

**AFR**  
**RESERVED**  
**Court No.1**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW**

**O.A. No. 41 of 2015**

Friday, this the 5<sup>th</sup> day of January, 2018

**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

No. 153447890-F Ex-Sapper Parmjit Singh, son of Shri Surat Singh through legal Representative (Smt. Amandeep Kaur, legally wedded wife of the applicant), resident of village Mustafabad Saidan, P.O. Hemarajpur, District Gurdhaspur (PB)-143521

.... Applicant

By Legal Practitioner **Shri Shailendra Kumar Singh**, learned counsel for the applicant.

Versus

1. Union of India (UOI), through The Hon'ble Secretary, Ministry of Defence, South Block, IHQ of MoD (Army), DHQ PO New Delhi-110011
2. Chief of Army Staff (COAS), South Block, IHQ of MoD (Army), DHQ PO New Delhi-110011
3. General Officer Commanding-in-Chief, HQ Central Command, PIN-908544 C/O 56 APO
4. General Officer Commanding, HQ 6 Mountain Division, PIN-908406 C/O 56 APO
5. Commanding Officer, No. 54 Engineer Regiment, PIN-914054 C/O 56 APO

..... Respondents.

By **Shri G.S.Sikarwar**, learned Central Govt Counsel assisted by Maj Salen Xaxa, OIC Legal Cell.

**ORDER****Per Justice D.P. Singh, Member (J)**

1. Being aggrieved with the impugned order of punishment, by means of which the applicant was awarded five years' R.I and cashiering from Army service, he has preferred this petition under Section 14 of the Armed Forces Tribunal Act, 2007.

2. We have heard Shri Shailendra Kumar Singh, learned counsel for the applicant and Shri G.S.Sikarwar, learned counsel representing the respondents, assisted by Major Salen Xaxa, OIC Legal Cell and perused the record.

3. The factual matrix of the case is that the applicant was enrolled in the Indian Army (Engineer Regiment) as Sepoy on 28.07.2003. In July, 2012, he was posted to 54 Engineer Regiment at Bareilly. The applicant was issued a movement order and free railway warrant so as to proceed to attend Improvised Explosive Device (IED) course at HQ BEG & Centre Roorkee commencing with effect from 18.08.2014 to 20.09.2014. The applicant made necessary preparations accordingly to undertake journey on 17.08.2014. However, the fate seems to have got its own way in a man's life. It is rightly said that man proposes and God disposes.

4. On 16.08.2014 at about 2000 hrs, the applicant went to Garud Sainik Institute of 54 Engineering Regiment to purchase Chilli Chicken and bread etc. He came out from Garud Sainik Institute alongwith food items (supra) and while going to the place of his stay, he moved towards the park, which is a play station. The daughter of Hav KCB Singha was playing there on a

slide tunnel. It is alleged that while the girl child was going up the play station stairs and sliding down the slide tunnel repeatedly, her father Hav KCB Singha was standing near the stairs. When the applicant reached the lower end of the slide tunnel where the girl had reached after sliding down, he asked her saying, “*Ki haal hai mundiya...?*” The applicant was seen by the father of the girl child Hav KCB Singha leaning over the girl child standing towards western side of the slide tunnel, trying to insert his right hand finger in the genitals of the girl child. The incident of leaning of the applicant on the girl child was also seen by a lady, namely, Smt. Urmila Singh, from backside. Hav KCB Singha, father of the girl child, who was at the top of the slide tunnel, heard the shrieks of his daughter in pain and on going on top of the slide tunnel, noticed the applicant leaning and touching the genitals of girl child. He jumped from the top of the slide tunnel towards the accused shouting, “*Bhagna nahi*”. It is said that the applicant stepped back and said, “*Sorry sorry*”. Hav KCB Singha grabbed the accused applicant by his collar and hit him with fist blows. He tried to take the applicant towards Garud Sainik Institute to report the matter to Provost Unit personnel on duty. Meanwhile Sepoy Mane Sagar reached there and enquired regarding the quarrel. Hav KCB Singha told him about the incident, whereupon he also beat the accused, who fell down. Later on, the accused applicant was taken towards the entrance of the Garud Sainik Institute. In the meantime, military police personnel Lance Naik MP Manoj Kumar came there and he took Hav KCB Singha and the accused applicant to the reception area. While Lance Naik MP Manoj Kumar was noting down the particulars of Hav KCB Singha, the accused applicant slipped

away. Lance Naik MP Manok Kumar informed the deskroom to send the flying squad of Provost Unit immediately to Garud Sainik Institute. The flying squad consisting of Sub Kamlesh Kumar and two other Ranks reached there. Sub Kamlesh Kumar took a photograph of Hav KCB Singha and asked him and Sep Mane Sager to come to the deskroom. Hav KCB Singha requested that his children be dropped at his quarters before proceeding to the deskroom. After reaching the quarters, Miss K Supriya Singha (victim) told her mother in Mainpuri the entire facts relating to sexual abuse by the accused.

5. The applicant was later on arrested. A tentative charge-sheet was prepared against him and hearing of charges in accordance to Army Rule 22(1) for committing an offence under Section 69 of the Army Act read with Section 10 of the Protection of Children against Sexual Offences Act, 2012 (for short, POCSO Act) was carried out on 21.08.2014 by the Commanding Officer 54 Engineer Regiment. Four prosecution witnesses were examined with opportunity to the accused applicant to cross-examine them. The applicant cross-examined three out of four witnesses and denied the allegations made against him. He also denied to produce any witness in defence. A Summary of Evidence (SoE) was recorded from 21.08.2014 to 28.08.2014 and recommendation for holding General Court Martial (GCM) against the accused was sent by the Commanding Officer 54 Engineer Regiment to Headquarters 6 Mountain Division on 30.08.2014. Administrative order for holding General Court Martial (GCM) was passed on 10.06.2014.

6. The applicant was served with a charge-sheet dated 09.10.2014 containing the charge framed against him. The same is reproduced as under:

“CONFIDENTIAL

CHARGE SHEET

The accused, Number 15347890F Sapper Parmjit Singh of 54 Engineer Regiment is charged with:-

Army Act  
Section 60  
read with  
Section 10  
of the  
Protection  
of Children  
from Sexual  
Offences  
Act, 2012

COMMITTING A CIVIL OFFENCE, THAT IS TO  
SAY, AGGRAVATED SEXUAL ASSAULT,  
CONTRARY TO SECTION 10 OF THE  
PROTECTION OF CHILDREN FROM SEXUAL  
OFFENCES ACT, 2012

in that he,

at Bareilly Cantonment, on 16 Aug 2014, with sexual intent put his left hand on the left thigh and touched with right hand genitals of Miss K Supriya Singha, aged 04 years, daughter of No. 13988825F Havildar KCB Singha, thereby committing aggravated sexual assault.

C/o 56 APO  
Pin-914054  
Date:  
09 October  
2014

Sd/- Illegible  
(Ajai Londhe)  
Colonel  
Commanding Officer  
54 Engineer Regiment

To be tried by a General Court Martial

C/o 56 APO  
Date:  
10 October  
2014

Sd/- Illegible  
(Rajeev Pant)  
Major General  
General Officer Commanding  
6 Mountain Division”

7. Accordingly, GCM was held against the accused applicant from 18.10.2014 to 23.11.2014 and pursuant to the said proceedings, he was punished with cashiering from service and five years' R.I in civil prison. The applicant forwarded a pre-confirmation petition addressed to GOC-in-C on 02.12.2014, which was returned to seek confirmation from him as to

whether he would like to address the petition to GOC as per Section 164(a) or to GOC-in-C as per Section 164(2) of the Army Act and whether he would like to have personal hearing. Having no response from the applicant, the GOC confirmed the findings and sentence awarded by GCM (supra) vide order dated 13.01.2015. Promulgation of sentence was carried out on 14.01.2015 by the Commanding Officer 54 Engineer Regiment and the applicant was handed over to District Jail, Bareilly on 14.01.2015 to serve out the sentence.

8. It is pertinent to mention here that the charge-sheet (supra) shows that during the course of framing of charge, Section 69 of the Army Act read with Section 10 of the POCSO Act has been referred to with the allegation of aggravated sexual assault. As per Section 2(b) of the POCSO Act, the phrase 'sexual assault' has the same meaning as assigned to it in Section 9 of the POCSO Act. Section 9 of the POCSO Act is reproduced as under:

***“9. Aggravated sexual assault : (a) Whoever, being a police officer, commits sexual assault on a child—***

*(i) within the limits of the police station or premises where he is appointed; or*

*(ii) in the premises of any station house whether or not situated in the police station to which appointed; or*

*(iii) in the course of his duties or otherwise; or*

*(iv) where he is known as, or identified as a police officer; or*

***(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child—***

*(i) within the limits of the area to which the person is deployed; or*

*(ii) in any areas under the command of the security or armed forces; or*

*(iii) in the course of his duties or otherwise; or*

*(iv) where he is known or identified as a member of the security or armed forces; or*

*(c) whoever being a public servant commits sexual assault on a child; or*

*(d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or*

*(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or*

*(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or*

*(g) whoever commits gang sexual assault on a child.*

***Explanation.***—*when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or*

*(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or*

*(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or*

*(j) whoever commits sexual assault on a child, which—*

*(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or*  
***14 of 1987.***

*(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child*

*by rendering him physically incapacitated, or mentally ill to perform regular tasks; or*

*(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or*

*(l) whoever commits sexual assault on the child more than once or repeatedly; or*

*(m) whoever commits sexual assault on a child below twelve years; or*

*(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or*

*(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or*

*(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or*

*(q) whoever commits sexual assault on a child knowing the child is pregnant; or*

*(r) whoever commits sexual assault on a child and attempts to murder the child; or*

*(s) whoever commits sexual assault on a child in the course of communal or sectarian violence; or*

*(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*

*(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public,*

*is said to commit aggravated sexual assault.”*

9. Section 9 of the POCSO Act (supra) though makes a provision in respect of ‘aggravated sexual assault’, which does not necessarily contain the use of violence. However, the fact remains that the Legislature, to its wisdom, has used the word “assault” in Section 9 of the POCSO Act. The word “assault” in Black’s Law Dictionary has been defined as under:



**“Assault.** 1. *Criminal and Tort Law.* The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery. 2. *Criminal Law.* An attempt to commit battery, requiring the specific intent to cause physical injury-Also termed (in senses 1 & 2) simple assault; common assault 3. Loosely, a battery, 4. Popularly, any attack. Cf. BATTERY.-Assault (vb)-Assaultive (adj).

*“Ordinary usage creates a certain difficulty in pinning down the meaning of ‘assault’. Etymologically, the word is compounded of the Latin ad + saltare to jump at. In popular language, it has always connoted a physical attack. When we say that D assaults V, we have a mental picture of D attacking V, by striking or pushing or stabbing him. In the middle ages, however, the terms ‘assault’ and ‘battery’ were given technical meanings which they have retained ever since. It became settled that though an assault could be committed by physical contact, it did not require this, since a show of force raising an apprehension in the mind of the victim was sufficient. Also, a ‘battery’ did not require an actual beating; the use of any degree of force against an actual beating; the use of any degree of force against the body would suffice. The acts of spitting on a person and kissing without consent are both batteries. Glanville Williams, Textbook of Criminal Law 135-36 (1978).”*

*“In addition to the classic definitions of assault, some jurisdictions have used assault as a generic term to describe either assault or battery. Thus, a defendant who intentionally injures somebody may be convicted of assault rather than battery.” Arnold H. Loewy, Criminal Law in a Nutshell 57 (2<sup>nd</sup> ed. 1987).”*

10. The Black’s Law Dictionary also defines the phrases “Aggravated assault”, “sexual assault” and “simple assault”. The same are reproduced as under:-

**“Aggravated assault.** (18c) *Criminal assault accompanied by circumstances that make it more severe, such as the intent to commit another crime or the intent to cause serious bodily injury, esp. by using a deadly weapon. See Model Penal Code 211.1 (2). (Cases; Assault and Battery-54).*

*“The common law did not include any offense known as ‘aggravated assault.’ However, it did make provision for certain situations in this field, under other names, if, for example, the intended application of force to the person would have resulted in murder, mayhem, rape or robbery, if successful, and the scheme proceeded far enough to constitute an attempt the prosecution was for an attempt to commit the intended felony.” Rollin M. Perkins & Ronald N. Boyce, **Criminal Law**, 180 (3d ed. 1982).”*

**“Sexual assault.** (1880) 1. *Sexual intercourse with another person who does not consent. Several state statutes have abolished the crime of rape and replaced it with the offense of sexual assault. 2. Offensive sexual contact with another person, exclusive of rape. The Model Penal Code lists eight circumstances under which sexual contact results in an assault, as when the offender knows that the victim is mentally incapable of appreciating the nature of the conduct, either because of a mental disease or defect or because the offender has drugged the victim to prevent resistance. Model Penal Code 213. 4. Also termed (in sense 2) indecent assault; sexual assault by contact; indecent assault by contact.”*

**“Simple assault.**

*“(1) Simple Assault. A person is guilty of assault if he- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury.” Model Penal Code 211.1 (1997).”*

11. In view of dictionary meaning as reproduced above, “sexual assault” means assault with intention to commit sexual intercourse without consent.

Aggravated sexual assault makes it more severe with intention to commit another crime or cause serious bodily injury.

12. Section 351 of the Indian Penal Code (45 of 1860) defines the word “assault” as under:

*“351. Assault.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*

*Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.”*

13. According to Halsbury’s Law of England, an “assault” is any act committed intentionally, or possibly recklessly, which causes another person to apprehend immediate and unlawful violence.

14. Keeping in view the dictionary meanings of “assault” as reproduced above, the case of the applicant is be looked into in the light of the evidence on record,.

15. While assailing the impugned order of punishment, learned counsel for the applicant submitted that the girl had not identified the accused; SoE was substantially illegal; Rule 22 of the Army Rules was not complied with; the Medical Officer as well as the girl (victim) were not examined as per Army Rule 22. It is also argued that this is not a case of ‘aggravated sexual assault’; the offence for which the accused has been charged is substantially improper and that no man of common prudence shall commit

such sexual offence with a girl child in the presence of her mother, father and other girl child.

16. **Per contra**, submission of learned counsel for the respondents is that the applicant has not submitted any petition under Section 164(1) and 161(2) of the Army Act as per law, therefore, this OA is premature and not maintainable. On merits, learned counsel for the respondents has argued that the victim girl child appeared in the GCM and made statement against the accused applicant. There is corroborative evidence of other witnesses against the applicant too. It is also argued that no one can understand the mind-set of a criminal and keeping in view the present scenario, a person of any age may indulge in commission of such sexual offences at any time and at any place. It is vehemently argued that in the present case, the impeccable evidence on record shows that the applicant was leaning over the victim aged about four years; he was holding her left thigh with his left hand and was inserting his right hand finger in the genitals of the girl child, and this constitutes 'aggravated sexual assault' under POCSO Act.

17. We have given our anxious consideration to the rival submissions made before us and perused the record. So far as the presence of accused applicant at the scene of occurrence is concerned, it appears to have been proved beyond reasonable doubt. The evidence on record shows that adjacent to Garun Sainik Institute, there situates a play ground where the victim was playing in a slide tunnel and her father was present at the top of the said tunnel. One lady i.e. Mrs Urmila Singh was also present at the play ground where the victim was playing.

18. P.W.1 Spr Kamal Nath Dev had prepared sketch map of the site, which establishes that the height of the play station with slides in the middle of the play ground is approximately 8ft and length of the slide tunnel too is also approximately eight 8 ft.

19. P.W.2 Hav KCB Singha, father of the victim girl, has categorically stated that he had seen the girl child lying diagonally at the end of the slide tunnel and the accused applicant was bending over her. He had seen the left hand of accused holding the left thigh of girl child and his right hand index finger inserting in her vagina. The girl was wearing a frock and V-shaped short panties. The accused applicant had pulled up the frock of the girl child till her naval part. This witness further stated that he had then grabbed the accused applicant by his collar.

20. P.W.3 Smt. Urmila Singh has stated that she had seen the accused going towards the end of the slide tunnel where the girl child was sitting and that she had seen him bending over the girl child. She further stated that she had seen KCB Singha jumping down from the top of the play station and he caught hold of the accused.

21. From the statements of P.W.2 Hav KCB Singha and P.W.3 Smt. Urmila Singh, there seems to be no room for doubt that the accused applicant had gone to the girl child for the purposes of her sexual molestation. No motive has been pointed out on behalf of the applicant for his false implication.

22. Col S.D.Poddar, Medical Officer had appeared as P.W.4. He stated that it is not necessary that there should be an injury mark or bleeding when an adult finger is inserted inside the vagina of 4-year old girl child.
23. P.W.5 Sepoy Mane Sagar Ashok stated that he had hit the person whom Hav KCB Singha had caught.
24. P.W.6 Lance Naik/Military Police Manoj Kumar stated that he had brought Hav KCB Singha and the accused applicant inside Garun Sainik Institute. Later on he identified the accused.
25. P.W.7 Subedar/Military Police Kamlesh Kumar reached the spot in a Gypsy alongwith Hav Sunil Kumar and Naik Kamlesh Yadav.
26. P.W.8 Hav Sunil Kumar stated that he had noticed the presence of Hav KCB Sinha on the spot.
27. P.W.9 Mrs. Sharmila Devi is the wife of Hav KCB Singha. She affirmed that her child had informed her that a man had inserted his finger in her vaginal part, which was paining.
28. P.W.10 Maj Karthik Kanaknoor, Medical Officer had done a visual examination of the vagina of the girl child to find out if there was any abrasion, bleeding, wound or injury which may require immediate medical attention. He stated that he did not find any such thing externally.
29. P.W.11 Lt Col Gunjan Dwivedi, Medical Officer also reiterated the same thing. She did not find any injury, swelling or bleeding present in the private parts of the girl.

30. P.W.12 Nb Sub Kooshlesh Rati Tripathi and P.W.13 Lt Col Abraham Johnson are formal witnesses, who identified the accused applicant present before the Court.

31. The victim girl child herself appeared before the Court as P.W.14. She stated that her Papa (father) had hit one person in the park because he touched her private parts. On enquiry as to where on her body the accused had touched, she pointed out towards her private parts before the Court. She further stated, “*Usne andar tak hath gusaya, tang pakad kar.* (He put his hand till inside by holding my leg or words to that effect)”.

32. It is vehemently argued by learned counsel for the applicant that the same girl is alleged to have been molested again after two months of the incident, but no action was taken by the army authorities in the matter and this shows that this girl was habitual of raising such false allegations as have been made in the present case.

33. So far as the subsequent incident, as argued by the applicant’s counsel, is concerned, we feel that the commission and omission on the part of the respondents in dealing with allegations made by the girl child against anyone in respect of a crime committed at later stage, is a matter which falls within the jurisdiction of Army authorities and not in this Tribunal. As regards the present incident, it stands on its own legs. From the factual matrix of the case (*supra*), it is established beyond doubt that the applicant had gone to the scene of occurrence and he bent over the girl child to molest her.

34. The lone independent witness Smt. Urmila Singh appeared as P.W.3. She identified the accused applicant present before the GCM. According to her, she had seen the accused going towards the end of slide tunnel where the victim girl was sitting. She had also seen him bending over the girl child. When Hav KCB Singha was hitting the accused applicant, he was crying, "*Beti se pucho...Beti se pucho*". At that time, the girl child was standing near the end of slide tunnel and was crying. Seeing the commotion, the son of this witness got scared, so she took him to home. In cross-examination, this witness stated that she had never met KCB Singha or his daughters before the incident. She is a highly qualified lady possessing the degree of Master in Arts (M.A.) in Home Science. The relevant portion of her statement regarding the incident is reproduced as under:

*"The place from where the accused entered the pay-station area was approximately ten feet away diagonally from the spiral slide where I was standing towards the entrance of the institute.*

*The plastic bag in the hand of the accused was about 10 inches long. There was something kept in the bag.*

*The accused was carrying the plastic bag in his hand when he came out of the Institute.*

*When the accused walked past me, he would have gone brushing against me had I not moved away.*

*I moved away because I thought that the accused may dash or brush against me.*

*I saw the back of the accused when he was moving towards the slide tunnel.*

*I saw him being over at the end of tunnel. I could see his hand.*

*I did not see what he was doing there.*



*The accused was being with his back towards the fountain area.*

*I didn't hear any sound of talks between the accused and 'the Girl child' as I was busy looking after my toddler son.*

*I was standing approximately six to eight feet away from Havildar KCB Singha.*

*I can't tell how much time had elapsed in my seeing the accused bending over the end of slide tunnel and then seeing Havildar KCB Singha jumping from above the play-station.*

*Havildar KCB Singha was hitting the accused. The accused did not hit him back. At that time, the accused was saying "Kyon mujhe mar rahe ho. Beti se poncho... beti se poncho"*

*The packet that the accused was carrying fell down two or three feet away from the end of slide tunnel.*

*During the fight, till the time I was present, no one interfered.*

*My child got scared and started crying so I Immediately took him and went away."*

35. From the statement of P.W.3 Urmila Singh reproduced above, it appears that she had seen the accused bending towards the girl child who was playing at the bottom of slide tunnel, but she did not hear any sound or talks between the accused and the girl child though standing at six to eight feet away from Hav KCB Singha, who later on hit the accused.

36. The veracity of the girl child, who appeared as P.W.14, was tested by the Court. During the course of GCM proceedings, the victim stated that she used to go to park to play on swings and slides. Her mummy and sometimes her papa used to take her to park alongwith her baby sister. Pointing out towards her private parts, she stated that the accused had put his hand till inside (vaginal part) by holding her leg, which pained a lot. On her shrieks, her father came there and he hit the accused. She further stated

that on coming home, her mother had washed her private parts and applied coconut oil. In hospital, she was examined by the Medical Officer. The relevant part of the statement of this girl child is reproduced as under:

*“I go to the park to play on swings and slides.*

*My mommy takes me to the park, sometimes papa also takes me to the park.*

*My baby sister also comes to the park with me.*

*There is a ‘Jhula’ (Swing) and Slide in the park. The ‘Jhula’ on which I play is very high and touches the sky.*

*My papa never fights. My papa had hit one person in the park.*

*He hit him because he touched me here.*

*On being asked by Court where she was touched, ‘The girl Child’ points towards her private parts before the Court and says that she was touched there.*

*She further states, “usne andar tak hath gusaya....tang pakad kar”(he put his hand till inside by holding my leg or words to that effect) and again points towards her private parts before the Court. It pained a lot.*

*I shouted and then papa came and shouted to him “Hath mat laga”.*

*“Phir papa ne use mara” (Papa hit him or words to that effect).*

*I don’t know who was the person.*

*That person was wearing a white shirt.*

*I was wearing a frock and “chota chaddi” (small shorts/panties or words to that effect.).*

*Wen I went home, I told my Mommy that ëk aadmi mera tang pakad ke hath gusaya”(one person held my leg and put his hand inside) and ‘the Girl Child’ again points towards her private parts before the Court.*

*Mommy then put water there and applied oil.*

*Then I was taken to a hospital and was checked by doctor.”*

37. One thing seems to be very strange that during the course of proceedings, the girl child was shown the collage of photographs and after seeing the same for a considerable amount of time, she failed to identify the photograph of the accused, as is evident from her examination-in-chief. During cross-examination, when a question was put to this witness by the defence counsel as to whether her mother and father had tutored her to tell that someone had touched her on her private parts in the park and that her father hit him, the girl did not respond and was busy playing with the toys she had been provided with. Though this question was asked by the defence counsel several times, but no reply was given by the girl child. Once she said, *“Yes, Mommy told her to get ready fast”*.

38. The applicant, in his statement, has categorically denied that he met the girl child and bended over her for sexual assault. On the other hand, P.W.11 Lt Col Gunjan Dwivedi, Medical Officer, who examined the victim girl in the presence of her mother, did not find any injury, swelling or evidence of bleeding externally. She stated that chances are there of causing injury or bleeding on insertion of a finger in vagina, but all the time it is not necessary. According to her, there may or may not be injury on insertion of finger in vagina; all depends on resistance put in by the victim and force applied by the accused.

39. The statements of the prosecution witnesses referred to above, establish beyond doubt that the accused had gone to Garun Sainik Institute and later on he also visited the play area in stead of straightaway going back

from main route. The presence of the accused applicant at the scene of occurrence appears to have been proved. Ordinarily, at a public place it was not expected that the accused applicant, a member of armed forces, would commit such a crime. The statement of the prosecutrix has been supported by P.W. 3 Smt. Urmila Singh, an independent witness. No motive may be assigned to the prosecutrix or her father to falsely implicate the accused. From the evidence on record, however, insertion of finger by the accused in private parts of the girl does not seem to have been established beyond reasonable doubt.

40. Learned counsel for the applicant has vehemently argued that the manner in which the allegations have been levelled against the accused applicant, bending towards the girl child with chicken item in one hand is not possible. Submission made by the learned counsel for the applicant does not seem to inspire confidence for the reason that Smt. Urmila Singh, in her statement, has stated that the food item which the accused was having in his hand, had fallen down. Minor variations or discrepancies in the statements of prosecution witnesses are of no help to the applicant for the reason that the defence set up by him is that he did not enter the play area whereas the evidence on record establishes beyond doubt that he entered the play area and was seen bending towards the girl child. The GCM has elaborately dealt with the commission of the offence by the applicant and after considering the entire evidence on record, has recorded a finding of guilt against him, which does not call for any interference.

41. However, the statement of P.W.11 Lt Col Gunjan Dwivedi, Medical Officer does not establish that the girl suffered any external injury,

abrasion, swelling or like feature on account of forceful entry of finger by the accused in her private parts, hence it appears to be a simple case of ‘sexual assault’ as defined in Section 7 of the POCSO Act and ‘aggravated sexual assault’ as defined in Section 9 of the said Act.

42. So far as the submission of learned counsel for the applicant regarding the probability and time of commission of offence is concerned, no one can understand the mind-set of a person, who commits such a crime.

**Adrian Raine** argues that we must fight crime with biology. He says-

*“There are other reasons for antagonism to a biological approach. Social scientists are concerned that shining the spotlight on the biological causes of crime will shift attention away from important social problems like bad neighbourhoods, poverty, and racial discrimination. I can understand their perspective, and they are absolutely right that we need to eradicate these social inequalities.*

*The free-will debate also raises its ugly head. People are concerned about chalking up a good portion of crime and violence to genetics and biology-what does that say about choice and agency? Was it all determined from the get-go? Are we just gene machines destined to play out our programmed nature in life? Let’s face it, nobody wants to hear that, do they?*

*And that brings us to politics. Conservatives don’t like my work because they think it will encourage a soft approach to crime-we’ll blame crime on the brain, not the person. But liberals don’t like it either because they think civil liberties are at stake-we’ll use biomarkers to identify who is at risk for violence and lock them up before they have committed a crime, the pre-emptive strike.*

*Then at the end of the day we get down to plain old interdisciplinary rivalries. Neurocriminology is a new approach that is attracting attention and threatening the status quo. Other academics can get miffed that their own work does not reach the spotlight. They’re human after all. They want to protest their own turf, and you can understand*

*their frustration that their good science might not be getting the attention it deserves.”*

43. In view of above, to say ‘impossible’ with regard to a crime committed in crowd or otherwise is not absolutely correct. The commission of a crime depends upon the mind-set of accused, hence it cannot be said, as argued by the applicant’s counsel, that in the facts and circumstances of the case, the commission of offence, for which the applicant was charged, was not possible.

44. Learned counsel for the applicant has relied upon the following cases of the Apex Court in support of his submissions:-

(i) **Criminal Appeal No. 789 of 2002, Bhagwan Singh and others versus State of M.P., decided on 23.01.2003.**

This case does not seem to be applicable in the facts of the present case, for the reason that in the said case, during night the commission of murder took place and the statement of child, who appeared as witness, was found to be not trustworthy. The child had disclosed the incident and name of assailants. He was found to be sleeping at the time of occurrence, hence his statement was not relied upon.

The facts of the present case are entirely different and distinguishable. We have found the testimony of girl child trust-worthy.

(ii) **Criminal Appeal No. 401 of 1976, State of Assam versus Mafizuddin Ahmed, decided on 14.01.1983, reported in (1983) 2 SCC 14.**

In the said case, the only eye-witness was a seven-year old child, who was alleged to have seen the occurrence. The Hon’ble Supreme Court held that merely on the basis of Dying Declaration, there can be no conviction

unless it is corroborated by other evidence. Their Lordships of the Supreme Court further found that the High Court, in its judgment, has observed that the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring. The statement of the child witness was found to be vacillating throughout.

The categorical statement of the girl child in the present case establishes the guilt of the accused. She does not appear to have been coached or tutored to depose against the accused. Hence the ratio of the case relied upon by the learned counsel for the applicant does not apply to the present case.

(iii) Same principle is enunciated in **Criminal Appeal No. 1368 of 1999, Union of India and others versus L.D. Balam Singh**, decided by the Apex Court on 24.04.2002, hence it is of no help to the applicant.

45. Learned counsel for the applicant has also cited certain other cases of subordinate judiciary and Armed Forces Tribunal as well as the Apex Court, which may be distinguished on two grounds; first, in the present case, the girl child herself is the victim, who appeared during GCM; and secondly, the presence of accused applicant at the time and place of occurrence and further, his bending over the girl child have been established beyond doubt, being supported by the statement of independent witness Urmila Singh, P.W.3. The statements of the girl child and her father Hav KCB Singha, who was present at the scene of occurrence and had hit the accused, go on to establish that the accused had tried to molest

the girl child. The evidence on record, thus, conclusively proves the guilt of the accused. The defence set up by the accused that he did not enter the play area appears to be far away from truth.

46. We live in a country where girl children of every age, say, 2, 3, 4, 5 or so, are molested. Even old ladies are molested and raped by younger generation, shockingly breaking the barriers of relationship, morality and social order. All this is happening because of westernised way of living. Phones, TV and other materials are generating sexual temptation across the board.

47. We are in agreement with the finding of guilt recorded by the GCM, but keeping in view the fact that there is no evidence with regard to insertion of finger in the genitals of the girl child by the accused beyond reasonable doubt, and further that the evidence on record does not establish that there was some violence used by the applicant to cause aggravated sexual assault to the girl child, we are of the view that conviction of the applicant for the offence of aggravated sexual assault and sentence awarded to him for the said offence would not be proper. In the case of **K. Prema S. Rao & another versus Yadla Srinivasa Rao & others**, reported in (2003) 1 SCC 217, the Hon'ble Supreme Court had found that though the appellant in the said case was charged and punished for an offence of higher degree, he can still be convicted for an offence of lesser degree depending on actual evidence on record and for which no further opportunity of defence is required to be granted to the appellant, when he had ample opportunity to meet the charge for an offence of higher degree. As observed above, no external injury or abrasion, etc was found on the private



parts of the girl child. We, therefore, treat it a case of '*sexual assault*' or an indecent act and not of '*aggravated sexual assault*'. Hence it shall be appropriate that the sentence awarded to the applicant may be reduced to the period already undergone, keeping in view the fact that the applicant has remained in jail for more than two and a half years. Accordingly, the sentence of five years' R.I awarded to the applicant is reduced to the period of sentence already undergone. However, the punishment of cashiering from Army service awarded to the applicant is maintained.

48. Accordingly, the **O.A is allowed in part** to the extent as indicated in the preceding para.

The applicant is on bail. He need not surrender. His bail-bonds filed before the appropriate authority are cancelled and sureties discharged.

There shall be no order as to costs.

**(Air Marshal BBP Sinha)**  
**Member (A)**

**(Justice D.P. Singh)**  
**Member (J)**

Dated: January 05, 2018  
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