

FORM NO. 4

(SEE RULE 11 (1))

IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORDER SHEET

APPLICATION No. T.A. No. 75/2011

W.P.(S) No. 3188/2009

APPLICANT (S)

Sunil Kispotta

RESPONDENT (S)

Union of India & Others

Legal Practitioner for Applicant (s)

Legal practitioner for Respondents

Mr. AniruddhaDatta

Mr. Anup Kumar Biswas

<u>ORDERS OF THE TRIBUNAL</u>	
	<p><u>Order Serial Number:</u> Dated :26.09.2016</p>
	<p>1. Present : Mr. AniruddhaDatta, Id. Counsel for the applicant and Mr. Anup Kumar Biswas, Id. Counsel for the respondents assisted by MajNarender Singh, OIC, Legal Cell.</p> <p>2. Being aggrieved with the impugned order of dismissal from service along with punishment to undergo RI for five years (after commutation) the applicant had preferred a writ petition bearing No. WP(S) No. 3188/2009 in the High Court of Jharkhand at Ranchi. After the constitution of Armed Forces Tribunal the said petition has been transferred to the Regional Bench, AFT, Kolkata and had been renumbered as TA 75/2011. Since the applicant has not engaged any counsel in attending the Tribunal by an order dated 15.07.2015 ShriAniruddhaDatta was appointed as Amicus curiae /defence counsel in the present case.</p> <p>3. We have heard ShriAniruddhaDatta, learned counsel for the petitioner/appellant and Sri Anup Kr. Biswas, learned counsel for the respondent Nos. 1 to 8 assisted by</p>

MajNarender Singh, OIC, Legal Cell of the Army and perused the records including the records of General Court Martial (in short GCM).

4. The brief facts which borne out from the pleadings, materials on record and from the arguments advanced are that the applicant Sunil Kispotta is a Sepoi of Indian Army and was assigned duties of STD/PCO Booth of OEM d. accommodation in Khojatoli. At about 11.30 hours when it was raining very heavily and no one was in PCO Booth, it is alleged that master Pawan Kumar Pandey, son of L/Hav K.M. Pandey, aged about 11 and half years (according to petitioner age is 7/9 years), has gone to buy some cigarettes from some local vendor. It is alleged that when Master Pawan Kumar Pandey (supra) reached there the applicant Sep. Sunil Kispotta closed the windows and door of the STD/PCO Booth and attempted to sodomise the child. It appears that the applicant entered into the corner ingress with the master Pawan Kumar Pandey who later on at about 12.00 hours rushed to his home in a state of shock. The mother of the victim Smt. Kamala Devi has noticed that his son was tensed and shocked and found that his under wear was blood stain with spots of semen. The victim Pawan Kr. Pandey is partially a deaf and dumb and was studying in Class-I being mentally retarded by birth. The victim narrated the incident to his mother in signs and found that he was sodomised by the applicant. The mother washed the under wear and lateron reported the matter to the father L/Hav. K.M. Pandey, who thereafter ascertained the same by going to the location i.e. STD Booth and found Sep. Sunil Kistoppa and enquired the act but the applicant denied the incident. Thereafter, he left the Booth. It is alleged that lateron the applicant Sunil Kistoppa admitted the guilt and informed the same over telephone to the father of the victim and tendered apology. The father of the victim, thereafter, informed the said incident to Sub MajLaldharKujur at about 22 hours. The said incident was reported to the Adjutant by Hav. Anil Kumar Dubey at 10.30 hours on 4.7.2007 who informed the incident to the Commanding Officer at 13.30 hours and on enquiry by CO the applicant accepted the crime but blamed the child for initiating the act.

5. On 4th July, 2007 the wife of CO along with one officer's wife went to meet the child and the lady doctor inspected the

child and suspected some bruises in the anal region of the child. The child was then sent to Military Hospital at Namkun, Ranchi for primary investigation at 1930 hours on the same day, i.e. 4.7.2007 where the DMO inspected the child and advised for lodging FIR as it was a Medico Legal case.

6. In consequence thereof, on 4.7.2007 an FIR was lodged with Namkun PS at 10.30 p.m. The child was sent for detailed examination by police at Saar Hospital, Ranchi where x-ray and necessary tests were conducted by a team of doctor. On 5.7.2007 Sep Sunil Kispotta was handed over to police station Namkun for further investigation. While the investigation was going on vide case No. 121 of 2007 under section 377 of the Indian Penal Code, the Military authority decided to try the case by Court Martial. In consequence thereof, the accused was taken back by the Army authority in view of the permission granted by the Magistrate vide order no. 127 of 2007 dated 25.7.2007. Thus, a General Court Martial (in short GCM) was held after receiving back the applicant to be tried by GCM in pursuance to order passed by the Magistrate under section 125 of the Army Act read with Rule 5 of the Criminal Court and Court Martial Adjustment of Jurisdiction Rule 1978. The applicant was tried by GCM on a charge under section 69 of Army Act instead of section 377 of the Indian Penal Code vide charge sheet dated 12th October, 2007 and on 08.08.2007 a summary of evidence was recorded by the competent authority. In pursuance to order passed by the competent Military authority GCM was ordered on 28.01.2008 (Annexure R-25 of Counter affidavit).

7. The GCM was assembled on 12.02.2008 and prosecution produced 14 witnesses, viz., PW1 HavKanhiya Mani Pandey, (father of victim), PW 2 HavSambhu Kumar Chowdhury, PW 3 Smt. Kamala Devi, (mother of victim), PW 4 Sep Arun Kumar Dubey, PW 5 Hav Anil Kumar Gupta, PW 6 NK Vimal Kumar Singh, PW 7 CaptSangeetaDhaya, PW 8 Master PawanPandey (victim boy), PW 9 Dr. BihariPrasa, PW 10 Vinod Kumar M.O., PW 11 Dr. R.K. Singh, PW 12 Sub MajLaldharKujur, PW 13 Sub Inspector J.K. Yadav and PW14 CaptRajendra. On behalf of the respondents two witnesses were produced, viz., DW1 HavDigambar Singh and DW2 Sub Tappo.

8. While advancing arguments on behalf of the applicant,

the learned counsel for the applicant ShriAniruddhaDatta has raised three fold arguments, viz. (1) the victim being a deaf and dumb person, no statement could have been recorded by the GCM without the assistance of an expert ; (2) no forensic report was obtained with regard to staining of under wear by blood and semen and the under wear was washed out by mother deliberately ; and (3) it is further submitted that there is no even a whisper of evidence which may link up the applicant/accused with the victim and that too committed the offence on the aforesaid day and time.

9. While coming to the first limb of argument counsel for the applicant submits that since no expert was present to assist the GCM during the course of trial, the statement of the victim cannot be relied upon. Coming to this argument it may be relevant to take into account that the victim, who is a minor, was by birth partially deaf and dumb. His mother was providing all necessary assistance to discharge his routine works. He was a student of Class-I and going to school with the help of mother. It was the mother who used to take care of the victim. Accordingly, it may be inferred that the mother was well aware with the signs used by the victim in daily life. Mother being serving the victim round the clock with regard to all walk of life, it may be inferred that the mother was well aware with the signs used by the victim.

10. While considering this aspect of the matter, the recordings of findings by GCM are as under :

“The court believes in the testimony of HavildarKanhaiya Muni Pandey (PW-1), Smt KAMLA Devi (PW-3), Captain SangeetaDahiya (PW-7), PWs-13 and 14, who have brought out how Master Pawan Kumar Pandey (PW-8) had indicated to them by signs the entire act of carnal intercourse being committed with him by the accused. The Court also believes in the testimony of PW-8 himself who though could not stand the test of cross-examination, but clearly identified the accused in the Court and indicated to the Court by signs how the accused had closed the door and windows of the STD/PCO booth and committed the act of carnal intercourse with him. The said signs were clearly discernible by the Court. The Court takes cognizance of the change in the demeanour of PW-8 when he broke down during the course of the proceedings on his inability to express himself and on seeing the defence smirk. The Court believes in the testimony of PW-1 who stated that the accused

had called him up on the day of the incident and admitted his mistake and asked for forgiveness, which negates the claim of the accused that he had called up PW-1 only to enquire why he (PW-1) was looking for him, when both of them had already met each other earlier in the evening on the day of the incident. The Court also believes PWs 12 and 14 in the presence of whom the accused had admitted his mistake to a large extent. The accused had stated that he had sent PW-8 to buy cigarette for him and on his return, the accused sat near PW-8 who started fondling with the penis of the accused, When PW-8 did not stop even after the effort of the accused, the latter could not resist, masterbated and ejaculated on the underwear of PW-8. PW-14 has stated that the accused had made the said statement at the Summary of Evidence voluntarily and after being cautioned in terms of Army Rule 23(3), whereas PW-12 and DW-2 have brought out that PW-1 threatened to assault and physically assaulted the accused in their presence to make him admit his mistake, respectively. However, there is no evidence on record to show what action the said responsible appointments or the accused took or to which superior officers the said matter of assault was reported prior to the trial. The Court believes that the said version of PW-12 and DW-2 only reflects their vindictive attitude. Moreover, during the course of the proceedings, the accused completely denied having made any such statement and has even claimed that he was not acquainted with PW-8. The Court believes the said assertion of the accused as baseless and merely an attempt to save himself.

The Court believes in the testimony of expert witnesses Doctor Vijay Bihari Prasad (PW-9), Doctor Vinod Kumar (PW-10) and Doctor R.K. Singh (PW-11), who have stated that the injuries of PW-8 have been brought about by the penetration of something greater than the diameter of the anal being inserted into it and that the said penetration may be caused by 'penis'. The Court also has no reason to believe that the injuries of PW-8 could, in any way, be self-inflicted."

11. The counsel for the respondents Shri Anup Kumar Biswas has rightly draws our attention to section 118 of the Evidence Act which will be read as under :

“118. Who may testify. – All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation, - A lunatic is not incompetent to testify,

unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”

12. A plain reading of section 118 of the Evidence Act shows that mother was competent to justify and assist unless the Court found that she was short of understanding the questions put to her. Keeping in mind the fact that from birth, the mother, being the sole person, helping the victim by understanding the signs used by the victim to carry out the routine works of life, it may be easily inferred that the mother was understanding the signs used by the victim in daily life. Apart from above, the GCM itself made the observations that the signs used by the victim while making the statement during the proceeding was so simple that the GCM itself was able to understand what the victim intended to say. Counsel for the applicant invited our attention to two judgments in the case of **Venkattan v. Emperor, 1912 MWN 100** where, according to the applicant's counsel, it is held that the deaf and dumb person, unable by writing or signs to communicate their answer and to understand questions put to them are not competent witnesses though the case law has not been produced by the learned counsel for the applicant. According to the above case, the deaf and dumb person was unable to sign to communicate the experience he or she suffered during the course of commission of crime and also the questions put to him. But in the present case the victim was partially deaf and dumb and not completely. That apart, the victim understood the questions put to him and the mother was very well understood the signs used by the victim being nursing him from birth.

13. The other case relied on by the applicant's counsel is reported in 2006 CrLJ 3008, 3012-13 in the case of **Darshan Singh v. State of Rajasthan** . The case of Darshan Singh seems to be not applicable to the present case. In that case the victim seems to be fully deaf and dumb and not partially, as in the present case, and a statement was recorded with the aid of father. It appears that no material was placed similar to present one where the mother was taking care of the child from the birth and the victim was only partially deaf and dumb.

14. Accordingly, the argument advanced by the learned counsel for the applicant that being deaf and dumb the

statement of victim could not be trusted, lacks merit. The second limb of his argument is that no forensic opinion was obtained with regard to stain of blood and semen. While considering this aspect of the matter, the statement of the doctor PW 9 is relevant for convenience, the relevant portion is reproduced below :

“The Court believes in the testimony of expert witnesses Doctor Vijay Bihari Prasad (PW-9), Doctor Vinod Kumar (PW-10) and Doctor R K Singh (PW-11), who have stated that the injuries of PW-8 have been brought about by the penetration of something greater than the diameter of the anal canal being inserted into it and that the said penetration may be caused by ‘penis’. The Court also has no reason to believe that the injuries of PW-8 could, in any way, be self-inflicted.”

15. It is not disputed by both sides that according to the opinion of the doctor there was tear in the anal portion and keeping in view the factual position given hereinabove that the matter was referred for medical report and the FIR was lodged in the PS , the statement given by the mother seems to be quite natural that when the victim reached to the house at about 12 O’clock keeping in view his pity condition, the mother when found stain of blood and semen, washed the under wear. It may be noticed that in our society a house wife, who is not well versed with the law, will do the same thing which the victim’s mother has done in the present case. Of course, after getting the first hand information of the entire facts though the mother reported the matter to her husband, who is also an army person, and later on the further proceeding took place in the manner herein above, in such a situation the absence of forensic report with regard to stain on the under wear was seems to be not vital and the medical opinion recorded was that the victim’s anal portion was teared and it cannot be by other means except the circumstances on account of anal intercourse by the applicant. The evidence brought on record seems to be quite natural keeping the facts and circumstances of the case and cannot be disputed.

16. Coming to other limb of argument of the applicant’s counsel that there is no link with the evidence given by the prosecution and the applicant which are seems to be unfounded in the present case. The sequence of events (supra) at the face of records shows a natural happening whereby a

deaf and dumb child sodomized and rushed to house to narrate the incident to his mother. It may be noted that in case it would have been a consented incident as appears from the defence set up half heartedly action at some stage, there would have been no occasion for the victim who is partially deaf and dumb and who rushed to house in a bad shape whereby a blood stain shows that the victim suffered with such traumatized treatment for the first time in his life resulting into commission of such dastardly crime by army personnel and that too in a PCO Booth which, the applicant was managing. The material on records shows that at the time of incident there was no one except the accused/applicant and the victim. In such a situation there was no reason to disbelieve the contention of the victim, the statement of the mother, although not an eye witness, seems to be strong evidence which corroborates the contention of the victim coupled with the medical evidence and the allegation of the prosecution that the applicant has committed the offence in question feeling that being partially deaf and dumb person may not report under shy the incident to any other person including the mother. We feel that it is the deafness and dumbness given courage to the victim to report the entire matter to his mother being not understanding the social fall out in case the things come out in public. This is unfortunate that a minor boy had been mal treated by the accused who was on duty and expected to serve the Country as a proud member of the Indian Army.

17. With regard to the contention of the applicant that the sole witness cannot be relied upon for the purpose of conviction and sentence, counsel for the respondents have cited certain case laws which requires to be considered. In the case of **BadanMahato @ BudhanMahato v. The State of West Bengal and Kamal Chandra Dey&Ors. V. The State of West Bengal** reported in [2010(2) CLJ (Cal) 610 held in a case under section 376 of the IPC that the sole statement of the victim is enough to convict in the crime of rape. In that case when the victim was returning from the house of neighbor she was taken up by the accused persons to jute field where the accused persons committed rape one by one against her will.

18. In another case reported in (2004) 13 SCC 308 in the

case of **State of M.P. v. Dharkole alias Govind Singh and others** the Hon'ble Supreme Court held that even the names of some witnesses are not mentioned in the FIR does not affect the merit of the case. It is further held that in case ocular evidence is independent trustworthy it cannot be discarded merely because it is at variance with the medical opinion. The concept of probability cannot be expressed with mathematical precision, subjective element and it rests on common sense, more so, when the witnesses examined by the prosecution withstood the cross-examination and pointed to the guilt of the accused. In the present case the statement of the victim PW 8 as well as the mother's statement withstood incisive cross-examination and pointed to the applicant as the person who committed the crime.

19. In the case reported in (2004) 13 SCC 257 in the case of **Anil Kumar vs. State of U.P.** the Hon'ble Supreme Court held that where the allegation is based on lady the minor variance in her or his statement should not be given primacy and in case oral evidence is credible and cogent then even the minor variance with medical evidence shall be inconsequential.

20. In the present case the mother of the victim seems to act natural while washing the under wear of his son. Every Indian mother will do so in such a situation. She may be house wife or literally trained but do not know or understand the law but naturally does the same thing which has been done by victim's mother. That apart, the medical evidence reveals that the victim was suffering injury in the anal portion and it appears that the prosecution has taken prompt action against the accused/applicant in accordance with law and lodged FIR and obtained medical opinion.

21. In the case reported in (2004) 13 SCC 150 between **PramodMandal vs. State of Bihar** the Supreme Court reiterated the aforesaid principle of law with regard to appreciation of evidence which seems to squarely cover the present controversy. In PramodMandal's case (supra) the Hon'ble Supreme Court further held that in the absence of any motive for false implication, and if the offence is supported by trustworthy evidence, then the prosecution case may not be thrown out. Their Lordships further held that such matter including the matter with regard to Test Identification

Parade should be left to the Courts of facts to decide as to whether evidence requires sustained the conviction or not keeping the facts and circumstances of the case.

22. In the case reported in (2013) 12 SCC 399 (**Yogendra v. State of Rajasthan**) Their Lordships of the Hon'ble Supreme Court held that effort should be made to separate falsehood from truth or separation of grain of chaff. In case separation is not possible only then evidence will be discarded. In the present case, statement of the victim supported by mother's statement combinely established the guilt of the accused beyond reasonable doubt.

23. The Hon'ble Supreme Court further held that the Court has to examine whether the evidence led as a whole have a ring of truth and the case should be considered in the light of entire circumstances ignoring minor discrepancies which do not affect the core of prosecution version [vide (2013) 14 SCC 434, **Rohtash Kumar v. State of Haryana.**]

24. In the present case, the washing of under wear by the mother was a natural event and even in the absence of any forensic report with regard to the stain in the under wear, conviction of the appellant/applicant by the Court Martial proceedings seems to well founded.

25. As held by the Hon'ble Supreme Court, the minor discrepancies cannot take away the sub-stratum of testimony. More so, the presence of witnesses are not doubtful [vide (2014) 12 SCC 457, **PutchalapalliNaresh Reddy v. State of A.P.**]

26. In another case reported in (2012) 10 SCC 256 in the case of **Dahari and others vs. State of Uttar Pradesh** Their Lordship of the Hon'ble Supreme Court held that even the statement of closely related witness has a ring of truth to it, is cogent, credible and trustworthy, it should be relied upon. There is no reason to discard the testimonies of relatives of the deceased which are otherwise reliable. In the present case, the mother's statement established the offence committed by the applicant dealing with the immediate situation after the incident which seems to be quite natural and shows that partially deaf and dumb minor boy was sodomized.

27. In another case reported in 2012(10) SCC 333 (**Kuriya**

vs. State of Rajasthan) Their Lordships of the Hon'ble Supreme Court reiterated that there is no legal impediment to convict the accused on the sole testimony of the eye witness. The Court can and may act on a testimony of a single eye witness provided he is wholly reliable and based conviction thereon. In the present case, the statement of partially deaf and dumb recorded with the aid of mother, who was taking care since birth, supported by mother's own statement seems to be reliable and worthy as well as quite natural. Hence, the applicant has rightly been convicted by the Court Martial.

28. It may be noted that criminal trial and the disciplinary inquiry under Court Martial proceedings deal with different nature of subjects. In criminal trial guilt should be proved beyond reasonable doubt whereas in service matter probability of commission of misconduct should be looked into. In criminal trial ocular testimony supported by medical opinion has got primacy over other evidence and in case the statement with regard to commission of offence is proved and established by ocular testimony supported by medical evidence with due compliance of principles of natural justice, then other minor discrepancies in the procedure shall not affect to convict and punish the accused.

29. Keeping the fact that at the time of incident or commission of crime there was heavy rain and in the Booth except the applicant and the victim no one was present. It is out of question to expect that the crime shall be further supplemented by some other independent evidence. There is neither any plausible reason nor any motive to throw out the statement of victim which is supported by the statement of mother (supra). The statement of mother, though she was not an eye witness, establishes beyond doubt the conditions which had happened after such crime. In our view, we feel that the prosecution has succeeded to establish the commission of offence by cogent or trustworthy evidence. The prosecution has established the guilt of the accused beyond reasonable doubt by statements led before the GCM apart from making the statements before the Tribunal supplemented by mother's statement to the agony.

30. In view of above, we find that there is no other ground advanced by the applicant and we find that the TA lacks

merit and the same be rejected. The applicant shall serve the sentence, if not already served. The relevant case records be returned to the respondents by the Registry. Amicus Curiae, Sri AniruddhaDattabe paid fees and expenses in accordance to rules by the Registry within two months. We appreciate the assistance provided by Sri AniruddhaDatta.

31. Accordingly, TA stands dismissed.

32. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be handed over to the parties after observance of usual formalities.

(Lt Gen GautamMoorthy)
Member(Administrative)

(Justice Devi Prasad Singh)
Member (Judicial)

SS.