

A F R

(SEE RULE 102(1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH

O. A. NO.45/2013

THIS 13TH DAY OF JULY, 2015

CORAM

HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER
(JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER
(ADMINISTRATIVE)

APPLICANT(S)

Rfn Surinder Kumar, No.9113222W son of Shri Mohan Lal, aged about 26 years attached with Charli Company, 11th Battalion Jammu & Kashmir, Light Infantry (11 JAKLI), C/O 99 APO Fort William, Kolkata -700 021, permanently residing at Bharda Kalan, Teh. & P. O. Akhnoor, District Jammu, Pin – 181 201.

-versus-

RESPONDENT(S)

1. The Union of India, Service through the Secretary, Ministry of Defence, Government of India, South Block, New Delhi, Pin -110 011.
2. The Chief of Army Staff (COAS), Integrated HQ of Ministry of Defence (Army), South Block, Government of India, New Delhi, Pin 110.011.
3. General Officer Commanding-in-Chief, Eastern Command, Fort William, Kolkata - 700 021.

4. Commanding Officer, Jammu & Kashmir, Light Infantry (11 JAKLI), C/O 99 APO Fort William, Kolkata -700 021.

5. General Officer Commanding, HQ Bengal Area, Kolkata -700 020.

For the petitioner(s) : Miss Manika Roy, Advocate

For the respondent(s) : Mr. Anup Kumar Biswas, Advocate

ORDER

PER HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

1. Application under Section 14 read with 15 of the Armed Forces Tribunal Act, 2007 (in short 'Act') has been preferred by the applicant being aggrieved with the order dated 13.05.2013 passed in pursuance of Summary Court Martial (SCM) and action taken thereon dismissing the applicant from service and awarding punishment of one year RI. Prayer has been made for setting aside the orders and action taken with re-instatement in service. Allegation relates to the alleged molestation of a lady during course of journey in a train which emphatically has been denied factually as well as on account of procedural irregularities.

2. Since ages it is a matter of discussion how to empower the women. In the absence of empowerment or on account of gender discrimination a country which has been principally preaching that wherever ladies are respected the God assures His grace. However, in

the absence of peaceful atmosphere affirmative action, right to freedom, right to speech and movement and proper security to be placed on women may not come true.

3. It shall be appropriate to recollect a couplet of **Rabindra Nath Tagore** –

“Why should you not let woman empowered be
 With right to conquer her own destiny,
 O Lord ?
 Why must I sit and watch beside the road
 With lowered head, in tired patient wait
 For the day ordained by fate
 To grant my hopes ? Why should I gaze in space
 Why should I not by my own powers trace
 Fulfilment’s path ?

The alleged molestation of a girl in a train that too by an Armed Force personnel seems to be shame for a country where it has been in front line, canvassing for morality in life. However, when a matter comes before a Court or Tribunal through the process of judicial review, decision is taken in accordance with law of land even if the Judge or Presiding Officer of the Court or Tribunal are personally not in agreement with the final outcome which has sanction of law. Judges of High Court even while occupying the office in a Tribunal or any other public assignment supposed to carry on the oath of their office to discharge their obligation without fear or favour, malice and ill will. Other persons who sworn oath in their respective job are also supposed to follow their own standard while serving the nation in accordance with law but dispensation of justice required highest standard and probity with impeccable character.

4. Allegation against the applicant is based on a charge-sheet dated 07.04.2013 issued under Section 69 of the Army Act whereby the applicant had alleged to outrage the modesty of a lady making out an offence under Section 354 of I.P.C. in the intervening night of 27.01.2013 and 28.01.2013 while traveling in a train from New Jalpaiguri to Sealdah (Train No.12344 – Darjeeling Mail).

5. It has been alleged that during the night in train one Ms/Mrs Mridul Gupta was sleeping over the lower berth and the applicant slid his hand between two legs intending to outrage her modesty. Later on it has been alleged that when the applicant brought his face towards the sleeping girl (may be with intention to kiss) she got up and raised a hue and cry. General Officer Commanding, HQ Bengal Area on 30.004.2013 took a decision and ordered that the applicant be tried through SCM. After due trial SCM arrived at a conclusion vide its decision dated 13.05.2013 that the applicant has committed an offence and tried to outrage the modesty of Miss Mridul Gupta and hence he is sentenced with R.I. for one year with dismissal from service. According to the respondents, the sentence was reviewed by the reviewing authority on 13.05.2013. After filing of the application before the Tribunal the applicant has been enlarged on bail vide order dated 13.06.2013 in pursuance of power conferred under Section 15(3) of the Act. It has been argued by Miss Manika Roy, Id. counsel for the applicant that the applicant was not given any opportunity as required under Sec. 130 of the Army Act, 1950 (in short 'Army Act'). According to her, there was no proper arrangement for the accused in

pursuance of Army Rule 111. While assailing the impugned order, ld. counsel for the applicant further submitted that no Court of Inquiry (COI) was held which was mandatory keeping with the factual matrix of record. It has also been submitted that SCM lacks jurisdiction to try the civil offence since the alleged incident happened outside the military area. She further submits that the prosecutrix/complainant did not file any complaint required under Sec.154 of the Cr. P. C. merely under the garb of expression that she has full faith in the Army system. Army proceeded first only because Miss Mridul Gupta is the daughter of a Brigadier (M M Gupta). It is submitted that the entire evidence is circumstantial evidence and there must be a chain of incriminating pieces of evidence which is lacking. There was no eye witness on record, no reasonable opportunity was given to the applicant to defend his case and the evidences led by the prosecutrix is untrustworthy. Statutory requirement of Sec.125 as well as Sec.20 of the Army Act has not been followed. Vital witnesses were not called and the offence in question is not covered under any specific Section of the Army Act. Hence, trial by SCM under Sec.126 of the Army Act read with Sec.477 of Cr. P. C. is not proper. Case should have been referred to Civil Court and in absence of FIR, complaint should have been instituted under Sec.190 read with Sec.200 of Cr. P. C. or investigations should have been done under Sec.155 of Cr. P.C. The applicant could not raise objection with regard to jurisdiction of the place of trial permissible under Rule 53 of Army Rules, 1954 and no charges were framed against the applicant in pursuance of Rule 49 of

the Army Rules. No information was communicated by the respondents to make aware the applicant since no charge was framed. No such explanation has been obtained from the Army authority and the trial by SCM vitiates.

6. It has been further submitted by the applicant's counsel that Commanding Officer of the Unit did not follow Rule 22(1) of the Army Rule, 1954 and no opportunity was given to the applicant to lead defence witness and neither any prosecution witness was produced. Being the daughter of high-ranking Brigadier procedure prescribed by law has not been followed. Against the applicant's wishes person was appointed as the friend of the accused who has not discharged his obligation as required under the law. No request was made by the applicant for appointment of a friend of the accused. It is also submitted that procedure provided under Rules 133 to 141 of Army Rules read with Sec.162 of the Army Act has not been followed. Comments of the Review Officer is not available in the records. It is alleged that since the comments of the Review Officer is not available on record, the Receiving Officer cannot act mechanically relying upon the SCM report without recording his own reasoned independent finding/observation. It is also submitted that no hearing was given to the applicant before conviction as required under Rule 64 of the Army Rules, 1954 and he has been convicted on the solitary statement of the prosecutrix. Decision of the SCM is perverse and not sustainable in law.

7. On the other hand, Mr. Anup Kumar Biswas, Id. counsel for the respondents assisted by OIC, Legal Cell vehemently argued and rebutted the argument advanced by the Id. counsel for the applicant. It has been submitted that the applicant has not denied his presence at the scene of occurrence and as such sentence has been awarded by the SCM after following due procedure prescribed by law. Steps taken by the respondents after due trial with harsh punishment is not only justified but complete need of the time. It has also been submitted that the applicant has not exhausted his statutory remedy under Sec.164(2) of the Army Act by filing a statutory complaint, hence barred by Sec.21 of the Act. It is further submitted that sentence by SCM was reviewed and the offence under Sec.354 of I.P.C. is a cognizable offence, hence even if the complainant has not submitted any complaint in writing, the Army was right in taking a decision to proceed with SCM. It is also submitted that Parliament to meet out the requirement had amended the I.P.C. and added Sec. 354A, 354B, 354C and 354D by providing severe punishment up to three years with fine and on recurrence it may be extended to five years with fine.

8. It is further submitted by the respondents' counsel that SCM is one man body composed of Commanding Officer and other Officers as attendees, hence Sec.130 of the Army Act is not applicable. It is submitted that the applicant himself nominated Major Sham Singh Lalotra to be his friend of accused and was provided all facilities and benefits required under Rule 112 and 114 of the Army Rules. SCM was convened in pursuance of recommendation of the GOC Bengal

Area dated 14.03.2013. Four witnesses were examined and the prosecutrix, Miss Mridul Gupta appeared as witness. The applicant was provided opportunity to cross-examine the witnesses and was cautioned in terms of requirement of Army Rule 23(3). It is also submitted that the applicant was given full benefit provided under Rule 112, 114, 33 and 34 of the Army Rules and when the outcome of SCM was informed to the applicant by the Army and its assembly vide order dated 04.05.2013, he raised no objection. It has been stated that the Company Commander of the accused took first hand information of the incident from Miss Mridul Gupta and other passengers and the GRPF. SCM was conducted in accordance with the procedure laid down for civil offence under Sec. 69 of the Army Act. SCM has full jurisdiction to try the offence (Sec.69 of the Army Act) under the provisions contained in Sub-section (2) of Section 120 of the Army Act. It is also submitted that shelter of natural justice provided to the civilian cannot be equated with the members of the Armed Forces. Constitution in Article 33 itself distinguished the Army as a separate class.

9. Ld. counsel for the applicant had relied upon the cases reported in **AIR 1982 Delhi 191- R. S. Bhagat v. Union of India; AIR 1987 SC 2386 – Ranjit Thakur v. Union of India; (1982) 3 SCC 140 –Lt Col Prithi Pal Singh Bedi v. Union of India; AIR 1978 SC 597 – Maneka Gandhi v. Union of India; 3 (2003) 1 SLJ 151 (Del) (DB)- Nirmal Lakra v. Union of India; (2009) 2 SCC 570 – Roop Singh Negi v. Punjab National Bank & Ors. ; (2207) 12 SCC 462 – Sheel**

Kr. Roy v. Secretary, Ministry of Defence & Ors; AIR 1972 SC 2548 (V 59 C 495)- Delhi Special Police Establishment, New Delhi v. Lt Col S. K. Loraiya; 1991 CRI. L. J. 2850 – Ranbir Singh v. General Court Martial and Another; (2012) 6 SCC 228 –General Officer Commanding, Rashtriya Rifles v. Central Bureau of Investigation and Another ; AIR 1961 SC 1762 – Major E.G. Barsay v. State of Bombay; (1991) 3 SCC 213 – Ex.Naik Sardar Singh v. Union of India & Ors.; (1991)3 SCC 319 – Nagaraj Shivarao Karjagi v. Syndicate Bank, Head Office, Manipal & Anr.; 1991 CRI L.J. 2857 Allahabad High Court –Leela Dhar & Ors. v. State of U P & Ors.; 1994 LAB I.C. 2365 Delhi High Court-Mahipal Singh v. Union of India & Ors.; WP(C) NO.1755/2013 & CM No.3355/2013 –Maj Saurabh Saharan v. Union of India & Ors.; AFT, Principal Bench (Full Bench), New Delhi O.A. NO.471 of 2010- Ex-Hav Parmeshwar Ram v. Union of India & Ors.; AFT, Kolkata Bench O.A. (Appeal) NO.02 of 2014- Lt Col Virender Singh v. Union of India.

We have considered the arguments advanced by the ld. counsel for the parties and perused the records.

10. During trial before SCM four witnesses were produced. Undoubtedly, so far as the eye witness is concerned, the prosecutrix, Miss Mridul Gupta appeared as the sole eye witness (PW-1). The applicant was permitted to cross-examine her but from the records it appears that he declined to cross-examine the witness namely, Miss Mridul Gupta, PW-1. She stated that the berth (No.58) of the applicant

was in the same coupe. He jumped from his berth and with a water bottle in hand found to be sitting on her berth next to her legs. She thought that he is an outsider and waiting for TTE and while she turned to the wall of the berth the applicant moved ahead and tried to pull the bed-sheet underneath her by sliding his head under the legs. She was scared. After a moment she found the applicant leaned to close to her face after putting a bottle of water on the table. Thereafter, he went back to his own berth. However, after some time when she was sleeping she felt the presence of the applicant and when opened her eyes she saw the applicant stretching his head out of his berth and looking towards her. Thereafter, she found his head very close to her face then she became panic and shouted with top of the voice and switched on the light. On shouting and seeking help of co-passengers she asked the applicant to get up his berth. When she switched on the light she came to know that the applicant is a soldier and made query about him. The applicant tried to intimidate the lady when she informed the applicant that her father is a Brigadier. The applicant begged and tendered apology in front of the co-passengers. Then she caught the collar of the applicant to stop him from flying away but the applicant pointed her body and tried to break through and run away from her grip. The applicant tried to get free from the grip of the prosecutrix and dragged to some distance and hit her arm and in consequence she lost the grip. However, co-passengers caught hold of the applicant and asked him about his Unit. On a request made by the applicant, the other co-passengers of the applicant's Unit/friend

reached in the Coach from whom the prosecutrix came to know the applicant's name and Unit and name of the Commander, description of which has been given in the statement recorded during the SCM. She got phone numbers of the Unit from the members of the Unit and at about 01.30 hrs., she rang up and explained the situation to Lt. Nitesh Chhibber and requested him to be present at the Sealdah Station in the morning. It is stated that huge crowd gathered outside the AC coach. When the RPF personnel came to enquire the incident she told that she has already communicated her grievance to the Army authority and requested them to take away Surinder Kumar at Kolkata. In the morning at 06.45 hrs she met Company Commander of Charlie Coy Maj Anubhav Singh and Lt. Nitesh Chhibber at Sealdah Station. By that time Surinder Kumar was already in their possession.

11. Lt. Nitesh Chhibber appeared as PW 2 and made statement that on receipt of telephone call from Miss Mridul Gupta I assured her that I and Maj Anubhav Singh would meet her in the morning at Sealdah Station and we reached there and took possession of Rfn Surinder Kumar from RPF personnel. It was Maj Anubhav Singh who reported the matter to the Commanding Officer on arrival of the Unit. PW 3 Rfn Balvender Singh was traveling in the same train but in different coach and arrived to the scene of occurrence after TTE came to him and made enquiry against the applicant who was caught hold by Miss Mridul Gupta and co-passengers. Maj Anubhav Singh appearing as PW 4 was at Sealdah Station and had made query to the applicant

with regard to the incident of molestation and briefed the same to the Commanding Officer.

12. Statement of accused was also recorded which seems to be duly signed by him. He denied the incident. He was also cautioned under Rule 23(3) of the Army Rules.

Statutory provisions/Jurisdiction of S.C.M. :

13. Section 69 of the Army Act defines civil offence which has been subjected to Section 70. It provides that a person guilty of civil offence in case charged under the Army Act shall be tried by Court Martial and be punished with imprisonment which may be extended to 7 years. For convenience, Sec. 69 of the Army Act is reproduced as under :-

“69. Civil offences.- Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say, -

- (a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and
- (b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.

14. Exception to Section 69 has been provided under Section 70 of the Army Act which refers to those offences which may not be tried by Court Martial. For convenience Sec. 70 of the Army Act is reproduced as under :-

“70. Civil offences not triable by court-martial.- A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences –

- (a) while on active service, or
- (b) at any place outside India, or
- (c) at a frontier post specified by the Central Government by notification in this behalf.

15. However, civil offence has been defined under Sub-section (ii) of Section 3 of the Army Act which is reproduced as under :-

“civil offence” means an offence which is triable by a criminal court.

16. All criminal cases under the Code of Criminal Procedure are triable by Criminal Courts having jurisdiction in pursuance of the power conferred by Chief Justice of the State and statutory provisions. It means with exception to Sec.70 criminal offence committed by the Army personnel may be tried by the Court-Martial. Summary Court Martial (SCM) may be held by Commanding Officer of any Corps in pursuance of power conferred by Sec.116 of the Army Act. For convenience, Sec.116 is reproduced as under :-

“116. Summary court-martial.- (1) A summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.

(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed.

Court-martial shall deem to be closed after conclusion of trial. Court-martial may be dissolved in pursuance by Sec.117 of the Army Act.

17. Power of SCM has been given under Section 120 of the Army Act which provides that subject to sub-section (2) SCM may try any offence under the Army Act and pass sentence which may be passed under the Army Act. For convenience, Sec.120 is reproduced as under :-

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

- (2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.
- (3) A summary court-martial may try any person subject of this Act and under the command of the officer holding the court, except an officer, junior commissioned officer of warrant officer.
- (4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).
- (5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months, if such officer is below that rank.

18. Section 125 of the Army Act empowers to exercise discretion by Commanding Officer of the Army whether the accused persons is to be tried by Criminal Court or by Court-martial having jurisdiction for offence under Sec. 125 o the Army Act which is reproduced as under :-

“125. Choice between criminal court and court-martial.-

When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

19. Power has been conferred on Criminal Courts under Section 126 of the Army Act to require delivery of offender., if it is of opinion that proceeding should be instituted before it with regard to alleged offence. For convenience, Sec.126 is reproduced as under :-

“126. Power of criminal court to require delivery of offender.- (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final.

20. Much emphasis has been given by the ld. counsel for the applicant to explanation the word ‘emergency’ used in Sec.20 that there has been no emergency to move too fast with the SCM. On perusal of note (b) of Sec.120 of the Army Act it shows that Commanding Officer is the best and sole judge and in case any action is found to be not justified it may be viewed as grave irregularity and the Commanding Officer may be held responsible but it will not affect the legality of the finding. In case the Commanding Officer proceeds

with the trial without considering whether an emergency exists or not, a trial shall be illegal, but it shall depend on each case. There may be cases where urgency may not be noted but impliedly gravity of offence makes out a case of urgent trial.

Conditions provided in notes under Section 120 does not seem to extend any help to the applicant. We are of the view that allegation of molestation of a girl in a train is a very serious offence and it requires immediate trial. Hence, the decision was rightly taken by the Commanding Officer to proceed with the case immediately after receipt of information. Of course, the trial should proceed in accordance with statutory mandate. There appears to be no room of doubt that discretion should be exercised judicially vide R. S. Bhagat (supra) and other alike cases.

21. In view of the above, discretion has been given to Commanding Officer to decide whether the case should be tried by SCM or may be remitted to Civil Court but primacy has been given to Civil Court to call for record and hand-over the offender in case it desires to do so. Section 133 provides that provisions contained in the Evidence Act shall be applicable to proceedings to Court-Martial and under Section 135 Presiding Officer has been given power to summon witnesses.

22. Under Section 130 of the Army Act all trials by General, District or Summary General Court Martial the accused shall be asked whether he objects of being tried by any Officer. Submission of Miss Manika Roy, ld. counsel for the applicant that provisions contained in Section 130 has not been followed, seems to be misconceived

argument because Sec. 130 relates to General, District and Summary General Court Martial and it does not include and deals with SCM.

23. Subject to the aforesaid provisions contained in the Army Act it appears to be not correct that the Commanding Officer lacks jurisdiction to preside and take decision for SCM. Provisions under Sec.70 of the Army Act empower to proceed with Court Martial proceeding which may be Summary or other in accordance with the statutory provisions. In case a person is guilty of civil offence then it shall be discretion of Commanding Officer to take a decision as to whether the accused be tried by Court Martial or by Civil Court. The discretion exercised by the competent authority under the Army Act for trial of an offence under the provisions contained therein (supra) may not be interfered with the process of judicial review that too at the fag end of trial and punishment awarded thereon. In case a person has any grievance he has right to raise objection at initial stage and in the event of failure, he may approach the competent Court or appropriate forum to press for transfer of case to Criminal Court but once trial is concluded and punishment awarded it shall not be open to the Armed Forces personnel to object the discretion exercised by the Court Martial.

Alternative remedy :

24. It has been vehemently agued by the ld. counsel for the respondents that the applicant has not exhausted his alternative remedy which is mandatory under Section 21 of the AFT Act, 2007.

For convenience, Sec. 21 of the AFT Act is reproduced as under :-

“21. Application not to be admitted unless other remedies exhausted.-

- (1) The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be, and respective rules and regulations made thereunder.
- (2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), and respective rules and regulations-
 - (a) If a final order has been made by the Central Government or other authority or offices or other person competent to pass such order under the said Acts, rules and regulations, rejecting any petition preferred or representation made by such person;
 - (b) Where no final order has been made by the Central Government or other authority or officer or other person competent to pass such order with regard to the petition preferred or representation made by such person, if a period of six months from the date on which such petition was preferred or representation was made has expired.

This clause specifies the condition for not admitting an application unless other available remedies are exhausted. It also specifies the remedies available and the time limit for preferring the petition or representation. (Notes on Clauses).

Provisions contained in the Act (supra) begins with the word ‘ordinarily’ means that in exceptional cases Tribunal may entertain an application even if alternative remedy has not been availed, for the ends of justice. But that may be done only in rare cases not in a routine manner.

25. In the present case the applicant was granted bail by this Tribunal. Petition has been admitted, thereafter affidavits have been exchanged and the application has been fixed for final hearing. In such a situation, referring the matter to avail alternative forum seems

to create too much hardship to the applicant and not justified. Accordingly, we reject the preliminary objection raised by the ld. counsel for the Union of India and decide the application on merit.

Charges and Procedure under S.C.M.:

26. Ld. counsel for the applicant has assailed that Section 130 has not been complied with and we have held (supra) that it does not relate to SCM but it has been confined to General, District or Summary General Court Martial. The charges are framed in pursuance of provisions contained in Section 3 of the Army Rules, 1954 (in short 'Rules'). Rule 111 relates to arraignment of the accused on the charges, Rule 112 empowers the accused to raise objection and under Rule 113 charges may be amended. For convenience, Rule 111, 112 & 113 are reproduced as under :-

“111. Arraignment of accused.- (1)After the court and interpreter (if any) are sworn or affirmed as above mentioned, the accused shall be arraigned on the charges against him.

(2)The charges on which the accused is arraigned shall be read and, if necessary, translated to him, and he shall be required to plead separately to each charge.

“112. Objection by accused to charge.- The accused when required to plead to any charge, may object of the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules.

“113. Amendment of charge.- (1)At any time during the trial if it appears to the court that there is any mistake in the name or description of the accused in the charge-sheet, it may amend the charge-sheet so as to correct that mistake.

(2)If on the trial of any charge it appears to the court at any time before it has begun to examine the witnesses, that in the interests of justice any addition to, omission from, or alteration in, the charge is required, it may amend such charge and may, after due notice to the accused, and with the sanction of the officer empowered to convene a district court-martial or on active service a summary general court-

martial for the trial of the accused if the amended charge requires such sanction, proceed with the trial on such amended charge.

Sub-rule (2) of Rule 111 provides that charges should be read over to the accused and if necessary translated to his own language with opportunity to raise objection.

27. Under Rule 134 all the prosecution witness shall be required to be called and the accused will have right to make request to call attendance of any witness whose evidence is not contained in the summary in pursuance of power conferred by Rule 136. Rule 134 and 136 are reproduced as under :-

“134. Calling of all prosecutor’s witnesses.- The prosecutor or, in the cases of a trial by summary court-martial, the court is not bound to call all the witnesses for the prosecution whose evidence is in the summary 1[***] of evidence of whom the accused has been informed he or it intends to call, but he or it should ordinarily call such of them as the accused desires, in order that he may cross-examine them, and shall, for this reason, so far as practicable, secure the attendance of all such witnesses.

136. List of witnesses of accused.- The accused shall not be required to give to the prosecutor or court a list of the witnesses whom he intends to call, but it shall rest with the accused alone to secure the attendance of any witness whose evidence is not contained in the summary 4[***] and for whose attendance the accused has not requested steps to be taken as provided by sub-rule (1) rule 3.”

28. Under Rule 141 and 142 of the 1954 Rules, detail procedure has been given to cross-examine the witness. For convenience, Rule 141 and 142 are reproduced as under:-

“141. Mode of questioning witness.- Every question shall be put to a witness orally by the officer holding the trial, by the prosecutor, by or on behalf of the accused, or by the judge-advocate and the witness will forthwith reply, unless an objection is made by the court, judge-advocate, prosecutor, or accused, in which case he shall not reply until the objection is disposed of. The witness shall address his reply to the court.

(2)The evidence of a witness as taken down shall be read to him if he so requests before he leaves the court, and shall, if necessary, be

corrected. If he makes any explanation or correction, the prosecutor and accused or counsel or the defending officer may respectively examine him respecting the same.

(3) If the witness denies the correctness of any part of the evidence when the same is read over to him, the court may instead of correcting the evidence, record the objection made to it by the witness.

(4) If the evidence is not given in English and the witness does not understand that language, the evidence as recorded, shall be interpreted to him in the language in which it was given, or in a language which he understands if he so requests before he leaves the court.

(5) Where evidence is recorded by shorthand writer, it shall not be necessary to read the evidence of the witness to him under sub-rule (2) or (4), in the opinion of the court and the judge-advocate, if any (such opinion to be recorded in the proceedings), it is unnecessary so to do.

“142. Questions to witnesses by court or judge-advocate.- (1) The presiding officer, the judge-advocate (if any), or the officer holding the trial and, with the permission of the court, any member of the court may address a question to a witness while such witness is giving his original evidence and before he withdraws.

(2) Upon any such question being answered, the presiding officer, the judge-advocate (if any), or the officer holding the trial, shall also put to the witness any question relative to that answer which the prosecutor or the accused or counsel or the defending officer may request him to put and which the court deem reasonable.

29. Rule 149, however, provides that proceeding of the Court Martial may not be assailed on a technical ground unless it appears that injustice has been done to the offender. In case finding and sentence are otherwise correct. For convenience, Rule 149 is reproduced as under:-

“149. Validity of irregular procedure in certain cases. – Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any

defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid, they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules.

30. Within the four-corner of Sec.149 objection raised by the Id. counsel for the applicant with regard to framing of charges is to be considered as mentioned above. Rule 111 requires reading of charges before the accused and each of the charges should be read separately. Accused will have right to raise objection against the charges under Rule 112. In the present case it does not appear that charges were framed in terms of the Rules (supra). Ld. counsel for the respondents invited our attention to Annexure 1 which, according to him, are the charges. For convenience, Annex. 1 is reproduced as under :-

CHARGE SHEET

The accused, Number 9113222W Rifleman Surinder Kumar of 11 JAK LI, is charged with :-

Army Act
Section 69

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

in that he,

On night intervening 27 Jan 2013 and 28 Jan 2013, while traveling from New Jalpaiguri to Sealdah by 12344 Darjeeling Mail, used criminal force to Ms Mridul Gupta, daughter of Brigadier M M Gupta by sliding his hands under her legs, intending thereby to outrage her modesty.

Place : Kolkata

Sd/-
(Sarvajit Singh Guleria)
Colonel

Dated : 27 Apr 2013

Commanding Officer
11 JAK LI

“To be tried by Summary Court Martial”

Place : Kolkata

sd/-
(Ashok Kumar Choudhary)
Lieutenant General

Dated : 30 Apr 2013

General officer Commanding
HQ Bengal Area

31. A plain reading of the aforesaid alleged charges does not seem to be a charge framed during SCM proceeding. Commanding Officer had placed a request before the General Officer Commanding, HQ Bengal Area who made an endorsement that the matter be tried by SCM. It may be an order to be tried by SCM but it may not be treated as a charge framed in pursuance of provisions contained in the Rules.

32. Sections 111, 112 & 113 of 1954 Rules show that the accused should be informed of the charges against him and it shall be read and if necessary be translated to his own language and the accused will have right to object that charges do not disclose an offence under the Army Act and is not in accordance to Rules. In case the Commanding Officer is satisfied to the objection raised by the accused in pursuance of Rule 112 he may discharge the accused or amend the charges in pursuance of power conferred by Rule 113 to meet out the requirement of law.

33. Chapter V of Rules 1954 lays down the procedure of investigation of charges and remand. Rule 28 provides that charge-sheet shall contain all the charges. Rule 29 provides that every charge-

sheet shall begin with the name and description of the present charge and Rule 30 provides that charge-sheet shall contain statement of the offence and statement of the particulars of the act, neglect or omission constituting the offence and other particulars. Under Rule 31 charge-sheet shall be signed by the Commanding Officer of the accused and shall contain the place and date of such signature. Rule 32 provides for validity of effective charge-sheet. In case it contains any mistake in the name or description of person charged and there shall be presumption in supporting the same which may reasonably be presumed to be impliedly included though not expressed therein. For convenience, Rules 28, 29, 30, 31 & 32 are reproduced as under :-

“28. Charge-sheet and charge.- (1) A charge-sheet shall contain the whole issue or issues to be tried by a court-martial at one time.

(2) A charge means an accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence.

(1) A charge-sheet may contain one charge or several charges.

29. Commencement of charge-sheet. – Every charge-sheet shall begin with the name and description of the person charged and state his number, rank, name and the corps or department (if any) to which he belongs. When the accused person does not belong to the regular Army, the charge-sheet shall show by the description of him, or directly by an express averment, that he is subject to the Act in respect of the offence charged.

30. Contents of charge : (1) Each charge shall state one offence only and in no case shall an offence be described in the alternative in the same charge.

(2) Each charge shall be divided into two parts-

(a) statement of the offence; and

(b) Statement of the particulars of the act, neglect or omission constituting the offence.

(3) The offence shall be stated, if not a civil offence, as nearly as practicable in the words of the Act, and if a civil offence, in such words as sufficiently describe in technical words.

(4) The particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect

or omission is intended to be proved against him as constituting the offence.

(5)The particulars in one charge may be framed wholly or partly by a reference to the particulars in another charge, and in that case so much of the latter particulars as are so referred to, shall be deemed to form part of the first mentioned charge as well as of the other charge..

(6)Where it is intended to prove any facts in respect of which any deduction from pay and allowances can be awarded as a consequence of the offence charged, the particulars shall state those facts and the sum of the loss or damage it is intended to charge.

“31. Signature on charge-sheet.- The charge-sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature.

“32. Validity of charge-sheet.- (1)A charge-sheet shall not be invalid merely by reason of the fact that it contains any mistake in the name or description of the person charged, provided that he does not object to the charge-sheet during the trial, and that no substantial injustice has been done to the person charged.

(2)In the construction of a charge-sheet or charge, there shall be presumed in favour of supporting the same every proposition which may reasonably be presumed to be impliedly included though not expressed therein.

34. In the present case at the face of record it appears that charges were not framed at all as required by the statute. No step was taken during course of SCM to frame charges in the light of provisions contained in Rule 28 to 32 and Rule 111, 112 & 113 of 1954 Rules. In such a situation, presumption of validity of charge-sheet as the fiction of law under Rule 149 seems to be not available.

35. Provisions contained in Chapter V, Sec. –1 of the Rules seems to cover general provisions while dealing with procedural aspect as well as power of Commanding Officer during course of Court Martial, Dist. Court Martial, General Summary Court Martial and Summary Court Martial and hence procedure prescribed therein is applicable in the present case.

36. It is well settled proposition of law that in case the authority wants to do certain thing then that should be done in the manner provided by Statute or not at all vide **AIR 1967 SC Page 368- Barium Chemicals v. Union of India; 2003 Vol.2 SCC Page 111- Bhavnagar University v. Palitana Sugar Mill (P) Ltd.**

37. Accordingly, it was incumbent on the S.C.M. to frame charges in the manner provided by 1954 Rules. It may be noted that Appendix II of the Army Rules, 1954 contains a format of charge-sheet with regard to different offences. The alleged charge-sheet (supra) at the face of record is not in the required format and does not contain ingredients which should be borne out from the plain reading of the charge-sheet. Format 109 of the Appendix II of the Army Rules contains format with regard to framing of charges for offence punishable under Section 354 of the I.P.C. For convenience, format of charge-sheet as provided under 109 of the Appendix II is reproduced as under :-

“No.109
Charge-Sheet
[Section 69]

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT TO OUTRAGE HER MODESTY, CONTRARY TO SECTION 354 OF THE INDIAN PENAL CODE.

in, that he,

at....., on....., used criminal force to Smt....., wife of Shri....., by putting his right hand on her thigh, intending thereby to outrage her modesty.”

38. In the original record there is arraignment alleged to be signed by the accused pleading not guilty with blank space which also does not

seem to be charge-sheet in view of the discussion made hereinabove which is reproduced as under :-

“ARRAIGNMENT

By the Court- How say you No.9113222W Rifleman Surinder Kumar..... are you guilty or not guilty of the.....(Blank).....charge preferred against you ?

Not Guilty

Accused - Sd/ Surinder Kumar	Sd/- (SS Guleria) Col The Court
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Note –If the accused pleads guilty to any charge the provisions of AR 115(2) and (2A) must be complied with.

[Instructions – (1) If the accused pleads ‘Guilty’, proceed to Page C, D, E, F and G and scoreout pages; if he ‘pleads’ ‘Not Guilty’, proceed to D,E,F and G (3) and (4) or (5) and scoreout page C(2); if he pleads ‘Guilty to some charge or charges and ‘Not Guilty’ to other (not alternative, proceed to D,E,F,G,H or I and then to C(3), (4), or (5) abd (2)].

2. The questions are to be numbered throughout consecutively in a single series.”

Though record shows that charge-sheet is attached as Mark ‘B2’ but it does not seem to be in the record. There appears to be non-application of mind during the course of recording the ‘Arraignment’.

39. In view of the above, there appears to be no room of doubt that charges were not framed and the communication of order passed by

the Commanding Officer, Bengal Area has been presumed to be a charge-sheet which is not correct.

Purpose of charge-sheet.

40. Purpose of charge-sheet is to specify the accusation for which the accused has been charged and required to meet during the course of trial. It is the first notice to an accused of the matter where of he/she is accused and it must convey to him with sufficient clearness and certainty that the prosecution intends to prove against him and of which he would have to clear mind. Object of the framing of charge is to enable the accused of the case he is required to answer during trial. Charges must be properly framed and evidences tendered must relate to matters stated in the charge. It has been settled by the Hon'ble Supreme Court that charge is not an accusation in abstract but a concrete accusation of an offence alleged to have been committed by the accused. Further the accused is entitled to know with the greatest precision and particularity the acts said to have been committed and section of the penal law infringed; otherwise he must be seriously prejudiced in his defence vide **AIR 1958 SC Page 672- Srikantiah B.N. v. State of Mysore; AIR 1948 Sind 40, 48 : (1948) 49 Cr.L.J. 72 – Waroo v. Emperor & AIR 1963 SC 1120 – Birichh Bhuian v. State of Bihar.**

41. To specify a definite criminal offence is the essence of Criminal Jurisprudence which is in tune with Article 14 of the Constitution of India and part and parcel of Principle of Natural Justice. Offence whatever may be, no trial may proceed without

framing of charges. Section 211 of Cr. P. C. deals with the contents of charges. Section 212 of Cr. P. C. provides that the charge shall indicate the particulars, place and person, the time and place of the office and Section 213 of Cr. P. C. provides that when manner of committing offence must be stated. Section 215 of the Cr. P. C. deals with the effect of errors for framing of charges.

42. It is further well settled that even if there are irregularity in framing of charges it may not be fatal unless irregularity and omission has misled and caused prejudice to the accused and occasioned a failure of justice itself not vitiates the trial. Failure to specify the manner and mode of offence makes a charge vague but where particulars are on record there could not have been any prejudice to the accused. Section 221 of the Cr.P.C. like Section 113 of the Army Rules, 1954 takes care of the situation and provides safeguard empowering the Criminal Court or the SCM to convict the accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence along with other offences to which charges are framed. Further merely because of an inapplicable provision has been mentioned in the charge, trial may not be invalidated vide **3950 (3976) (SC) : AIR 2005 SC 3820 : 2005(3) – State (NCT of Delhi) v Navjot Sandhu, 2005Cr.LJ.; (1995) 4 SCC 181- State of J&K v. Sudershan Chakkar; (2001) 4 SCC 38- Omvati v. State (Delhi Admn.); AIR 2011 SC 3114- Rafiq Ahmed @ Rafi v. State of U.P.; AIR 2012 SC 1485- Rattiram v.**

State of M.P.; AIR 2012 SC 3026- Bhimanna v. State of Karnataka; AIR 2013 SC 840- Darbara Singh v. State of Punjab;

43. However, in the present case at the face of record charges were not framed and hence the omission appears to be fatal. In a case reported in **1979 Vol.1 SCC Page 87- Bhupesh Deb Gupta v. State of Tripura**, Hon'ble Supreme Court has set aside the conviction since charges were framed entirely indicating different factual aspects which has no co-relation with the offence for which the accused was charged. Hence it was held that it caused prejudice to the accused.

Relevant portion of the judgment is reproduced as under :-

“12. The wording of the charge framed by the Special Judge is that the money was remitted by Nikhil Chakraborty for showing, in exercise of official function a favour to the said Sachindra Dey on the plea of securing service for the said Sachindra Dey. The High Court understood the charge as meaning that the money was sent by Nikhil Chakraborty on behalf of Sachindra Dey as a gratification for securing service for the said Sachindra Dey. It appears from the charge and from the judgment of the courts below that the courts proceeded on the basis that the gratification was received by the accused for showing favour as a public servant. As the basis of the charge is entirely different from what is sought to be made out now i.e. the gratification was paid to the accused for influencing a public servant, it cannot be said that the accused was not prejudiced by the frame of the charge. It would have been open to the prosecution to rely on the presumption if the charge was properly framed and the accused was given an opportunity to meet the charge which the prosecution was trying to make out against the accused. On a careful scrutiny of the facts of the case, we are unable to reject the contentions of the learned counsel for the accused that he was prejudiced by the defect in the charge and that he had no opportunity to meet the case that is put forward against him.”.

44. Framing of charges is the part and parcel of Article 14 of the Constitution of India. That is why it has been held by Hon'ble Supreme Court in the case of **Roop Singh Negi** (supra) that the

Enquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject-matter of charges is illegal.

Principle of Natural Justice is equally applicable to the Armed Forces personnel. In the case of **Sheel Kr. Roy** (supra) Hon'ble Supreme Court held that it is well settled legal principle accepted throughout the world that a person merely by joining Armed Forces does not cease to be a citizen or be deprived of his human or constitutional right.

45. In the case of **Prithi Pal Singh Bedi** (supra) Hon'ble Supreme Court held that even during course of enquiry under Rule 180 in case character or military reputation of a person is likely to be affected then such person be given a full opportunity to participate in the proceedings of Court of Inquiry. Nothing should be done behind the back without giving opportunity of participation.

46. In the case of **General Officer Commanding, Rastriya Rifles** (supra) Hon'ble Supreme Court held that Court Martial proceedings are akin to criminal prosecution. However, once the matter stands transferred to the Army for conducting a Court Martial then the Court Martial has to be done in accordance with Army Act, Rules and Regulations framed thereunder.

Section 130:

47. It is vehemently argued by the Id. counsel for the applicant that provisions in Section 130 has not been followed. For convenience, Sec.130 is reproduced as under :-

“**130. Challenges.-** (1) At all trials by general, district or summary general court-martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

- (2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded and the remaining officers of the court shall, in the absence of the challenged officer decide on the objection.
- (3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner by another officer, subject to the same right of the accused to object.
- (4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.”.

Argument advanced by the ld. counsel seems to be misconceived.

Sec.130 relates to general, district or summary general court-martial.

It does not cover or regulate the proceedings of SCM. Hence argument with regard to applicability of Sec.130 is rejected.

Procedural safeguard :

48. There appears to be no room of doubt that procedural safeguard provided by the Army Act, Rules and Regulations framed by it are to be followed vide **AIR 1978 SC 597 – Maneka Gandhi v. Union of India and Ranjit Thakur v. Union of India**. Question with regard to procedural safeguard has been retreated by Hon’ble Supreme Court in the case of **General Officer Commanding, Rashtriya Rifles (supra)**. It has further been vehemently argued that a friend of the applicant was not allowed seems to be not correct in view of the fact that the record transpires that the applicant was provided friend of accused to appear on his behalf during the course of SCM.

Factual finding: (Complainant not submitted any complaint)

It is further argued by the Id. counsel for the applicant that since the complainant herself has not submitted any complaint, the trial vitiates. Argument seems to be not sustainable for the reason that Sec.354 of the Cr. P. C. is a cognizable offence. Earlier it was bailable but later on it has been informed that this Section has become non-bailable by Legislature. Otherwise, there appears to be oral communication by the prosecutrix (supra) on telephone resulting with the follow up action seems to be sufficient.

49. Section 39 of the Code of Criminal Procedure provides that it shall be obligatory on the part of a citizen to give information with regard to certain offences. Sec. 37 of the Cr. P. C. further provides that every person is bound to assist the Magistrate or Police. Sec. 43 empowers the citizens of the country to arrest an accused in whose presence an offence of non-bailable and cognizable is committed. Under Sec. 49 of Cr. P. C. exception has been given where members of Armed Forces may not be arrested except after obtaining complaint of Central Government.

50. A combined reading of different provisions of Cr. P. C. and Constitution shows that authority in power under the law may proceed against a criminal incident on their own in accordance with law in case the offence is cognizable. Sec.154 of Cr. P. C. speaks with regard to information of the cognizable offence which may be given orally to an officer in charge of Police Station and an officer empowered under the Army Act (emphasis supplied). First Information Report is not a

substantive piece of evidence. It is only to use the contract or corroborate the matter thereof vide **2010 Vol.10 SCC 374 – Sambhu Das v. State of Assam; AIR 2010 SC 2254-Patai @Krishna Kumar v. State of U.P.**

51. In view of the above, accusation or complaint or communication or information of crime is not required to be made by only prosecutrix but it may be done by others (Factual finding). Miss Mridul Gupta appeared as PW 1 before the SCM. She in verbatim supported the allegation discussed in the preceding paragraph. Though she is the only eye witness the chain of evidence recorded during SCM shows that at about 01.30 hrs. in the night over telephone she came into contact of Lt Nitesh Chibber. It was in pursuance of information communicated at Sealdah Station at 06.45 A.M. Lt. Chibber and Company Commander of Charlie Coy Maj Anubhab Singh along with Army troop were present. According to material available on record the applicant had decline to cross-examine the witnesses.

52. Lt. Chibber appeared as PW 2. According to him, Miss Mridul Gupta gave him a phone call in the night from the train at 01.30 hrs and narrated the details with regard to molestation committed by the applicant while traveling in the coach. He also stated that the prosecutrix/complainant got phone number from one Balvender Singh who was traveling in the coach.

53. Rfn Balvender Singh who was traveling in another coach appeared as PW 3. He stated that he came to the scene of occurrence

after hearing hue and cry. It is appropriate to reproduce his statement which is as under :-

1. I, No 9113923M Rfn Balvender Singh of 11 JAK LI States the following:-

“(a) I, Number 9113923M Rfn Balvender Singh identify the accused No.9113222W Rfn Surinder Kumar of 11 JAK LI.

(b) No 9113222W Rfn Surinder Kumar of ‘C’ Coy of 11 JAK Li and I no 9113923M Rfn Balvender Kumar of ‘A’ Coy were detailed for Trap and Skeet Shooting course to be conducted at Binnaguri with effect from 07 Jan 2013 to 26 Jan 2013. I hereby produce my course detailment letter, movement order and Railway ticket. (att as Exhibit ‘A’ ‘B’ & ‘C’ respectively)

(c) After completion of the course on 27 Jan 2013 we left from Binnaguri to NJP Station at 1400Hr and areached NJP at 1900Hr. We boarded Train No.12334 Darjeeling Mail from NJP Station at 2000Hr. My seat No was 48 in B7 and Rfn Surinder Kumar’s Seat No was 58 in B2 Coach.

(d) At 2100Hr we had our dinner together and thereafter Rfn Surinder Kumar took the ticket with him and moved to Coach No.B7. At 2130Hr after getting his ticket checked by TTE, he handed over he ticket to me and returned back to his seat.

(e) At 0100Hr while I was asleep TTE came to me and inquired me about the second passenger on the ticket. I informed him that the second passenger was traveling in Coach No.B2. TTE took me along to Coach No.B2. There was a large crowd gathered in the Coach.

(f) As I reached he Coach Miss Mridul Gupta inquired from me whether Rfn Surinder Kumar was travelling with me ? I informed her in affirmation. Then she inquired about what job did I do ? I informed her that I was serving in 11 JAK LI (Army) Then she asked me where is my unit located ? I informed her that the unit is located in Kolkata.

(g) She asked me about my movement order and I Card. I showed by I Card and movement order o her, which she kept in her possession. Thereafter she asked for the Mobile No. of my Commanding Officer. As the battery of my phone was law I could not give the No of my Commanding Officer, but I remembered the phone No of Lt Nitesh Chibber who is performing th duty of ‘A’ Coy 2IC. she

spoke to Lt Nitesh Chhibber and asked me to leave. I returned back to my seat and in the morning Maj Anubhav Singh and Lt Nitesh Chhibber met us at Sealdah Raiulway Station and took us to the unit.

The above statement has been read over to No 9113923M Rfn Balvender Singh in the language he understands and he signs it as correct.

sd/-Balvender Singh.”.

A plain reading of the statement given by Balvender Singh shows that he was not an eye witness but he reached at the scene of occurrence immediately after the incident. The situation and circumstances narrated by Balvender Singh seems to be quite natural and indicate towards the occurrence of offence.

54. PW 4 Maj Anubhav Singh was also present at Sealdah Station and stated the factual matrix on record. Record also shows that statement of the accused was also recorded who has set up a defence of alibi. Statement of the accused seems to be partially helped the prosecution version to the extent that he was present on different stages of occurrence in the frightful night.

55. Argument made by the ld. counsel for the applicant that there is only one eye witness who cannot be treated seems to be misconceived argument. There is no material or record to indicate the reason or motive for false accusation. In the absence of any evidence or substantial material with regard to false accusation statement of a single eye witness or prosecutrix in the case of molestation or rape is sufficient for conviction in case supported by surrounding circumstances vide **1996 Cr. L.J. 346 (Orissa)- Damodar Behera v. State of Orissa; 2002 Cr. L.J. 2673 – Sheo Singh v. State of U.P.;**

1997 Cr. L.J. 2802 (HP) – State of H. P. v. Ramdas; 1996 Cr. L.J. 1111(Bombay) –Keshab Baliram Naik v. State of Maharashtra; AIR 1952 SC 54 –Rameswar v. State; AIR 1958 SC 143 –Jitu v. State of H.P.; AIR 1995 SC 2472 –Col Singh v. State of M.P.; AIR 1996 SC 1136- Dharma v. Nirmal Singh Bitu.

Finding :

56. We have already held that charges were not framed during the course of trial of SCM. Non-framing of charge vitiates a trial (supra). However, overwhelming evidence on record prima facie points out towards the occurrence.

57. Sec. 45 of the Army Act provides that any officer, junior commissioned officer or warrant officer in connection with Court Martial may suffer such less punishment and others may liable to be dismissed. Sec.46 deals with disgraceful conduct of Armed Forces personnel which includes indecent behaviour. For convenience, Sec. 45 and 46 are reproduced as under :-

“45. Unbecoming conduct.- Any officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned.

46. Certain forms of disgraceful conduct. – 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
- (b) malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or

(c) with intent to render himself or any other person unfit for service voluntarily causes hurt to himself or that person;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.”.

58. Sec.63 further provides that in case conduct of an Army personnel is prejudicial to good order and military discipline, he may be liable to suffer for imprisonment. It is always expected that a person who joined the Armed Forces shall be disciplined and shall lead life of morality and discipline to its highest pedestal. Alleged conduct of the applicant does not seem to be expected from the member of Armed Forces. The sentence could have been reduced or affirmed only in case the charges would have been framed by the SCM.

59. In the justice delivery system role of a Judge is not easy; but some time he or she becomes mentally disturbed when law favours a person who does not stand at the fortune of morality and discipline because of bad conduct. **Rabindra Nath Tagore** in a poem said –

“Where desert sands of petty rule have not
Choked justice’s stream, diffusing manly worth
In a hundred paths; where You, through all our days,
Lead us in all our labours, thoughts and joys—
With ruthless blows from your own hand, awaken
India, O Father, into that heaven.”.

60. There appears to be no room of doubt that basic principle of law is that decision should be based on some source of law and not merely on presumption and supposition vide **AIR 1975 SC 229 Para 34 – Indira v. Rajnarayan**. It is beauty of the rule of law and democracy

that in spite of all hardship they use to adhere with the constitutional spirit and statutory mandate.

61. In the present case the importance of framing of charges reflected from Rule 113 (supra) under which SCM has right to amend the charges. In case trial is permissible without framing of charges then the power conferred by Rule 113 (supra) would not have been conferred on SCM. Factual matrix on record reveals that charges were not framed at all. Hence, it seems to be fatal.

62. Next question cropped up as to whether punishment awarded by the SCM should be set aside and the applicant be restored with all benefits. It seems to be not justified since the offence of molestation at public place is a very serious that too by an Army personnel. Hence we have to adopt exceptional procedure contained in the Armed Forces Tribunal Act, 2007 (in short 'Act') with regard to re-trial.

63. Section 16 of the Act empowers the Tribunal to remit for re-trial in special circumstances by the Court Martial. According to definition contained in Sec.3(f) of the Act the Court Martial includes General Court Martial, District Court Martial, Summary General Court Martial and Summary Court Martial. Needless to say that power conferred to the Tribunal under Sub-section (2) of Sec. 16 may be exercised rarely in an offence of public importance and the conduct which does not suit the civilized society. For convenience, Sec.16 of the AFT Act is reproduced as under :-

“16. Re-trial.—(1) Except as provided by this Act, where the conviction of a person by Court-Martial for an offence has been

quashed, he shall not be liable to be tried again for that offence by a Court-Martial or by any other Court.

(2) The Tribunal shall have the power of quashing a conviction, to make an order authorizing the appellant to be retired by Court-Martial, but shall only exercise this power when the appeal against conviction is allowed by reasons only of evidence received or available to be received by the Tribunal under this Act and it appears to the Tribunal that the interests of justice require that an order under this section should be made:

Provided that an appellant shall not be retired under this section for an offence other than –

(a) the offence for which he was convicted by the original Court-Martial and in respect of which his appeal is allowed;

(b) any offence for which he could have been convicted at the original Court-Martial on a charge of the first-mentioned offence;

(c) any offence charged in the alternative in respect of which the Court-Martial recorded no finding in consequence of convicting him of the first-mentioned offence.

(3) A person who is to be retried under this section for an offence shall, if the Tribunal or the Supreme Court so directs, whether or not such person is being tried or retried on one or more of the original charges, no fresh investigation or other action shall be taken under the relevant provision of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be, or rules and regulations made thereunder, in relation to the said charge or charges on which he is to be retried.

This clause empowers the Tribunal for quashing a conviction and make order for re-trial by a Court-Martial on certain conditions and specifies the offences for which an appellant shall not be retried under this clause. (*Notes on Clauses*).

64. Though we intend to set aside the impugned order of conviction because charges were not framed but without giving entire consequential benefit, which is subjected to the outcome of fresh trial.

65. The applicant shall be entitled to arrears of salary to the extent of 50% and it shall be open to the Army authority to take work from him or not or pass appropriate order in accordance with rules for his status during the course of trial. Trial must be concluded within two months from the date of receipt of certified copy of the present order. OIC, Legal Cell shall ensure to communicate the order to appropriate

authorities within three days. The applicant shall appear before the appropriate authorities after receipt of notice immediately.

66. Though allegation is serious that a girl who requires to be protected and helped to carry on her life pleasurely has been suffered mental pain and agony but everyone should realize that democracy survived and continued successfully only by adhering to rule of law even in difficult situation. Any compromise to enforce a law because of hardship or gravity of offence may be disastrous in due course of time and shall create a gallery to be abused by unscrupulous elements (supra). It shall be appropriate to quote **Lord Macmillan in the case of Liversidge v. Anderson reported in 1942 AC 206**, which is reproduced as under :-

“It is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those they follow in peacetime. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary.”

67. It shall further be appropriate to refer to the words of **Lord Halsbury in Sharpe v. Wakefield reported in 1891 AC 172 & 179**

which is reproduced as under:-

“.....when it is said that something is to be done within the discretion of the authorities.....that something is to be done according to the rules of reason and justice, not according to private opinion.....according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular.”

68. It may be noted that Article 8 & 9 of the Universal Declaration of Human Right in respect of which a resolution was passed by the

United Nations and was supported by India which is reproduced as under :-

“ARTICLE 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution of by law.

ARTICLE 9

No one shall be subjected to arbitrary arrest, detention or exile.”.

Thus, not only the Constitution of India and statutory provisions but Universal Declaration of Human Rights also provide safeguard to the citizen being India signatory to it.

69. While awarding proportionate punishment past conduct or antecedent history of a person which shows a propensity or a tendency to act in a particular manner should be considered. It is indeed largely from the past events showing tendencies or inclinations of a person that an inference can be drawn that he/she is likely in the future to act in a particular manner which may amount to misconduct or criminal incident. In order to justify such an inference, it is necessary that such past conduct or antecedent history should ordinarily be proximate in point of time. In case the past conduct is blackened then of course severe punishment should be awarded during course of trial. However, every conduct become past and no one may assure that there shall not be recurrence. It is for the judicial mind to look into the matter keeping the surrounding facts and circumstances.

70. Because of non-framing of charges trial vitiates with the consequence of setting aside the conviction. It is a fit case where power conferred by Sub-section (2) of Sec.16 may be exercised. Accordingly, for the reasons discussed in the body of the present order O. A. deserves to be allowed. Accordingly, allowed. While allowing the O. A. we pass the following order :-

- 1) Order dated 13.05.2013 and the sentence awarded by the SCM thereon as well as follow-up promulgation are set aside;
- 2) Respondents shall proceed with re-trial in the light of Sec.16 of the AFT Act, 2007 from the stage of framing of charges expeditiously say within a period of two months from the receipt of certified copy of the present order;
- 3) Applicant shall be entitled for half of the salary which shall be paid to him within two months along with arrears and the rest including other consequential benefits shall be subject to final outcome of the re-trial proceedings.

The application is allowed accordingly. Cost made easy.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)