

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION (APPEAL) No. 205 of 2021****Friday, this the 15th day of December, 2023****"Hon'ble Mr. Justice Anil Kumar, Member (J)**
Hon'ble Maj Gen Sanjay Singh, Member (A)"

No. 15451683-F Sepoy Pawan Chandra Bhatt, S/o Shri Harish Chandra Bhatt (through Legal Representative) Smt Kamla Devi and Mother of the applicant, R/o Village Sirtuli, Post-Kanakot, Distt-Champawat (Uttarakhand)-262528. (Applicant undergoing sentence of GCM at Central Jail, Amritsar (Punjab).

..... Appellant

Ld. Counsel for: **Shri Shailendra Kumar Singh**, Advocate
the Applicant **Shri Ravi Kumar Yadav**, Advocate

Versus

1. Union of India (UOI), through the Hon'ble Secretary, Ministry of Defence, South Block, IHQ of MoD (Army), DHQ, PO-New Delhi.
2. Chief of Army Staff (COAS), South Block, IHQ of MoD (Army), DHQ, PO-New Delhi-110011.
3. General Officer Commanding, HQ 15 Infantry Division, C/o 56 APO, PIN-908415.
4. Commanding Officer, No 415 Field Hospital, C/o 56 APO, PIN-903415.
5. OIC AMC Records, Lucknow Cantt, Lucknow (UP).

.....Respondents

Ld. Counsel for the Respondents. **:Shri Amit Jaiswal**, Advocate
Central Govt Counsel

ORDER

1. The instant Original Application (Appeal) has been filed under Section 15 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

(i) Issue/pass an order or direction of appropriate nature to the respondents quashing/setting aside the arbitrary and illegal General Court Martial held from 23 Nov 2020 to 14 Dec 2020 and confirmation of GCM on 01 Feb 2021.

(ii) Issue/pass an order or direction if appropriate nature to the respondents to re-instate the applicant in the service with effect from 14 Dec 2020 protecting his previous service for all purposes including consequential monetary benefits.

(iii) Impose a special cost, as deemed fit by this Hon'ble Tribunal, on the respondents for all types of harassment (mental, social, professional and financial) undergone by the applicant.

(iv) Any other relief as considered deemed just and proper by the Hon'ble Tribunal in the nature and the circumstances of the instant case, be awarded in favour of the humble applicant.

Facts of the Case

2. The applicant was enrolled in the Army on 25.03.2015. He was serving with 415 Field Hospital which was stationed at Amritsar. While performing duty as Dandaman (Co-driver) in school bus No. 32, he was responsible for safe boarding and de-boarding and custody of children during transit from bus stop to Kindergarten

School, New Amritsar Military Station (NAMS), Khasa and back. The said school bus run twice every day. The schedule departure of bus for school was 0840 hrs and it returned to unit at 1000 hrs in the morning time. The bus returned to school at 1230 hrs to pick the children and drop them back to their respective bus stops at 1340 hrs. On 17.01.2020, 415 Field Hospital received a complaint against appellant regarding sexual misbehaviour with Ms 'A' and Ms 'B'. He was removed from Dandaman duties w.e.f. 17.01.2020 and Court of Inquiry (C of I) was conducted on 03.02.2020. Summary of Evidence (S of E) was recorded from 11.06.2020 to 15.06.2020 which prima facie found that appellant committed the offence and case existed against him. Accordingly, disciplinary proceedings commenced on 15.07.2020 and GCM was conducted on 23.11.2020 and subsequent days. Two charges of committing aggravated sexual assault contrary to Section 10 of the POCSO Act, 2012 were framed. The GCM on its conclusion on 14.12.2020, held him guilty for both the charges and he was sentenced to suffer rigorous imprisonment for five years and dismissal from service. On 01.02.2021, findings and sentence were confirmed by General Officer Commanding, 15 Infantry Division.

Appellant is presently lodged in Civil Jail, Amritsar. This O.A. (A) has been filed for setting aside GCM proceedings and re-instate appellant into service w.e.f. 14.12.2020 protecting his previous service.

3. Learned counsel for the appellant submitted that being enrolled in the Army on 25.03.2015 and serving with 415 Field Hospital, appellant was performing Dandaman duty in school bus No. 32. The bus was primarily deployed to pick children of serving personnel from unit location to Kindergarten School NAMS, Khasa and drop back to unit location. The scheduled departure from unit location was around 0840 hrs and then at 1000 hrs respectively and from Kindergarten School NAMS, Khasa it started at 1230 hrs and again at 1340 hrs respectively. Around 43 children used to board in this bus in which appellant was responsible for ensuring safe boarding of children and to be dropped at respective destinations on return from Kindergarten School.

4. Learned counsel for the appellant further submitted that appellant was removed from duty of Dandaman on 17.01.2020 after he performed his morning duty of dropping children from unit location to school and on 25.01.2020 C of I was held in which evidence of girls was

not recorded. It was further submitted that S of E was recorded from 11.06.2020 to 15.06.2020 in which statement of girls were not recorded but it was directly recorded in GCM proceedings. His GCM was conducted and concluded on 14.12.2020 awarding five years rigorous imprisonment and dismissal from service.

5. Learned counsel for the appellant further submitted that Army Rule 22 was not complied with and victims were never brought before C of I or any other type of investigation. It was further submitted that Charge Sheet dated 27.05.2020 was prepared merely on the basis of presumption, conjectures and hearsay evidences which is arbitrary and bad in the eyes in law. Further submission of learned counsel for the appellant is that neither FIR was lodged under Section 154 of Cr.P.C. nor there was any complaint before the Magistrate under Section 190, therefore, GCM proceedings stand vitiated.

6. In support of his contention learned counsel for the appellant has relied upon para 34 of judgment dated 25.06.2018 passed by Hon'ble Bombay High Court, Nagpur Bench in Criminal Appeal No 406/2017, **Navin Dhaniram Baraiye vs State of Maharashtra** and judgment dated 11.09.2015 passed by Hon'ble Bombay

High Court, in Criminal Appeal No 330 of 2015, **John @ Vivek Ramesh Jadhav vs State of Maharashtra**. He pleaded for setting aside GCM proceedings and re-instate appellant into service.

7. Per contra, learned counsel for the respondents submitted that appellant was performing duties in School Bus number 32 w.e.f. 15.06.2019 to 17.01.2020. He was responsible for safe boarding and de-boarding and custody of children during transit from bus stops to Kindergarten School, NAMS, Khasa and back. On 17.01.2020, the unit of appellant received a complaint against Number 15451683F Sepoy (Tailor) Pawan Chandra Bhatt regarding sexual misbehaviour with Ms 'A' and Ms 'B', he was removed from Dandaman duties w.e.f. 17.01.2020 and C of I was held. Appellant was held guilty by the said C of I and pursuant to this, GCM was conducted which on its conclusion held him guilty and sentenced him to suffer rigorous imprisonment of 05 years and dismissal from service.

8. Learned counsel for the respondents further submitted that Army Rule 180 and 23 (3) were complied with during the C of I proceedings and Rule 58 of Army Rules, 1954 was also complied with in which appellant

made written statement. It was further submitted that after promulgation of sentence, appellant was handed over to Superintendent, Central Jail, Amritsar (Punjab) on 19.02.2021 for execution of the sentence. He pleaded for dismissal of O.A. (A) stating that appellant had done heinous crime which requires no sympathy.

9. Heard Shri Shailendra Kumar Singh, learned counsel for the appellant and Shri Amit Jaiswal, learned counsel for the respondents and perused the record. We have also perused C of I proceedings, S of E and GCM proceedings.

10. It is undisputed fact of the parties that the appellant was enrolled as Tailor in the Indian Army on 25.03.2015. While posted with 415 Field Hospital, he was deputed to perform duty of Dandaman in bus No 32 which used to ply between family quarters to Kindergarten School NAMS, Khasa and vice versa. School going children of serving soldiers were being dropped and collected through this bus.

11. On receipt of a complaint, appellant was removed from his duty on 17.01.2020 after performing morning duty. Station Headquarters New Amritsar Military Station convened a C of I to investigate the case vide convening

order dated 24.01.2020. After completion of C of I, 415 Field Hospital was intimated to record S of E which was recorded from 11.06.2020 to 15.06.2020. In the S of E it was concluded that appellant had committed the offence and prima facie case existed against him. Based on S of E, GOC, 15 Infantry Division recommended initiation of disciplinary proceedings against No. 15451683F Sepoy (Tailor) Pawan Chandra Bhatt. The charge sheet was framed on 23.11.2020 as under:-

"CHARGE SHEET

FIRST CHARGE

Army Act Section 69

Committing a civil offence, that is to say aggravated sexual assault, contrary to Section 10 of the Protection of Children from Sexual Offence Act, 2012.

In that he,

at New Amritsar Military Station, on 16 January 2020 committed aggravated sexual assault on Miss 'A', daughter of Sergeant 'X', aged about 03 years to wit, with sexual intent hugged her and bit on her cheeks and lips.

SECOND CHARGE

Army Act Section 69

Committing a civil offence, that is to say aggravated sexual assault, contrary to Section 10 of the Protection of Children from Sexual Offence Act, 2012.

In that he,

at New Amritsar Military Station, between 22 June 2019 and 16 January 2020, committed aggravated sexual assault on Miss 'B', daughter of Sergeant 'Y', aged about 03 years to wit, with sexual intent made her sit in his lap and hugged her."

12. General Court Martial proceedings concluded on 14.12.2020 and appellant was found guilty of both the charges. He was sentenced with (i) to suffer rigorous imprisonment for five years and (ii) to be dismissed from the Army service. On 19.02.2021, appellant was handed over to civil jail to carry out his remaining sentence.

13. The appellant has been charged and convicted in special penal statute i.e. Protection of Children from Sexual Offence (POCSO) Act, 2012. Section 29 of the POCSO Act, 2012 provides:-

"29. Presumption as to certain offences. Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

Section 30 of the POCSO Act, 2012 further provides that:-

30. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

14. Under normal criminal jurisprudence, the burden is cast upon the prosecution to prove the offence alleged against the accused beyond reasonable doubt to fasten criminal liability on the accused. However, under the POCSO Act, which is a Special Statute enacted to prevent sexual exploitation and sexual abuse of children which are heinous crimes, the court shall presume the accused to be guilty if he is prosecuted with the offences mentioned therein and the accused is saddled with the onus to prove his innocence on the basis of the principle of reverse burden of proof.

15. Thus, as provided under Section 29 and 30 of POCSO Act, 2012 there is presumption that the accused charged under Section 3, 5, 7 and 9 of the aforesaid Act has committed such an offence and the accused is obligated to prove his innocence.

16. It is also settled legal position that for presumption under Section 29 of POCSO Act, the prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, on the basis of preponderance of probability. If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused,

the accused can rebut the same either by discrediting the prosecution witnesses through cross examination or by adducing his own evidence.

17. In the present case, to ascertain whether the aforesaid foundational fact has been established on the basis of preponderance of probability, the evidences on record have to be properly scrutinized.

18. The star witnesses in this case is the victim girls and in fact the conviction of the appellant is primarily based on account of victim girl's and supportive evidence of the witness to whom the victims have stated the fact.

19. It is admitted fact that victim 'A' and victim 'B' are children under the provision of POCSO Act. Children witness 'A' and 'B' are examined during the GCM proceedings and cross examined by the defence.

20. Before writing their statements both the child witnesses were examined by the GCM to ascertain whether they could understand properly and had the capacity to testify before the court and after being fully satisfied with the capability to do so, proceeded to examine them.

21. Prosecution witness No 7 (Ms 'A') has stated as under:-

"I go to school in a truck (ALS) but now I do not want to go to school in that truck. One of the uncle of that truck has bite me in the left side of my neck (the child points towards left side of her neck). The uncle also hugged me and loved me. I felt pain because that uncle bite me on my neck and I felt bad. I do not exactly remember all the things which happened on that day."

22. PW-7 (Ms 'A') further stated that:-

"the accused bit me twice, once on neck and other time at my cheek'. She has also stated that the uncle also hugged me tightly on that day."

23. Prosecution witness No 8 (Ms 'B') has stated as under:-

"I used to go to school in a truck (ALS). There was an uncle in that school bus who used to sit at the back of the bus. That uncle did a wrong thing with me."

24. PW-8 (Ms 'B') further stated that:-

"uncle touched my vagina many times by putting hand inside my skirt and undergarment. She pointed towards her vagina and said that under touched here."

25. PW-8 (Ms 'B') also stated that:-

"uncle used to make me sit in his lap and touched my vagina. She also stated that she also saw once the accused made Ms 'A' sit in his lap. She stated that she informed the incident to her mother."

26. Prosecution witness No 3 (Sergeant 'X') father of Ms 'A' stated as under:-

"On 16 Jan 2020 between 1300 hrs to 1400 hrs, I received a phone call from my wife and she informed me that when she received our daughter Ms 'A' from the bus-stop today, she was not in good mood and she was about to cry. She also told me that our daughter informed her (Mrs DX) that 'UNCLE GANDE HAIN AUR UNHONE MUJHE KAATA' (uncle is bad and he has bite me or words to that effect) and my wife informed that our daughter has gestured pointing her finger towards her lips. My wife appeared stressed. S I consoled her stating not to worry and told her that I was coming home."

27. Sergeant 'X' further stated that:-

"on the same day evening, I and my wife talked about the incident to our daughter, Ms 'A'. She informed us that 'BUS WALE UNCLE NE MUJHE TIGHT HUG KIYA' (the bus uncle hugged me tightly or words to that effect). The child pointed towards her lips and stated 'AUR MUJHE YAHA PAR KAATA AUR UNKA THOOK MERE MUH MEIN CHALA GAYA' (the uncle bit me here and his saliva enter inside my mouth or words to that effect)."

28. Prosecution Witness 1 (Mrs DX) mother of Ms 'A' stated that:-

"As my daughter got down from the school bus, she looked very sad and she was shying away which was little unusual of her. As we walked about 10 to 15 steps away from the stop, she told me "BUS WALE UNCLE GANDE HAIN" (The bus uncle is bad or words to that effect). When I asked her as to what happened, she informed me that BUS WALE UNCLE NE MUJHE KAATA (Bus wale uncle has bite me or

words to that effect). When I asked her where the accused bite her, she pointed towards one corner of her lips and some cheek area around her lips and informed that the accused bite her there."

29. PW-1 (Mrs DX) further stated that:-

"the accused has hugged my daughter very tightly and he kissed her on lips. The child said that "UNCLE NE MUJHE KISS KIYA AUR UNKA THOOK MERE MUH MEIN AA GAYA MUJHE ACHA NAHI LAGA (Uncle kissed me, his saliva went inside my mouth, I did not like it or words to that effect)."

30. The victims who are two female children aged about 03 years (at the time of offence) have categorically stated that they were repeatedly sexually assaulted by the appellant while going to school and coming home from school. Mother, father and class teacher have also deposed in favour of prosecution.

31. Learned counsel for the appellant contended that to believe on statement of Ms 'A' and 'B' is not safe without their corroboration by independent evidence, for this he relied on judgment dated 25.06.2018 passed by Nagpur Bench of Hon'ble Bombay High Court in Criminal Appeal No 406/2017, **Navin Dhaniram Baraiye vs State of Maharashtra.**

32. Regarding testimony of child witness it has been held by the Hon'ble Apex Court in **state of Maharashtra vs Bharat Fakira Dhiwar**, (2002) 1 SCC 622 that:-

*"14. In the case of **Panchhi vs. State of UP**, (1998) 7 SCC 177, it has been held that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It was held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. It was held that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It is held that it is more a rule of practical wisdom than a law.*

*15. In the case of **Suryanarayana vs State of Karnataka**, (2001) 9 SCC 129, it has been held that the evidence of a child witness cannot be discarded only on the ground of her being of tender age. It is held that the fact of a child witness would require the court to scrutinize the evidence with care and caution. It is held that if the evidence is shown to have stood the test of cross-examination and there is no infirmity in the evidence, then a conviction can be based upon such testimony alone. It is held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. It is held that some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. It is held that discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness. It is held that while appreciating the evidence of a child witness, the courts are required to rule out the possibility of the child being tutored."*

33. The testimony of the victims is found to be cogent, convincing and reliable and without any material discrepancy.

34. Having discussed the evidences on record as mentioned above, this Court is satisfied that prosecution

has been able to establish the foundational facts based on preponderance of possibility.

35. The appellant was given full opportunity to rebut the charge but nothing material has been adduced by the appellant to rebut the same except that he had no previous criminal history and was never under suspicion.

36. Appellant's contention that he was given no opportunity of being heard during the S of E, is without basis as he was given full opportunity to cross-examine the prosecution witnesses. During the recording of S of E, appellant stated that he wanted to give his statement in writing which he submitted later on 05.12.2020 (Exhibit-13) stating that being innocent he was wrongly implicated in this case.

37. Appellant's other contention is that since neither FIR was lodged under Section 154 of Cr. P.C. nor there was complaint before the Magistrate under Section 190 of the said code, the conviction and sentence cannot be sustained. In regard to this, respondent's counsel rightly contended that Army Authorities are empowered to deal with such type of cases and FIR is not mandatory for trial under Army Act.

38. Appellant's next contention is that neither children had identified the accused/appellant nor any identification parade was made. In this regard we find that statement of victims 'A' and 'B' made during GCM proceedings is trustworthy in that she identified the appellant when she was shown appellant's photograph (Page 96 of GCM proceedings) and the victims have also identified them during their statement before GCM.

39. In the light of the above discussion, we are in agreement with the conclusion arrived at by the GCM which sentenced appellant for five years rigorous imprisonment and dismissal from service. Consequently, we dismiss the appeal as devoid of any merit.

40. No order as to costs.

41. Miscellaneous application(s), pending if any, stand disposed off.

(Maj Gen Sanjay Singh)
Member (A)

Dated : 15.12.2023
rathore

(Justice Anil Kumar)
Member (J)

RESERVED

(Court No 2)

Form No. 4

{See rule 11(1)}
ORDER SHEETARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

ORIGINAL APPLICATION NO (A) No 205 OF 2021

Pawan Chandra Bhatt

Applicant

By Legal Practitioner for the Applicant

Versus

Union of India & Ors
Respondents

By Legal Practitioner for Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>15.12.2023</u> <u>Hon'ble Mr. Justice Anil Kumar, Member (J)</u> <u>Hon'ble Maj Gen Sanjay Singh, Member (A)</u></p> <p>Judgment pronounced. O. A.(A) No. 205 of 2021 is dismissed. For orders, see our judgment and order passed on separate sheets.</p> <p>(Maj Gen Sanjay Singh) Member (A) rathore</p> <p>(Justice Anil Kumar) Member (J)</p>