

HIGH COURT OF JAMMU AND KASHMIR
JAMMU

LPAOW 137/2001 & LPAOW 115/2001

Date of order 09.04.2014

UNION OF INDIA & ANR
UNION OF INDIA

VERSUS
VERSUS

SURINDER KUMAR
ONKAR SINGH CHIB

ORDER SHEET

Coram:

HON'BLE MR. JUSTICE M. M. KUMAR-Chief Justice
HON'BLE MR. JUSTICE MUZAFFAR HUSSAIN ATTAR-Judge

FOR THE APPELLANT/S : MR. P.S.CHANDEL, CGSC
FOR THE RESPONDENT/S : MR. J.R.ARORA

i/	Whether to be approved in		
	Press/Media	:	Yes
ii/	Whether to be reported in		
	Digest/Journal	:	Yes

MUZAFFAR HUSSAIN ATTAR

01/ The respondents in both these Letters' Patent Appeals (LPA) have been imposed punishment by the Summary General Court Martial (SGCM), which was called in question by them in two separate writ petitions. The learned writ Court, in view of the fact that common issues were involved and the punishment was outcome of a single incident and common trial by the SGCM, disposed of both the writ petitions by one common order, whereunder, the punishments imposed on the respondents-writ petitioners were set aside and respondent, Surinder Kumar, earned clear acquittal, whereas, Onkar Singh Chib was given benefit of doubt. It is this judgement, which has been called in question in these two LPAs.

02/ In LPA (OWP) 115/2001, the Court by its order dated 11-09-2001 ordered for staying of the implementation of the impugned judgement. Similarly in LPA (OWP) 137/2001, on 16-03-2002, the impugned judgement was ordered to be suspended pending disposal of the Appeal.

03/ For appreciating the issues raised at bar, we deem it appropriate to give brief resume of the facts of the case.

04/ On 22-03-1996 at 13.45 hours, a message was received by police station, Pahalgam from police post, Aishmuqam. Through a wireless message, the SDPO, Bijbehara/SHO, Pahalgam were informed that a written complaint was lodged by Gulzar Ahmad Teeli S/o Ghulam Qadir R/O Shumhal, Aishmuqam, in which it was mentioned that during search operations in the said village, a group of four army personnel entered in the house of the father of the complainant in the evening hours on 21-03-1996. The group was headed by Mr. Sharma and Mr. Raju. It was also mentioned in the complaint that at that point of time, the complainant and his father were in the mosque for offering evening prayers and his wife and unmarried sister were at their home. The wireless message also contained further contents of the complaint in which it was stated that the army personnel, after finding the girls alone, raped them. On the basis of said wireless message, case F.I.R No. 25/1996, u/s 452, 376 RPC was registered in police station Pahalgam. The Investigation Officer informed the concerned Army Officer.

05/ The proceedings initiated, resulted in convening of a SGMC on 29-04-1997, which ultimately sentenced the accused No. 247454 ON Naik, Rajvinder Singh of 4RR to suffer rigorous imprisonment for ten years ; to be dismissed from service ; and to be reduced to the ranks. The accused No. 3985028 N, Sepoy (Lancnaik) Onkar Singh Chib of 4RR was sentenced to suffer rigorous imprisonment for ten years ; and to be dismissed from service. The accused No. 2477108X Sepoy (Lancnaik) Surinder Kumar of 4RR was sentenced to suffer rigorous imprisonment of ten years ; and to be dismissed from service. The accused No. 3181297F, Sepoy Sanjay Prakash of 4RR was sentenced to suffer rigorous imprisonment for ten years ; and to be dismissed from service.

06/ Out of four sentenced persons, Surinder Kumar and Onkar Singh Chib alone challenged the orders in two separate writ petitions, which, as already stated, have been allowed by the learned writ Court and are subject matter of these LPAs.

07/ The learned writ Court allowed the writ petitions after it re-appreciated the evidence of the witnesses. The learned writ Court allowed the writ petitions by recording a finding that two female prosecution witnesses, one married and the other unmarried, had given two different statements at pre-trial stage and during the trial of the case and further the medical evidence did not corroborate the allegations of these ladies.

08/ Mr. P.S.Chandel, learned CGSC, appearing for the Appellants, was at great pains to explain that the pre-trial and the SGCM proceedings have been conducted in accordance with the Army Act and the Rules made thereunder. Learned counsel submitted that the learned writ Court has allowed the writ petitions by presuming that the medical evidence does not support the prosecution story and there is variance in the statements of prosecution witnesses made at pre-trial stage and in the SGCM proceedings. Learned counsel submitted that the aforestated findings, recorded by the learned writ Court, are not factually correct. He referred to the record of the proceedings and submitted that there is complete compliance with rules 22 to 24 and 106 of the Army Rules 1954 (for short Rules of 1954). Learned counsel, on the basis of record, submitted that the permission, for conducting trial of the offence by the SGCM, was also obtained by the competent authority on 24-02-1997 and the necessary orders for convening SGCM was issued by the Officiating General Officer Commanding on 26-03-1997. Learned counsel, while referring to the official record, copies whereof were provided to the Court also, submitted that the respondents-writ petitioners were afforded sufficient opportunity of being heard and were given ample opportunity to cross examine the witnesses. Learned counsel further submitted that all proceedings have been conducted in presence of the independent witnesses as is reflected at S.NOs.3, 8 and 18 of page 9 of the SGCM proceedings. Learned counsel

submitted that the record would show that the provisions of rules 22 to 24 including that of rule 106 have been complied with. Learned counsel also submitted that the official record would show that there is no variance in the statements made by the prosecution witnesses in the pre-trial proceedings as well as in the SGCM proceedings. Mr. Chandel further submitted that contrary finding recorded by the writ Court is not supported by the record. He also submitted that the finding recorded by the writ Court in the impugned judgement that medical evidence does not support the prosecution case is completely against the official record. Learned counsel referred to the statement of Dr. Mattoo, who figured at S.No. 6 in the list of prosecution witnesses of SGCM proceedings and submitted that this witness has supported the case of the prosecution and on examination of unmarried prosecution witness, he found that her hymen was ruptured and there were marks on her cheeks. Learned counsel submitted that the statement of the doctor is also corroborated by the statement of the Investigation Officer, ASI, Bashir Ahmad, who figured at S.No.2 of the list of witnesses in SGCM proceedings. Learned counsel also submitted that the said ASI, had seized the clothes, bunch of hairs and one blood stained Shalwar of the unmarried prosecution witness. Learned counsel also submitted that in accordance with the mandate contained in rule 95(2) of the Rules of 1954, the respondents were also provided "*friend of the accused*". Learned counsel also submitted that the

claim of the respondents and finding of the learned writ court that they were not provided defending counsel of their choice is against the official record and against the judgement of Hon'ble the Supreme Court dated 08-12-1997 passed in case **Union of India and others v. Major A.Hussain, AIR 1998 SC 577**. Learned counsel also submitted that the claim of the respondents that they were not provided copies of the record of the Court of Enquiry in terms of rule 177 of the Rules of 1954 and breach thereof would vitiate the trial, is against the law laid down by Hon'ble the Supreme Court in Major A.Hussain's case supra. Learned counsel also submitted that re-appreciation of evidence by the learned writ Court in a writ petition is not permissible in law. He submitted that the SGCM proceedings do not suffer from any procedural irregularity and placed reliance on judgement titled **Union of India v. Major G.S.Sodhi, AIR 1991 SC 1617**. Learned counsel also submitted that the punishment was imposed on the respondents on the basis of direct evidence and not on the basis of confessional statements alone, which were, subsequently, retracted. Learned counsel submitted that even in absence of confessional statements, there was ample evidence available to the SGCM, which inspired confidence and it was sufficient to impose punishment on the respondents. Learned counsel further submitted that even in absence of confessional statements, which were later retracted and were used as corroborative evidence, the offence against the respondents was

proved in accordance with law and the punishment has been rightly imposed on them. Learned counsel, in support of his contention, referred to the case titled **State (NCT of Delhi) v. Navjot Sandhu alias Afshan Guroo, AIR 2005 SC 564**. Learned counsel submitted that since there is complete compliance with the procedure prescribed by law in SGCM proceedings, the learned writ court could not interfere in the findings of SGCM. Learned counsel, in support of his contention referred to and relied upon judgements of Hon'ble the Supreme Court reported in 1995(5) Supreme 366, AIR 1987 SC 2386 and AIR 1998 SC 577. Learned counsel, accordingly, prayed for allowing of the LPAs and setting aside the judgement impugned therein.

09/ Mr. J.R.Arora, learned counsel appearing for the respondents, submitted that prosecution case is a bundle of contradictions and cannot become basis for imposing any kind of punishment on the respondents. Learned counsel, while elaborating his submissions, stated that the testimony of the prosecutrix is not corroborated by the medical evidence and the medical examination of both unmarried as well as married prosecution witnesses speaks against the commission of offence of rape. Learned counsel further submitted that no Court of Enquiry has been conducted in accordance with the mandate contained in rule 177 of the Rules of 1954. Learned counsel submitted further that in the case on hand, the conditions contained in the said rule have been observed in breach, as such, the trial

against the respondents-writ petitioners is illegal. He further submitted that in terms of rule 182 of the Rules of 1954, the proceedings of the Court of Enquiry (COI) or any confession, or statement, or answer to a question made or given at a COI, will not be admissible evidence against a person, who is subject to the Army Act and also submitted that no evidence in respect of the proceedings of the Court can be given against any person except upon trial of such person for willfully giving false evidence before the Court. Learned counsel submitted that the material collected by the COI could not be used against the respondents in the SGCM proceedings. He also submitted that the confessional statements have been obtained by the COI of the unit from the respondents and the statements cannot be said to have been made out of their free will and without any coercion or influence. Learned counsel also submitted that the confessional statements are not written in the hands of the respondents. Learned counsel also submitted that the alleged confessional statements have been retracted by the respondents. He also submitted that proviso to rule 33 & 34 of the Rules of 1954 have not been strictly complied with, in as much as, 24 hours time was not provided to the respondents for preparing their defense, which in the submission of the learned counsel, would result in vitiating the SGCM proceedings. Learned counsel also submitted that neither services of the counsel/advocates were provided to the respondents nor any prior information was given to

them for convening and conducting of SGCM proceedings. Learned counsel further submitted that the provisions of the Evidence Act are applicable to the Court Martial proceedings and appreciation of evidence is to be made as per Evidence Act. Learned counsel further submitted that the evidence has not been properly appreciated by the SGCM and statements of witnesses which contradict each other have been made the basis for recording convictions against the respondents. Learned counsel, in support of his contentions, relied upon the judgement of the Gowhati High Court (2004)2 Crimes (HC) 165, (2005)0, CrLJ 220, judgement of the Andhra Pradesh High Court and also relied on Navjot Sandhu's case supra.

10/ We have had the benefit of examining the official record of the case, copies whereof were supplied by learned counsel for the Appellants. We have examined it and are satisfied that the procedure, as provided by the Army Act and Rules made thereunder, has been complied with in its entirety and there has been no breach of the provisions of the Act or Rules made thereunder, more particularly, rules 22 to 25. We are also satisfied that the evidence brought on record, at all stages, has proved the guilt against the respondents-writ petitioners and there has been no serious infirmity in the statements of the witnesses at any stage of the proceedings. The witnesses have corroborated the material particulars of the offences with which the respondents – writ petitioners were charged. The findings recorded by the SGCM, in our opinion, cannot be said to be

based on no evidence or completely perverse. The proceedings against the respondents have been conducted in most fair and transparent manner and opportunity of hearing to defend themselves has been provided to the respondents in accordance with the mandate contained in the Army Act and Rules made thereunder.

11/ Since the learned writ Court has recorded findings in the impugned judgement that the material witnesses (one married and another unmarried) gave contradictory statements at pre-trial and post-trial stages and that medical evidence did not support the allegation of rape, we deem it necessary to refer to the necessary evidence so as to keep the record straight. We would like to make it clear that under our power of judicial review, in terms of article 226 of the Constitution of India, there is virtually no scope available to the writ Court to re-appreciate the evidence. The Court Martial proceedings can be rendered invalid if there is breach of fundamental procedural rules, which have the effect of rendering the proceedings illegal. Statement of the unmarried prosecution witness, who, as per evidence, was a virgin at the time of commission of crime and statements of other prosecution witnesses as also statements of Dr. Mattoo and Dr. Masooda Jan Shahmiri, is reproduced hereunder:

“No: 2963 NGO ASI Bashir Ahmed, incharge police post, Aishmuqam being duly affirmed is examined by the prosecutor:-

On 22 March 1996, I was performing the duties of incharge police post Aishmuqam. At about 1300 hours, Shri Guljar Ahmed Teli S/O Shri Gulam Qadir Teli resident of village Shumahal came to my police post and submitted a written complaint to me. He also told me that on 21 March 1996

at about 1830 hours four Army personnel of 4 Rashtriya Rifles (Aishmuqam Camp) entered his house and committed rape with his wife Mrs Misrra and his sister Miss Dilshadda. On the basis of the written complaint of Shri Guljar Ahmed Teli an FIR No: 28/96 was recorded by me. After recording the FIR I gave a wireless message to Police Control Room Anantnag and Sub Divisional Police Officer, Bijbiara and also to Station House Officer, Phalgam.

Thereafter, I went to village Shumahal alongwith a constable for further investigation. On the way to the village Shumahal, I went to meet Commanding Officer, Colonel PK Narula of 4 Rashtriya Rifles and told him about the incident of rape reported by Shri Guljar Ahmed Teli. Thereafter, I went to the house of Shri Guljar Ahmed Teli in village Shumahal. I prepared a rough sketch of the house of Shri Guljar Ahmed Teli and the neighbouring houses. On the basis of that rough sketch, I prepared the sketch showing only topographical features on ground. I hereby produce four sets of topographical sketches of the scene of incident. Each set of sketch contains eight copies.

Sketches are received, marked Exhibit 'L', 'L-1', 'L-2', 'L-3' respectively, signed by the Judge Advocate and attached to the proceedings.

I identify my signature on Exhibits 'L to L-3', the same are encircled in red by the Judge Advocate. The sketches are not scale. A arrow points the direction of north.

The sketch depicts the house of Shri Guljar Ahmed Teli. In his house, on the ground floor, there are three rooms and on the first floor also there are three rooms. The sketch also shows the neighbouring houses of Shri Ghulam Rasool Salroo, Shri Assadulla Teli and Shri Gulam Ahmed Teli. Near the house of Shri Guljar Ahmed Teli there is a cow shed. The sketch also shows Ashimuqam-Hapatnar road.

The distance between the house of Shri Guljar Ahmed Teli and house of Shri Gulam Rasool Salroo is approximately 20 feet.

The house of Shri Gulam Ahmed Teli and Shri Assadulla Teli are approximately 110 feet and 50 feet respectively from the house of Shri Guljar Ahmed Teli.

I also took down the statements of Mrs Misrra w/o Shri Gulzar Ahmed Teli and Miss Dilshadda d/o Shri Gulam Qadir Teli.

I also recorded the statements of Mrs. Sarra w/o Shri Gulam Rasool Salroo, Shri Assadulla Teli and Shri Gulam Ahmed Teli. I also seized two firens belonging to Miss Dilshadda and Mrs Misrra. I also seized bunch of hairs of Mrs Misrra.

A seizure memo in respect of abovesaid articles was prepared by me. These articles were handed over to civil Court alongwith the challan. When civil Court handed over the case to the Army authority, the same were also given to the unit of the accused persons. I donot know under whose custody these items were kept till today. I donot know whether these items were kept safely or not.

I hereby produce the following articles which were seized by me:-

(a) A green colour firen belonging to Mrs. Misrra which is received, examined, labelled, the label is marked Material Exhibit 'ME-6' and signed by the Judge Advocate, the firen is taken as Material Exhibit and placed in the custody of the Court. The firen is also examined by the defending officer. The court observes that firen is torn from the side.

(b) One gray colour firen belonging to Miss Dilshadda is received, examined, labelled, the label is marked Material Exhibit 'ME-7' and signed by the Judge Advocate, the firen is taken as Material Exhibit and placed in the custody of the Court. The firen is also examined by the defending officer. The court observes that this firen is torn from the front.

(c) One packet containing a bunch of hairs of Mrs Misrra which is received, examined, labelled, the label is marked Material Exhibit 'ME-8' and signed by the Judge Advocate, the hairs are taken as Material Exhibit and placed in the custody of the Court. The hairs are also examined by the defending officer.

On 22 March 96, I could not sent Mrs. Misrra and Miss Dilshadda for medical check up to District Hospital Anantnag as there was no vehicle available for this purpose.

On 23 March 96, Miss Dilshadda and Mrs Misrra were sent for medical check up in District Hospital, Anantnag along with a constable.

I donot remember the name of the constable.

Thereafter, I handed over the case to Sub Inspector Mujaffar Ahmed, Station House Officer, Phalgam for further investigation.

CROSS EXAMINED BY DEFENDING OFFICER
ON BEHALF OF ALL ACCUSED PERSONS.

When I reached to the house of Shri Gulzar Ahmed Teli for investigation of the case, many people of the village were already gathered in his house.

When I went to the room of the first floor of the house some articles and bedding were scattered all around in the room.

I also seized Salwar of Miss Dilshadda which she was wearing at the time of commission of rape.

At this stage, witness is shown Material Exhibit 'ME-5' which he identifies as the same Salwar which he had seized on 22 March 96.

I did not seize the Salwar of Mrs Misrra which she was wearing at the time of commission of rape.

I found some stains of blood on the Salwar of Miss Dilshadda which I had seized.

RE-EXAMINATION DELINED BY THE PROSECTOR

NO QUESTIONS BY THE COURT

Provisions of Army Rule 141 (2) are complied with.

Unmarried girl (name withheld) being duly affirmed is examined by the prosecutor:-

I am 17 years old girl. I donot know my exact date of birth. I have studied upto forth class.

On 21 March 1996 I and my sister-in-law (Brother's wife) Mrs Misrra were sitting outside our house. At about 1800 hours, on the same day, I heard someone shouting that one Mr. Sharma has come to our village Shumahal with Army for search. After few minutes, four Army personnel came to our house.

At this stage, the witness identifies all the accused persons as the same Army personnel who had come to her house on 21 March 96. Naik Rajvinder Singh, whom the witness identifies as the person who told her and Mrs Misrra to go inside house. Thereafter, all the four accused persons came inside the house and they searched a room and kitchen on the ground floor. After that, all the accused persons told me to light a lantern and insisted us to come up on the first floor of the house. I gave a lighted lantern to them

and told them to search on the first floor on their own but they would not come with them on the first floor as there was no male member present in the house at that time. All the accused persons threatened us with their weapons. When I and Mrs Misrra were climbing up the stairs, all the accused persons started touching my breasts and face.

At this state, the witness points out towards Lance Naik Surinder Kumar as the person who also kissed her and touched her breasts.

Then all the accused persons told us to come on the loft which was constructed above the first floor. I and Mrs Misrra refused to go with them on the loft. After that, all the accused persons took myself and Mrs Misrra forcibly in a room on the first floor. They thoroughly searched that room. During the search they threw all the items which were lying in the room. After that Lance Naik Onkar Singh Chib whom the witness identifies as person who took Mrs Misrra out of that room. Naik Rajvinder Singh, Lance Naik Surinder Kumar and Sepoy Sanjoy Prakash remained there with me in the room. Then they touched my breasts and cheeks. After that, Naik Rajvinder Singh also went out from that room and Sepoy Sanjay Prakash and Lance Naik Surinder Kumar whom the witness clearly identifies as the persons remained with her in the room. Then Lance Naik Surinder Kumar made me lie down on the floor. At that time, Sepoy Sanjay Prakash was also standing there and was threatening me. Lance Naik Surinder Kumar opened my Salwar and tried to pull it down. I tried to put up my Salwar again and again. I started crying. After pulling down my Salwar Lance Naik Surinder Kumar also pulled down his pant and he lied down on my stomach. He climbed on the top of me and after that he did 'NAJAYAJ HARKAT' with me. When he claimed on the top of me, I was pushing him away again and again. At that time Sepoy Sanjay Prakash who was standing there threatened me with his gun. I was trying to get up but Lance Naik Surinder Kumar was lying on the top of me. At that time I felt pain on the sides of my stomach and hips. I was having pain due to the weight of Lance Naik Surinder Kumar on me. He was making up and down motions on my stomach. Then he made 'NAJAYAJ HARKAT' with me. I started crying. At the time of 'NAJAYAJ HARKAT' by Lance Naik Surinder Kumar with me, Sepoy Sanjay Prakash had put his gun on my chest and he kept on standing there. At that time, he was speaking something but I did not understand. He also tried to shut my mouth with his hand. After Lance Naik Surinder Kumar did 'NAJAYAJ HARKAT' with me, Sepoy Sanjay Prakash went out from the room. After few minutes Naik Rajvinder Singh came in the room and touched my naked thighs. At that time, Lance Naik Surinder Kumar was still on my top. After few minutes, Naik Rajvinder Singh (Sardar) also went out. Thereafter, Lance Naik Surinder Kumar after wearing his pant also went away with his gun.

Lance Naik Surinder Kumar kept on doing up and down motions on my stomach for about 5-6 minutes. After that, I felt that my Salwar was wet. I saw that the tape of my Salwar was also broken. I saw that on my Salwar there were some white water and few drops of blood. I immediately changed that Salwar after all the accused persons ran away from our house. I came down on the ground floor in the room where I saw my sister-in-law, Mrs Misrra lying on the ground in unconscious state. I saw that her firen was torn and her Salwar was also lying open. I sprinkled some water on her face and she regained consciousness after few minutes. Thereafter, Mrs Misrra went out of the house to call some male members who had gone to the mosque for prayer. After few minutes, my father Shri Gulam Qadir Teli and my bother Shri Gulzar Ahmed Teli came back to the house along with Mrs. Misrra. I told the whole incident to them.

Next day in the morning my brother Shri Gulzar Ahmed Teli went and reported the incident to police post Aishmuqam.

Two police men, whose names I donot know, came to our house in the evening. They recorded my statement. Police also seized my Salwar which I was wearing at the time of incident. They also seized bunch of hairs of Mrs Misrra.

On 24 March 96, I and Mrs Misrra went for medical checkup. I donot remember the place where we had gone. One police man was also with us at that time.

After 2 days of that medical examination, we again went for another medical examination.

I had also gone to Aishmuqam Camp to identify the accused persons. I donot remember the date on which identification Parade was carried on. I identified all the accused persons on that day.

At this stage, the witness is shown the printed Salwar, Material Exhibit 'ME-5' which she indentifies as the same Salwar which she was wearing at the time of incident of rape.

The witness is again shown two firens, Material Exhibits 'ME-6' and 'ME-7'. She identifies that gray colour firen that's Material Exhibit-'ME-7' belongs to her and she was wearing the same at the time of the incident.

At this stage, the witness is shown a topographical sketch, Exhibit 'L' which is also explained to her. She points the following details which are marked by the Judge Advocate as:

- Point A The route taken by all accused persons come to our house.*
- Point B Room where Lance Naik Surinder Kumar did 'NAJAYAJ HARKAT' with me.*
- Point C Room (Ground floor) in which Mrs Misrra was found lying unconscious after all accused persons left the house.*
- Point D 'Loft' in my house.*
- Point E Place where Lance Naik Surinder Kumar lied me down on the floor and did 'NAJAYAJ HARKAT'*
- Point F Place where Sepoy Sanjay Prakash was standing, when Lance Naik Surinder was doing 'NAJAYAJ HARKAT' with me.*

**CROSS EXAMINED BY THE DEFENCE OFFICER
ON BEHALF OF ALL THE ACCUSED PERSONS.**

On the day of incident all the accused persons were wearing civil clothes. Two were wearing firens. One was in Jacket and other was in blue pullover. Lance Naik Surinder Kumar was also wearing a black 'Patka'. I donot know whether they had beard or not as I was afraid.

All the accused persons told me to lit the lantern. At that time, the visibility was good and natural light was also coming to the rooms on the first floor. The accused persons came for search of our house approximately at 1800 hours. Initially, we told the accused persons that we would not come inside the house and if they want to search the house, they can search it without their presence.

As the accused persons were not speaking in Kashmiri, hence I recognized them as military persons. I could understand only few lines of conversation amongst the accused persons.

All the accused persons molested me when I was climbing the stairs.

I do not know whether they molested Mrs. Misrra or not while we were climbing the stairs.

Lance Naik Surinder Kumar first molested me.

Sepoy Sanjay Prakash threatened me and also touched my breasts at that time.

Sepoy Sanjay Prakash touched my breasts with one hand and he was holding his gun in other hand.

Naik Surinder Kumar forced me to lie down on the ground and after that he entered his hand in my Salwar to open it then he broke the tape of my Salwar.

Naik Rajvinder Singh, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash were trying to take out my firen and in the scuffle, it got torn.

At the time Lance Naik Surinder Kumar was doing 'NAJAYAJ HARKAT' my Salwar was rolled down upto thighs. Lance Naik Surinder Kumar opened his pant while he was lying on top of me. At the time of 'NAJAYAJ HARKAT' his gun was lying down on the ground. I was pushing him again and again but he was lying on the upper portion of my things. When Lance Naik Surinder Kumar was doing 'NAJAYAJ HARKAT' I felt pain in my vagina and stomach. Both the accused persons remained in the room with me for amount ½ hours.

It took me two to four minutes to come down on the ground floor after wearing my Salwar. All the accused persons had already left at that time. They searched our house only for two to four minutes. Salwar of Mrs. Misra was also opened and down upto knees when I saw her lying in unconscious state. I did not see any blood on her Salwar.

After all the accused persons entered the house for search they closed the main door.

All the windows of the house were also closed at that time. We started crying and shouting for help while the accused persons were taking us on the first floor. I kept on crying and shouting for the help till the time all the accused persons left our house.

At the time of 'NAJAYAJ HARKAT' I was pushing the accused with both my hands from his shoulders.

I tried to give him a slap but he held both my wrists. People of our village told us that Sharma Sahib has come with Army for search. I donot know whether militants are usually coming to our village or not. No militant has ever come to our house.

It is incorrect to suggest that I have falsely implicated the accused persons under pressure from militants.

It is incorrect to suggest that I have taken money to give this statement.

It is further incorrect to suggest that I am telling lies in the Court.

I donot know whether the accused persons had searched any other house in the village before they entered into our house. I donot know who is 'Sharma Sahib'. I do not know whether my family tried to compromise with accused persons regarding this incident.

Just after I heard that 'Mr. Sharma' has come to the village with Army, the accused persons come to our house. Before giving this statement in the court I had met the prosecutor and Commanding Officer of 4 Rashtriya Rifles. My brother was also with me at that time. My brother did not tell me what he had spoken to the Commanding Officer.

RE-EXAMINATION BY THE PROSECUTOR

I was not wearing any watch on the day of incident. I am not sure that for how much time Lance Naik Surinder Kumar stayed with me in the room because I was not wearing any watch. I can understand Urdu but not fully.

QUESTIONS BY THE COURT

At the time of incident, I was approximately 17 to 18 years old. Around 1 year has passed to the incident. I was about 17 years old at the time of incident. I donot know what is the age written in my school certificate.

'NAJAYAJ HARKAT' was done against my will and consent. I was forced into such an act.

'NAJAYAJ HARKAT' I mean Lance Naik Surinder Kumar penetrated his erected penis inside my vagina and ejaculated. Earlier I was not explaining this word in clear terms as I was feeling shy to tell the court.

The whole penis was penetrated inside my vagina. Blood was also coming out of my vagina.

At the time of intercourse by Lance Naik Surinder Kumar, Sepoy Sanjay Prakash has put his gun on my chest and was threatening me. He was also shouting which I did not understand.

When Lance Naik Surinder Kumar was having intercourse with me, Sepoy Sanjay Prakash also shut my mouth with his hand. Sepoy Sanjay Prakash did not having intercourse with me.

I have earlier also given statements twice to police and once to Judicial Magistrate.

After Lance Naik Surinder Kumar had finished intercourse with me, he again tried for that but he failed. During the intercourse I did not become unconscious but I was shocked.

I was not married at the time of incident.

NO QUESTION SUGGESTED BY THE PROSECUTOR AND DEFENDING OFFICER THROUGH COURT.

The witness does not wish her evidence to be read over to her.

The provisions of Army Rules 141 (2) and 142(2) are complied with.

Doctor Mushtaq Ahmed Mattoo son of Shri Gulam Ahmed Mattoo resident of Srinagar being duly affirmed is examined by the prosecutor:-

I am working in Laladed Hospital, Srinagar as Registrar from last five years. I did my MBBS from Kashmir University in the year 1981. After that I obtained my Master's degree in the field of gynaecology in the year 1992. I have earlier also examined rape victims many times.

At this state, the prosecutor submits that in view of educational qualification and experience of the witness, he be allowed to examine him as an expert in terms of section 45 of the Indian Evidence Act.

The defending officer has no objection.

ADVICE BY JUDGE ADVOCATE

Gentlemen, you have heard the submission of the prosecutor for permitting him to examine Doctor Mushtaq Ahmed Mattoo as expert witness. The defence has no objection to this witness being examined as an expert. Section 45 of the Indian Evidence Act reads as under:

“ 45. Whenever the court has to form an opinion upon a point of foreign law or science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.

The opinion or beliefs of third person as a general rule are irrelevant and therefore, inadmissible. Witnesses are to state facts only i.e what they themselves saw or heard or perceived by any other sense. There are however, cases in which the Court is not in a position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject e.g. when the question involved is beyond the range of common experience or common knowledge, when special study of a subject or special training or special experience therein is necessary. Under this head come matters of science, art, hand writing, finger impression and foreign law. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision. The rule of admissibility is founded on necessity. Keeping in view, the qualification and experience of this witness, you have to consider whether to allow the submission of the prosecutor and permit him to examine Doctor Mushtaq Ahmed Mattoo as an expert.

The Court is closed to consider its decision.

The Court decides to allow the submission of the prosecutor.

The Court is re-opens, the accused is brought before it and the above decision is announced in the open court.

On 25 March 1996 at about 1900 hours I examined Mrs. Misra wife of Shri Gulzar Ahmed Teli and Miss Dilshadda daughter of Shri Gulam Qadir Teli both resident of village Shumahal Aishmuqam. They were brought to me for medical examination by Inspector Mohomad Mujjaffar Khan, Station House Officer, Police Station, Phalgam.

I first examined Mrs Misra thoroughly. On her physical examination, I did not find any marks of violence on her body and she was not bleeding from any site.

After examining her local parts, I found that her hymen was not intact and she was a parous woman. After that I made a slide of her vaginal smear for laboratory examination. However, after the laboratory examination, no spermatozoa was found in that smear because she was brought for medical examination after about five days of incident of rape.

Thereafter, I examined Miss Dilshadda. I did both general physical examination and local examination of her private parts. She had a doubtful mark of violence on her face. It was like a scratch mark which appeared to be healed up. She was not bleeding from any site.

After examining her private parts, I found that her hymen was not intact. Her vaginal smear was taken and on its examination no spermatozoa was found in it.

I hereby produce the report of the medical examination of Mrs. Misra and Miss Dilshadda, which is received, read and is marked Exhibit 'G' signed by the Judge Advocate and attached to this proceedings.

The report is in my hand writing. I identify my signature thereon which is encircled in red by the Judge Advocate.

CROSS EXAMINATION BY THE DEFENDING OFFICER
ON BEHALF OF ALL ACCUSED PERSONS

Hymen may also get ruptured by riding cycling or running etc.

In my opinion, hymen of virgin girl may also be ruptured during vigorous examination of vagina by a doctor.

Before I examined both the girls, I did not see the previous medical examination report of the victims. But I asked both the girls whether they have been medically examined earlier in regard to this incident. They told me that they were examined by a local doctor who is not a specialist.

A doctor who is not a specialist in gynaecology can also certify whether the hymen is ruptured or not.

The scratch on the face of Miss Dilshadda was approximately 3-4 days old.

**RE-EXAMINATION DECLINED BY THE PROSECUTOR
QUESTIONED BY THE COURT**

In my opinion, a woman who has given birth to 3 to 4 children, if subjected to rape by two or three persons, still there is a possibility of absence of any internal or external injury on her private parts. In such cases internal injuries like inflammation, abrasion or swelling may still be absent on her private parts.

In case of intercourse by one or two persons with a paros lady, there is a possibility of absence of external or internal injuries.

In my opinion, if the rape victim is examined after about 20-24 hours no spermatozoa may be found in the vaginal smear. Spermatozoa automatically die after about 12 hours of intercourse. In the case if the victim has taken bath or has cleaned her private parts then spermatozoa may not be found even after half an hour of intercourse.

In my opinion, if the victim of rape is medically examined after about 24 hours of alleged rape and she is a multi paros woman, then swelling or abrasion may not be found on her private parts.

In my opinion, hymen of a virgin girl may still remain intact even after intercourse. Rupturing of hymen depends on the degree of vigorousness with which the sexual intercourse has been done.

In my opinion, if rape has been committed on a virgin girl of 18-19 years old with someone holding her legs or arms, there is a possibility of absence of any external or internal injuries on her private parts especially when medical examination is carried out after about 24 hours of commission of rape.

In my opinion a virgin girl may also be subjected to sexual intercourse with the absence of injury on her private parts and without rupturing of hymen.

Miss Dilshadda was about 20 years old when I examined her.

In my opinion, there is very remote possibility of blood coming out from vagina after intercourse without any internal injury or rupturing of the hymen.

**NO QUESTION SUGGESTED THROUGH COURT BY
THE PROSECUTOR AND DEFENDING OFFICER.**

The witness does not wish his evidence to be read over to him.

Provisions of Army Rules 141 (2) and 142(2) are complied with.

Doctor Mrs. Masooda Jan Shahmiri daughter of Late Khwaya Amiruddin Wani resident of Srinagar being duly affirmed is examined by the prosecutor:-

I am posted in District Hospital, Anantnag in the gynaecology department since 1989. My qualifications are MBBS MD. I passed my MBBS

in the year 1969 and qualified my MD in the year 1981 from Government Medical College, Jammu. I have earlier also examined rape victims.

At this stage, the prosecutor submits that in view of educational qualification and experience of the witness she be allowed to examine her as an expert in terms of section 45 of the Indian Evidence Act.

The defending officer has no objections:

ADVICE BY JUDGE ADVOCATE

Gentlemen, in the light of my advice on pages 57 and 58 of the proceedings, you may decide the request of the prosecutor.

The Court allows the request of the prosecutor.

On 23 March 1996, I examined Mrs. Misrra wife of Shri Gulzar Ahmed Teli and Miss Dilshadda daughter of Shri Gulam Qadir Teli both resident of village Shumahal. They were brought to me for medical examination by NO 382 Head Constable Gulam Qadir of Police Station Aishmuqam. I first examined Mrs. Misrra at about 1245 hours. The victim was about 30 years old married woman and was having four children. On her physical examination, I did not find any marks of violence on her body. On examination of her private parts, no marks of external violence were seen. On her internal examination, I found her vagina capacious admitting two fingers easily, uterus normal size, anteverted fornice free. Her vaginal smear was taken and was sent for laboratory examination. As per laboratory report number 464 dated 23 March 96, no spermatozoa were seen in her vaginal smear.

I then gave my opinion that Mrs. Misrra was about 30 years old, married, having four children used to intercourse and there was no recent evidence of intercourse as per laboratory report.

I hereby produce the report of medical examination alongwith the laboratory examination report of Mrs Misrra which is received, read and is marked Exhibit 'R', signed by the Judge Advocate and attached to the proceedings.

The report is in my hand writing. I identify my signatures thereon which are encircled in red by the Judge Advocate.

After that, I examined Miss Dilshadda at about 1300 hours. Her general condition was good and she was conscious, cooperative and intelligent. She was approximately nineteen to twenty years old and no marks of external violence on her body were found except a mild abrasion on right side of the face.

On local examination, it was found that vulva and vagina were well developed, her hymen was intact and there were no marks of external violence on her private parts.

As Miss Dilshadda, being a unmarried girl was virgin, therefore, I conducted Per Rectum (PR) examination. In that examination her uterus appeared of normal size, anteverted. Her vaginal smear was taken and sent for laboratory examination. The laboratory examination report No: 463 dated 23 March 96 reveals that in the vaginal smear no spermatozoa was present but few pus cells and epithelial cells were seen.

In my opinion Miss Dilshadda was approximately 19 to 20 years old with a mild abrasion on right side of her face. There was no evidence of intercourse and her hymen was intact.

I hereby produce the report of medical examination alongwith the laboratory examination report of Miss Dilshadda which is received, read and Marked Exhibit 'S', signed by the Judge Advocate and attached to the proceedings.

The report is in my hand writing. I identify my signatures thereon which are encircled in red by the Judge Advocate.

In my opinion, if the victim of rape has taken bath or washed her private parts then spermatozoa may not be found in her vaginal smear. Motile sperm dies within three to four hours.

**CROSS EXAMINED BY DEFENDING OFFICER
ON BEHALF OF ALL ACCUSED PERSONS.**

In my opinion, in case of slight penetration inside the vagina of a virgin girl, there is a possibility that her hymen might not rupture. It is very rare that hymen is not ruptured after full penetration.

In my opinion, in cases of forced penetration even if it is minor penetration inside the vagina of a virgin girl, there will exist some kind of internal injuries on her private parts like swelling or abrasion etc.

**RE-EXAMINATION DECLINED BY THE PROSECUTOR
QUESTIONED BY THE COURT**

In case of Per Rectum examination, there is no possibility of tearing of the hymen during the examination.

**NO QUESTION SUGGESTED THROUGH COURT BY
THE PROSECUTOR AND DEFENDING OFFICER**

*The witness does not wish her evidence to be read over to her:
Provisions of Army Rules 141 (2) and 142(2) are complied with.*

At this stage, the Court observes that Lance Naik Onkar Singh Chib (accused No: 2) is not present in the Court.

The defending officer submits that the said accused is not well and is suffering from Dysentery and loose motion. The doctor, Captain Sanjay Nigam of 426 Field Ambulance has advised him Attend 'C' (complete bed rest) for 24 hours. The other accused persons are fit to undergo the trial but Lance Naik Onkar Singh Chib is unfit to undergo the trial as is certified by Captain Sanjay Nigam.

In view of the above, the defending officer requests to adjourn the Court for 24 hours i.e. till 0900 hours on 11 April 1997.

The prosecutor has no objection.

ADVICE BY JUDGE ADVOCATE

Gentlemen, you have heard the submission of the defending officer and answer thereto by the defending prosecutor. Now, I draw your attention to Army Rules 80 (4), 80 (5) and 82 (1):

80. Sitting in closed Court-

(4) Except as hereinbefore mentioned all proceedings, including the view of any place, shall be in open Court and in the presence of the accused subject to sub rule.

(5) The court shall have the power to exclude from the Court any witness who has yet to give evidence or any other person, other than the accused, who interferes with its proceedings.

82. Continuity of trial and adjournment of Court-(1) When a court is once assembled and the accused has been arraigned the Court shall continue the trial from day to day in accordance with rule 81, unless it appears to the Court that

an adjournment is necessary for the ends of justice or that such continuance is impracticable.

Gentlemen, Army Rule 80 (4) provides that all proceedings of the Court shall be held in the presence of the accused persons. Further Army Rule (82) (1) provides that Court may be adjourned if it is necessary to meet the ends of justice or the its continuance becomes impracticable. In view of above, you should consider the submission of the defending officer. You may decide the submission in the close Court.

The court is closed to consider its decision

The court decides to adjourn until 0900 hours on 11 April 1997.

The court is re-opened the accused persons are brought before it and the above decision is announced in open court.

Doctor Imtiaz Hussain Dar son of Shri Mohamad Ismail, resident of village Krangsoo, Mattan being duly affirmed is examined by the prosecutor.

(Provisions of Army Rule 135 are complied with)

My qualification is MBBS. I passed my MBBS in the year 1991 from Government Medical College, Srinagar. After that, I am posted as Medical Officer in a Civil Hospital, NTPHC Aishmuqam from last three years.

On 25 April 1996, Station House Officer Phalgam came to me alongwith Naik Rajvinder Singh, Lance Naik Onkar Singh Chib, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash for their medical examination. As the incidents is about 1 year old, I cannot exactly identify all the persons who I examined.

At this stage, the witness identifies Naik Rajvinder Singh, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash as the same persons whose medical examination, I carried out on 25 April 1996. I did the General Physical Examination, local examination and spermatozoa microscopic examination.

I found that all the accused persons are capable of performing the sexual intercourse and they are potent.

No external injury was found in their body.

No injury was also found on their private parts.

CROSS EXAMINED BY THE DEFENDING OFFICER
ON BEHALF OF ALL ACCUSED PERSONS.

I did the medical examination of the accused persons at their unit location (Aishmuqam Camp) on the request of Station House Officer, Phalgam.

I don't know the name of that police officer.

RE-EXAMINATION DECLINED BY THE PROSECUTOR
NO QUESTION BY THE COURT

Provisions of Army Rule 141 (2) are complied with.

Married women (name withheld) being duly affirmed is examined by the prosecutor:-

(The witness is examined "in camera")

The incident is about one year old. I donot remember the exact date of the incident. Four Army personnel whom the witness indentifies sitting as

accused persons in the court, came to our house in village Shumahal for search. At that time, Miss Dilshadda, I and my younger daughter aged about 5 years were at home. There was no male member present in the house.

All the accused persons searched the ground floor of our house. Thereafter, they told us to light a lantern so that they can search the house on the first floor. I told them that natural light is already there. After that, I gave them a lighted lantern. The accused persons told me and Miss Dilshadda to come up on the first floor with them for the search. I told the accused persons that they can search the house on the first floor on their own but she and Miss Dilshadda would not come with them on the first floor. Thereafter, all the accused persons took me and Miss Dilshadda on the first floor. There, they searched all the rooms. After the search on the first floor, the accused persons told us to accompany them on the loft constructed above the first floor. We refused to go with the accused persons on the loft. After that, all the accused persons took me and Miss Dilshadda in a room on the first floor and they searched that room thoroughly. They also threw on the floor some articles and clothes lying in the room. Thereafter, an accused person, whom the witness identifies as Naik Rajvinder Singh, took me to another room on the first floor and Lance Naik Onkar Singh Chib, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash whom the witness clearly identifies as the same persons who caught hold of Miss Dilshadda and remained inside the room with her. I tried to open the door of the room in which the three accused persons viz Lance Naik Onkar Singh Chib, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash were left alone with Miss Dilshadda. At this, Naik Rajvinder Singh threatened me with his weapon. After few minutes, Lance Naik Onkar Singh Chib also came out from that room and Miss Dilshadda remained alone with Sepoy Sanjay Prakash and Lance Naik Surinder Kumar in the room. After that, Naik Rajvinder Singh and Lance Naik Onkar Singh Chib started pushing me from that place by threatening me with their weapons and they also started pulling out my firen which I was wearing at that time. It got torn in the scuffle. Then both the accused persons brought me down by force in a room on the ground floor of the house. There they forced me to lie down on the floor and also threatened me to keep quite or they will kill me. After forcing me to lie down in the floor, Naik Rajvinder Singh opened the tap (NALA) of my Salwar and after pulling down my Salwar he did 'NAJAYAJ HARKAT' with me.

After, Naik Rajvinder Singh finished 'NAJAYAJ HARKAT' Lance Naik Onkar Singh Chib also did the same 'NAJAYAJ HARKAT' with me. At the time of 'NAJAYAJ HARKAT' by Naik Rajvinder Singh, he had opened his pant which he was wearing but he kept on wearing his shirt. I donot remember whether he had completely removed his pant or not. At the time of 'NAJAYAJ HARKAT' by Naik Rajvinder Singh he was lying on my stomach. He remained on my top for about 4-5 minutes.

By 'NAJAYAJ HARKAT' I mean that what a male does with a female after marriage.

After Naik Rajvinder Singh finished 'NAJAYAJ HARKAT' with me, he got up from stomach and kept on standing nearby in the same room with his gun. Naik Rajvinder Singh was standing there in the room, when Lance Naik Onkar Singh Chib climbed on my top and did 'NAJAYAJ HARKAT' with me for about 4-5 minutes.

After that, I become unconscious. When I regained consciousness, I saw that my firen was torn and Miss Dilshadda was tying the knot of tape of my Salwar. She also sprinkled few drops of water on me. When I regained full consciousness, I immediately went to the mosque where my husband Shri Gulzar Ahmed had gone for prayers at that time. After meeting my husband outside the mosque, I narrated the whole incident to him.

Next day, in the morning, my husband went to the Police Station to lodge a report about the incident. Thereafter, two policemen came to our house on the same day at about 1600 hours and they recorded my statement. I do not know the names of those policemen.

After one day of the incident, a policeman also took me and Miss Dilshadda for medical examination in a hospital at Anantnag. There, I and Miss Dilshadda were medically examined by a doctor. After medical examination, we went to Srinagar for another medical examination on the same day. There also we were medically examined in a hospital at about 1700 hours on the same day.

On the third day of incident, I and Miss Dilshadda also went to Aishmuqam Army Camp for the identification of the accused persons. I identified all the accused persons during the identification parade.

CROSS EXAMINED BY THE DEFENDING OFFICER
ON BEHALF OF ALL ACCUSED PERSONS.

When the accused persons came to our house for search, I was sitting in the terrace (varanda) of my house. All the accused persons came from the side of house of Mrs. Sarra.

All the accused persons were wearing civil clothes. Two were wearing firens and one was wearing a Jacket. No one was in army uniform. At that time, they were not having any beard except Naik Rajvinder Singh who is Sardar (SIKH) was having beard.

All the accused persons told me and Miss Dilshadda to go inside the house as they wanted to search the house. When all the accused persons came to our house my youngest daughter was also sitting in the terrace (Varanda) but when she saw the accused persons entering our house, she ran away from there.

Before the accused persons entered our house for search, I told them that there was no male member and we were alone in the house.

The accused persons entered our house at about 1830 hours on the day of incident.

I did not tell the accused persons that I would call some male member before they carry out search in the house.

The accused persons initially searched one room and a kitchen on the ground floor.

I told the accused persons that we would not come up on the first floor with them for search.

All the accused persons started molesting us when I and Miss Dilshadda were climbing up stairs.

They were pulling us and threatening to kill us if we will shout.

Before the accused persons came to the first floor, they closed the main door of our house.

When they were closing the door, I started shouting for help but no one came there to help us.

The house of Mrs Sarra is located near my house.

After I and Miss Dilshadda went on the first floor with all the accused persons, they searched all the rooms on that floor.

When Miss Dilshadda was forced inside a room by Lance Naik Onkar Singh Chib, Lance Naik Surinder Kumar and Sepoy Sanjay Prakash, I started shouting that why they had closed the door of that room from inside. I also started pushing that door.

I and Miss Dilshadda were shouting loudly for help but no one came from outside to help us.

Lance Naik Onkar Singh Chib and Naik Rajvinder Singh took me down on the ground floor forcibly. I did not refuse to go down.

I kept on crying, shouting and pleading for mercy till the time all the accused persons remained in my house.

I was shouting loudly so that my voice could be heard outside the house.

When Lance Naik Onkar Singh Chib was threatening me with his gun, Naik Rajvinder Singh at that time opened the tape (NALA) of my Salwar. Before Naik Rajvinder Singh opened my Salwar, he told me why I am shouting. He also told me to keep quite otherwise he will kill me.

When Naik Rajvinder Singh was opening my Salwar he did not open his pant at that time.

Naik Rajvinder Singh forced me to lie down on the floor. He also pulled out my Salwar forcibly. After he took out my Salwar, he kept it on the floor in the same room.

After he completely removed my Salwar, he opened his pant and climbed on my top. At that time, I started crying and praying him for mercy.

After Naik Rajvinder Singh did 'NAJAYAJ HARKAT' with me. Lance Naik Onkar Singh Chib lied down on my stomach. Naik Rajvinder Singh kept on standing there till Lance Naik Onkar Singh Chib finished 'NAJAYAJ HARKAT' with me.

After Naik Rajvinder Singh got up from my top, I tried to get up from the place but Lance Naik Onkar Singh Chib again forced me to lie down on the floor.

When Lance Naik Onkar Singh Chib was doing 'NAJAYAJ HARKAT' with me, Naik Rajvinder Singh after wearing his pant kept on standing nearby with his Rifle.

When Lance Naik Onkar Singh was doing 'NAJAYAJ HARKAT' with me, I did not see his face.

At the time of incident, I was wearing a vest, kurta, salwar and a firen.

At the time of 'NAJAYAJ HARKAT' by Naik Rajvinder Singh and Lance Naik Onkar Singh Chib, my vest, kurta and firen were lifted upto lower level of my breasts but my Salwar was completely removed.

The accused persons had torn my firen only when they were forcibly bringing me down on the ground floor from the first floor.

After both the accused persons finished with the 'NAJAYAJ HARKAT' with me, I immediately fell unconscious and I did not see them going out from the house.

I regained consciousness after about 10-15 minutes. I was in the state of shock therefore, I donot remember about condition of my clothes at that time.

When I regained consciousness, I saw Miss Dilshadda in the room. I asked her about the accused persons. She told me that all had already left the house.

When I came back from the mosque alongwith my husband, many people of our village had already gathered there.

I narrated the incident of rape to my husband only after we reached at our house. I did not tell him about the rape outside the mosque because there were so many people present.

I went running to the mosque to meet my husband.

When I came back from the mosque with my husband, Miss Dilshadda was alone at home and she was crying. When I came back from the mosque, Miss Dilshadda had already changed her clothes.

Next day of incident, I went for medical examination alongwith Miss Dilshadda. We also went to identify the accused persons in Aishmuqam Army Camp after two days of incident.

We went for identification of accused persons at about 1300 hours. All the accused persons were wearing the same dress which they were wearing at the time of incident. After identification parade also, we went for medical examination one more time.

Only Naik Rajvinder Singh and Lance Naik Onkar Singh Chib had intercourse with me.

RE-EXAMINATION BY THE PROSECUTOR

All the windows of my house were already closed when accused persons came for search. They only closed the main door of the house.

No one else except Naik Rajvinder Singh and Lance Naik Onkar Singh Chib had touched me.

I went for medical examination on 23 March 96. In the morning, we went to Anantnag for medical examination. Then we went to Srinagar for another medical examination on the same day. In the evening we stayed in Srinagar and from Srinagar we came back next day for identification of the accused persons.

QUESTIONED BY THE COURT

I am about 30 years old. I got married about 13-14 years ago. I have four daughters. The age of my eldest daughter is about 12 years and youngest daughter is about 4 years.

I am illiterate and I have not studied in any school.

When Lance Naik Onkar Singh Chib was doing 'NAJAYAJ HARKAT' with me, at that time Sepoy Sanjay Prakash also came on the door of the room and asked me why I am shouting. He asked this to me while standing at the door only but he did not come near me and touched me. At this time Lance Naik Onkar Singh Chib was doing 'NAJAYAJ HARKAT' with me, Sepoy Sanjay Prakash also threatened to kill me with his gun. He threatened me while standing at the door of the room in which I was forced to lie down.

Till the time I was conscious, Sepoy Sanjay Prakash did not touch me.

Naik Rajvinder Singh and Lance Naik Onkar Singh Chib penetrated their penis inside my vagina. By 'NAJAYAJ HARKAT' I mean as stated above.

Both the accused persons ejaculated inside my vagina.

When I regained consciousness, I saw that my vagina was wet with semens.

Before I went for medical examination for the first time to a Hospital in Anantnag, I had thoroughly washed my private parts. Miss Dilshadda had also washed her private parts before going for the medical examination.

After I fell unconscious, I did not know whether anybody has touched me or not.

When the accused persons were threatening me with their weapons, I was not fully understanding as to what they were saying.

When both the accused persons were having sexual intercourse with me, I tried to get up but I could not move from there, as they were lying on top of me.

At the time of incident, most of the males of our village had gone to the mosque for prayers.

When we were climbing up the stairs, I saw that all the accused persons were molesting Miss Dilshadda.

Lance Naik Surinder Kumar neither threatened me nor touched me.

At this stage, the witness is shown a topographical sketch, Exhibit 'L-2' which is also explained to her. She points out the following details which are marked by the Judge Advocate as:

Point A Room where Naik Rajvinder Singh and Lance Naik Onkar Singh Chib did 'NAJAYAJ HARKAT' with me.

Point B Room where Miss Dilshadda was forcibly kept inside.

When I was climbing the stairs, Sepoy Sanjay Prakash did not threaten me and touched me.

Naik Rajvinder Singh and Lance Naik Onkar Singh Chib had intercourse with me against my will and without my consent. It was done forcibly.

At this stage, the witness is shown two firens, that is, Material Exhibits 'ME-6' and 'ME-7'. She identifies that the green colour firen (ME-6) is the same firen which she was wearing at the time of the incident.

I gave some hairs to the police after pulling it from my head. The police did not collect the hairs from the room.

**NO QUESTION SUGGESTED THROUGH COURT BY
THE PROSECUTOR AND DEFENDING OFFICER**

*The witness does not wish the evidence to be read over to her.
Provisions of Army Rules 141 (2) and 142 (2) are complied with."*

12/ The unmarried prosecution witness has, in unequivocal terms, in her pre-trial statement, stated that Lance Naik Surinder Kumar came to her house for search operation on the evening of 21-03-1996 and raped her. Her statement recorded at pre-trial stage is also taken note of :

“Unmarried girl (name withheld) states:-

I identify the person here as accused.

Number 2477108X Lance Naik Surinder Kumar came to our house for search on evening of 21 March 96. He along with other soldiers forced me and my sister-in-law Mrs Misrra W/O Gulzar Ahmad Teli to accompany them for search. After the search Lance Naik Surinder Kumar and one more soldier forced me into a room. The other soldier kissed me and ran his hand over my breast and then left. Thereafter Lance Naik Surinder Kumar forcibly threw me on bed and removed my Shalwar. He thereafter removed his clothes and climbed on top of me and raped me. He was on top of me for five to six minutes. During this time one more soldier had come and ran his hands over my thighs. After raping me once Lance Naik Surinder Kumar tried to rape me again but this time he was unable to enter me. He then wore his clothes took his gun and went away. I then wore another pyjama and went to my sister-in-law Mrs Misrra who was lying unconscious. I threw some water over her face which helped her regain her consciousness. I went for medical check up on 22 March 96 to District Hospital Anantnag with my brother Gulzar Ahmad Teli and a police person from police Station Aishmugam.

Cross Examination by the Accused.

The accused asked the following questions:

- (a) Q-1 Did you become unconscious during the act of alleged rape?
A-1 I was conscious throughout.
- (b) Q-2 Did you have a spare salwaar in the same room?
A-2 Yes, one more salwar along with other clothes were hanging on the nails and I wore the salwar after removing it from there.

The above statement has been read over to me in the language I understand along with the questions and answers and I sign it as correct.

Sd/- x x x x x
NUMBER 13746274H
NAIK BASHIR AHM
INTERPRETER

Sd/- x x x x x
MISS DILSHADDA
D/O GULAM QUADIR TELI
R/O SHUMAHAL
R/O SHUMAHAL
24 MARCH 96

Sd/- x x x x x
SURINDER KUMAR
LANCE NAIK
ACCUSED
24-3-96

Sd/- x x x x x x
AJ SINGH, SM
LIEUTENANT COLONEL
OFFICER RECORDING
SUMMARY OF EVIDENCE
24 Mar 96

Sd/- x x x x x x x
RAJEEV CHATURVEDI
CAPTAIN
INDEPENDENT WITNESS. ”

13/ Besides the statements of the witnesses, there is evidence of independent witness also available on record before whom all the four accused persons had admitted commission of the offence, which, they later on retracted. The evidence of unmarried witness is clear and unambiguous in its tone and tenor. She has stated that

because of the forced sexual intercourse, blood oozed out from her vagina and her Shalwar got stained by blood. This blood stained Shalwar was seized by the police officer of police station Pahalgam during the investigation of the case. Another prosecution witness, Dr. Mattoo, has corroborated the statement of the unmarried prosecutrix. One fails to understand as to how and for what reason, Dr. Shahmiri has stated that the hymen of the unmarried girl was intact. The respondents have not alleged mala fides against the prosecutrix or their family members or against the officers of the Army, who conducted the pre-trial and post-trial proceedings. The findings recorded by the SGCM cannot be questioned on any ground whatsoever. The confessions made by the respondents, at the initial stage, were, subsequently, retracted by them but in the facts and circumstances of this case, the retracted confessions had corroborated the case set up against them. One further circumstance in this case is that out of four persons, who were awarded punishment, only two challenged it before the learned writ Court and other two have accepted the punishments awarded to them by the SGCM.

14/ Section 3(i), (ii) & (x), section 9 with comments and section 108 of the Army Act 1950 are taken note of :

“3(i) “Active service”, as applied to a person subject to this Act, means the time during which such person –

- (a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or*
- (b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by any enemy, or*
- (c) is attached to or forms part of a force which is in military occupation of a foreign country ;*
- (ii) “Civil offence” means an offence which is triable by a criminal court ;*

.....
(x) “enemy” includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act ;
.....

(9) Power to declare persons to be on active Service:-

Notwithstanding anything contained in clause (i) of section 3, the central Government may, by notification, declare that any person or class of persons subject to this Act shall with reference to any provision of this Act or of any other law for the time being in force, be deemed to be on active service within the meaning of this Act.

COMMENTS

In exercise of the powers conferred by section 9 of the Act, the Central Government hereby declares that all persons subject to the Act, who are not on active service under clause (i) of section 3, shall, while serving with the Army Farms and Units deployed on Operation RAKSHAK in the States of Punjab, Jammu and Kashmir, Rajasthan, Gujrat and the UT of Chandigarh be deemed to be on active service within the meaning of the Act and of any other law for the time being in force ;

.....
(108) Kinds of courts-martial :- *For the purpose of this Act there shall be four kinds of courts-martial, that is to say :-*

- (a) general courts-martial ;*
- (b) district courts-martial ;*
- (c) summary general courts-martial ; and*
- (d) summary courts-martial.”*

15/ Respondents, in view of the aforementioned provisions of the Army Act, were on active service and they have committed civil offence u/s 376 RPC, which has been proved against them.

16/ Human being in itself is a complete universe. It comprises of different worlds, viz. human body; human mind (head and heart) and human conscience. Human being abhors and despises all kinds of

abominable attempts and efforts which either result in the invasion of any part of its universe and/or places an adverse impact on them. A human being is always in immense love with its own worlds. A forcible invasion of any of the above described worlds has a destructive impact on its entire universe.

17/ Additionally, a human being, in collaboration with other human beings, constitutes a society, a nation or a country, which is defined and identified by its boundaries. From the advent of human history, human beings have zealously and at all costs been guarding the territorial boundaries of their respective countries. At all times in the human history, armies have been raised to accomplish the aforesaid purpose. This “*class of people*” has all along been specially trained physically, mentally, psychologically and emotionally to withstand all kinds external pressures and temptations. This special class of people called “*Army*” stands guarantee to the sovereignty of a State and defend freedoms of its citizens.

18/ The misdemeanor, more particularly, of the army personnel, which is of serious nature, cannot be compromised with. In order to preserve and maintain the territorial integrity of the country, the army personnel have to be the people possessed of high moral values and practising utmost discipline. The Army Act 1950, in the backdrop of article 33 of the Constitution of India is designed and engineered to ensure that the Indian Army becomes a model Army

in the world. There cannot be any compromise with the standards and maintenance of discipline in the army. They are not only the sentinels of the frontiers of the country but are also sacred guards of the rights of the people. Any invasion of the rights of the people by this kind of force cannot be tolerated. The SGCM has been justified in awarding punishments to the respondents.

19/ For our above recorded discussion, we hold that the pre-trial and post-trial proceedings, conducted against the respondents, are in accordance with the mandate contained in the Army Act 1950 and Army Rules 1954 and there has been no breach of any provisions contained therein. We, accordingly, **allow** these Letters' Patent Appeals, **set aside** the impugned judgement dated 09-02-2001 passed in OWPs 229/1998 & 125/1998 and in consequence thereof, both these writ petitions, filed by the respondents – writ petitioners, stand **dismissed** along with connected CMAs.

20/ Before parting with this judgement, we would like to place on record our anguish and pain about the manner Dr. Shahmiri has conducted herself. We warn her to be careful in future.

(Muzaffar Hussain Attar)
Judge

(M. M. Kumar)
Chief Justice

Jammu
09.04.2014
Tariq Mota