

(2011) 08 DEL CK 0082
In the Delhi High Court
Case No : Writ Petition (C) 2029 of 1998

CT. Narender Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Border Security Force Act, 1968 — Section 117(2), 46
Border Security Force Rules, 1969 — Rule 45, 68, 93
Constitution of India, 1950 — Article 136, 226, 32
Penal Code, 1860 (IPC) — Section 376, 451

Citation : (2011) 08 DEL CK 0082

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : R.M. Tewari and Jayant Tewari, in W.P. C 2029 and 2030/1998, Bishram Singh, in W.P. C 2370/1998, for the Appellant; Jyoti Singh Anuj Aggarwal and Bhupinder Sharma, Deputy Commandant, BSF, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

1 Briefly put the facts leading to the filing of the above captioned petitions are that Petitioners Narender Kumar, Kaptan Singh and Raj Bahadur Singh were employed as Constables and Petitioner Om Prakash was employed as a Naik with the Border Security Force (hereinafter referred to as the "BSF") and were attached to the 88th Bn. deployed at village Chhaturgul in District Srinagar on 23.12.1996.

2. On 24.12.1996, the prosecutrix complained to Subedar Ajit Singh PW-1, that the Petitioners had raped her in the night of 23.12.1996.

3. In view of the serious allegations leveled by the prosecutrix, Mr. Shailesh Kumar, 2-IC was detailed to conduct a preliminary inquiry. Conducting an inquiry he found a prima-facie case in favour of the complainant and taking cognizance of the report the Commandant framed following charge against the Petitioners:

BSF ACT

COMMITTING A CIVIL OFFENCE, THAT

IS

SECTION 46

TO SAY, RAPE PUNISHABLE u/s 376 IPC

In that they

At Chack (Chhaturgul) on 23/12/96 at

1830 Hrs onward committed rape on

prosecutrix of Village - Chack

(Chhaturgul), Teh. Kangan

Distt. Srinagar (J&K).

4. Complying with the provisions of Rule 45 of the Border Security Force Rules, 1969 (hereinafter referred to as the "BSF" Rules), the Commandant conducted hearing of the charge and forming an opinion that Record of Evidence need to be drawn out detailed Shailesh Kumar, Assistant Commandant (Tech), to conduct the proceedings pertaining to the Record of Evidence.

5. Record of Evidence proceedings being completed and Record of Evidence submitted and considering the same Inspector General, BSF Srinagar Frontier, directed that a General Security Force Court (hereinafter referred to as the "GFSC") be convened to jointly try the Petitioners and at the trial the prosecution examined 16 witnesses.

6. Noting the testimony of the material witnesses, we highlight that the prosecutrix PW-6, deposed that she is a married woman and had 6 children. On 22.12.1996, which was a Sunday, at about 10.00 AM the Petitioners came to her house and enquired about her husband and she told them that her husband was not present in the house having gone to Jammu for treatment. Thereafter the Petitioners conducted a search of her house and left after about 15-20 minutes. On the same day, at about 07.30 P.M., when she and her children were about to take dinner, someone knocked at the main door of her house. The door was knocked 3-4 times as a result whereof the middle portion of the door broke; the latch of the door got uprooted and the door opened by itself. She saw the Petitioners standing there. She took an oil lamp in her hand and informed her daughter that the Petitioners had again come to the house. Petitioner Om Prakash took the lamp from her hand, broke the same and told her that he was going to conduct a search of her house, upon which she told him that he had already conducted a search of her house in the morning. Petitioner Om Prakash told her that his superior officer had directed him to search her house, upon which she relented and permitted her house to be searched. Om Prakash told her

to open the door of the cattle shed. Thereafter Om Prakash caught hold of her hand and forcibly took her inside the cattle shed. Om Prakash asked her to remove her clothes upon which she requested him to leave and upon her refusal to remove her clothes Om Prakash pulled her hair and manhandled her, as a result whereof, she sustained an injury in her left knee and forehead. Her wrist watch broke during the scuffle between her and Om Prakash who tore her clothes and raped her. Thereafter, Petitioner Kaptan Singh came and raped her. As she was being raped by Kaptan Singh she raised her voice and told her daughters that in case someone makes enquiries about her, they should tell them that she has been killed by the force personnel who had visited their house in the morning upon which Petitioner Om Prakash said that they should take her in the forest and kill all of them. Thereafter Petitioner Narender Kumar and Raj Bahadur also raped her. Before leaving her house, Om Prakash threatened to kill her and her children in case she reported the incident to anyone. After about five minutes her daughters Nazma and Zamila came to her and helped her to move to the adjoining room. On the next day, at about 11.00 A.M. her eldest daughter Naseema came to her house and she informed her that she was raped by the force personnel the previous night. She also told her that the force personnel had threatened her children. At that time Naseema saw some force personnel carrying food outside their house. She and her daughter rushed to them and informed them that 4 force personnel had raped her the previous night and that she could identify the said persons. At about 04.00 P.M. the force personnel, along with their superior officer, came to her house. The Petitioners were mixed up with other force personnel and she was asked to identify the culprits. She correctly identified the Petitioners from amongst the group of the force personnel. On 27.12.1996 the superior officer came to her house and conducted an inspection of the place of occurrence and also gave her Rs. 200/-. She identified the Petitioners on three occasions, firstly on the day after the incident, secondly on 27.12.1996 and thirdly on 29.12.1996. On being questioned about Petitioner Raj Bahadur raping her she said: (Quote) "The accused No. 4 did not penetrate his penis inside my vagina and I could not feel when the semen was ejaculated. Now the witness says that the penis was penetrated inside her vagina by all the accused persons and the accused No. 2,3 and 4 did as the accused No. 1 had done with her. I could feel the semen being discharged inside me. After the ejaculation by the accused, I also got discharged. The accused No. 4 did not penetrate inside. Whereas, the accused No. 2 and 3 had penetrated and discharged inside".... The three accused persons i.e. 1,2 and 3 raped me ruthlessly. However, the accused No. 4 raped me without any ruthlessness in one position. All the four accused persons penetrated their penis in my vagina, however, the accused No. 4 kept it inside for a very less time. I felt the ejaculation inside my vagina by the accused No. 1,2 and 4, however, the accused No. 4 did not ejaculate inside."

7. The prosecutrix was cross-examined with respect to a statement made by her during Record of Evidence when she was examined, the statement being

indicating finger towards NK Om Prakash and Const. Kaptan Singh, the prosecutrix further stated that after breaking into my house through door NK Om Prakash came first and then Const. Kaptan Singh, due to darkness I am unable to say that after them who came on third and fourth but four persons came that I am sure", she stated (Quote) "The witness explains that at the time of recording my statement, the recording officer had asked about four persons to which I identifies the accused persons. It was not asked to specify the serial number in which the accused persons committed rape. I had seen the accused persons committing rape, at Sl. No. 3 and 4 in the torch light with the accused person was showing. I do not know as to how the words, "due to darkness" has been written in the ROE. I never stated about it".

8. Nazma PW-7, the daughter of the prosecutrix, deposed that the Petitioners had visited her house and searched the house. At that time Petitioner Om Prakash enquired from her mother about her father. On the same day, in the evening, someone knocked at the main door and after four five knocks the door broke. As the door opened Petitioner Om Prakash came inside the house and took the lamp from the hand of her mother and broke the lamp. Thereafter he told her mother that he wanted to search their house and her mother told him that he had already searched their house in the morning. Petitioner Om Prakash told her mother that he had orders from the superior officer to search their house. Thereafter Petitioner Om Prakash directed her mother to go inside the cattle shed and simultaneously Petitioner Kaptan Singh also went inside the cattle shed. When she and her brother started weeping Petitioner Narender Kumar put the gun in his mouth and Petitioner Raj Bahadur put an axe on the neck of her brother. Her mother shouted from the cattle shed that in case of her death they should tell people that force personnel who had come to their house in the morning had visited in the evening. As she tried to go out to get some help, Petitioner Narender Kumar stopped her from doing so. Thereafter Petitioners Om Prakash and Kaptan Singh came out of the cattle shed and Petitioners Narender Kumar and Raj Bahadur went there. After sometime the Petitioners left their house. When she went inside the cattle shed she saw the salwar of her mother lying near her ankles. The next morning her elder sister came to their house and she and her mother informed her elder sister about the incident which took place the previous night. When her mother was present inside the cattle shed she heard Om Prakash directing her mother to open the string of her salwar. That she does not remember the date on which the Petitioners had visited their house.

9. Zamila PW-8, the daughter of the prosecutrix, deposed in harmony with the testimony of her sister Nazma.

10. Subedar Ajit Singh PW-1, deposed that on 21.12.1996 he was performing the duties of Coy Commander of the 88th Bn. when he received a message from the Battalion Headquarters that he should keep ready one party, consisting of 1 senior officer and 18 junior officers for an operation. Accordingly, he prepared a

party and the Petitioners were detailed by him in the said party. On 22.12.1996, Rajinder Singh Adjutant, came to Coy Headquarters at village Chattergaul and briefed the party. He directed the party to lay a Naka to apprehend a militant Bahadur Khan who had absconded and was expected to move in the area surrounding village Chattergaul. The party was divided into 2 groups and was deployed near a place called Humilnar. One group was headed by SIB.D. Shahi and consisted of 9 junior officers, and the other group was headed by HC Ashok Kumar and consisted of 8 junior officers, including the Petitioners. Some officers from the 2 groups used to come to a place situated between the Coy Headquarters and the place where the 2 groups were deployed for collecting meals prepared at the Coy Headquarters for the 2 groups. On 23.12.1996 HC Chaman Lal was detailed by him to carry meals for lunch for the 2 groups and deliver the same at the meeting point. On return HC Chaman Lal informed him that on the way to deliver the meals a lady and her daughter had stopped him and told him that 4 BSF personnel had committed a misdeed on her on the night of 23.12.1996. On hearing the same from HC Chaman Lal, he i.e. Subedar Ajit Singh decided to carry the dinner for the 2 groups so that he could himself enquire into the matter. Before leaving, he directed the leader of the 2 groups to send the men who had come to the meeting point in the evening on 23.12.1996. On 24.12.1996 at about 04.15 P.M. he reached the meeting point and the men detailed in the 2 groups were already present there. At that time the prosecutrix came there and told him that 4 personnel had committed a misdeed with her on the night of 23.12.1996. When he made enquiries from the prosecutrix, if any of the said 4 personnel who had committed misdeed with her were present there, she pointed towards the Petitioners. Shailesh Kumar who was detailed by Rajinder Singh Adjutant, to conduct a preliminary inquiry into the matter conducted an identification parade of the Petitioners. The prosecutrix correctly identified the Petitioners at the said identification parade. Some entries were made in the General Diary Register regarding the incident in question.

11. SI B.D. Shahi PW-2, deposed that he was leader of one of the groups which was deployed at Humilnar to apprehend militant Bahadur Khan. On 24.12.1996 he received a message from the Coy Headquarters to bring the men who had gone to the meeting point for collecting the meals on the evening of 23.12.1996. Accordingly, he along with the 4 persons who had gone to the meeting point for collecting meals on the evening of 23.12.1996 went to the meeting point. The members of the group of HC Ashok Kumar were also present there. The prosecutrix along with her daughter were present at the meeting point at that time. The 2 groups were segregated and Subedar Ajit Singh asked the prosecutrix to identify some persons upon which she pointed towards the group consisting of Petitioner Om Prakash and started weeping and murmured that she would kill herself.

12. HC Ashok Kumar PW-3, deposed that he was leader of one of the groups which was deployed at Humilnar to apprehend militant Bahadur Khan. On 23.12.1996 at about 08.00 A.M. he detailed Petitioners Om Prakash, Kaptan

Singh and Narender Kumar and Const. Yashpal to fetch water from a drain flowing near Humilnar and the said persons returned to the place of deployment at about 09.00 A.M. On the same day i.e. 23.12.1996 at about 04.45 P.M. he detailed the Petitioners to collect evening meals from the meeting point. The Petitioners did not return to the place of their deployment in time. When he made enquiries from the Petitioners about their delayed return to the place of their deployment, they informed him that Petitioner Om Prakash had gone to purchase biddi etc. On 24.12.1996 at about 04.00 P.M. he received a message from the Coy Headquarters to bring the men who had gone to the meeting point for collecting the meals on the evening of 23.12.1996, accordingly he sent the Petitioners to the meeting point. Subedar Ajit Singh had directed him and Petitioners Kaptan Singh, Narender Kumar and Raj Bahadur to give in writing that Petitioner Om Prakash had committed rape upon the prosecutrix.

13. HC Chaman Lal PW-4, deposed that on 24.12.1996 at about 11.30 A.M. when he was coming back from the meeting point after delivering meals to the men from the 2 groups, he was stopped by the prosecutrix and her daughter and they informed him that 4 BSF personnel had visited their house on 23.12.1996 and manhandled the prosecutrix. He reported the said conversation to Subedar Ajit Singh. After sometime the men from the 2 groups who had collected the meals from the meeting point in the evening of 23.12.1996 came at the meeting point and the prosecutrix identified the Petitioners as the persons who had visited her house on 23.12.1996. He accepted that a portion of an entry in the General Diary Register regarding the incident had been interpolated.

14. Lance Naik Mohinder Singh PW-5, deposed that he was detailed as a member of a party entrusted with the task of apprehending militant Bahadur Khan. He was assigned to the group headed by SIB.D. Shahi and had gone to the meeting point in the evening of 23.12.1996 to collect meals. On receipt of message from Coy Headquarters he had gone to the meeting point on 24.12.1996. The prosecutrix had identified the Petitioners as the persons who had visited her house on 23.12.1996 and had given beatings to her in his presence.

15. Dr. Abdul Qayum PW-9, deposed that on 30.12.1996 the police had brought the prosecutrix to him for being medically examined but the prosecutrix did not allow him to medically examine her. However, he noticed that there were some scratches on the forehead and knee of the prosecutrix. The prosecutrix was complaining that 4 persons had raped her in the evening of 23.12.1996.

16. Shri Gulam Mohidin Lone PW-10, the Lambardar of village Chattergaul, deposed that as per the custom followed in village Chattergaul the setting of the sun marked the dawn of a new day. Be it noted here that the aforesaid deposition of the witness was not controverted by the Petitioners.

17. Const. Yash Pal Singh PW-11, deposed he was detailed as a member of a party entrusted with the task of apprehending a militant Bahadur Khan and he was assigned to the group headed by HC Ashok Kumar. On 23.12.1996, at about

08.00 A.M. along with Petitioners Om Prakash, Narender Kumar and Kaptan Singh he had gone to fetch water from a drain flowing near Humilnar and had returned to the place of their deployment at about 09.30 A.M. On 25.12.1996 he had seen Subedar Ajit Singh slapping Petitioner Kaptan Singh.

18. SI Mohd. Elyas Pandit PW-13, deposed that on 29.12.1996 FIR No. 169/1996 under Sections 376/451 IPC was registered by the police in connection with the incident of rape of the prosecutrix. He had conducted investigation in the case. He seized the clothes worn by the prosecutrix at the time of the incident and noted that the clothes were torn. When he questioned Rajinder Singh, Deputy Commandant, regarding the delay in registering the FIR he was told that the delay has been caused since the Unit was investigating the matter at its level.

19. Dr. Rizwana PW-14, deposed that she conducted the medical examination of the prosecutrix on 31.12.1996 and found that vagina of the prosecutrix admitted two fingers; there were old tears in the hymen of the prosecutrix; no spermatozoa was found in the vagina of the prosecutrix and there were no marks of any violence on any part of the body of the prosecutrix. Since the prosecutrix was brought for medical examination after about 8 days of alleged incident of rape it was difficult to opine whether the prosecutrix was raped as she was a married woman.

20. The Petitioners denied all incriminating circumstances appearing against them and claimed innocence and false implication. The Petitioners submitted a written statement before the GFSC wherein they denied that they had gone to the house of the prosecutrix on the morning of 23.12.1996. They, however, admitted of going to the house of the prosecutrix in the evening of 23.12.1996 and claimed that the purpose was to enquire whether bidis and cigarettes could be purchased and stated that only Om Prakash went up to the main door of the house and that the others remained outside.

21. In defence, the Petitioners examined 6 witnesses.

22. Const. Anil Shinde DW-1, deposed that he had seen Sub. Ajit Singh slap Petitioner Narender Kumar in the afternoon of 27.12.1996. Const. Ravi Shankar DW-2, deposed that Petitioner Raj Bahadur had not gone to fetch water on the morning of 23.12.1996 and that he had seen Sub. Ajit Singh slapping Petitioners Narender Kumar, Kaptan Singh and Raj Bahadur in the afternoon of 27.12.1996. Const. Rajesh Kumar DW-3, stated that Petitioner Raj Bahadur had not gone to fetch water in the morning of 23.12.1996 and that on 27.12.1996 he was informed by Petitioner Narender Kumar that he was beaten by Sub. Ajit Singh, which fact was confirmed by Const. Yash Pal, Naik Mohinder Singh and other persons. Const. Satyanarayan Singh DW-4, deposed that on 27.12.1996 he had seen Sub. Ajit Singh threatening Petitioner Om Prakash to give in writing that he had committed the offence of rape. Naik Mohinder Singh DW-5, deposed that he had seen Sub. Ajit Singh beating Petitioners Narender Kumar, Kaptan Singh and Raj Bahadur in the afternoon of 27.12.1996. Const Puran Singh DW-5, deposed

that Sub. Ajit Singh compelled the prosecutrix to make a statement against the Petitioners on 26.12.1996 and he gave a sum of Rs. 200/- to the prosecutrix on 27.12.1996 to identify Petitioners Narender Kumar, Kaptan Singh and Raj Bahadur as the persons who had visited her house on 23.12.1996 and raped her.

23. After the conclusion of defence evidence, Shailesh Kumar CW-1 was examined as a court witness. He deposed that he had conducted a preliminary enquiry and had prepared a report. On 27.12.1996 he got conducted the test identification parade of the Petitioners and that the prosecutrix correctly identified the Petitioners as the persons who had visited her house on 23.12.1996 and raped her. He stated that he had mingled the Petitioners with other force personnel at the time of conduct of their test identification parade. He further stated that he had prepared the Record of Evidence.

24. After considering the evidence led by the prosecution and the defence, the opening and closing address of the prosecutor and the defending officer and summing up by the law officer, vide order dated 21.07.1997, the GFSC convicted the Petitioners and sentenced them to undergo imprisonment for 10 years and inflicted the penalty of dismissal from service which finding and sentence was confirmed by Inspector General vide order dated 16.9.1997.

25. Aggrieved by the finding and sentence awarded by the General Security Force Court which stood confirmed by the Inspector General, the Petitioners preferred petition(s) u/s 117(2) of Border Security Force Act, 1969 to the Directorate General Border Security Force, Ministry of Home Affairs, Government of India, which petition(s) were rejected vide order dated 16/17.04.1998.

26. The Petitioners have preferred the above captioned writ petitions challenging they being convicted and sentence to undergo RI for 10 years and needless to state, challenge they being dismissed from service. At the hearing of the writ petitions following 12 submissions were advanced by learned Counsel for the Petitioners:

(i) That as per the charge the Petitioners had raped the prosecutrix on 23.12.1996 but the prosecutrix deposed that the Petitioners had raped her on 22.12.1996. Counsel argued that the lie of the prosecutrix got exposed when she deposed that she was raped by the Petitioners on 22.12.1996 at the time when they visited her house forgetting that the Petitioners had visited her house on 23.12.1996 and not 22.12.1996. As per the counsel, the aforesaid major discrepancy in the evidence of the prosecutrix renders her evidence most untrustworthy.

(ii) That there is a major discrepancy in the evidence of the prosecutrix vis-?-vis Petitioner Raj Bahadur which renders her evidence untrustworthy particularly with regard to Petitioner Raj Bahadur. The discrepancy pointed out by the counsel was that as per the prosecutrix the Petitioners had visited her house in the morning of 23.12.1996 whereas the evidence on record sufficiently establishes that Petitioner Raj Bahadur could not have visited the house of the

prosecutrix on the morning of 23.12.1996 as he was not a member of the party which had gone towards the village to fetch water in the morning of 23.12.1996.

(iii) The fact that the certain entries recorded in the General Diary Register relating to the incident in question were manipulated as evident from the testimony of HC Chaman Lal PW-4, and that Sub. Ajit Singh had given a sum of Rs. 200/-to the prosecutrix, when seen in the light of the evidence of the witnesses of the defence lend very strong credence to the defence of the Petitioners that the prosecutrix has falsely implicated them at the instance of Sub. Ajit Singh.

(iv) That there are major loopholes in the testimony of the prosecutrix which renders her testimony most untrustworthy. The first loophole pointed out was that the prosecutrix stated in her statement recorded in the Record of Evidence that due to darkness she cannot say who raped her after Petitioners Om Prakash and Narender Kumar had raped her; whereas in her testimony before the GFSC she deposed that Petitioners Kaptan Singh and Raj Bahadur had raped her after she was raped by Petitioners Om Prakash and Narender Kumar. The second loophole pointed out was that the testimony of the prosecutrix is most ipse dixit on the point of penetration of the male organ of Petitioner Raj Bahadur in the vagina of the prosecutrix. The third loophole pointed out was that it was not possible for Petitioner Raj Kumar to have raped the prosecutrix in the position alleged by the prosecutrix for the reason sexual intercourse in such position is possible only in case of a consensual intercourse.

(v) That the GFSC committed an illegality in placing reliance upon the uncorroborated testimony of the prosecutrix in convicting the Petitioners particularly when the medical evidence did not support the case of the prosecution. Counsel further argued that instead of supporting the case of the prosecution the medical evidence particularly the evidence of Dr. Rizwana PW-14, the doctor who examined the prosecutrix, that she did not find any injury on any part of the body of the prosecutrix is a strong pointer to the fact that no rape was committed upon the prosecutrix.

(vii) That there was an inordinate delay of seven days in registration of the FIR in the present case which is fatal to the case of the prosecution.

(vii) That the identification parade of the Petitioners was not conducted in a proper manner and thus in such circumstances the identification of the Petitioners by the prosecutrix in the court is of no value.

(viii) That Rule 45 of BSF Rules, 1969 envisages application of mind by the Commandant in coming to the conclusion whether a prima facie case is made out against the accused persons or not. In the instant case, no material whatsoever had surfaced against the Petitioner at the stage of hearing of the charge framed against the Petitioner envisaged under Rule 45 of the BSF Rules, 1969. When there was no material before the Commandant pointing towards the guilt of the Petitioners he was not justified in directing the preparation of the Record of

Evidence and ought to have dismissed the charge framed against the Petitioner.

(ix) That the trial of the Petitioners stands vitiated for the reason the task of preparation of Record of Evidence was assigned to an officer who was prejudiced against the Petitioners inasmuch as he had prepared a report indicting the Petitioners of having committed rape upon the prosecutrix prior to his detailment as the Recording Officer and the same has resulted in denial of fair trial to the Petitioners.

(x) That Rule 93 of the BSF Rules requires the Court to put all incriminating circumstances appearing against an accused to the accused, which was not done in the instant case as the circumstance that the Petitioners had visited the house of the prosecutrix on 22.12.1996 and raped her was not put to the Petitioners.

(xi) That the trial of the Petitioners stands vitiated for the provisions of Rule 68 of BSF Rules were not followed while appointing Const. Manjit Singh as an interpreter in the trial of the Petitioners.

(xii) That the order dated 16.09.1997 passed by the Inspector General confirming the finding and sentence of the GFSC and the order dated 16/17.04.1998 passed by the Directorate General Border Security Force dismissing the appeal u/s 117(2) filed by the Petitioners are nullity and deserve to be quashed as they are non-reasoned orders and thus show complete non-application of mind by the authorities which had passed the said orders.

27. Before dealing with the aforesaid submissions advanced by the learned Counsel for the Petitioners, let us first proceed to note the parameters of the jurisdiction of the High Court while examining the correctness of the finding and sentence of the Security Force Courts in exercise of its power under Article 226 of the Constitution of India.

28. Deciding W.P.(Crl.) No. 93/1980 R.S. Ghalwat v. UOI and Ors. decided on 4.6.1981, a Division Bench of this Court laid down the parameters of the jurisdiction of the High Court while examining the correctness of the finding and sentence of the Court Martial in exercise of its power under Article 226 of the Constitution of India in the following terms:

16. Effort was then made to go through the record of court martial (and we did go into it) and persuade us to hold that the finding of court martial was vitiated because of various alleged illegalities in the matter of confession, admissibility of evidence and other irregularities. Now if the writ petition was to be treated as a Habeas Corpus petition the only jurisdiction the court has would be to see whether the return shows that the detenu is held lawfully. Once it is shown, as in the present case that court martial, properly convened and constituted has passed an order in pursuance of which the Petitioner is being held no relief would be possible as this Court cannot go into the question of sufficiency of evidence, and the conviction by competent court would be a sufficient answer to the petition u/s 491, Criminal P.C. vide Kartar Singh Sardar Jit Singh vs. Imperator ,

Kartar Singh v. Emperor. The court is entitled to go into the regularity of steps taken by the court martial in the course of trial or by the confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court martial or the confirming authority"

17. We, however, do not propose to dispose of this matter on this short point and heard the matter on the footing that the writ Petitioner was also asking a writ of certiorari, against the finding of a statutory tribunal, i.e. General Court Martial constituted under the Act. But even then the jurisdiction of this Court is limited to only finding out whether there is error of jurisdiction or it is a case of total lack of evidence. We do not sit as a court of appeal. If there was legal evidence available on which a finding could be given, the sufficiency or otherwise is for the authority to decide and this Court cannot substitute its opinion for that of Court martial.

19. Thus where the court martial acts within jurisdiction, habeas corpus would not issue to interfere with its decision on the ground of mere insufficiency of evidence or irregularity of procedure except where there has been no hearing at all or the rules of natural justice have not been followed. In the Canadian case of *Ex parte Forgan*, it was recognized that, where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence could be reviewed by the Supreme Court upon an application for either certiorari or habeas corpus. (See *Military Law in India* by Sharma P. 202, Notes 68 and 69).

20 Where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact.... A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. had jurisdiction) to determine.

See *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, . A writ of certiorari under Article 226 of the Constitution can be issued for the purpose of examining the record and proceedings of a court-martial if the complaint is that the court-martial was not duly constituted, that it had no jurisdiction over the person or over the subject matter of the charge or that there is an error of law apparent on the face of the record or that the principles of natural justice were violated so as to result in miscarriage of justice. Where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence can be reviewed by this Court, upon an application for certiorari. The courts-martial are in fact a specialised form of administrative courts and the scope of review traditionally afforded by the civil courts over their judgments has been very limited. This is evident from the fact that Article 136 of the Constitution expressly excluded the power of judicial review in respect of any judgment, determination sentence order passed or made by any court or tribunal

constituted by or under any law relating to the armed forces though the jurisdiction of the Supreme Court and High Courts under Article 32 and Article 226 of the Constitution respectively to issue writs to any person or authority has been preserved. See (2nd (1976) 2 Del 691, Ram Murti Wadhwa v. Union of India. It is true that general power to issue writs of Habeas Corpus and certiorari given to this Court under Article 226 does not make the finding of the court-martial totally immune from scrutiny by this Court. But as said by (1952) 346 US 137: 97 L Ed 1508, Burns v. Wilson "the statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the Military Courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil court. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. Thus the law which governs a civil in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is suit generis; it must be so, because of the peculiar relationship between the civil and military law. Military law, like State law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. We have held before that this does not displace the civil courts' jurisdiction over an application of habeas corpus from the military prisoner. But these provisions do mean that when a military decision had dealt fully and fairly with an allegation raised in the application it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence...

(Emphasis Supplied)

29. From the aforesaid observations, it is clear that while examining the correctness of finding and sentence of the Court Martial/Security Force Courts in exercise of its power under Article 226 of the Constitution of India the jurisdiction of the High Court is limited to finding out only whether there exists an error of jurisdiction or is it a case of total lack of evidence. It is not open to the High Court to re-evaluate the evidence on record or whether the evidence on record is sufficient to sustain the finding of the Court Martial/Security Force Court or to substitute its opinion for that of the Court Martial/Security Force Court.

30. The submissions advanced by the learned Counsel for the Petitioners can be divided into two categories, whereas submissions "(i)" to "(vii)" pertain to the veracity of the evidence of the prosecutrix, submissions "(viii)" to "(xii)"

pertain to the procedural irregularities allegedly committed by the department at various stages in the present case.

31. Are the learned Counsel for the Petitioners correct in contending that the discrepancy in the evidence of the prosecutrix regarding the date of the incident renders her as an untrustworthy witness?

32. The prosecutrix is a rustic woman. What should be the approach of the Court while appreciating ocular evidence of a rustic witness? The answer to this

question lies in the following observations made by the Supreme Court in the decision reported as Shivaji Sahabrao Bobade v. State of Maharashtra AIR 1993 SC 2622:

Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioral pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

33. Sub. Ajit Singh PW-1 and HC Chaman Lal PW-4, deposed that the prosecutrix met them in the afternoon of 24.12.2006 and informed them that she has been raped by 4 BSF personnel in the previous evening, which would be the evening of 23.12.2006. The testimony of aforesaid witnesses was corroborated by SI B.D. Shahi PW-2, that on 24.12.1996 he along with some of the other members of the group had gone to the meeting point; that the prosecutrix and the Petitioners were present there; that the prosecutrix had pointed towards the group of Petitioner Om Prakash and that she was weeping and distressed at that time. The fact that the prosecutrix informed Sub Ajit Singh PW-1 and HC Chaman Lal PW-4 on 24.12.2006 that she was raped by 4 BSF personnel in the evening of 23.12.2006 assumes great significance in the light of the fact that 3 out of 4 Petitioners had gone towards the village of the prosecutrix in the morning of 23.12.2006 to fetch water and all the 4 Petitioners had visited the house of the prosecutrix in the evening of 24.12.2006.

34. Being a rustic woman, it can reasonably be expected that the prosecutrix would be having problems in determining the date on a particular day. The problem of the prosecutrix in determining the date on which she was raped by the Petitioners further gets compounded by the fact that according to the custom of the village of the prosecutrix (See deposition of PW-10 noted in para 16 above) at sunset people would say that the next day has begun, could well be the source of the confusion. It is apparent that the prosecutrix got confused with the dates while deposing before the GFSC and thus ended up deposing that she was raped by the Petitioners on 22.12.1996. But the fact of the matter is that the prosecutrix had informed Sub. Ajit Singh PW-1 and HC Chaman Lal PW-4, on 24.12.2006 that she was raped by 4 BSF personnel in the previous evening i.e. the evening of 23.12.2006 and that the Petitioners had visited the house of the prosecutrix in the evening of 23.12.2006.

35. In order to deal with the submission "(ii)" advanced by the learned Counsel for the Petitioners it is necessary to recreate the scene on the day of the incident. Petitioners Om Prakash, Kaptan Singh and Narender Kumar and Const

Yesh Pal Singh visited the house of the prosecutrix on the morning of 23.12.1996. At that time said persons merely searched the house of the prosecutrix but did not do anything evil to the prosecutrix. Since the persons who had visited the house of the prosecutrix in the morning of 23.12.1996 had not done anything evil to the prosecutrix she would have no reason to remember the faces of the said persons but would just have a faint recollection of their faces in her mind. When the Petitioners visited the house of the prosecutrix in the evening of 23.12.1996 they did something very evil to her. Due to the evil act of rape committed by the Petitioners upon the prosecutrix the faces of the Petitioners would have been imprinted in the mind of the prosecutrix. In view of the fact that three out of the four force personnel who had visited her house in the evening of 23.12.1996 and raped her were the force personnel who had visited her house in the morning of 23.12.1996 and that the prosecutrix just had a faint recollection of the faces of the force personnel who had visited her house in the morning of 23.12.1996, the possibility is writ large that the prosecutrix assumed that the fourth force personnel who had visited her house in the evening of 23.12.1996 and raped her i.e. Petitioner Raj Bahadur is the fourth force personnel who had visited her house in the morning of 23.12.1996 along with Petitioners Om Prakash, Kaptan Singh and Narender Kumar.

36. Whether the learned Counsel for the Petitioners are right in contending that Sub Ajit Singh had an animus against them and thus falsely implicated them in the present case?

37. The Petitioners admitted having visited the house of the prosecutrix in the evening of 23.12.2006, albeit for a different reason than the one claimed by the prosecutrix. On 23.12.2006 in the evening the Petitioner went to the meeting point to collect meals for dinner and had returned late to the place of their deployment and told the leader of their group HC Ashok Kumar PW-3, that they got late as Petitioner Om Prakash had purchased beedi etc while they were returning to the place of deployment. On the next day i.e. 24.12.2006 in the afternoon the prosecutrix informed HC Chaman Lal PW-4, that she was raped by 4 BSF personnel in the evening of 23.12.2006 who in turn informed the said fact to Sub. Ajit Singh. If the claim of the Petitioners is correct Sub. Ajit Singh would have come to know about the visit of the Petitioners to the house of the prosecutrix in the evening of 23.12.2006 before the afternoon of 24.12.2006. How did Sub. Ajit Singh come to know that the Petitioners had visited the house of the prosecutrix in the evening of 23.12.2006? Did he have divine powers or was the prosecutrix aware of the fact that Sub. Ajit Singh is inimically disposed towards the Petitioners and thus she went to him and told him about the visit of the Petitioners to her house in the evening of 23.12.2006?

38. The matter can also be looked at from another angle. The first person who came to know about the incident of rape of the prosecutrix was HC Chaman Lal PW-4. HC Chaman Lal PW-4, deposed that in the afternoon of 24.12.2006 while he was returning from the meeting point to the headquarters after delivering

meals for lunch he was met by the prosecutrix who informed him that she was raped by 4 BSF personnel in the evening of 23.12.2006 and in turn informed the said fact to Sub. Ajit Singh. If Sub. Ajit Singh were to falsely implicate the Petitioners he could have easily said that the prosecutrix had met him in the afternoon of 24.12.2006 and told him that she was raped by 4 BSF personnel in the evening of 23.12.2006. What was the need for Sub. Ajit Singh to have introduced HC Chaman Lal to complicate the matter?

39. Petitioners Om Prakash, Kaptan Singh and Narender Kumar had gone towards the village of the prosecutrix on the morning of 23.12.2006 to fetch water. On the same day in the evening all the four Petitioners had gone to the meeting point which was near the village of the prosecutrix for collecting meals for lunch and had returned late to the place of their deployment. Faced with such facts, the Petitioners were under a compulsion to admit that they had visited the house of the prosecutrix in the evening of 23.12.20-06, albeit for a reason different than the one claimed by the prosecutrix. Their admission of being at the house of the prosecutrix is important.

40. Thus looked at from any angle, there is no merit in the submission of the learned Counsel for the Petitioners that they have been falsely implicated in the present at the instance of Sub. Ajit Singh.

41. The submission (iv) advanced by the learned Counsel for the Petitioners require this Court to re-evaluate the evidence of the prosecutrix. It has already been stated by us in the foregoing paras that while examining the correctness of the finding and sentence of the Court Martial/Security Force Courts in exercise of its power under Article 226 of the Constitution of India the High Court does not act as a court of appeal and it is not open for the High Court to re-evaluate the evidence led before the Courts Martial/Security Force Courts.

42. The submission (v) advanced by the learned Counsel for the Petitioners is most fallacious. Dr. Rizwana PW-14, deposed that it was difficult for her to opine whether the prosecutrix was raped as she was a married woman, more so when she had examined the prosecutrix 8 days after the incident of rape. Regarding the absence of injury on the body of the prosecutrix, Dr. Abdul Quayum PW-9, had deposed that he had noticed scratches on the forehead and knee of the prosecutrix. The prosecutrix had deposed that she had sustained an injury on her knee and forehead when Petitioner Om Prakash was committing rape upon her. Be that as it may, absence of injuries on the private parts of a rape victim especially a married lady cannot, ipso facto, lead to an inference that no rape has been committed upon her. (See the decisions of the Supreme Court reported as Madan Gopal Kakkad Vs. Naval Dubey and Another, and B.C. Deva @ Dyava Vs. State of Karnataka,

43. It is no doubt true that the FIR has been registered in the present case six days after the happening of the incident. Is the said delay unexplainable? The incident in question happened on 23.12.1996. The prosecutrix informed HC

Chaman Lal PW-4, about the incident in question on 24.12.1996 who in turn informed the same to Sub. Ajit Singh PW-1, on 24.12.1996 itself. Immediately thereafter Shailesh Kumar was detailed to conduct a preliminary enquiry in the matter. On 28.12.1996 Shailesh Kumar gave a report prima facie finding truth in the allegations leveled by the prosecutrix. After considering the report of Shailesh Kumar on 29.12.1996 Commandant M.R. Kadian forwarded an application to police station Kangan for lodging an FIR against the Petitioners. It is apparent that the superior officers had first wanted to inquire into the allegations of rape leveled by the prosecutrix at their level before lodging an FIR against the Petitioners inasmuch the prestige of the BSF was at stake. Unlike policemen BSF personnel are not conversant with the criminal law and thus are not aware of the importance of lodging of an FIR with promptitude.

44. Regarding submission "(vii)" it is necessary to note the deposition of Shailesh Kumar CW-1, that he mingled the Petitioners with other force personnel at the time of conduct of their identification parade. Be that as it may, the identification of an accused in a test identification parade is of great importance in the cases when the victim and accused are total strangers to each other and due to happening of the incident in a flash or any other reason the victim has not been able to have a good look at the accused, which was not the position in the instant case. Thus, even if it is assumed for a second that the test identification parade of the Petitioners was not conducted in a proper manner the same is of no relevance in the present case.

45. The learned Counsel for the Petitioners are not correct in contending that no material has surfaced against the Petitioners at the stage of hearing of the charge framed against the Petitioner envisaged under Rule 45 of the BSF Rules, 1969 for the reason the prior to framing of charge against the Petitioners Mr. Shailesh Kumar had conducted a preliminary enquiry and prepared a report finding prima facie truth in the allegations of the prosecutrix.

46. It is no doubt true that the Recording Officer Shailesh Kumar had prepared a report indicting the Petitioners of having committed the rape upon the prosecutrix. Is the said circumstance sufficient to vitiate the trial of the Petitioners?

47. As per the scheme of BSF Act, 1968 the Recording Officer is not the authority who is to adjudicate upon the innocence or guilt of an accused person with regard to the offence with which he is charged. The job of the Recording Officer is merely to record the evidence appearing against an accused in a given case based on which the Commandant may dismiss the charges framed against an accused; or rehear the charge and award one of the summary punishments to the accused; or try the accused by a Summary Security Force Court; or apply to a competent authority or officer to convene a court for the trial of the accused. In view of the fact that the Recording Officer is not the adjudicator of the innocence or guilt of the Petitioners, the alleged apprehension of bias of Recording Officer Shailesh Kumar has no effect whatsoever on the trial of the

Petitioners. The detailment of Shailesh Kumar as the Recording Officer is neither an illegality nor is even an irregularity but at best is a mere impropriety on the part of the department which in no way affects the trial of the Petitioners.

48. A somewhat similar situation arose before the Supreme Court in the decision reported as Major G.S. Sodhi Vs. Union of India (UOI), In the said case, the Petitioner was convicted by the Court Martial constituted under the Army Act. One of the contentions advanced by the Petitioner before the Supreme Court was that the Officer who had ordered preparation of Summary of Evidence was biased against the Petitioner. After noting that the said officer had no role to play in the trial of the Petitioner and had not returned the finding of guilt of the Petitioner, it was held that the allegations of bias leveled against the said officer do not affect the court-martial proceedings.

49. Even assuming for the sake of arguments that the detailment of Shailesh Kumar as the Recording Officer was an irregularity, the same could not affect the trial of the Petitioners particularly when the same has not caused any prejudice to the Petitioners. It is not the case of the Petitioners that Shailesh Kumar had incorrectly recorded the statements of the witnesses while preparing the Record of Evidence inasmuch as neither any suggestion nor any question to the said effect was put to him in his cross-examination by the Petitioners. It is settled legal position that the irregularities committed by the department at a stage anterior to the trial of an accused by the Security Force Court which do not cause any prejudice to the accused do not vitiate the trial of the accused. In said regard, it is relevant to note following observations made by a Division Bench of this Court in the decision reported as Union of India and Others Vs. Ex Constable Mohinder Singh (deceased now represented through LRs. Smt. Kiran Devi and two others),

"Indeed an infraction of the Rule or an irregularity in complying with the Rule 45, which does not cause any prejudice to the accused, will not vitiate the subsequent proceedings conducted at the stage of pre or post convening of the court and trial of the accused by Summary Security Force Court. The reason is that the procedure prescribe by Rule 45 or 48, 49 and 51 are at a stage anterior to the trial by the Summary Security Force Court. It is the order of the Summary Security Force Court which results in the conviction and punishment of the accused which is material and not inconsequential, infraction and irregularity in the procedure prescribed in the Rules at pre-trial stage. Similar view has been taken by the two Division Benches of this Court in the case of ex-Const. Ashok Kumar (supra) and Union of India v. O.P. Bishnoi (supra). This view is also fortified by the law laid down by the Hon"ble Supreme Court in Lt. Col. Prithipal Singh (supra) and Major G.S. Sodhi (supra)?..

50. The submission "j" that the circumstance that the Petitioners had visited the house of the prosecutrix on 22.12.1996 was not put to the Petitioners is predicated upon the premise that the evidence of the prosecutrix was to the effect that the Petitioners had raped her on 22.12.1996 is meritless as we have

already held in the foregoing paras that the prosecutrix got confused with the dates and thus wrongly deposed that she was raped by the Petitioners on 22.12.1996.

51. Rule 68 of the BSF Rules prescribes that an oath is required to be administered to an Interpreter. Having perused the record of the General Security Force Court, we find that an oath was administered to Const. Manjit Singh who acted as Interpreter in the trial of the Petitioners. That being the position, we fail to understand as to how the provisions of Rule 68 of the BSF Rules have been violated in appointing Const. Manjit Singh as an interpreter. In any case, an opportunity was given to the Petitioners during the trial to object to the appointment of Const. Manjit Singh as an interpreter but no objection was raised by them. Having raised no objection to the appointment of Const. Manjit Singh as an interpreter during the trial, it does not lie in the mouth of the Petitioners to find fault with the said appointment.

52. In dealing with the last submission advanced by the learned Counsel for the Petitioners, we note the submission runs in the teeth of the decision of the Constitution Bench of the Supreme Court reported as S.N. Mukherjee Vs. Union of India, and conclude that it is not necessary for the competent authorities to pass reasoned orders while confirming the finding and sentence of the General Security Force Courts or while disposing of the appeals filed by the force personnel u/s 117(2) of the BSF Act.

53. The prosecutrix had clearly indicted the Petitioners as the persons who had committed rape upon her. The evidence of the prosecutrix stands corroborated by the evidence of her daughters Nazma PW-6 and Zalima PW-7, who deposed that the Petitioners had visited their house in the morning and evening of 23.12.1996; Petitioner Om Prakash had forcibly taken the prosecutrix in the cattle shed in their house; one by one other Petitioners had also gone in the cattle shed; when Petitioner Om Prakash was present in the cattle shed they had heard him directing the prosecutrix to open the string of her salwar; the prosecutrix was weeping and shouting at the time when she and the Petitioners were present in the cattle shed; Petitioner Kaptan Singh had pointed a gun at Nazma and Petitioner Narender Kumar had put an axe on the neck of their brother and that after the departure of the Petitioners from their house they had seen that the salwar of the prosecutrix was lying near the ankles of the prosecutrix. Furthermore, Petitioners Om Prakash, Narender Kumar and Kaptan Singh had visited the house of the prosecutrix on the morning of 23.12.1996 and came to know that the husband of the prosecutrix was not present in the house. The deposition of Nazma PW-7 and Zamila PW-8, that the Petitioners had visited their house in the morning of 23.12.1996 has not been controverted by the Petitioners. It has further come in evidence that the party detailed for apprehension of militant Bahadur Khan was directed to not go to any house in the village. Despite such directions the Petitioners claim that they went to the house of the prosecutrix ostensibly to make enquiries from her regarding the

shop where bidis, cigarettes etc can be purchased by them. The very act of the Petitioners of disobeying the directions of their superior officers and going to the house of the prosecutrix for a most flimsy reason when they are fully aware of the fact that no adult male member is present in the house of the prosecutrix lends credence to the claim of the proescutrix that the Petitioners had committed rape upon her when they visited her house in the evening of 23.12.1996.

54. Above being the position, the General Security Force Court was completely justified in returning the verdict of the guilt of the Petitioners. Accordingly, the above captioned petitions are hereby dismissed.