

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

RESERVED
(Court No. 3)**Transferred Application No. 347 of 2010**Monday the 27th day of April, 2015**“Hon’ble Mr. Justice Abdul Mateen, Member (J)
Hon’ble Lt. Gen. A.M. Verma, Member (A)”**No. 13895811-P Sepoy Dvr (ASC) Bishwambar Dayal, S/o Shri Babu Ram,
R/o Village & P.O. Shahi, District Pilibhit (U.P.)

..... Applicant.

By Shri K.K. Mishra, counsel for the applicant.

Versus

1. The Chief of Army Staff through OIC Legal Cell (Army), MH Compound, New Cantt, Allahabad.
2. Commandant-cum-Chief Record Officer, ASC Records (MT), through Commanding Officer, 5011 ASC Bn (MT), C/o 56 APO.
3. CCDA(P), Draupadi Ghat, Allahabad.

..... Respondents.

By Shri Bhanu Pratap Singh Chauhan along with Capt. Ridhishri Sharma,
Departmental Representative.**ORDER**

1. This Transferred Application has been filed by the petitioner seeking the following reliefs :

“(i) Issue writ order or direction in the nature of mandamus to Respondent No. 1 to treat the petitioner as having

continued in colour service till further orders by this Hon'ble Court.

(ii) *Issue a writ of certiorari summoning the records of the case and quash the same with all the consequential benefits to the petitioner.*

(iii) *Quash the sentence awarded by the Summary Court Martial (held on 5th and 6th September 1997) mentioned at page 64 of the Original application (Annexure 4 refers).*

(iv) *Issue a writ, order or direction in the nature of mandamus to the Chief Controller of Defence Accounts to release contributory and other dues of the petitioner, if any so far held.*

(v) *Issue any other writ, order or direction considered expedient and in the interest of justice and equity.*

(vi) *Award cost of the petition."*

2. The facts of the case, in brief, are that in 1997 the petitioner was serving in 5011 ASC Battalion (MT). On 24.3.1997, the day of Holi, there was an allegation against the petitioner of using criminal force on Ms. Banitha Kumari, aged 16 years, sister of L/Nk Bipin Kumar Singh. Following this allegation charges were heard and the petitioner was tried by SCM on 5th & 6th September, 1997 for an offence as under :

"Army Act
Section 6..

COMMITTING A CIVIOL OFFENCE, THAT IS TO SAY
USING CRIMINAL FORCE TO A WOMAN WITH
INTENT TO OUTRAGE HER MODESTY CONTRARY
TO SECTION 354 OF THE INDIAN PENALCODE

*In that he,
At Jalandhar Cantt opn 24 Mar 97, at about 1400 hrs
used criminal force to Miss Banita Kumar sister of No
14802723-L L/LNk(Dvr/MT) Bipin Kumar Singh of
5011 ASC Bn (MT) by pressing her breast, biting and*

kissing her on face and pulling down her salwar and underwear intending thereby to outrage her modesty.”

3. In SCM the petitioner was awarded sentence of 6 months' RI and dismissal from service. Aggrieved against the petitioner filed a petition under Section 164(2) of Army Act before the COAS. When he did not receive any response about the disposal of his petition under Section 164(2) of the Army Act, the petitioner filed Civil Misc. Writ Petition No. 38461 of 1999 before the Hon'ble Allahabad High Court. While disposing of this petition the Hon'ble High Court on 30.8.2000 directed the respondents to consider and dispose of the statutory petition of the petitioner early.

4. In pursuance of the aforesaid direction of the Hon'ble High Court, the COAS considered the statutory petition of the petitioner and rejected the same on 16.11.2000 by a speaking order. Aggrieved against the petitioner again filed Civil Misc. Writ Petition No. 16314 of 2001 before the Hon'ble Allahabad High Court, which has ultimately been transferred to this Tribunal and registered as Transferred Application No. 347 of 2010.

5. In this petition the petitioner has stated that he has been falsely implicated in a case of attempted molestation and this is an act of revenge by some individuals. He has further stated that while conducting SCM proceedings the provisions of Section 120(2) of the Army Act were not complied with and no FIR was lodged, which is a must since the girl is not subject to the Army Act. The petitioner also claims that Rules 22 and 34(1) of the Army Rules have not been complied with. The charge-sheet was in English language which is not understood by the petitioner and no

translator was provided. The victim girl is deaf and dumb and her statement during the SCM was recorded without the help of experts. The victim was also not medically examined. The petitioner claims that he was beaten up.

6. Learned counsel for the petitioner argued that in SCM no legal counsel was provided. The correct forum for trial of an offence of this nature is either by DCM or the Sessions Court wherein the punishment awardable is more than the powers of SCM. Alternatively had the case been in Sessions Court, the Army could have taken over the case and tried the petitioner by DCM wherein there was an opportunity for the petitioner of having a legal counsel. Learned counsel for the petitioner argued that since the charges were not proved, the petition deserves to be allowed.

7. Shri Bhanu Pratap Singh Chauhan, learned Standing Counsel, duly assisted by Capt. Ridhishri Sharma, Departmental Representative, argued the case of the respondents. According to the respondents, the petitioner admitted that he outraged the modesty of the girl, who is a deaf and dumb, by applying colour on her face and breast and attempted to pull down her clothes. The charges were heard under the provisions of Rule 22 of the Army Rules on 25th and 26th March 1997 and pre-trial documents were sent to the GOC, 11 Corps for his direction under the provisions of Section 120 of the Army Act. Consequently, GOC, 11 Corps directed that the petitioner be tried by SCM. The respondents stated that the FIR was not lodged since the incident had taken place in the Unit lines. The charge-sheet and all other relevant documents were handed over to the petitioner on 7.8.1997 and the

trial took place on 5th & 6th September, 1997. Thus, the provisions of Rule 34 of the Army Rules were complied with. The petitioner was asked to name a Friend of Accused, vide letter dated 23.8.1997, and he nominated Major R.S. Natt as his Friend of Accused. The charge-sheet was read over to the petitioner in English and also explained in Hindi. The SCM proceedings were conducted in the language, viz. in Hindi, which the petitioner understands. According to the respondents, for recording the statement of the victim no expert was needed as the statement was made in a manner which could be well understood by all. No medical examination was conducted since this was a case of molestation and attempted rape but not rape. The respondents also stated that the petitioner offered money to the victim. According to the respondents, the punishment so awarded to the petitioner is, therefore, just and legal for the offence that the petitioner committed.

8. Heard both the sides and examined the documents.

9. We find that the provisions of Rules 22 and 34 of the Army Rules were complied with in toto and there is no infirmity in the trial. The pre-trial documents were sent to the GOC, 11 Corps, and he directed that the petitioner be tried by SCM and, therefore, there is no violation of Section 120 of the Army Act. The SCM was conducted in accordance with law. The petitioner pleaded not guilty and thereafter the court examined six prosecution witnesses and four defence witnesses before arriving at the

finding of guilty. We find no infirmity in the entire proceedings of the SCM.

10. During trial, P.W. 1 testified as follows :

“ I No 14802723L Lnk/Dvr (MT) Bipin Kumr Singh, am posted to 5011 ASC Bn (MT) since Aug 95. At about 1000 hrs on 24 Mar 97, I came to play Holi in ‘A’ Coy Ground. After playing collective... I went back to my qtr at about 1315 hrs. I alongwith my wife and sister Miss Banita Kumari had some eatable. Thereafter, my wife some rice to my sister to clean and cook them subsequently. After these instructions to my sister, we played holi with ... in the qtrs and then went to play holi in the rear Qtrs of the Dhankrik Block. After 20 min or so we came back to our qtr. I ... and call for sister. There was no response from inside, however her chappals were out side the door. I went inside the house but my sister was not here and the rice she was cleaning sere spread on the ground. I asked my neighbourers where about of my sister including Mrs Bishambhar Dayal but non gave any clue. I asked my wife to search for my sister and I picked my cycle to search for my sister when I went in the rear of Sep Manpal’s qtr, I heard something and some body was knocking the door from in side. I cried back in front of an Unoccupied qtr from where the sound was coming. I tried to open the door but it was bolted from side. However, I kicked the door hard and opened. I saw, my sister, Miss Banita Kumari was standing in corner with her Salwar down and shirt torned and crying. Sep/Dvr (MT) Bishambhar Dayal was closing zip of his trousers. Seeing

me, he said “ BK Sir, sorry” my handicapped sister caught me and cried bitterly by. I too could not control myself and started crying. In the mean time Mrs Bishambhar Dayal and one of his relation serving in 91 Sub Area took him away in order to hide him inside his Qtr. My wife helped my sister in putting on her cloth and took her to our Qtr. I then went to Bishambhar Dayal’s Qtr knocked the door but no body opened it. Then, I ... and.. opened the door. I found all family members of Sep/MT Bishambhar Dayal including their relative were hiding inside the kitchen. I caught Bishambhar Dayal and dragged him outside the Qtr. Then I requested LNK Deepak Kumar Shukla to help me in taking Bishambhar Dayal to Bn gate in order to hand him over to BHM. I the matter to SJCO A Coy and Bn Sub Maj. I further say that when I saw my sister inside she shown me a ten rupees note which was given to her by Sep/Dvr (MT) Bishambhar Dayal.”

This statement of the brother of the victim pretty much describes the entire incident and brings out that the petitioner did commit this offence.

11. P.W. 2 during the trial was the victim herself, who is deaf and dumb. The court observed that she is deaf and dumb and, therefore, her statement was recorded in the family quarter of the Unit. The relevant portion of her statement is extracted below :

“Miss Banita Kumar is a dumb and deaf. In order to indicate the incident on ground, the witness intends to take the court to.the site. At this stage the court is adjourned at the Court at 1400 hrs on

05 Sep 97 in order to reassemble at 1401 hrs on 05 Sep 97 at the site (Dankirk line) of the incident.

The court reassemble at 1410 hrs on 05 Sep 07 at the Dankrik Lines family quarters of 5011 ASC n (MT) where the witness and the accused stayed in neighbour hood of each other.

Observation of the Court. The witness indicated by her finger and nodding her head, the qtr in which she stayed along with her sister-in-law and brother and the unoccupied qtr where she was taken by the accused. She indicated by finger in actions where she was sitting and picking the rice inside her qtr at about 1400 hrs on 24 Mar 97. On asking a question she indicated Sep/MT Bishambhar Dayal came to her qtr, caught hold her by the wrist and took her to the unoccupied room. By action with hand and head, she indicated that Sep/MT Bishambhar Dayal bolted the door from inside. She shown a ten rupees note and indicated by actions of her hand that Sep/MT Bishambhar Dayal forced the Note in her hand. By actions of her hands, she indicated that Sep/MT Bishambhar Dayal pressed her breast with both the hands. The witness indicated with her hands and teeth that Sep/MT Bishambhar Dayal bitten her on both the cheeks. She indicated place with her fingers and hands where Sep Bishambhar Dayal pushed her on the ground, opened her salwar and removed her underwear. She indicated with her finger that Sep/MT Bishambhar Dayal tried to touch lower part.

Then she indicated that she cried and in the mean time her brother came by forced open. the door. Then she indicated by catching her brother that she caught him and cried.”

CROSS EXAMINED BY THE ACCUSED

When the accused asked the witness by catching this own wrist as to who carried her to the then unoccupied room, the witness indicated by catching her own wrist and touching the accused that you caught my wrist and took me to the qtr. ”

Here the victim herself has described in detail as to how did the petitioner attempted to outrage her modesty in which he caught hold of her in an unoccupied room and bolted the door from inside. This act of the petitioner clearly indicates his intention. He also offered a Rs. 10/- note to the girl and pressed her breast with both his hands. He also bit her on her both cheeks and opened her *Salwar* and removed her underwear. It must have been traumatic for the victim to describe this incident in such detail, yet, it must be stated, she was brave enough to do so and to bring out the ill-intention of the petitioner.

12. The petitioner too made a statement during the trial as also during Summary of Evidence. During the trial, he stated that he applied colour to the victim and that he treats her as his sister. In the Summary of Evidence, however, he stated that the girl had thrown colour on him and entered an unoccupied room and he followed her. He goes on to state that “*when I applied colours on her face, breast and backside of her body inside the*

unoccupied quarter, she started crying. At that moment her brother Bipin Kumar Singh entered the room.” By his own admission he applied colour on the breast of the girl. It is inconceivable that the person who considers a girl to be his sister would apply colour on her breast and, therefore, we are inclined to believe that the statement given by the petitioner that he treats the girl as his sister is false and there is credibility in the statement given by the victim that he did try to outrage her modesty. The petitioner also admitted that he had consumed rum.

13. Two defence witnesses testified that they saw the girl applying colour to the petitioner and thereafter the petitioner followed her to the unoccupied room. D.W. 3 L/Nk Dvr (MT) Manpal stated that the petitioner was intoxicated. The narrative that comes out is that the girl victim applied colour on the petitioner and she ran into a room, which was unoccupied. The petitioner followed her and bolted the door of that room from inside, applied colour on her face, breast, back side and opened her *Salwar* and underwear, and also offered her money. At this stage the brother of the victim girl forcibly entered the room, rescued the girl and caught hold of the petitioner. The charge of using criminal force against the victim girl has thus been proved beyond reasonable doubt. It is a heinous crime, particularly to a deaf and dumb, who is sister of his colleague and more particularly so when the petitioner's wife was present close by. The petitioner's wife also said that the petitioner had gone mad.

14. Finding no merit in this petition we are of the opinion that the petitioner deserves no mercy for this despicable act. Accordingly, this Transferred Application is dismissed. No order as to costs.

(Lt. Gen. A.M. Verma)
Member (A)

(Justice Abdul Mateen)
Member (J)

PG.