

**IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI.**

OA(A) – 56 /2016

PRESENT

HON`BLE DR(MRS) JUSTICE INDIRA SHAH, MEMBER(J)

HON`BLE LT GEN GAUTAM MOORTHY, MEMBER (A)

Ex Lnk Mirgane Saudagar Navnath
Force No.15569572 F Sapper(Lance Naik)
R/O Mandegaon Telegram Barshi
PO Mandegaon PS Pangri
Tehsil ,Barshi Dist.Solapur
Presently in Central Jail, Dimapur.

..... **Applicant.**

**By legal practitioner for
Applicant.**

Mr R.Mazumdar
Mr. H.Bezbaruah

- Versus -

1. Union of India, represented by the Secretary
Ministry of Defence, Government of India,
New Delhi – 110 011.

2.The General Officer Commanding in Chief,
Eastern Command Pin 908542
C/O. 99 APO

3. General Officer Commanding ,
3 Corps C/O. 99 APO

..... **Respondents**

**By Legal Practitioner for the
Respondents**

Brig N.Deka (Retd), CGSC

Date of Hearing : 09.05.2018

Date of Judgment and Order : 12 .06.2018

JUDGMENT AND ORDER

(Dr(Mrs) Justice Indira Shah)

1. This is an appeal against the findings dated 16.05.2016 of the General Court Martial (GCM, in short), whereby the applicant was held guilty under section 69 of the Army Act, 1950 read with section 10 of the Protection of Children from Sexual Offences Act, 2012 (in short, POCSO Act, 2012) and sentenced to suffer rigorous imprisonment for 5 years and be dismissed from service.

2. The applicant being appointed in the Bombay Engineers Group, Pune on 29.01.2002, was engaged since 1st day of November, 2013 to perform the duties of co-driver of the Sewak, School Bus of Kendriya Vidyalaya, Dimapur. On 11.11.2013, a complaint was lodged by the father of the victim girl, a student of Class IV, aged about 8/9 years old, alleging that the applicant had committed aggravated sexual assault on his daughter in the school bus, on the pretext of checking her Identity Card. A Court of Inquiry was conducted and thereafter, the charge under section 10 of POCSO Act, 2012 conjoining section 69 of the Army Act, 1950 was framed. The charge being explained, the applicant pleaded not guilty.

3. During the GCM proceedings, altogether 9 (nine) witnesses were examined by the Prosecution. Thereafter, the statement of the applicant was recorded wherein he denied the allegations levelled against him and pleaded that he was innocent. On conclusion of GCM proceedings, the applicant was held guilty and sentenced thereon as stated earlier.

4. The applicant, thereafter, preferred a Pre-Confirmation Petition to the General Officer Commanding, 3 Corps which was rejected. The confirming authority vide order dated 29.06.2016 confirmed the findings and sentence against the applicant by the GCM. The applicant preferred a petition on 27.08.2016 under section 164 (2) of the Army Act, 1950 against the order of the confirming authority but the same has remained unattended till date.

5. Heard Mr. R.Mazumdar, learned counsel appearing for the applicant and Brig N.Deka(Retd),learned CGSC appearing for the respondents.
6. At the threshold, the applicant has challenged the jurisdiction of the GCM. It is submitted that the GCM has no jurisdiction to try the applicant for the offence committed under the POCSO Act, 2012. Per contra, the counsel for the respondents relying the Order dated 21.05.2016 passed in **OA-79/2015 (Colonel Hardeep Singh Bindra Vs. Union of India and Others)** by the Armed Forces Tribunal, Regional Bench, Mumbai has submitted that the GCM proceedings do not suffer from lack of jurisdiction.
7. In the case of Colonel Hardeep Singh Bindra (supra), the Tribunal revisited a catena of cases and provisions of Army Act as well as Code of Criminal Procedure. It was held therein that the GCM has the jurisdiction to try the appellant for the offence i.e. aggravated sexual assault within the meaning of Section 9(b) of the POCSO Act, 2012.
8. It is further submitted that the GCM has failed to appreciate the evidence adduced by the Prosecution Witnesses in its proper perspective, more particularly, the evidence of the victim girl (PW 5) and her mother who denied that there was any such alleged incident.
9. It is also submitted that delay in convening the GCM is fatal to the prosecution and has caused extreme prejudice to the applicant. The incident took place on 11.11.2013, whereas the applicant was charge-sheeted in February, 2016.
10. It is argued by the counsel for the applicant that the findings of the GCM are based on inadmissible evidence. The proceedings of the Court of Inquiry are not admissible in evidence as per Section 182 of the Army Rules, 1954. But the GCM's findings are based on the materials collected in the Court of Inquiry. The confirming authority also failed to appreciate the relevant legal provisions.

11. Refuting the arguments advanced by the learned counsel for the appellant, learned counsel appearing on behalf of the respondents submitted that the provision under section 33 of the POCSO Act, 2012 was followed at all stages while adjudicating the case.

12. The victim (PW 5) being a child witness could have forgotten the incident but she in her earlier statement recorded during the Court of Inquiry had vividly narrated the incident. Her statement was recorded by PW 9 and was exhibited in the GCM proceedings. Since her previous statement was exhibited in the GCM proceedings, it is admissible in law.

13. It is argued by the learned counsel for the respondents that as per Section 29 of the POCSO Act, 2012, the accused is presumed to have committed the offence, unless contrary is proved by him.

14. PW 1, IC-459882 Colonel Shivendra Kumar Shahi was Officer Commanding, 520 Supply Service and Transport Unit, at the relevant point of time. The father of the victim complained him that co-driver of the Sewak School bus has molested his daughter under the garb of checking her Identity Card. He told him (PW 1) that the accused (appellant) inserted his hand inside his daughter's uniform to pull out the Identity Card and in the process groped her breast. He further alleged that the girl child is not willing to go to the school till the accused is there in the bus as co-driver. PW 1 then assured the victim's father that appropriate action will be taken against the accused. Thereafter, he (PW 1) rang up Colonel B.K. Agarwal, Officer Commanding Troops and narrated the incident. He also informed the Camp Commandant. The accused was, thereafter, removed from the duties of co-driver of the Sewak School bus. PW 1 then told the victim's father that he should lodge a written complaint against the accused, if he wishes to pursue the case. Accordingly, a written complaint was lodged by the father of the victim on 12 Nov. 2013.

15. PW 4, is the mother of the victim. In her examination –in- chief, she initially stated that she did not remember anything about the incident as two and half years have elapsed since the incident occurred. In the same breathe, she also deposed that she did not want her child to depose before the Court (GCM) proceedings and narrate the incident, as she has with great difficulty recovered from the trauma. She also stated that she was fed up of giving statements before various authorities. It is in her deposition that the girl child was so scared that she was not willing to go to school. She stated that she does not want, what has happened to her daughter, should happen to any other girl.

16. PW 2 identified the accused as co-driver of the school bus in which her daughter used to commute between home and school. In her cross-examination by the defence, she stated that she had no complaint against the accused.

17. In her reply to the query by the Court, she stated that wrong things happened with her girl child which traumatised her and because of those things the child was scared to go to school. She further admitted that the incident for which her husband had lodged complaint was true. The said incident had happened with her girl child. She explained that she was not narrating the incident as she could not narrate the incident, being the mother of the girl child, it is very difficult for her to talk about it before various authorities time and again.

18. The demeanor of the witness at this stage was recorded, as the Court (GCM) observed that the witness had started sobbing. Further cross examination by the defence was declined.

19. PW 3, the Executive Engineer (Civil), Devananda Hazarika was on duty of Camp Commandant in addition to his appointment as Staff Officer II (Planning) He deposed that on 11th November,2013 at about 1630 hours, he received a phone call from Officer Commanding,520 Supply Service and Transport Company-Colonel S.K.Shahi (PW 1) that the accused had molested the girl child of his Unit personnel in

Sewak School Bus and that he should be immediately removed from the co-driver duties.

20. PW 3, then, reported the incident to Colonel B.K. Agarwal, Officer Commanding Troops and on his order the accused was removed from the co-driver duties. After one week PW 3 was told by Subedar Major that there was a quarrel between the accused and victim's father and the accused was admitted in the medical inspection room. PW 3 visited the medical inspection room and found the accused lying on bed with some injuries. Accused told him that victim's father caused the injury.

21. PW 4, Naik Suresh Pratap Singh, was the driver of the School bus. He deposed that the accused was detailed as co-driver. On the day of incident, the junior class students, including the victim boarded the bus. The children started making noise. PW 4 then asked the accused to control them. The accused went inside the bus and settled down the children. Thereafter, the senior students boarded the bus. According to him, when he asked the accused to settle down the children, the accused went inside the bus, scolded them and came out near the door of the bus, where PW 4 was standing. He then said that he was sitting on his driver's seat and so he could not say whether the accused went inside the bus to settle down the children.

22. PW 4, in his cross examination by defence stated that at the time of incident he was on his driver's seat. He did not hear any cry from the child. No complaint from anybody was lodged to him.

23. The victim was examined through video conference as PW 5. Some searching questions were put to test the competency of the child witness. On being satisfied that she was competent to give evidence, her evidence was recorded. The Judge Advocate and the prosecutor being women officers were allowed to put questions to the victim. The victim was accompanied by her father. She stated that she used to go to School by School bus and sometimes her father also dropped her to School. The driver uncle and the bus, she stated were good. She further stated that if anybody does anything wrong to her, she tells her mother first. She further stated that she does not

remember if anybody had done anything wrong to her or anybody had touched her body. She stated that it was one and half years since she left the station, she was unable to remember anything. However, when the video camera turned towards the accused for identification, she became alert and corrected her posture. She could identify the accused as person who used to come in bus.

24. In her reply to the question by the Court she stated that the conductor uncle (co-driver) used to check her identity card. She also stated that she cannot say if anybody touched her or misbehaved with her.

25. PW 5, was recalled and re-examined whereby her statement recorded during the Court of Inquiry was exhibited as Exhibit '9'. PW 5 admitted that the signature below the statement, as her statement, may be her signature. The entire statement recorded in Exhibit- 9 was read over to her and her reply was that she does not remember anything. The CDs, i.e. the CDs containing the previous video recordings and the video recordings of GCM were submitted in the Court and marked as Ext-10.

26. PW 6, Pioneer Company (Sewak) attached to Supply Service and Transport Company, namely Madan Kumar used to work in Wet Canteen. One day on hearing hue and cry he went to Wet Canteen and saw the father of the victim and accused quarrelling. The accused told to him that he wants to meet Colonel S.K.Shahi, Officer Commanding. PW 6 went to call the Officer Commanding and when he came back he saw both the accused and father of the victim scuffling. According to PW 6, the accused fell down and was shifted to medical inspection room.

27. PW 7, is the father of the victim. It is in his evidence that on the date of the incident while he was having lunch with his wife, his daughter (victim) came home crying and said that she will not go to School from tomorrow. On being asked, she said that the conductor uncle (accused) again checked her identity card and this time the accused while checking the Identity Card inserted his hand inside her sweater and pressed her breast. She also told her parents that on previous two occasions, the

accused had checked her Identity Card. She further told that this time she had inserted her Identity Card inside her sweater so that accused cannot check it.

28. PW 7, further stated that there was no requirement for the accused to check the Identity Card of the girl child as the accused was their neighbour and knew her by her face.

29. PW 7, immediately went to Colonel S.K.Shahi, Officer Commanding and reported the incident, who in turn assured him not to be worry and that the accused will be removed from co-driver duties. On the later part of same day, PW 7 was informed that the co-driver has been changed.

30. On the next day, the accused came to PW 7, who was then working in the Wet Canteen. The accused enquired about the complaint made by PW 7 against the accused. PW 7 told him that he did not wish to speak to him. The accused started abusing him and attempted to enter inside the Wet Canteen. PW 7 pushed him out and the quarrel resulted into physical fight. On the same day PW 7 also lodged a written complaint of molestation of his daughter against the accused.

31. According to PW 7, on 17th November, 2013, wife of the accused visited his house and asked his wife to withdraw the complaint. His wife, however, told her that she did not want to speak to her and asked her to leave.

32. Again on 19th November, 2013, while PW 7 was in the Wet Canteen, the accused came and asked him to withdraw the complaint against him. When PW 7 asked him to go away, the accused started abusing him and attempted to hit him with a stick he was carrying in his hand. PW 7, however, snatched the stick and pushed him back. The accused fell down on the ground and started bleeding. Thereafter, the accused rushed towards the Officer Commanding's residence and fell in front of his gate. Hearing the commotion, the Officer Commanding came and enquired about the matter. The accused was then removed to medical inspection room. Subsequently, PW 7 was awarded 7 days pay fine for using criminal force against the accused.

33. In his cross-examination by the defence he stated that the accused was known to him by face only since July-August, 2013, when he came to his neighbourhood to stay with his family. He admitted that it is the duty of the co-driver to settle down the children in case they are creating nuisance in the bus.

34. PW 8, was attached to Headquarter Sewak and was officiating Deputy Chief Medical Officer. There is nothing relevant in his evidence to be discussed here as he had not examined the victim. Only the accused came to him for treatment for the injuries sustained by him in the fight with PW 7.

35. PW 9, Lieutenant Colonel Rajesh Katoch, was then posted at Headquarters Project Sewak, Dimapur and was second incharge of 1563 Pioneer Unit. He was detailed to record a court of inquiry in the matter of alleged molestation of the girl child by the accused. He stated that during the Court of Inquiry, the victim appeared as witness and narrated the entire incident. PW 9 recorded her statement as stated by her. He also stated that the accused was also present at the relevant time. After recording the statement PW 9 translated and explained the statement to all the witness present, including the victim, in Hindi language which they understood and then only they signed it. PW 9, exhibited the signature (Exhibit 9/1) as signature of the victim girl.

36. PW 9, then elaborated that the girl child in her statement before him had stated that the accused inappropriately touched her body on the pretext of checking her identity card. She told him that the accused had done the same on previous occasions as well. He further stated that the girl child broke down into tears while narrating the incident.

37. He deposed that during the recording of her statement, the accused was present in the same room, in a corner, out of sight of the girl child and only at the time of identification, the accused was brought before her. The girl child had identified the accused. PW 9 also exhibited his own signature as Exhibit 9/2.

38. The accused/applicant in his statement before the Court admitted that he was at Dimapur on 11 Nov.2013 and was performing duties as co-driver of the school bus of Kendriya Vidyalaya School. On the date and time of occurrence, the accused stated that the victim along with other children boarded the bus. The students were making noise. PW 4 asked the accused to settle them down. Accused went inside the bus and saw the victim quarrelling with another student for a window seat. He shouted at the girl child to stop fighting. However, the girl child did not listen to him. He then asked her as to in which class she was. She told him that she was in Class V, however, the other students shouted that she was lying and she was in Class IV. He stated that when he tried to check her Identity Card, she covered it with her hand. After a while, the children de-boarded the bus and continued playing. When the children started boarding the bus again he noticed that her Identity Card was hanging around her neck outside her Uniform. On checking the Identity Card, he learnt that the girl child was in Class IV. He then scolded her for lying to him. In the evening on the same day he was informed that he has been removed from the co-driver duty. The subsequent event has not been denied. The defence plea is that the allegation against the accused is false and baseless.

39. As per section 29 of the POCSO Act, 2012, the accused is to prove 'the contrary', that is, he is to prove that he has not committed the offence and he is innocent. However, in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. There are two major factors that are usually required to be proved in a POCSO trial. The first is minority of the victim. The second is of course, the actual commission of the offence. The moment these will be proved, the offence will be established. Once minority of victim is proved the presumption would apply as to the *mens rea* and the *actus reus*.

40. Sections 29 and 30 of the POCSO Act,2012 may be quoted hereinbelow :

"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 the offence unless the contrary is proved.

30. Presumption of culpable mental state – (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.”

41. In this case the victim was a student of Class IV and aged 8 years old at the time of the incident. It is no body's case that she was not a minor. There is overwhelming evidence that the accused was detailed as co-driver of the school bus. There is unrebutted evidence of PW 4, the driver of the bus that on the day of incident the victim along with other children boarded the bus. The students were making noise and PW 4 asked the accused to settle down the children. The accused went inside the bus and settled down the children. The victim in her evidence before the Court has stated that the accused used to check her Identity Card. PW 2, mother of the victim stated that the complaint lodged by her husband was true. She was fed up of giving statements and she stated that she wishes that what has happened with the girl child should not happen to any other girl. She also stated that it is very difficult for her, being a mother, to narrate the incident before so many people. It is also in her evidence that she does not want the girl child to depose before the Court as the girl child with great difficulty has forgotten the incident and she does not want her to undergo the same trauma again.

42. On the complaint lodged by the father of the victim, the duty of the accused as co-driver was immediately changed. This evidence of PW 1 is corroborated by the evidence of father of the victim and PW 3, Executive Engineer(Civil) Devandnda Hazarika.

43. PW 7, father of the victim has categorically stated that the victim came back home from school, crying. She told that she will not go to School anymore. The reason she told that the accused had again checked her Identity Card and that on previous

two occasions also he had checked her identity card but on the fateful day while doing so he inserted his hand inside her sweater and groped her breast and that the reason she had deliberately inserted her Identity Card inside her sweater so that the accused cannot check it. The complaint lodged by PW 7 to PW 1 is substantiated by PW 1 and PW 3.

44. PW 9, Colonel Rajesh Katoch during the course of investigation in the Court of Inquiry recorded the statement of the victim. He deposed that the victim narrated the entire incident.

45. The aforesaid evidence are substantive in nature.

46. The statement of the victim recorded during the course of inquiry is not a substantive piece of evidence. It has limited scope i.e. to contradict or corroborate in the manner provided under Section 145 of the Evidence Act.

47. There is nothing on record to the effect that the victim on her part or her parents had any motive or previous enmity against the appellant to rope him in false case. The quarrel between the accused/appellant and father of the victim was subsequent to the incident as because the victim's father lodged a complaint against the accused.

48. There is no direct evidence and the law relating to circumstantial evidence is well settled by catena of Judgments i.e. **Bhim Singh and Another Vs. State of Uttarakhand (2015) 4 SCC 281; Sharad Birdhichand Sard Vs. State of Maharashtra (1984) 4 SCC 120-21** etc. may be summed up as follows :-

"1. The circumstantial evidence from which the conclusion is drawn should be fully established.

2. The circumstances should be conclusive in nature and tendency.

3.They should exclude every possible hypothesis except the one to be proved.

4.There must be chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused."

49. Thus substantive evidence may be summarized as under:

1. The accused was co-driver of the bus and he checked the Identity Card of the victim, a minor girl.

2. The victim came home crying and reported her parents that the accused on the pretext of checking her Identity Card inserted his hand inside her uniform and groped her breast.

3. Father of the victim immediately lodged a complaint against the accused.

4. The accused on the date of incident itself was removed from the duty as co-driver of the school bus.

5. Mother of the victim found it difficult to narrate the incident time and again and stated what happened to her daughter should not happen to any other girl.

6. Victim stated that the accused used to check her Identity Card

7. The accused went to ask the victim's father about the complaint. Wife of the accused also visited the house in connection with the same complaint.

50. The aforesaid facts are well corroborated, not even denied by the defence and, therefore, safely inferred as proved.

51. So far the fact that the accused inserted his hand inside the uniform of the girl child on pretext of checking her Identity Card and with intention to molest her, he groped her breast, there is no eye-witness account. But from the evidence of PW 2, the father of the victim and PW 9, Colonel Rajesh Katoch, it appears that the victim had narrated the incident to them. Even mother of the victim has corroborated that

there was an incident, her daughter was traumatized and the complaint against the accused by her husband was true.

52. Children of tender ages have to often wait for extended periods of time to depose before the trial court. Further, in case of aggravated sexual assault, the child may block the memory from her mind, making testimony at the trial stage difficult.

53. Therefore, the POCSO Act, 2012 was brought into force to combat a widely prevalent evil of child abuse and Section 29 as well as Section 30 have been inserted which requires that the accused is to prove 'the contrary', that is, he is to prove that he has not committed the offence and he is innocent.

54. When PW 7 (victim's father), lodged complaint against the accused, he had no enmity or previous grudge. The victim in her evidence has admitted that she used to tell her mother, if something wrong happens. Mother of the victim though resiled from her previous statement, apparently corroborated the prosecution story that there was an incident, her daughter had suffered trauma. So she was not inclined that her girl child should depose before the Court as the girl child with great difficulty has forgotten the incident. Her statement that what happened with the girl child should not happen with other girl, all these circumstances lead to definite conclusions, excluding any hypothesis bearing innocence of the accused. The facts established by the prosecution are consistent only with the hypothesis of the guilt of the applicant. There may not be direct evidence against the accused to prove that he molested the victim but the circumstantial evidence from which an inference of guilt can be drawn are cogent and firmly established.

55. In view of the above, we affirm and uphold the conclusion and decision of General Court Martial.

56. The appeal is accordingly dismissed.

57. No costs.

MEMBER (A)

MEMBER (J)

MC