

**COURT No.2  
ARMED FORCES TRIBUNAL  
REGIONAL BENCH: GUWAHATI  
(Through Video Conferencing)**

1.

MA 27/2023 in OA(Appeal) 22/2023

Sub(RT) Brijesh Kumar Sharma ..... Applicant  
VERSUS  
Union of India and Ors. .... Respondents

For Applicant : Mr. Amit Joshi, Advocate  
For Respondents : Mr. P.J. Barman, Advocate  
OIC Legal Cell

CORAM

HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)  
HON'BLE AIR MARSHAL BALAKRISHNAN SURESH, MEMBER (A)

ORDER  
20.09.2023

Order allowing the MA 27/2023 in OA 22/2023 pronounced,  
signed and dated.

(JUSTICE ANU MALHOTRA)  
MEMBER (J)

(AIR MARSHAL BALAKRISHNAN SURESH)  
MEMBER (A)

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**ORDER**  
**20.09.2023**

At the outset, it is observed that the OA(Appeal) 22/2023 filed by the appellant/applicant in which the MA 27/2023 was filed by the applicant has since been dismissed as withdrawn with liberty granted to the appellant/applicant herein to seek redressal, if any, in accordance with law, if required in the event of confirmation, if any, of the sentence dated 10.08.2023 in relation to the General Court Martial proceedings conducted against the applicant vide which the appellant/applicant was convicted for the commission of the offence punishable under Section 354 of the Indian Penal Code, 1860 and sentenced to suffer an imprisonment for one year apart from being

directed to be dismissed from service, in as much as the application of the applicant under Section 164(1) of the Army Act, 1950 was still pending consideration on 10.09.2023 when the MA 27/2023 was heard.

2. At the outset, on behalf of the respondents, it was sought to be contended that in as much as the application under Section 164(1) of the Army Act, 1950 was still pending and that thus the requisite remedies in terms of Section 21(1) of the Armed Forces Tribunal Act, 2007 having not been exhausted by the applicant, the application seeking the grant of bail/suspension of the conviction of the sentence of simple imprisonment for one year was wholly premature and reliance in relation thereto was placed on behalf of the respondents on the order dated 13.12.2018 of the Armed Forces Tribunal(PB) *in OA 1256/2018 in the case of Major General Basaraj G. Gilganchi Vs Union of India & Ors.* to submit to the effect that the applicant was mandatorily required to exhaust all remedies available in law in terms of the Army Act, 1950 before seeking any redressal before the Armed Forces Tribunal. On behalf of the applicant, on the other hand, reliance was placed on the verdict of the High Court of Delhi in the case of *Major Saurabh Saharan Vs Union of India & Ors* dated 19.03.2013 in WP(C)1755/2013 and CM/3355/2013 with specific **reliance on observations in Para 9** which read to the effect:

*“9. The order dated 19.10.2010 of the AFT in Ex.Hav Parmeshwar Ram Vs Union of India & Ors in OA No.471 of 2010 had noticed that by virtue of Section 39 of the 2007 Act, primacy was accorded to its provisions by a non-obstante clause. Applying that logic and having regard to the decisions of the Supreme Court dealing with the interpretations of statute, especially in cases where two special statutes operated in somewhat similar fields, the AFT was of the opinion that Section 164-which was in question in that case and which provides for statutory remedy by way of an appeal to the Central Government, will not preclude the Tribunal from the exercise of judicial power under Section 15, even pending the consideration of the statutory recourse under Section 164 by the litigant. The relevant observations of the Tribunal in that regard are as follows:*

*“38. There is no conflict between the two sections, Section 15 of the Act, 2007 and Section 164(2) of the Army Act. Both can survive if our perception is clear that Section 15 is the judicial review of the administrative action. However, once a judicial power is already exercised and orders are passed by the authorities, then administrative remedy provided u/s 164(2) automatically stand ousted. In this connection, one of the points which has been raised by the Jaipur Bench is with reference to Section 21 of the Act of 2007 i.e. exhaustion of the alternative remedy under the Act.*

*Section 21 uses the word ‘ordinarily, an application shall not be admitted unless it is satisfied that applicant WP( C) No.1755/2013 page 5 had availed the remedy available to him under the Act i.e. Army Act, Navy Act or Air Force Act as the case may be. The expression ordinarily does not mean to prohibit the jurisdiction of the judicial remedy under the Tribunal. This is a rule of prudence that the party should first exhaust as far as possible administrative remedy but that does not touch the jurisdiction of the Tribunal to adjudicate the matter judicially. The judicial determination of administrative action always take precedence over the administrative action. This is a cardinal principle of judicial system. Therefore, section 21 will not abrogate the power of the Tribunal to entertain appeal against the order of Court Martial. Even pendency of petition u/s 164(2) of the Army Act will not prevent Tribunal to entertain appeal u/s 15 of the Act of 2007 against the order of Court Martial order.*

*39. Therefore, we hold that view taken by the AFT(Jaipur Bench) does not lay down a correct law and we hereby over rule*

*the same. The three questions which have been referred to the Tribunal are answered as under:*

*(1) Section 15 will over ride Section 164 of the Army Act and the Tribunal has full jurisdiction to entertain the appeal notwithstanding any petition filed by aggrieved party u/s 164 of the Army Act, 1950. (2) The power u/s 15 of the Tribunal is not dependent on the statutory representation u/s 164(2) of the Army Act, 1950. It is independent adjudicatory power and appeal against the order passed by the Court Martial or any connection therewith will be maintainable.*

*(3) The pendency of the petition under Section 164 will not bar to exercise of power u/s 15 of the Act. Once the judicial determination has taken place then it will be binding on the parties and thereafter no further interference by the Section 164 of the Army is permissible.*

*10. The terminology used in Section 15(1) makes it clear that the Tribunal shall exercise all jurisdiction, powers and authorities in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental thereto. In other words regardless of whether under Section 153 of the Army Act has confirmation been done or not, the legality of the proceeding leading up to the imposition of a sentence, is open to question before the Tribunal; and latter would be within its rights to examine and pronounce upon it. Likewise, the power conferred under Section 15(3) is not constrained by any consideration of pendency of statutory remedies or procedures like Section 153 and 164 of the Army Act. In this view of the matter, this Court has no doubt that the Tribunal possesses the jurisdiction to decide upon the legality of the proceedings and procedure adopted by the Court martial, irrespective of whether or not confirmation had taken place. Likewise, it should have, in the opinion of this Court, at least in this case, examined the merits of the application for bail, having regard to the fact that the Petitioner had remained in custody for about 340 days.*

*11. While on the subject the court is mindful of the circumstance that the petitioner in this case is aggrieved of procedural violations, which ordinarily would have been open to examination in proceedings under Article 226 of the Constitution of India.*

*12. The formation of AFT by virtue of the 2007 Act was for the creation of an efficacious, expensive and speed dispute resolution mechanism. It was not the intention that some of the remedies such as WP( C) No.1755/2013 Page 7 questioning the*

legality of a Court proceeding during its pendency by seeking a writ or direction in the nature of certiorari, would get lost by the enactment of the said Act.

13. This conclusion is fortified by the expressed terminology used in Section 14 which has conferred upon the Tribunal, on and from the appointed date, all jurisdictional powers and authorities exercisable immediately before that date, by all courts.

14. It is, therefore, held that any order, decision, finding or sentence passed by a court martial or any other matter connected therewith or incidental thereto would be within the Tribunal's authority and jurisdiction. The Tribunal would be competent to pronounce upon the proceedings and procedure adopted by the Court martial, pending confirmation of sentence.

15. Furthermore, there is no dispute about the fact that the petitioner has been in military custody for nearly a year. The Court has carefully considered the nature of allegations leveled against him and the punishment imposed. Para 392(1) of the Regulation of the Army, no doubt empowers the army authorities to detain those convicted of offences by court martial or held guilty. Nevertheless, the confirmation proceedings under Section 153 have to be expeditious, keeping in mind the length of custody already undergone by the person connived.”

3. On a consideration of the submissions made on behalf of either side, it is essential to advert to Section 15 of the Armed Forces Tribunal Act, 2007 which provides to the effect:

**“15. Jurisdiction, powers and authority in matters of appeal against court martial.-**(1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court-martial or any matter connected therewith or incidental thereto.

(2) Any person aggrieved by an order, decision, finding or sentence passed by a court-martial may prefer an appeal in such form, manner and within such time as may be prescribed.

- (3) *The Tribunal shall have powers to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary.: Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.*
- (4) *The Tribunal shall allow an appeal against conviction by a court-martial where-*
- (a) *the finding of the court-martial is legally not sustainable due to any reason whatsoever; or*
- (b) *the finding involves wrong decision on a question of law' or*
- (c) *there was a material irregularity in the courses of the trial resulting in miscarriage of justice,*  
*But, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant.*  
*Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefor in writing.*
- (5) *The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.*
- (6) *Notwithstanding anything contained in the foregoing provisions of this section, the Tribunal shall have the power to-*
- (a) *substitute for the findings of the court-martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a sentence afresh for the offence specified or involved in such findings under the provisions of the Army Act, 1950(46 of 1950) or the Navy Act, 1957(62 of 1957) or the Air Force Act, 1950(n45 of 1950), as the case may be; or*
- (b) *if sentence is found to be excessive, illegal or unjust, the Tribunal may-*
- (i) *remit the whole or any part of the sentence, with or [without conditions;*
- (ii) *mitigate the punishment awarded;*
- (iii) *commute such punishment to any lesser punishment or punishment mentioned in the Army Act, 1950(46 of 1950), the Navy Act, 1957(62 of 1957) and the Air Force Act, 1950(45 of 1950), as the case may be ;*
- (c) *enhance the sentence awarded by a court-martial:*

*Provided that no such sentence shall be enhanced unless the appellant has been given an opportunity of being heard.*

*(d) release the appellant, if sentenced to imprisonment, on parole with or without conditions;*

*(e) suspend a sentence of imprisonment;*

*(f) pass any other order as it may think appropriate.*

*(7) Notwithstanding any other provisions in this Act, for the purposes of this section, the Tribunal shall be deemed to be a criminal court for the purposes of Sections 175, 178,, 179, 180, 193, 195, 196 or 228 of the Indian Penal Code (45 of 1960) and Chapter XXXVI of the Code of Criminal Procedure, 1973(2 of 1974).*

*(emphasis supplied)*

A bare perusal of Section 15(3) of the Armed Forces Tribunal Act, 2007 makes it apparent that this Tribunal has powers to grant bail to any person accused of an offence and in military custody with or without any conditions which it considers necessary, subject to the proviso that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

4. In relation thereto on a plain reading of Section 15(3) of the Armed Forces Tribunal Act, 2007 and the guidelines laid down by the Hon'ble High Court of Delhi in *Major Saurabh Saharan Vs Union of India & Ors*, it is apparent that adjudicatory powers of this Tribunal in relation to bail applications filed when the personnel of the Armed Forces are in military custody i.e. apparently even before the confirmation of the sentence imposed against them are clearly existent and such applicants are maintainable before the Armed Forces Tribunal.



5. Qua the merits of the prayer made by the applicant seeking grant of bail, it is submitted on behalf of the applicant that he has been in military custody since 25.06.2023 and thus had undergone 73 days of military custody till the date of hearing on 05.09.2023 and thus on 20.09.2023 i.e. today the applicant has spent 88 days in military custody against the total sentence imposed by the General Court Martial vide judgment dated 10.08.2023 of one year of simple imprisonment awarded to the applicant which judgment itself gives recommendation to mercy in the GCM proceedings which read to the effect:

*“RECOMMENDATIONS TO MERCY*

*The Court has awarded the abovementioned sentence in view of the minimum punishment prescribed under Section 354 of Indian Penal Code, 1860. The Court unanimously recommends the accused to mercy on the ground that his character is exemplary and that there are no entries in his conduct sheet till date and also the fact that the accused has displayed utmost professionalism while discharging military duties in his entire service.”*

The applicant has further submitted to the effect that the recommendations dated 05.09.2022 of the Dy. Commandant on the basis of the Summary of Evidence that had been led put forward deductions to the effect:

*“Deductions*

*4. In view of the above, the evidence on record reveals that the first charge can not be held to be true since there have been*

*dichotomies and contradictions. The accusations is subjective and exhaustive and no tangible answers or proof has been provided by the prosecution witnesses in support of the accusation.*

*5. PW-01 confirming from her mother whether her modesty had been outraged and not raising any objection to what was alleged seems totally fabricated and baseless where as she was subjected to such rituals in the past.*

*6. PW-02's denial to having witnessed anything inappropriate makes the accusation baseless. It is not possible that the accused has unfastened and ripped off PW-01's T-Shirt in 30-40 seconds and PW-02 did not notice anything. PW-02 also confirmed that he did not see anything inappropriate happening and he was allowed to see the proceedings of the entire ritual.*

*7. There may be an element of the build up of a scenario that PW-01 could imagine things happening to her as she dreamt about men grabbing and holding her as also seeing her neighbours as witches. It is a medical condition which only a certified medical officer can comment upon however, the Regimental Medical Officer did recommend her for psychiatric evaluation. Also she has not had slept for the past three days prior to 11 January, 2022 builds up to the case.*

*8. The accused has had an impeccable and respectable tenure at 58 Gorkha Training Centre and has performed numerous such rituals and nobody ever complained anything about him.*

*9. Charge one cannot be ascertained since the accusation could not be pin pointed.*

*10. Charge two is proven beyond doubts since the same has come out clearly throughout.”*

It was thus vide order dated 05.09.2022 recommended by Colonel Vibhu Vashishtha, Deputy Commandant, to the effect:

**“Recommendation**

*11. In view of the above, in absence of conclusive evidence to substantiate the Charge One against the accused, I recommend that Charge One against the accused be viewed objectively and be dismissed in totality and since Charge Two has been proven beyond doubts, the accused be dealt with Administratively and disposed off summarily”*

Consequentially, the recommendations dated 05.09.2022 of Brigadier Robi Kapoor, Commandant, 58, Gorkha Training Centre on the Summary of Evidence in respect of JC-623863L, Subedar(Religious Teacher) Brijesh Kumar Sharma of 58 Gorkha Training Centre were as under:-

*“I agree with the recommendations of the Commanding Officer. In absence of conclusive evidence to substantiate Charge One against the accused, I recommend that Charge One against the accused be viewed objectively and be dismissed in totality and since Charge Two has been proven beyond doubts, the accused be dealt with Administratively”*

6. The charges framed against the applicant on 15.06.2023 were to the effect:

First Charge  
Army Act Section 69

COMMITTING A CIVIL OFFENCE,  
THAT IS TO SAY, USING

CRIMINAL FORCE TO A  
WOMAN WITH INTENT TO  
OUTRAGE HER MODESTY,  
CONTARY TO SECTION 354 OF  
THE INDIAN PENAL CODE

in that he,  
at Shillong, on 11 January, 2022,  
while performing the duties of  
Religious Teacher of 58 Gorkha  
Training Centre, used criminal  
force to Smt. ABC wife of  
Rifleman XYZ, by touching her  
breasts, intending thereby to  
outrage her modesty.

Second Charge  
Army Act Section 63

AN ACT PREJUDICIAL TO GOOD  
ORDER AND MILITARY  
DISCIPLINE

in that he,  
at Shillong, on 11 January,  
2002, while performing the  
duties of Religious Teacher of  
58 Gorkha Training Centre,  
improperly and without  
authority, performed the  
superstitious ritual of casting off  
evil eye on Smt. ABC wife of  
Rifleman XYZ

Even after the recording of the summary of evidence and additional  
summary of evidence, Colonel Vibhu Vashishtha, the Deputy Commandant  
had recommended on 22.02.2023 to the effect:

*“After perusal of Summary of Evidence and Additional  
Summary of Evidence, there is no change observed as per as the  
context is considered therefore, in absence of conclusive  
evidence to substantiate Charge One against the accused. I  
recommend that Charge One against the accused be viewed  
objectively and be dismissed in totality and since Charge Two*

*has been prove beyond doubts, the accused be dealt with Administratively and disposed off summarily.”*

7. Thus once again the Commanding Officer after perusal of the Summary of Evidence and additional evidence Summary of Evidence: had recommended that there was no change as per context. It was also submitted on behalf of the applicant that the Brigadier Commandant vide recommendations dated 22.02.2023 agreed with the recommendations of the Commanding Officer and had recommended to the effect:

*“I agree with the recommendations of the Commanding Officer. In absence of conclusive evidence to substantiate Charge One against the accused, I recommend that Charge One against the accused be viewed objectively and be dismissed in totality and since Charge Two has been proven beyond doubts, the accused be dealt with Administratively and disposed off summarily”*

and thus the Commandant, 58, Gorkha Training Centre had also recommended as well as agreed with the recommendations of the Commanding Officer that in the absence of any conclusive evidence to substantiate Charge One against the accused be viewed objectively and be dismissed in totality and that since Charge Two has been proven beyond doubts, the accused be dealt with administratively and disposed off summarily. It was thus submitted on behalf of the applicant that the conviction of the applicant/appellant was unsustainable and that the

applicant be allowed to be released on bail and that the sentence be suspended.

8. As regards the conviction and sentence in as much as the OA 22/2023 has already been dismissed as withdrawn with liberty granted to the applicant to seek redressal in the event of confirmation( if any) of the sentence, the said aspect is not being considered and the present adjudication is only in relation to MA 27/2023 having been filed by the applicant seeking grant of bail in as much as the applicant is in military custody and the sentence imposed by the General Court Martial is yet to be confirmed.

Vide order dated 05.09.2023, it had been observed by us as under:

*“It is considered essential that the entire Court of Inquiry proceedings and the entire Summary of Evidence be placed on record by the respondents which be so placed on record by 11.09.2023 and a scanned copy thereof be also sent to the Bench at New Delhi”*

During the course of the hearing on 05.09.2023, it has been observed by us as under:

*“Pursuant to proceedings dated 01.09.2023, though the copy of the GCM proceedings have been submitted, the originals have not been submitted. On behalf of the respondents, it has been submitted that the matter is still pending for confirmation of the sentence and thus only the duplicate set of the GCM proceedings has been submitted before the Hon'ble Bench at Guwahati. It has also been submitted that*

*the scanned copy of GCM proceedings thereof has been sent to the Principal Bench at Delhi. However, a perusal of the scanned documents that have been received, indicate that several pages are incomplete. In view thereof, the complete scanned copy of the entire GCM proceedings be placed on record by the respondents and also be e-mailed to the Registry of the AFT(PB), New Delhi. Furthermore, on a perusal of the records available with us, in view of the documents annexed as Annexure-V dated 17.02.2022 wherein it was stated by the Commandant to the effect:-*

“DIRECTIONS OF THE COMMANDANT

1. *On perusal of the enquiry I concur with the opinion of the court.*
2. *As opined by the court Witness No.09 not be convicted of charge as alleged by the Mrs ABC and Rfn XYZ in his complaint.*
3. *Apropos, the case be treated as closed.*
4. *CCTV cameras be installed inside temple for complete coverage of the premises.*

*C/o 99 APO*

*Dt. 17 Feb 2022* ”

*coupled with the factum that vide recommendations dated 05.09.2022 of the Deputy Commandant, it was stated to the effect:-*

“Recommendation

*“11. In view of the above, in absence of conclusive evidence to substantiate the charge one against the accused, I recommend that Charge One against the Accused be viewed objectively and be dismissed in totality and since Charge Two has been proved beyond doubt, the accused be dealt with Administratively and disposed off summarily.”*

*it is considered essential that the entire Court of Inquiry proceedings and the entire Summary of Evidence be placed on record by the*

*respondents which be so placed on record by 11.09.2023 and a scanned copy thereof be also sent to the Bench at New Delhi.”*

9. Pursuant thereto, the respondents have placed before us the letter No. 1010/Est(iii) dated 09.09.2023 which reads to the effect:

*“HQ 101 Area(DV)  
PIN -908101c/o 99n APO*

**GCM PROCEEDINGS AGAISNT JC-623863L SUB(RT) B K Sharma, 58, GTC**

1. Ref HQ 101 Area(DV) letter No.63802/BKS/DC-1 dt 09 Sep 2023
2. It is intimated that Court of Inquiry proceedings to investigate into the allegations made against JC-623863L Sub(RT) Brijesh Kumar Sharma with reference to complaint submitted by No.5762014K Rfn Aju Sunari was convened vide convening order No.1007/Est dated 14 Jan 2022. On completion, the dirns of Comdt, 58, GTC dated 17 Feb. 2022 were issued and fwd to HQ 101 Area(DV) in triplicate vide our letter No.1010/Est dt. 21 Feb.2022.
3. However, dirns of Comdt, 58, GTC for said C of I were found by the perusing auth. GOC 101 Area, not in consonance with the evidence. Thereafter, the convening auth reviewed the evidence and issued fresh dirns dt 12 Apr 2022 while cancelling the earlier dirns.
4. For your info and necessary action pl.

Sd/  
(Ravi Kant Kushwaha)  
Lt.Col.Adjt  
for Comdt”

10. On behalf of the respondents, it was thus submitted that in as much as the Convening Authority had reviewed the evidence and issued fresh direction dated 12.04.2022 as well as cancelling the earlier directions and had directed to the effect that further disciplinary action be initiated against the applicant, the applicant who had been convicted after trial for the commission of a heinous crime for the offence- punishable under Section 354 of the Indian Penal Code, 1860 for outraging the modesty of a woman ought not to be granted bail. It was further submitted on behalf of the respondents that the grant of bail to the



applicant would encourage other personnel of the Armed Forces to commit similar offences. Inter alia, on behalf of the respondents reliance was placed on the Court of Inquiry that had been conducted and the opinion of the Court of Inquiry with specific reliance on paragraphs 3 and 4 as depicted therein as hereinunder:

“OPINION OF THE COURT

The Court has the following opinion:

1. *Mrs ABC and Rfn XYZ have extremely deep-rooted beliefs in superstitious practices and have been undergoing such practices from anyone who could provide such services. Especially Mrs ABC who has been quite frequent in undergoing such practices even before and after marriage.*
2. *The couple had visited the Witness No.8 at the temple voluntarily unannounced and requested the Witness No.8 to perform the ritual also there have been no previous contact or acquaintance of both the individuals which rules out any premeditated intention of the Witness No.8 towards Mrs ABC.*
3. *Since no previous connection or acquaintance could be established between Witness No.1/2 and Witness No.8, the possibility of framing Witness No.8 by witness No.1 for vendetta is highly improbable.*
4. *Rfn XYZ was sent out of temple to fetch flowers from the temple garden for the puja/ritual by Witness No.8 at least once if not twice as alleged by Witness No.1 thereby creating a situation wherein both of them were alone and out of any kind of observation.*
5. *Although practices and rituals carried out by the RT JCO were being done in good faith to provide psychological relief to individual and families who are ethnically and culturally superstitious and have a strong belief in such rituals, were tantamount to promoting superstitious and is out of purview of any teaching in Army Schools of instructions.*
6. *Absence of any kind of surveillance means in the temple is a matter of concern and provides a scope of occurrences of such incidents in future also.”*

11. It was thus submitted on behalf of the respondents that the opinion of the Court of Inquiry proceedings clearly indicates that it had not obliterated the possibility of the commission of offence punishable under

Section 354 of the Indian Penal Code in as much as the it had been observed therein that the possibility of framing the applicant by the complainant No.1 for vendetta was highly improbable and the scope for the commission of offence by the applicant was clearly brought forth through the evidence recorded for the purpose of Court of Inquiry.

12. On a consideration of the submissions that have been made on behalf of either side, without any observations on the merits or demerits of the trial i.e. the General Court Martial that had taken place specially in view of the OA 22/2023 having been withdrawn by the applicant with liberty granted to seek redressal, if any, required in the event of confirmation(if any) of the sentence dated 10.08.2023 imposed by the General Court Martial, it is nevertheless essential to observe that the directions of the Commandant dated 17.02.2022 pursuant to the Court of Inquiry conducted clearly indicated to the effect:

**“DIRECTIONS OF THE COMMANDANT**

1. On perusal of the enquiry I concur with the opinion of the court.
- 2.As opined by the Court Witness No.09 not be convicted of charge as alleged by Mrs ABC and Rfn XYZ in his complaint.
3. Apropos, the case be treated as closed.
4. CCTV cameras be installed inside temple for complete coverage of the premises.”

Thus, as on the date i.e. 17.02.2022, it had been the opinion of the Commandant to the effect that the applicant be not convicted of the

charge as alleged by the complainant and alleged by Mrs ABC and Rfn XYZ in the complaint and that the case be treated as closed.

13. Undoubtedly, reliance has been placed by the respondents on the observations dated 17.10.2022 by the Lt.Gen. General Officer Commanding to the effect:

*"1. I have perused the Summary of Evidence along with the documents placed on record.*

*2 On conjoint reading of the documents along with the deposition of the witnesses, it has emerged that the particular case stems from the complaint filed by Number 5762014K Rifleman Ajju Sunari of 58 Gorkha Training Centre, wherein he has alleged JC-623863 Subedar Religious Teacher) Brijesh Kumar Sharma, of exercising criminal force to outrage the modesty of his wife on 11 January 2022. The alleged incident took place at the Center Mandir, while the complainant and his wife had undergone a ritual to wade off evil spirit on their own request.*

*3 While going through the documents, it can be discerned that, on 11 January 2022, there was at least one instance if not two, wherein the accused and the victim were alone in which the alleged act of outraging the modesty of the victim took place. Also the accused himself instructed the husband to go out to fetch flower thus creating a situation of suspicion. The reporting of the incident by the victim has come out sequentially and does not raise suspicion of any significant fabrication or after thought. It is quite natural to share such incident to her mother as the victim was just 21 years old and in these ages, mothers normally are the close confidant in these matters.*

*4 It has been observed that while recording the statement, the Junior Commissioned Officer has vehemently denied the allegations leveled against him and has cross examined the prosecution witnesses at length. However, despite Junior Commissioned Officer contending the allegations, he has not been able to bring out any coherent reasons to indicate the reasons for falsely implicating him by the victim. Moreover, no fact has emerged which could infer any previous acquaintance or indicate any element of*

*animosity between the victim and the accused. The fact that needs due consideration that, it is quite obvious not to have eye witnesses in such alleged crimes. Therefore, in the particular case the deposition of the victim, despite being the only witness cannot be entirely ignored and the same needs to be considered in light of the attendant circumstances.*

*5 It seems highly unlikely that victim would levy such a grave allegations against the Religious Teacher Junior Commissioned Officer without the grain of truth in it. In such cases of sexual assault as alleged by the victim, the burden of proof lie with the accused and none of the witness nor any evidence proves innocence of the accused. Moreover, the accused enjoys the position of power in the instant case. Having considered the factual matrix of the case it emerges that the particular case has sufficient evidence to justify the accused to undergo the trial.*

*6 Therefore, upon holistic and comprehensive examination of the case, I am of the considered opinion that, to meet the ends of justice and subsequent to zero tolerance toward such offences in the organization, it is recommended to put the case into trial by a General Court Martial.”*

14. It cannot be overlooked that:

- the recommendations in the Court of Inquiry,
- the recommendations of the Commanding Officer dated 05.09.2022, and
- the recommendations of the Commandant dated 05.09.2022 after recording of the Summary of Evidence, and
- the recommendations of the Commanding Officer dated 22.02.2023, and

- the recommendations of the Commandant dated 22.02.2023 after recording of the Summary of Evidence and the Additional Evidence, were all to the effect that that Charge One against the applicant was not established and be dismissed in totality and the factum that though through the letter dated 09.09.2023 as placed on record by the respondents, though it has been stated to the effect that directions dated 17.02.2022 of the Court of Inquiry were found by the perusing authority 101 Area not in consonance with the evidence and thereby the Competent Authority reviewed and cancelled the earlier directions, for issuing of fresh directions, the said review with the reasons recorded by the competent authority and issuance of fresh directions dated 12.04.2022, have not been placed before us.

15. In the circumstances in the instant case, in as much as the applicant undoubtedly as a Religious Teacher had conducted several similar rituals as conducted in the case of the complainant with the applicant having held an unblemished record without even a red ink entry against him, coupled with the factum that the applicant has since been in military custody till today for about 88 days without there having been a confirmation of the sentence imposed on him coupled with the factum of there being varying opinions in the Court of Inquiry and the observations dated 17.10.2022 of the Lt. General, General Officer Commanding the consistent recommendations through the Court of Inquiry and that of the

Commanding Officer and the recommendations of the Commandant twice, that there was no conclusive evidence in relation to Charge One against the accused/applicant and that the said Charge be dismissed in totality, it being the cardinal principle of criminal jurisprudence that where there are two views possible on evidence led, the view that is in favour of the accused leaning towards his innocence ought to be accepted cannot be overlooked.

16. In view of these circumstances, the applicant is held entitled to be allowed to be released on bail taking into account the factum that the applicant is in military custody for the last 88 days with there being no valid sentence against him, in view of Section 153 of the Army Act, 1950 which provides to the effect:

*“153. Finding and sentence not valid, unless confirmed.-No finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by this Act.”*

17. The applicant is thus allowed to be released on bail till the confirmation(if any) of the sentence dated 10.08.2023 and till the date, the OA(Appeal) if any filed by the applicant in accordance with law is taken up for consideration by the Armed Forces Tribunal on furnishing a bail bond of Rs.10,000/- with one surety of the like amount to the satisfaction of the Principal Registrar, Armed Forces Tribunal(PB), New Delhi, (which

bond of Rs.10,000/- with one surety of the like amount to the satisfaction of the Principal Registrar, Armed Forces Tribunal(PB), New Delhi, *(which bail bond and surety bond may be submitted through the email and furthermore the proceedings for consideration of the bail bond and surety bond of the appellant/accused be conducted by video conferencing)* with further directions to the effect:-

- that the applicant shall not make any contact with the complainant and the witnesses of the prosecution;
- and that the applicant shall not make any attempt to intimidate the prosecution witnesses in any manner;
- and that the applicant shall not commit any offence whatsoever during the period that he is on bail;
- and under no circumstances shall the appellant/applicant leave the country without the permission of the Armed Forces Tribunal.

The MA 27/2023 thus stands disposed of.

(AIR MARSHAL BALAKRISHNAN SURESH)  
MEMBER (A)

(JUSTICE ANU MALHOTRA)  
MEMBER (J)

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