IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 2919 OF 2024

Ex-LT Col PK Tiwari (SL-04526K)
Residing At H-606, A-Wing, Daffodils,
Magarpatta City, Hadapsar, Pune ...Petitioner

Versus

1. Union of India
Through the Secretary,
Ministry of Defence, South Block
New Delhi-110001

2. Chief Of Army Staff
IHQ, MoD (Army)
Sena Bhavan, New Delhi-110011

3. LT GEN JS Jain
GoC-in-C
HQ Soughtern Command
Pune,-411001

4. Maj Gen Inderjeet Singh
General Officer Commanding
Dakshin Maharashtra & Goa Sub Area Pune

5. Brig Rajesh Verma
Commander 3 Electronic Warfare Brigade,
C/o 56 APO

6. Col Rakesh Yadav
Commandant, Army Sports Institute
Pune (MH)- 411023

7. XYZ
through guardian being
Mr. B.K. Chaturvedi
having Address at Army Sports Institute,
Ghorpadi, Pune 411 036 ...Respondents

Ms. Saakshi Jha a/w Mr. Ujjwal Gandhi, Mr. Prateek Dutta, Ms. Bhavi Kapoor and Mr. Parth Govilkar, for the Petitioner.
Mr. Amarendra Mishra, for Respondent No.1
Mr. Aashish Satpute, APP for Respondent-State

CORAM : REVATI MOHITE DERE &
DR. NEELA GOKHALE, JJ.

RESERVED ON : 3rd February 2025
PRONOUNCED ON : 17th February 2025

Judgment (*Per Dr. Neela Gokhale*):

1. Rule. Rule made returnable forthwith. With the consent of parties, the matter is heard finally.

2. The Petitioner assails the Judgment and Order dated 17th January 2024 passed by the Armed Forces Tribunal, ('AFT') Mumbai Bench in Original Application ('OA') No. 227/2021 as well as the

Judgment and Order dated 19th March 2021 passed by the General Court Martial ('GCM') convened by the Respondent Army Authorities, to try the Petitioner for offences punishable under Section 69 of the Army Act 1950. ("AA")

3. Section 69 of the AA provides for trial by Court Martial for commission of a civil offence and punishment as prescribed under the said provision. Section 3 (ii) of AA defines 'civil offence' to mean an offence which is triable by a criminal court. The Petitioner was thus, tried by the Court Martial for two charges under Section 69 AA, *firstly*, for allegedly committing aggravating sexual offence under Section 10 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO") and *secondly*, for allegedly committing sexual harassment under Section 12 of the same Act.

4. The alleged incident took place on 1st February 2020. Summary of Evidence ('SoE') was taken down by the Commanding Officer, followed by issuance of a convening order dated 21st January 2021 of the General Court Martial. Charges were framed. Post trial, the

GCM returned a finding of guilt of the Petitioner. He was sentenced to the minimum punishment of 5 years imprisonment under relevant sections of POCSO. He was also sentenced to be cashiered from service. As per procedure, the Confirming Authority duly confirmed the findings of the Court Martial. Representation under Section 164(2) AA against the Finding and Sentence of the GCM was made on behalf of the Petitioner to the competent authority and was dismissed. The sentence was promulgated by the competent authority. The Petitioner challenged the Finding and Sentence of GCM before the AFT, Mumbai Bench by filing an OA, which was also dismissed by the AFT. It is this Judgment and Order which is assailed by the Petitioner in the present petition under Article 226 /227 of the Constitution of India.

5. Article 227 (4) takes away the power of superintendence of the High Court for matters emanating from court martial under Section 15 of the AFT Act. However, as affirmed by the Supreme Court in the matter of ***Union of India & Others vs Parashotam Dass***[1] exercise

1 (2023) SCC Online SC 314)

of powers of judicial review by the High Court under Article 226 is not diluted even for matters dealing with courts-martial. It is a settled position of law that the High Courts, under Article 226, have the power of judicial review even in respect of courts martial and the High Court can grant appropriate relief *"if the assailed proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."* While dealing with the issue whether existence of provision of statutory appeal against the final decision or Order of AFT under Section 30 and 31 of the AFT Act, prohibits exercise of powers of judicial review by High Courts, pertaining to such orders, under their 226 jurisdiction, the Supreme Court in the *Parashotam Das* (supra) decision, held as under:

> *"28...To deny the High Court to correct any error which the Armed Forces Tribunal may fall into, even in exercising jurisdiction under Article 226, would be against the constitutional scheme. The first independent judicial scrutiny is only by the Armed Forces Tribunal. To say that in some*

matters, a judicial scrutiny would amount to a second appeal, would not be the correct way to look at it. What should be kept in mind is that in administrative jurisprudence, at least two independent judicial scrutinies should not be denied, in our view. A High Court Judge has immense experience. In any exercise of jurisdiction under Article 226, the High Courts are quite conscious of the scope and nature of jurisdiction, which in turn would depend on the nature of the matter.

29. We believe that there is no necessity to carve out certain cases from the scope of judicial review under Article 226 of the Constitution, as was suggested by the learned Additional Solicitor General. It was enunciated in the Constitution Bench judgment in S.N. Mukherjee_case that even in respect of courts-martial, the High Court could grant appropriate relief in a certain scenario as envisaged therein, i.e., "if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record.

30. How can courts countenance a scenario where even in the aforesaid position, a party is left remediless? It would neither be legal nor appropriate for this Court to say something to the contrary or restrict the aforesaid observation enunciated in the Constitution Bench judgment

> *in S.N. Mukherjee case. We would loath to carve out any exceptions, including the ones enumerated by the learned Additional Solicitor General extracted aforesaid as irrespective of the nature of the matter, if there is a denial of a fundamental right under Part III of the Constitution or there is a jurisdictional error or error apparent on the face of the record, the High Court can exercise its jurisdiction. There appears to be a misconception that the High Court would re-appreciate the evidence, thereby making it into a second appeal, etc. We believe that the High Courts are quite conscious of the parameters within which the jurisdiction is to be exercised, and those principles, in turn, are also already enunciated by this Court."*

6. It is thus, in the exercise and limits of our Article 226 jurisdiction of judicial review that we deal with the challenge in the present petition. The case against the Petitioner is that he joined his posting in Army Sports Institute in Pune on 31st January 2020. On the next date he went to the MT NCO (Mechanical Transport) when the complainant Havildar ABC (name masked) reported for duty. After polite conversation, the Petitioner told the said Havildar to bring his children to meet the Petitioner. Havildar ABC went to the

residence which was nearby and brought his son aged 8 years and daughter aged 11 years to meet the Petitioner. The Petitioner was chatting with the kids. He told the complainant that he knew palmistry and took the hand of his 11 year old daughter and started studying the same. He asked the Complainant to bring a pen. The Complainant left the room to bring a pen and his son followed him out of the room. When he returned in approximately 2 minutes, he found his daughter crying. She came to him and told him that the Petitioner touched her thigh inappropriately and asked her if he could kiss her. When she declined, he again asked her if he could kiss her as a friend. The Complainant immediately called the Commanding Officer. He came and the Petitioner was taken to the Officers' Mess. Thereafter, the Summary of Evidence was recorded and convening order was passed to convene the GCM which eventually resulted in the impugned order.

7. The petition was initially placed before a Learned Single Bench of this Court and by its Order dated 31st January 2024, this Court issued notice to the Respondent and directed that the effect,

operation and implementation of the Judgment and Order impugned shall remain stayed. Accordingly, the Petitioner is not detained and his liberty stands protected till date. The petition is now placed before us, the matter being one to be heard by a Division Bench and in term of our roster.

8. Ms. Sakshi Jha, learned counsel appears for the Petitioner and Mr. Amarendra Mishra learned counsel, represents the Respondent No. 1. Mr. Ashish Satpute, learned APP represents the State of Maharashtra.

9. Ms. Jha took us through the findings of the GCM and that of the AFT, Mumbai Bench. According to her, the evidence of the Petitioner was not appreciated properly by the GCM and these grounds raised by her before the AFT were not considered while affirming the findings of the GCM. Her contentions are as follows:

i) The initial complaint of the Havildar-Complainant was not processed properly. It was written by the Havildar and not by his 11 year old daughter. There is no signature of acknowledgement

on the complaint of any officer to indicate who received it.

ii) The GCM and AFT failed to appreciate the motive of the Havildar-Complainant in making the false complaint which was that the Petitioner denied permission to the Havildar to attend a Map Reading Course in spite of his requests to do so and the complaint was simply as a grudge for this issue.

Iii) Prosecution did not prove the age of the daughter and did not submit her original birth certificate.

iv) Sexual intent as is the ingredient in Section 10 and 12 of the POCSO Act, was not proved.

v) Court of Inquiry was not directed in the alleged incident.

vi) Medical examination of the minor girl was not conducted, as required under the provisions of POCSO Act.

Vii) There are discrepancies in the statements of the minor daughter.

Viii) The Petitioner interacted with the minor daughter as a grandfather and father figure without any ill will or bad intention. Thus, accordingly the Petitioner, the entire story was

cooked up.

On these and allied grounds, Ms. Jha urged us to allow the petition.

10. Per contra, Mr. Mishra contended that it is not mandatory on the part of the Army authorities to conduct a court of Inquiry in all cases. By a reasoned decision, the HQ MG&G area (Disciplinary & Vigilance) in consultation with the Southern Command (DV) decided to proceed straight away for recording the Summary of Evidence for expeditious delivery of justice. He countenanced the allegation of the Petitioner regarding a perceived grudge of Petitioner against the Havildar-Complainant by saying that there is no evidence to suggest that the compliant was motivated out of revenge for not selecting him for Map Reading exercise. It is in fact stated that the Havildar-Complainant was actually granted permission to attend the Map Reading Course even before the Petition joined the unit. Mr. Mishra also raised a legitimate issue as to why the Petitioner told the Havildar-Complainant to bring his children to meet him, when the Petitioner joined the posting

only one day prior and was not even substantially acquainted with the Havildar-Complainant to want to meet his children. Mr. Mishra also submitted that insofar as the proof of age of the victim is concerned, the prosecution produced on record the original birth certificate issued by the Government of Uttar Pradesh. It bears the seal and monogram of the government with her name as well as her parents' name. It is further pointed out that in any case, the Petitioner never seriously challenged the age of the minor daughter before the GCM and no suggestion was also given in the cross examination in that regard. Regarding the objection that the minor girl was not subjected to a medical examination contemplated under POCSO Act, it is contended that Section 164A of Cr.PC is for medical examination of a rape victim and although the present case relates to an aggravated sexual assault on the minor girl, the incident related to the Petitioner inappropriately touching the minor girl on her thigh and requesting to kiss her. There was no bodily injury which was neglected to be examined by the medical authorities. He submits

that thus, failure of medical examination in this particular case was not fatal to the prosecution.

11. Mr. Mishra also drew our attention to the findings of the GCM relating to the victim's evidence. The GCM has specifically recorded their satisfaction of finding the statement and version of the story of the victim to be absolutely trust worthy. Her evidence is corroborated by the evidence of PW1 to PW 7. In fact she narrated her ordeal immediately to her father and the father in turn in formed his Commanding Officer promptly. Two other officers were also called who took the Petitioner to the Officers' Mess. Although they did not see the incident, the chain of events are succinctly narrated by them. Most importantly, Mr. Mishra states that the incident per se is not denied by the Petitioner. All he says is that his intent was not inappropriate but his touch and conduct was purely motivated by a sentiment of fatherly nature. The Petitioner continues to state that he merely requested for a kiss from the young girl out of fatherly or grandfatherly affection and there was no sexual assault as the kind contemplated under

the POCSO Act. Mr. Mishra thus, justified the findings and sentence of the GCM and defends the AFT, Mumbai Bench, Order and prays for dismissal of the present petition.

12. We have heard the counsels of both the parties and perused the records with their assistance.

13. At the very outset, as discussed the herein above, the scope of our intervention is limited. We shall only examine if there is a denial of a fundamental right under Part III of the Constitution of the Petitioner or there is a jurisdictional error or error apparent on the face of the record to warrant interference in the findings of the GCM which evidence has already been substantially re-appreciated by the AFT, Mumbai Bench. We have gone through the provisions of the Army Act and the Army Rules, 1954 ('Army Rules') made thereunder. Section 177 of the Army Rules relating to assembling a Court of Inquiry ('CoI') to collect evidence and report regarding any matter assigned to the CoI. It is settled law that Rule 177 does not mandate that a CoI must be invariably set up in each and every

case prior to recording of SoE or convening a GCM. It is only if the competent authority is of the view that evidence requires to be collected, that the authorities may decide to constitute a CoI for the purpose of collecting evidence. It is merely in the nature of a Fact Finding Inquiry which is not mandatory under the AA nor the Army Rules. Hence, this argument raised by the Petitioner has no substance.

14. The AA and Army Rules lay down the procedure to be followed by the GCM. Army Rule 23 deals with the recording of the SoE. Army Rules 28 to 125 deal specifically with the convening of GCM, its conduct right up to the signing of the findings and sentence of the GCM. From the record of the GCM, it appears that the procedure is scrupulously followed. We did raise a doubt regarding the signing of the Findings and Sentence of the GCM as the same appears to be signed only by the Presiding Officer and the Judge-Advocate General. We were concerned that the view of the entire Board of the GCM was not reflected anywhere on record of the GCM. We thus, posed this question to the counsel

representing the Army authorities. Mr. Mishra brought to our attention to Army Rule 61(2) which provides that the opinion of each member of the Court as to the finding shall be given by word of mouth on each charge separately. Further Army Rule 67 relating to the Announcement of sentence and signing and transmission of proceedings, provides that upon the Court awarding the sentence, the Presiding Officer shall date and sign the sentence and such signature shall authenticate the whole of proceedings and the proceedings upon being signed by the Judge-Advocate and shall be transmitted at once for confirmation. Army Rule 87 also provides that every member of the Board must give his opinion by word of mouth on every question which the GCM decides and is required to give his opinion on the sentence as well even if his opinion supports an acquittal of the accused. Thus, we were told that in view of these Army Rules, which are statutory rules do not envisage recording a written view of each member of the Board or each member signing the finding and sentence. We also enquired with Ms Jha as to whether there was a challenge to these Rules,

she declined and also indicated that the Petitioner was not assailing these Army Rules. Thus, in these circumstance, we do not find any infirmity in the form of the findings and sentence of the GCM in this regard.

15. Insofar as the objection of the Petitioner regarding establishing the age of the minor victim is concerned, we find that ample proof was produced before the GCM in the form of her birth certificate, which in our view is sufficient to establish the correct age of the victim. We also find that the Petitioner did not seriously dispute her age and neither are there any suggestions in the cross examination of any witnesses. Although we have not re-appreciated the evidence, we did find it necessary to satisfy our conscience regarding the age of the victim as this ground was tried to be vociferously argued before us. Having perused the record, on this count also we agree with the view of the GCM and the AFT, Mumbai Bench.

16. Regarding the contention of the Petitioner relating to the medical

examination of the minor victim not being conducted and which is imperative under the POCSO is concerned, we agree with view of the AFT, Mumbai Bench that there was no physical injury to the victim. The aggravates sexual assault in the present matter related to an inappropriate touch on the thigh of the victim accompanied with a request to kiss her. Although a medical examination ought to have been conducted immediately, even if to ascertain the mental status and trauma suffered by the victim, failure in sending the victim for medical examination per se, especially in the absence of any physical injury to her person, does not lend infirmity to the finding of the GCM, in the facts of the present matter.

17. The most important evidence against the Petitioner and which can be the last nail in the coffin of the Petitioner to put it figuratively, is the statement of the victim. She clearly narrated the incident before the GCM. The law relating to the statement of prosecutrix is now well developed. In cases of sexual assault, supposed considerations which have no material effect on the veracity of the

prosecution case or even discrepancies in the statement of the prosecutrix herself, should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. The Supreme Court in the case of State Of Punjab vs Gurmit Singh & Ors[2] has held as under;

> *".....The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not*

2 1996 SCC (2) 384,

found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding….."

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It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable….."

18. The GCM in para 6 of its findings, while reproducing her statement, recorded its opinion that there was sufficient consistency in the victim's narration of the details of the incident.

Her demonstration in Court as regards the specific manner in which the accused behaved with her once her father left the room was depicted with immense clarity. Thus, the GCM clearly held the defence to have failed to contradict her on this material aspect. Thus, the statement of the prosecutrix- minor girl inspires confidence that she has narrated the incident correctly. Furthermore, her instinct of identifying a bad touch of the petitioner must be believed.

19. Another limb of the Petitioner's contention is relating to his intent. It is important to note that the suggestions given to the witnesses are that the touch of the Petitioner was not inappropriate albeit it is stated to be 'fatherly' or 'grandfatherly'. We have combed through this evidence as well, if only to satisfy ourselves regarding the authenticity and interpretation of the statement. The AFT has recorded that the Petitioner has not denied the incident but has justified his behaviour by saying that the touch was not intentional but was in the nature of a touch of a parent or a grandfather. This suggestion was totally denied by the

victim. The girl met the Petitioner for the very first time and there was no reason for the Petitioner to hold her hand and read her palm even under the pretext of reading her horoscope, touch her thigh and request to kiss her. The girl immediately sensed a bad touch and reported as such to her father instantly. In view of this deposition, we are unable to take issues and dissent with the findings of either the GCM or the AFT in this regard.

20. From the above discussion, we do not find any jurisdictional error with the findings of the GCM and the Judgment and Order passed by the AFT, Mumbai Bench, impugned herein. We do not find any violation of the fundamental rights of the Petitioner. There is no infirmity in the decision making process in arriving at the impugned finding by both the GCM as well as the AFT, Mumbai Bench. The petition is dismissed.

21. Rule, is accordingly discharged.

22. In view of the dismissal of the petition, all Interim applications are also disposed off. The Interim order dated 31st January 2024 is

vacated and the Petitioner is directed to surrender to the Army authorities with immediate effect to facilitate his transfer to the concerned Prison Authorities, as per rules.

23. All parties to act on the authenticated copies of this Judgment.

DR. NEELA GOKHALE, J. **REVATI MOHITE DERE, J.**

24. After the judgment was pronounced, learned counsel for the Petitioner seeks stay of the said judgment. Request for stay is rejected.

DR. NEELA GOKHALE, J. **REVATI MOHITE DERE, J.**