions of the Army Act and Rules such as Army Rule 149 would have to be seen. The issue has been considered by the Apex Court in Major G.C.Sodhi Vs. Union of India 1991 (2) SCC 382 and Union of India Vs. Major A.Hussain 1998(2) SCC 537 in which it has been held that breach of a pre trial procedure would not vitiate the trial unless prejudice is caused to the accused, These cases were considered in Union of India Vs. Dev Singh Mil L.J.2003 SC 146 in which it has been held that a breach of a pre trial procedure under Rule 22 would vitiate the trial if a preliminary objection is taken in the trial.

17- We shall now examine the cases cited by learned Counsel for the applicant. R.P.Shukla and others Vs. Central Officer Commanding in chief Lucknow AIR 1996 (MP) 233 was a case where inquiry under Rule 180 and hearing under Rule 22 was held before introduction of the proviso to Rule 22. Moreover it appears that the nature of the tentative charge- sheet being a mere accusation and not a charge- sheet at all was not considered in that case. If the tentative charge is a mere accusation yet to be investigated by proceedings independent of a court of inquiry the adverse action taken on the basis of such independent proceedings cannot be based upon the result of the proceedings of the court of inquiry. In Vinayak Daulat Ram's case also the distinction between a tentative charge sheet and a regular charge sheet was not considered. Moreover much water has flown since these decisions in view of the Apex Court's decisions in Major A.Hussain (upra) and Dev Singh (supra). In Lt.Gen. S.K.Dahiya Vs. Union of India Mil L.J. 2007 (Del) 151 the action challenged was of severe displeasure

awarded by Court of inquiry. The observation regarding the effect of Court of inquiry proceedings upon Rule 22 proceedings were made in the context of mandatory nature of Rule 180 and in any case were obiter as in that case there was no trial by Court Martial. In Lt.Gen S.K.Sahni Vs. Union of India and others (T.A.34/AFT/2009) the question was really regarding compliance of order of Delhi High Court which gave option to the Army authorities in that case either to proceed under Rule 180 or under Rule 22 and the Delhi High Court had directed that no part of Court of inquiry was to be used. The Tribunal held that once proceedings under Rule 180 were started the course cannot be changed midstream and it was held that the respondents were trying to over- reach the order of the Delhi High Court. In Maj. General R.K.Loomba.Vs. Union of India Mil.L.J.2008 (Del) 180 a recordable censure was given directly on the basis of the court of inquiry proceedings. Another case relied upon by the learned counsel for the applicant is State of Bihar Vs. L.K.Adwani 2003 (8) SCC 361.In this case neither rule 180 was used nor there were Court Martial proceedings. For

these reasons the decisions cited by the learned counsel for the applicant are quite distinguishable.

18- In view of what has been discussed above we are of the opinion that non compliance with the provisions of Rue 180 would not vitiate the trial where the proviso to Rule 22 has not been applied or even in such cases where the proviso has been applied, if no preliminary objection is taken in the trial unless prejudice is shown to have been caused to the accused. In this case in the summary of evidence the statements of Balam Ram, Sub Bheem Singh, Sub Jagwant Raj Singh , Smt. Prakasha Devi and Smt. Veena Devi etc. were recorded The proviso was not applied and there was a hearing of charge under Rule 22. No use of Rule 180 proceedings was made . The order of remand under Rule 24 of the Army Rules is based upon the summary of evidence and not upon the evidence collected in the Court of inquiry. The contention therefore has no merit.

19- Another submission made by learned counsel for the applicant is that the offence under section 69 of the Army Act cannot be tried by SCM unless the conditions provided in Section 120(2) of the Army Act have been complied with. Section 120(2) of the Army Act reads as under:

> "**Powers of summary Court Martial- (1)**....
>
> (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."

The respondents have filed as Annexure-CA1 copy of the order of Lt. Gen M.A.Gurbaxani Commandant IMA by which he has ordered the trial of the applicant by SCM in respect of offence under section 69 in compliance of provisions of Section 120(2) of the Army Act. In view of this certificate provisions of Section 120(2) of the Act have been complied with. Learned counsel for the applicant submits that the transaction relating to the grant of sanction by the competent authority has to be entered in the charge- sheet in view of provisions of Regulation 459, but in the present case the charge-sheet issued does not contain any such entry. In our opinion mere non entry of the transaction relating to the grant of sanction would not invalidate the proceedings if the sanction has infact been granted.

20- The next contention of learned counsel for the applicant is that under section 125 of the Army Act, an order was required to be passed by the competent

authority exercising his discretion that the offence is to be tried by a Court Martial.. Section 69 of the Army Act reads as under:

> "**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."

It is clear from this provision that offence under section 69 of the Act can be tried only by a Court Martial. In the circumstances SCM was not patently lacking jurisdiction. However, the civil offence can also be tried by the ordinary Courts. In so far as exercise of discretion referred to in Section- 125 is concerned we do not find any pleading to this effect either in the Petition or in the rejoinder affidavit or in the Petition under section 164 of

the Army Act and it also does not appear that any such objection was taken by the applicant during the course of SCM proceedings .In absence of any pleading at any stage it is difficult to allow the applicant to raise this plea at the time of arguments specially when the offence is triable by Court Martial also. It has also not been stated as to how the applicant has been prejudiced by the trial.

21- In Pradeep Singh Vs. Union of India Mil.L.J. 2007 SC 119 it was held:

> "A Court martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court- martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. 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 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 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."

The discretion under section 125 of the Act is required to be exercised at the initial stage. It is therefore a pre trial proceeding. Its object is to prevent conflict of jurisdiction between ordinary criminal court and court Martial. In Ex. Sepoy Ranjit Singh Vs. Union of India Mil. L.J.2002 Del. 140 relied upon by the applicant's counsel it appears from para 40 of the reports that the ordinary courts were also seized of the matter because an averment was made by the respondents that the CJM had passed an order. Full facts in this regard are not clear from the judgment. The decision appears to have been based mainly on other points which were also involved also. In respect of an irregularity in pre trial proceedings it has been held that the irregularity would not vitiate the trial unless objection in this regard is taken by the accused in SCM proceedings or prejudice is caused to the accused. We have already referred to the cases upon the point in a previous portion of our order. In the present case there is nothing to indicate that any such objection was taken . This contention of counsel for the applicant also fails.

22- It was then submitted that the Commanding officer had made spot inspection without giving any opportunity to the applicant to be present. Reliance has been placed by the applicant upon Rule 80(4)(5) of the Army Rules. These rules no doubt provide that spot inspection is to be made in the presence of the accused. Although the record indicates that proceedings had been adjourned for enabling the Commanding officer to make spot inspection but it is not clear whether the accused was given notice or was present at the time of spot inspection as the fact of giving of notice of spot inspection, or of any spot inspection having been made has not been recorded in the proceedings. Moreover, in the present case there is nothing to indicate that the result of the proceedings could have been affected by spot inspection. The question as to whether the applicant had committed the offence of outraging modesty of the lady was to be decided upon the oral evidence. The relevance of spot inspection in such a case is hardly any.

23- It was then contended that the applicant was not provided a friend of accused as per his choice. However, there does not appear to be any pleading in support of the contention. The counsel has referred to para 20 of the petition but we do not find anything to support this argument. What has been stated in para 20 of the petition is that the friend of the accused Jaipal Rampal had approached the applicant and asked him to give certain signatures on blank papers which the applicant had refused.

24- It was also submitted that the applicant was not heard on the question of mitigation of sentence. The Army rules applicable to SCM proceedings have laid down two separate procedures, where the accused has pleaded 'guilty', and where he has pleaded not guilty vide Army Rules 116 and 118. When the accused has pleaded guilty no evidence is led to prove the case. In such a case a separate hearing for determination of the circumstances having a bearing upon the question of sentence is required which may also require evidence to be led on this point. In a case where the pleading is 'not

guilty' the circumstances in which the offence was committed which would indicate its gravity have already appeared in the evidence. After the prosecution case the material circumstances appearing in the evidence are required to be put to the accused so that he can explain them. Rule 123 of the Army Rules provides for procedure on conviction. It is quoted below:

> "**123- Procedure on conviction:** (1) If the finding on any charge is "Guilty" the Court may record of its own knowledge or take evidence of and record the general character, age, service, rank and any
>
> recognized acts of gallantry or distinguished conduct of the accused and previous convictions of the accused either by as Court Martial or a Criminal Court, any previous punishments awarded to him by an officer exercising authority under section 80; the length of time he has been in arrest or in confinement on any previous sentence and any military decoration or military reward of which he may be in possession or to which he is entitled.
>
> (2) If the Court does not record the matters mentioned in this rule of its own knowledge, evidence on these matters may be taken in the manner provided in rule 64 for similar evidence at general and district Court Martial."

25- It is apparent from a plain reading of Rule 123 that after the finding of 'guilty' the Court may record of its own knowledge or take evidence of and record the general character, age, service rank and any recognized acts of gallantry or distinguished conduct of the accused

and previous convictions of the accused either by a Court Martial or a Criminal Court. On the basis of the evidence which is adduced at the trial and that in proceedings under Rule 123 the Court would be in a position to determine the sentence. It appears that for this reason the procedure relating to a plea of " not guilty" does not contain any provision relating to hearing on Mitigation of sentence found in the procedure where the accused pleads ' guilty'. It is thus clear from a comparison of provisions relating to procedure to be followed on a plea of 'guilty' and that of 'not guilty'. that the legislature in its wisdom has not provided for separate hearing on mitigation of sentence in a case of plea of 'not guilty'. This contention therefore does not have any merit.

26- It was then submitted that the plea of defence has to be considered. It is no doubt true that the plea of defence has to be considered where reasons are required to be recorded. Learned counsel for the applicant has placed reliance upon the Apex Court decision in Union of India & others Vs. Sunil Tiwari

Mil.L.J.2001 SC 159. That was a case of trial for an offence under section 307 IPC which is not triable by SCM. Army Rule 62(1) ~~of the Rules~~ provides provides that after finding of 'guilty' or not 'guilty' , the Court shall give reasons in support thereof. Rule 62, however falls under section 2 of Chapter-V of the Army Rules which relates to General Court Martial's and District Court Martial and this provision does not apply to SCM. In SCM proceedings the Court is not required to give any reasons. In the circumstances the decision cited by learned counsel for the applicant has no application.

27- It is then contended that the counter affidavit in the present case was sworn by Maj. Virendra Mohan who had no personal knowledge about the proceedings as he was not present in the Court Martial proceedings. It is also submitted that the provisions of Regulation 547 of the Regulations for Army have not been complied with. It is pointed out by learned Standing counsel that Regulation 547 has been amended and the officers not below the rank of Capt. are now authorized to file counter affidavit. The notification by which amendment

has been made was placed before us. In view of the amendment made the objection that the counter affidavit was sworn by an officer of the rank of Major, does not hold good .It is however, true that Major Virendra Mohan was not having any personal knowledge as he was not present in Court Martial proceedings. This aspect had a bearing upon the compliance of the provisions of Rule 180 and we have not believed the respondent's stand as Major Virendra Mohan could have no personal knowledge. But that aspect has no bearing on the conviction which is based on oral evidence led in the trial. The proceedings therefore are not vitiated on account of this reason.

Looking into the nature of the offence and the circumstances it was committed the punishment awarded is not excessive.

28- We therefore, do not find any merit in this T.A and it is accordingly dismissed.

(Lt Gen P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)

IA/-