AFR
RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION NO. 253 OF 2012

Wednesday this the 12th day of December, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No 4269228K Ex Havildar Krishna Kumar Thakur
S/o Shri Ram Kailash Thakur
Village and Post – Basua
Police Station – Aurai
District – Muzaffarpur (Bihar)

…….. Appellant

Ld. Counsel for the Appellant : **Col Y.R. Sharma (Retd)**, Advocate

Versus

1. Chief of the Army Staff, Army Headquarters, South Block, New Delhi – 110011.

2. General Officer Commanding in Chief, HQ Western Command, PIN-908543, C/o 56 APO.

3. General Office Commanding, HQ 9 Infantry Division, PIN – 908409, C/o 56 APO.

4. Commander, HQ 32 Infantry Brigade PIN – 908032, C/o 56 APO.

5. Colonel Yogesh Kumar Gautam, Commanding Officer, 5 Bihar Regiment, PIN – 910505, C/o 56 APO.

6. Major Dheeraj Modgil, SM, Assistant Judge Advocate General, HQ 2 Corps, C/o 56 APO.

…… Respondents

Ld. Counsel for the Respondents : **Shri D.K. Pandey**
Central Govt Counsel.

ORDER

"Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)"

1. By means of this O.A., the appellant has challenged the finding and punishment awarded by the General Court Martial (in short 'GCM'), whereby the GCM has held the appellant guilty of the charges levelled against him and awarded him the punishment of three years R.I., reduction to rank and dismissal from service.

2. The appellant was charged as under :

CHARGE SHEET

The accused No 4269228K Havildar Krishna Kumar Thakur of 5 BIHAR is charged with:-

Army Act Section 46(a)	*DISGRACEFUL CONDUCT OF AN UNNATURAL KIND*

In that he,

At Meerut Cantt on 08 July 2010, forcibly inserted his penis into the anus of Master Abuj Patial, aged about 11 years, son of Number 3995735L Naik Tansi Kumar of 17 DOGRA.

Place : C/o 56 APO
Dated : 03 August 2011

Sd/- x x x x x x x
(Yogendra Kumar Gautam)
Colonel
Commanding Officer
5 BIHAR

To be tried by a General Court Martial.

Station : Meerut Cantonment
Dated : 05 August 2011

Sd/- x x x x x x x
(Sunil Kumar Gadeock)
Major General
General Officer Commanding
9 Infantry Division.

3. In brief, the facts of the case, as pleaded by the appellant, are that the appellant was enrolled in Bihar Regiment on 15th October 1988. Due to his sincerity and dedication, he was promoted to the rank of Naik in 2002 and thereafter he was promoted to the rank of Havildar on 25th October 2005. During his long service period of almost 25 years, the appellant served in peace, field and Counter Insurgency area including United Nations Mission with the Battalion in Kongo. During his service

period, the appellant came to Meerut alongwith Advance Party of 5 Bihar. Since the personnel of the Battalion being replaced were to be relieved from various duties, the appellant was detailed as NCO in charge of PRASAD Shop on 03rd June 2010, a non CSD Canteen Shop of 32 Infantry Brigade. One Naik Tansi Kumar of 17 DOGRA was performing the duty of NCO incharge the cloth shop of non CSD Canteen Shop of 32 Infantry Brigade. The cloth shop and the PRASAD shop were housed in the same room and have one entrance only. Naik Tansi Kumar was an old hand and knew various people who were dealing with the cloth shop. The appellant had brought some dollars with him from UN Mission and on 06th June 2010, he gave $440 to Naik Tansi Kumar to exchange it into Indian currency since he wanted to send some money to his home and also to purchase a Motor Cycle. Naik Tansi Kumar assured the appellant that he shall exchange the dollars. The appellant narrated this fact to Havildar Manoj Kumar (PW-6) on 08th July 2010. Since the appellant was in urgent need of money, so he kept on asking Naik Tansi Kumar (PW-2) to exchange his dollars, but he made some excuses in one form or the other, thus, his motive was clear not to return the money. Then the appellant insisted on PW2 to immediately return his money. On 07th July 2010 at about 2000 hours an argument took place between the appellant and PW2 regarding exchang of dollars and PW 2 promised to give the exchanged currency next day morning i.e. on 08th July 2010. This fact was witnessed by Pawan Kumar, who has been examined in the GCM as PW 5. On 08th July 2010 at about 0900 hrs, the appellant again requested PW 2 to give his exchanged money, to which Naik Tansi Kumar replied that he shall exchange the money by evening. On 08th July 2010 thereafter Naik Tansi Kumar, (PW 2) left the Brigade Non CSD shop alongwith Naik Manoj Kumar, PW 6 leaving his son (victim) out of shop. The appellant took the victim inside the shop and committed the alleged offence with the victim. After some time a lady Smt. Meena Kumari, reached there and asked the appellant that why the appellant was demanding the money to which the appellant replied that he had paid the dollars to Naik

Tansi Kumar. The lady Meena Kumari had heated arguments with the appellant and left the shop threatening the appellant to teach him a lesson.

4. Thus, the defence of the appellant was that he had given 440 Dollars to Naik Tansi Kumar for exchange, but on one or the other pretext, he was not returning the money. The wife of Naik Tansi Kumar had threatened to teach him a lesson. It is also pleaded that PW 2 Naik Tansi Kumar left for the market leaving his son PW 3 xxxx (name withheld) playing outside the cloth shop under a well planned conspiracy to implicate the appellant.

5. During the course of GCM, the following witnesses were examined:

6. PW-1 Sepoy Satyender Kumar Singh has prepared the sketch map of the place of occurrence, which he has proved. This prosecution witness was recalled and was cross examined by the defence witness.

7. PW-2 Naik Tansi Kumar, the father of the victim, who has also deposed against the appellant and has stated that the incident has taken place at the place marked in red ink in the sketch map prepared by PW1. He has stated the facts as narrated to him by his son.

This witness was cross examined by the defence counsel, wherein he has stated categorically that the accused had not given him 440 Dollars on 06th July 2010 for exchange. He has also denied the suggestion of the accused that there was an altercation of the accused in the morning of 07th July 2010. This witness has also specifically denied the suggestion of the appellant that he had intentionally and deliberately gone to the market leaving behind his son and with ulterior motive, he has made false and fabricated complaint against the appellant to close his mouth to demand his 440 dollars.

8. PW-3 is the victim himself. Since he was a child witness, therefore, certain questions were put to him to verify whether he has sufficient knowledge and understanding to depose. After being satisfied on the point, his evidence was recorded.

This witness was also cross-examined by the defence counsel. The examination -in-chief of this witness is reproduced as under :

> *"On 08 Jul 2010, I had gone with my father to study at Non CSD shop (The witness could not recall exact time). After I completed my studies and revised all the lessons given by my father, I went to Mandir with my father for 'Aarti' (Evening Prayer or words to that effect). After the evening prayer, we came back to the Non CSD shop and my father started distributing the 'Prashad' (Offering of temple or words to that effect). My father gave 'Prashad' to this uncle (the witness pointed towards the accused) and one more uncle who was present there and rest of 'Prashad' was given to me by my father. After some time, my father went with another uncle to bazaar and I stated playing outside. Thereafter, I was called inside the Non CSD shop by the 'Prashad' wale uncle'.*
>
> *I hereby identify and point out "Prashad wale uncle', who is presently sitting in this Court, as the accused.*
>
> *After calling me inside the shop, the accused told me that don't tell it your 'Mummy' (mother or words to that effect) and 'Papa' (father or words to that effect). The accused opened my Capri (half pant) and opened the zip of his pant.*
>
> *The Court observes that witness has started weeping and is emotionally distressed, while narrating the incident. The Court calms him down and offers him a glass of water.*
>
> *The witness further states that, "Uske Baad En Uncle Ne Apna Susu Mere Chootdon Me Dal Diya" (Thereafter, the accused put his penis in to my buttocks or words to that effect). The accused then started fondling my body and kissed my cheeks. I felt a severe pain in my anus region and I immediately got up and ran outside the shop. I hid myself behind the shop and started weeping. This uncle (accused) also followed and came to me and told to come inside the shop. At that time, uncle (accused) appeared to be frightened. When uncle (the accused) told me to come inside, I told him that I will not go inside and ran towards the parking lot. I started praying Goddess that my father should come back soon and after some time, my father also came back. I did not divulge anything at that time to my father because, I was apprehensive that if I will tell him, a scuffle may ensue between uncle and my father. Thereafter, after locking the Non CSD shop, myself and father started for home on motorcycle. On the way to home, my father asked that do you want to eat something, to which, I replied that I do not want to eat any thing and told him to reach home quickly. As soon as I reached home, I started weeping and clung to my mother and told, "Papa Ki Yahan Se Duty Change Karba Do" (change the duty of father from this place or words to that effect). On this my mother asked that why are you weeping. I narrated the whole incident to my mother.*

I told to change the duty of my father from this place because "Yeh Prashad Wale Uncle Gande The" (The witness pointed out towards the accused and said he was a dirty man or words to that effect).

When my father told me to accompany him to Dogra Mandir to identify the accused, I hid myself under the bed because, I was very much scared. My father took me with him along with my mother and we went to Dogra Mandir on motorcycle. When we reached at that place my father asked me pointing towards the accused that whether this was the uncle, I was referring to. I identified the accused two to three times. One uncle was standing there told my father that don't tell this incident to your unit. Thereafter, we went to Military Hospital and I was checked there by the doctors. "

9. PW 4 Smt Meena Kumari, who is the mother of the victim. She was also recalled and cross-examined subsequently.

10. PW 5 is Pawan Kumar Aggarwal, who is dealer of Puja Samagri. The evidence of this witness it not very material.

This witness was also recalled. This witness in his cross-examination has given the following statement:

"On 06 Jul 2010, the accused in general told me that he has given dollars for exchanging in Indian currency because, he wants to purchase a motorcycle and he has to send some money at his home. The accused had not told me that to whom he had given dollars for exchanging in Indian currency. At that time, I had told the accused that he could have given dollars to me and I would have exchanged the same.

At about 2000 hrs on 07 Jul 2010, "Havildar Krishna Kumar Thakur aur Naik Tansi Kumar Ke beech ein Bahut Tu Tu Mein Mein Huyi" (Lot of arguments took place between the accused and Naik Tansi Kumar or words to that effect). Naik Tansi Kumar told the accused that he will give money to the accused tomorrow.

At about 0900hrs on 08 Jul 2010, Naik Tansi Kumar told the accused that he will give money to the accused in the evening.

On 08 Jul 2010, after Naik Tansi Kumar left the 'Brigade Non CSD' shop along with Naik Manoj Kumar after leaving his son behind, a lady came at the shop approximately after 20 minutes. I am not aware that who was that lady. She asked the accused, that why he was asking for money. The accused told the lady that he had given dollars to Naik Tansi Kumar. They had heated arguments. The lady left the shop after 10 to 15 minutes. I also left the shop at about 2030hrs along with my daughter. The witness voluntarily states that the lady while leaving the shop told the accused that, she will complaint to the authorities, if he troubles them more in this regard."

11. PW 6 is Havildar Manoj Kumar. At the time of the incident, he was performing the duties of RO Plant NCO. This witness had taken lift from Naik Tansi Kumar on his motor cycle. At that time, victim, the appellant and Shri Pawan along with her daughter were left behind at the Brigade Non CSD shop. Thus, the evidence of this witness is also not very material.

This witness was also recalled and cross examined by the defence counsel, but nothing material has come out in his evidence.

12. PW 7 is Subedar Surinder Kumar Singh. This witness after getting the information of defect in the RO Plant, when he reached there, then he was informed by Naik Manoj Kumar that the appellant had committed a wrong act on the son of Naik Tansi Kumar. This witness has identified the appellant. No cross-examination was done to this witness initially.

However, this witness was also recalled for cross-examination by the defence counsel. This witness has also stated in his cross-examination that on 10th July 2010, when he reached and enquired about the incident, the appellant told him that he was not at fault and his medical examination would be conducted in the Military Hospital. Next day, he took the accused to the Military Hospital and his medical examination was conducted.

13. PW 8 is Subedar Sandeep Kalaundia. On getting the information, about R.O. Plant, this witness also reached at the RO Plant location. He informed Lt. Shailendra Kumar Verma, Officer Commanding, when he reached RO Plant location, Subedar Surender Kumar Singh told him that Havildar Krishna Kumar Thakur has committed a wrong act on the son of Naik Tansi Kumar.

14. PW 9 is Lt Shailendra Kumar Verma. This witness has stated that on getting the information, he reached at the RO Plant. At that time, the appellant Naik Tansi Kumar alongwith his wife and son were standing.

Naik Manoj Kumar informed that wrong act has been committed on the son of Naik Tansi Kumar. The wife of Naik Tansi Kumar was weeping and his son was standing quietly. This witness was informed that he told him that he had gone to the market and left his son under the care of his the appellant. He had gone to the shop only for evening prayer. When he came back from the market, his son was standing in a dark side and he was crying. On enquiry, his son did not tell him anything but he insisted to go back home. When he reached home, his son started crying loudly and narrated the story to his parents. No cross examination was done to this witness also. However, he was recalled and cross-examined, but nothing material could be elicited in his cross-examination to discredit his testimony.

15. PW 10 is Major Preema Sinha, who was posted in the Military Hospital Meerut as Dermatologist. She has examined the victim and has stated in his examination-in-chief as under:

> *"At about 2215hrs, an 11 year old boy master Abuj Patial was brought by his parents Naik Tansi Kumar of 17 DOGRA and mother Mrs Meena Kumari with alleged history of their son being sexually abused by Havildar Krishna Kumar Thakur of 5 BIHAR Regiment at about 2010 hrs in the Non CSD shop of 32 Infantry Brigade located near the 'Dogra Mandir'. The boy had told his parents that Havildar Krishna Kumar Thakur had fondled with his private parts and attempted sexual inter course parianally, when the boy was left with him at that shop for about 30 to 40 minutes alone. The boy had also told his parents that Havildar Krishna Kumar Thakur had urinated in his anal region and was complaining of pain in the anal region.*
>
> *The boy was complaining of pain the anal region. He was unable to lie on his back therefore, he was lying on his abdomen. On examination, he was afebrile, his pulse was 100 per/min and blood pressure was 100/76 mm of Hg. General and systemic examination was essentially normal. Thereafter, I conducted venereological examination (examination of anal and private parts) The penis and scrotum were normal. Buttocks revealed healed scars of old folliculitis lesions (boils). Perianal region appeared erythematous (redness). I also conducted examination of oral cavity, which was normal. During examination of the perianal region, the boy was complaining of pain in that region. As far as the redness and pain in the perianal region is concerned, it may not be a complete intercourse but may be attempted one.*
>
> *Thereafter, I handed over the case to Major Vikas Singh, Surgeon on call after complete examination."*

16. Is witness, in the cross-examination by the defence counsel, has stated that she did not observe any cuts in the perianal region of the victim. The perianal region was dry and she did not observe any liquid material during examination. During examination, she has observed healed scars of old folliculitis lesions (boils). In her opinion, the boy must had boils earlier, which had healed leaving behind scars on the buttock region.

17. PW 11 is Lt Col Rajesh Bahal of Military Hospital, Meerut. On 09th July 2010 at about 1100 hrs, he had conducted the medical examination of the appellant. He has stated that on local examination of genitals, he did not find any abnormality and this covers the examination of penis, scrotum and surrounding areas. In the process of examination, he asked the accused that he he was wearing the same clothes, which he wore at the time of incident, to which he replied that he had changed his clothes. Therefore, the examination of clothes was not conducted by this witness.

18. It transpires from perusal of the records that witnesses were not cross-examined initially and later on they were recalled and cross-examined by defence. After recording the evidence of all the witnesses, an opportunity was given to the appellant to examine any witness in his defence. The appellant declined to adduce any evidence or to examine any witness in his defence. However, he has stated in his statement that he intends to submit his unsworn written statement and hearing be adjourned to prepare unsworn written statement. After relying the evidence, the GCM recorded its finding and announced its finding that the accused is held guilty of charge.

19. Learned counsel for the appellant has argued that in the instant case, there is no direct evidence and the prosecution case rests only on circumstantial evidence and the link of circumstantial evidence is not

complete. He has also argued that the medical evidence is not satisfactory to establish that there was any penetration. He has also argued that the appellant has been tried under Section 46 (a) of the Army Act, 1950, which is about unnatural act. Such an act with a man is no more unnatural, so the unnatural act would means such an act with some animal, hence the alleged offence committed by the appellant, cannot be termed to be unnatural act. The next submission of the learned counsel for the appellant is that the evidence produced on behalf of the prosecution was not sufficient to prove the guilt of the accused and accordingly the findings recorded by the GCM are incorrect.

20. In the alternative, it has been argued by the learned counsel for the appellant that even if the findings of the GCM are held to be correct, even then the punishment awarded to the appellant is shockingly disproportionate and excessive, because by such a severe punishment, the appellant has been snatched away the only means of his livelihood to survive in future and he had no means to maintain his family. It is submitted that keeping in view the circumstances, the punishment awarded to the appellant was too harsh and shocks the conscience of the Tribunal. It is also submitted that it was the duty of the GCM to take into consideration the long exemplary service and behaviour of the appellant while awarding the punishment. He has also informed the Tribunal that though the appellant was sentenced with the punishment of 03 years' R.I., but the appellant has already undergone imprisonment for about 04 years and now after serving out the sentence, he has been released.

21. Learned counsel for the respondents has argued that the GCM has rightly believed the testimony of the victim of offence. Appellant has been tried for the offence under Section 46 of the Army Act and not under section 377 IPC. It has also been argued that the medical evidence also does not rule out the possibility of the alleged offence. The ground of false implication has no substance. Even if it is taken to be true, even

then no person would ever like to involve their minor in such an incident.

22. It has also been argued by the learned counsel for the appellant is that the evidence of the victim is not corroborated by medical evidence.

23. Law is settled on the point that the evidence of the victim in such type of offences is treated at a very high pedestal and no corroboration is required. If the evidence of the victim is found to be wholly reliable, then the same can be made basis for conviction. On this point, we would like to quote the pronouncement of Hon'ble The Apex Court in the case of ***"Childline India Foundation and Another Vs Allan John Waters and Others***. We would like to reproduce Para 49, 50 and 51 of the case law, which are very much relevant in the present controversy. Para 49, 50 and 51 are reproduced as under:-

> *"49. Regarding the requirement of corroboration about the testimony of PWs 1 and 4, with regard to sexual abuse, it is useful to refer the decision of this Court in State of Kerala vs. Kurissum Moottil Antony, (2007) 1 SCC (Crl) 403. In that case, the respondent was found guilty of offences punishable under Section 451 and 377 IPC. The trial Court had convicted the respondent and imposed sentence of six months and one year's rigorous imprisonment respectively with a fine of Rs.2,000/- in each case. The factual background shows that on 10.11.1986 the accused trespassed into the house of the victim girl who was nearly about 10 years of age on the date of occurrence and committed unnatural offence on her. After finding the victim alone in the house, the accused committed unnatural offence by putting his penis having carnal intercourse against order of nature. The victim PW-1 told about the incident to her friend PW-2 who narrated the same to the parents of the victim and accordingly on 13.11.1986, an FIR was lodged.*
>
> *50. On consideration of the entire prosecution version, the trial Court found the accused guilty and convicted and sentenced as aforesaid. An appeal before the Sessions Judge did not bring any relief to the accused and revision was filed before the High Court which set aside the order of conviction and sentence. The primary ground on which the High Court directed acquittal was the absence of corroboration and alleged suppression of a report purported to have been given before the FIR in question was lodged. In support of the appeal, the State submitted that the High Court's approach is clearly erroneous and it was pointed out that corroboration is not necessary for a case of this nature.*
>
> *51. The following observations and conclusion in Kurissum Antony are relevant (SSC pp. 629-30, paras 7-11)*

"7. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in Rafiq v. State of U.P. with some anguish. The same was echoed again in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat. It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity or dignity had ever occurred. She would be conscious of the danger of being ostracised by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. State of Rajasthan were AIR P. 57, para 19)

> *'19.....The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ...'*

8. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in "the case of an accomplice to a crime". (See State of Maharashtra v. Chandraprakash Kewalchand Jain.) Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

9. It is unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life can be protected only if courts deal strictly with those who violate the social norms.

10. The above position was highlighted by this Court in Bhupinder Sharma v. State of H.P.

11. The rule regarding non-requirement of corroboration is equally applicable to a case of this nature, relating to Section 377 IPC."

(underlined by us)

24. Before proceeding further, we consider it appropriate to deal with the submission of the learned counsel for the appellant, which is with

regard to Section 46(a) of the Army Act, 1950. Section 46(a) of the Army Act, 1950 reads as under :

> ***"46. <u>Certain forms of disgraceful conduct</u>.*** *— Any person subject to this Act who commits any of the following offences, that is to say, —*
>
> *(a) is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or ..... "*

25. Emphasis of the learned counsel for the appellant is on the word "unnatural" and on the basis of this word, he has argued that an unnatural offence would be an offence when it is committed with animal and not with human being. We are of the view that this submission of the learned counsel for the appellant is absolutely misconceived. Even in, Section 377 of Indian Penal Code, which deals with the offence of sodomy starts with the heading "unnatural offence". So an act of this nature with a minor is an unnatural offence and submission contrary to it is absolutely misconceived and deserves to be rejected.

26. Now we deal with the evidence of victim. What weightage should be given to the evidence of victim of such an offence has been considered by the Hon'ble Apex Court in the case of **Aman Kumar & Anr vs State of Haryana** (Criminal Appeal No.1016 of 1997) decided on 10th February 2004, wherein the Hon'ble Apex Court has observed as under:

> *"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional."*

Reference may also be made on the pronouncement of the Hon'ble Apex Court in the case of **State of Punjab vs. Gurmit Singh** (1996) 2 SCC 384, wherein the Hon'ble Apex Court in Para 21 has observed as under :

> *"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only*

violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspirers confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations"

Reference may also be made in the case of **Vijay alias Chinee vs. State of Madhya Pradesh** (2010) 8 SCC 191, wherein the Hon'ble Apex Court in Paras 12, 13, and 14 has held as under :

"12. In State of Orissa Vs. Thakara Besra & Anr. AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In State of Himachal Pradesh Vs. Raghubir Singh (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.. A similar view has been reiterated by this Court in Wahid Khan Vs. State of Madhya Pradesh (2010) 2 SCC 9, placing reliance on earlier judgment in Rameshwar Vs. State of Rajasthan AIR 1952 SC 54.

14. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

27. The law position on this aspect is that if the evidence of victim of offence of sexual assault is found to be wholly reliable, then the Court may act upon it and there is no necessity to seek corroboration of his/her evidence. In this perspective, the submission of the learned counsel for

the appellant is that this case is based on circumstantial evidence and the standards established for proving the guilt of an accused by means of circumstantial evidence, have not been fulfilled. This submission is absolutely misconceived, because in this case the victim has been examined as a witness and he has fully corroborated the prosecution story. If the evidence of this victim of an offence is found to be wholly reliable, then there would not be any need or legal requirement to seek for corroboration in material particulars. On the contrary, even if the evidence of victim is not found to be wholly reliable, but the circumstances established, proves the guilt of the accused, even in that case, the accused can be convicted on the basis of circumstantial evidence. Therefore, in this case, the evidence of the victim has to be considered first.

28. We have examined the evidence of the victim of the offence and after going through his evidence, we are of the considered view that he has fully supported the case of the prosecution. In his cross-examination, he has specifically denied the suggestion given by the accused that the appellant has been falsely implicated and he has given evidence as tutored by his parents.

29. The demeanour of the witness during recording of evidence shows that he is a natural witness and whatever he has stated is truth. He is a boy of tender age, who does not know the implication of each word particularly the words used to describe such an act of sexual assault. The argument of learned counsel for the appellant is that this witness has stated that the appellant put his male organ inside his anus which is not supported by medical evidence. A boy of such a tender age has his own limitations to express the actual act. But his evidence clearly shows that the appellant lowered his Capri, thereafter opened his pant and tried to commit the intended unnatural offence. In the facts of this case, when the appellant is being tried for the offence under section 46 of Army Act,

complete penetration is not an essential ingredient. This act it self is disgraceful and unnatural within the purview of Section 46 of Army Act.

30. In the instant case, the appellant has come with two defences. The first defence is that he has been falsely implicated by the parents of the victim, so that they may not be asked to repay the dollars given by the appellant and the second defence, as suggested by the appellant to the victim. It is suggested that such an incident has taken place when he had gone on a picnic of his school. Thus, on one hand, the appellant's defence is that no such incident took place with the victim and he has been falsely implicated and on the other hand, his defence is that the victim was subjected to such an incident and he has been falsely implicated.

31. We have examined the grounds of false implication and we are of the considered view that no parents would involve their minor son in such type of incident, simply to escape from the liability to repay the amount of the accused. Even if the defence of the accused is relied upon to that extent that he has given 440 dollars to the victim's father, even then it cannot be a ground for false implication in a case of such nature, because allegation of such nature not only brings bad name to the family, but it is also stigmatic for the victim.

32. Learned counsel for the appellant has argued that initially as per the case of the prosecution when the victim first met with his father after the incident, then he did not disclose this incident to him and it was only when he reached his home, he disclosed this incident to his father and this conduct of the victim is highly unnatural and hence his evidence is unreliable. We do not find any substance in this submission, because no hard and fast rule regarding the reaction of a person can be laid down that in the giving circumstances, each and every person must react in a particular manner. Reaction of each and every person in a given circumstances depends on the nature of the man and if the victim after

such an incident, was horrified or could not gather courage to narrate such an incident to his father at the place of incident or in the market, then this act of the victim cannot be said to be unnatural, which may render his testimony unreliable. A minor boy considers himself to be absolutely safe at his home and if the victim has preferred to disclose the incident to his parents at his home, then there is nothing unnatural. Therefore, we are of the considered view that the evidence of this witness is wholly reliable and submission of the learned counsel for the appellant regarding unnatural conduct of the victim has no substance.

33. A perusal of the records of GCM shows that each and every incriminating circumstance emerging into the prosecution evidence was put to the accused after conclusion of the evidence. Thereafter the accused had submitted an unsworn written reply, which has been made part of the record, as Ext. 44, which reads as under :

"UNSWORN STATEMENT OF THE ACCUSED PERSON

1. Sirs, my defence is that on 08 Jul 2010 the charge (B-2) put on me is false and fabricated. No such incident ever took place, I completely deny these allegations. The threats by Smt Meena Kumari (PW-4) on the night of 08 Jul 2010 in the presence of PW-5 that if I demand the exchanged Indian Currency of the 440 dollars then "she will make me learn a lesson by falsely blaming me of eve teasing and rape and she will get me Court Martialed and send me to jail etc". She told me to stop asking the exchanged Indian currency in lieu of 440 dollars immediately. After arguing (tu tu – mein mein) with me for more than 10-15 minutes in a very repeated loud voice, I got scared and remained silent.

2. After Smt Meena Kumari left, her husband Nk Tansi Kumar (PW-2) returned from the market. At that time I asked him for my money and told him what right does your wife has got to threaten me that "she will teach me a lesson by falsely blaming me of eve teasing and rape and she will get me Court Martialed and send me to jail etc". Then Nk Tansi Kumar threatened me with the same kind of threats after that he started closing the displayed clothes in his clothes shop and left in anger threatening me "that we will make you learn a lesson today itself" and he executed his threats the very same night as in the charge sheet (B-2) which I reject out rightly and deny them completely.

3. I, on 06 Jul 2010 gave Nk Tansi Kumar 440 dollars to exchange them into Indian currency and he said that he will give me the money and also help me buying a motorcycle from Pathankot at a cheaper price. Thereafter, in the evening of 07 Jul 2010 when he did not pay me the exchanged Indian currency, the value of 440 dollars we have an argument "tu tu – mein mein" and then he promised me again that he will get said

money tomorrow (08 Jul 2010) which is with his wife an amount of 440 dollars converted into Indian currency. In the morning of 08 Jul 2010, I asked him for the money in the presence of Shri Pawan Kumar (PW-5) which again caused an argument between us after which he said he will get the amount in the evening definitely which he has forgotten with his wife. The rest of the incident and the threats given to me by both (PW-2 & PW-4) gave are as mentioned in para 1 and para 2 above which have also been read out.

4. My above mentioned statements may kindly be read together by the court and I may please be given justice and I be freed from the charge (B-2) set upon me as I am completely innocent.

Thanking all the respected members of the court and the learned Judge Advocate with "Charan Sparsh" in anticipation."

34. Thus, as per unsworn written reply, the only defence of the appellant was that he has been falsely implicated and no such incident has taken place. But when the victim was cross-examined on behalf of the appellant, then suggestion put to the victim, shows that he was subjected to such incident though in a school picnic. Thus, the appellant himself was not certain as to what his defence was. Leaving it apart, we may make it clear that we are not resting our decision on this aspect of the case, but we have taken into consideration the entire evidence and particularly the evidence of the victim. It has also been argued on behalf of the respondents that the alleged place of occurrence, which is the shop was within the public view and it cannot be believed that any such type of incident can be committed in such a place. PW-1 Sepoy Satyender Kumar Singh has prepared the sketch map of the place of incident. It shows that puja samagri shop and the cloth shop are in the same room and the RO plant is towards the north-east direction from the said shop. In the half portion of this room, puja samagri shop manned by the appellant runs and in the remaining half, cloth shop runs which is managed by the victim's father. There is only one common entrance door of the said room. Admittedly, the father of the victim, who runs cloth shop, was not present there at the time of incident, as he has gone to the market in connection with the RO plant leaving behind his son. Therefore, the present appellant was the only person present in the shop and, therefore, since there was only one door of the said shop and the

persons whom the appellant claims that they were present, were out of the shop. Since there was only one door, therefore, what was being done inside the shop was not visible in the outer side. In the sketch map, no window in the said shop has been shown. The manner in which the victim has narrated the incident, shows that it must take very little time to complete the act and, therefore, this submission that no one has seen the incident, who was present outside the shop, has absolutely no substance.

35. Learned counsel for the appellant has also argued that there was contradiction in the evidence of the victim that the appellant has passed urine in his anus, but as stated earlier, the victim is a minor child of 11 years. He does not understand implication of such words. Hon'ble Apex Court in a catena of decisions has held that minor contradictions, which does not go to the root of the case have to be ignored because such minor contradictions are bound to occur in the evidence of most natural witness. Hon'ble Apex Court in the case of **Latesh alias Dadu Baburao Karlekar vs. State of Maharashtra** (2018) 3 SCC 66. The relevant part of Para 48 reads as under :, wherein Hon'ble Apex Court observed in Para 48 as under :

> *"48. .....It is settled law that oral evidence takes precedence over the medical evidence unless the latter completely refutes any possibility of such occurrence."*

36. Hon'ble Supreme Court in the case of **State of Andhra Pradesh vs Pullagummi Kasi Reddy Krishna Reddy alias Rama Krishna Reddy & others** (2018) 7 SCC 623 has considered this aspect in Para 11. The relevant part of Para 11 reads as under :

> *"..... Minor contradictions and omissions in the evidence of a witness are to be ignored if there is a ring of truth in the testimony of a witness."*

37. In another case **Kameshwar Singh vs. State of Bihar & others** (2018) 6 SCC 433, Hon'ble Supreme Court has observed in Para 22 as under:

> *"22. ..... Hardly, one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is the duty of the Court to scrutinise the evidence carefully and, in terms of felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Efforts should be made to find the truth. This is the very object for which Courts are created. To search it out, the Court has to disperse the suspicious cloud and dust out the smear of dust, as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So, it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the Court, within permissible limits to find out the truth. It means, on one hand that no innocent man should be punished, but on the other hand to see no person committing an offence should go scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. The evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the Court to accept the evidence."*

38. The next argument of the learned counsel for the appellant is that the evidence of victim is not corroborated by medical evidence. He has referred to the evidence of Major Preema Sinha, who was posted in the Military Hospital, Meerut as Dermatologist and to the evidence of Surgeon of Military Hospital, Meerut to whom PW-10 referred the victim. Though he has not been examined during the GCM, but his evidence was recorded in the Summary of Evidence and on the strength of this submission, it has been argued that the allegations are not supported by the medical evidence.

39. Law on the point of medical contradiction of such type of offence is well settled and it has been held by the Hon'ble Apex Court in a catena of decisions that in such cases of medical corroboration is not *sine quo non* to prove the offence, Medical consistency become material only when the medical inconsistency is of such a nature, which completely rules out the possibility of the prosecution case. On this point, reference may be made to the following decisions of the Hon'ble

Apex Court in the case of **State of Punjab vs Gurmit Singh** (AIR 1996 SC 1393) followed in the case of **Munna vs. State of U.P. (**2014) 10 SCC 254.

40. Thus, in the instant case, after going through the entire evidence, we are of the considered view that the evidence of PW3 is wholly reliable and the findings of the GCM, holding the appellant guilty, cannot be said to be illegal or irregular. GCM has not committed any mistake of law or fact in relying upon the prosecution evidence. No argument of any procedural lapse was raised on behalf of the appellant during his arguments.

41. Section 46 of the Army Act, 1950 deals with disgraceful conduct, therefore, we find substance in the submission of the learned counsel for the respondents that even there is only an attempt to commit such an act, even then the same will fall within the purview of Section 46 of the Army Act, as such an act would be disgraceful unnatural conduct.

42. The last submission of the learned counsel for the appellant is that the punishment awarded to the appellant is too harsh, because the appellant has been reduced to rank after 24 years of his unblemished service. Apart from it, he has already suffered four years' imprisonment and has also been dismissed from service. His dismissal from service has disentitled his pensionary benefits, due to which his family has come to road and his entire family is on the verge of starvation. In support of his submission, he has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **S Muthukumaran vs. Union of India & others** (2017 (4) SCC 609), wherein the Hon'ble Apex Court has held in Paras 10 and 11, which reads as under :

> *"10. As a matter of record, the appellant was enrolled in the Indian Army on 26-4-1994 and till his termination on 10-7-2011, he is said to have discharged his services diligently for more than seventeen years. During the period of his service, he had no adverse remarks in his service record except the present one. In our view, when the dismissal order was passed*

in case of the appellant, the GOC could have taken into account the unblemished service record of the appellant and his long service. If an order of discharge would have been inflicted against the appellant, he still would have been restricted from continuing in service and at the same time, the appellant, who had served diligently for more than 17 years, would have been granted with the benefits accrued on his service rendered so far.

11. No doubt, the dismissal order passed against the appellant was within the powers of the authorities concerned. However, as far as the dismissal from service is concerned, it is an extreme punishment imposed against the appellant. The appellant has to thrive in civil life by doing an appropriate job suitable to his qualification. In the facts and circumstances of the present case, we are inclined to modify the punishment of dismissal from service into discharge from service. The modification of the sentence of dismissal from service into that of discharge will not change the position of the appellant, so as to claim any reinstatement into service. Even if he was discharged from service, in lieu of dismissal from service, the appellant cannot seek for any employment or re-employment into the Army. Therefore, there would not be any grievance for the respondents in the event of punishment of dismissal being modified into that of discharge. At the same time, interest of justice would be served as the appellant would get the benefits like gratuity and other attendant benefits for the service rendered by him and the appellant would also get an opportunity to lead an honourable life in the society."

43. It is submitted that the aforesaid pronouncement of the Hon'ble Apex Court applies to full force to the facts and circumstances of the case, because in that case the appellant had only served for 17 years, but in the instant case the appellant has served for a very long period of 24 years and has also absolutely unblemished career.

38. Keeping in view the abovequoted observations of the Hon'ble Apex Court, we are of the view that this aspect of the matter, while awarding to sentence, was not duly considered by the GCM.

44. For the offence under Section 46(a) of the Army Act, 1950, the maximum sentence that can be awarded to an accused, is only seven years R.I., out of which the appellant has already served out the inflicted punishment of 03 years' RI, but actually he has remained in custody for a period of about four years. Thus, keeping in view this fact and also the long unblemished career of the appellant, we find substance in the

submission of the learned counsel for the appellant that the sentence is too harsh. We are of the view that while confirming the findings of the GCM, holding the appellant guilty, only his sentence of dismissal from service deserves to be modified. He has already been reduced to rank and the said punishment deserves to be confirmed.

45. So far as the punishment of dismissal from service is concerned, we are of the view that only this part of the punishment deserves to be converted into discharge.

46. Accordingly, this O.A. deserves to be partly allowed and is hereby **partly allowed.** The findings of the GCM holding the appellant guilty is hereby confirmed. The sentence of reduction to rank and imprisonment of three years' R.I. is also hereby confirmed. However, the sentence of dismissal from service is hereby modified to discharge from service. The appellant shall be entitled to pensionary benefits for the rank to which he has been reduced to.

47. The Respondents are directed to release the pensionary benefits of the appellant within a period of four months from the date a certified copy of this order is produced before the competent authority.

48. Let a copy of this order be provided to the learned counsel for the respondents for onward transmission to ensure compliance.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : December ,2018
PKG