

FORM NO. 21
(SEE RULE 102(1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH

MA No.47/2024 in OA(A) No.1/2024.

THE 18TH DAY OF JUNE, 2024.

Commander(SD Aviation) Mrinmay Nandi(Rtd) (84631-T) –
Represented by his wife Smt. Bithi Nandi. ... Applicant,

-Vs-

Union of India and others.

.... Respondents.

Advocates:

For the applicant,

Mr Kanchan Das,
Mr Kamal Bardhan,
Mr Asit Das,
Ms Munmun Mondal, and
Mr Ashis Mondal.

For the respondents,

Mr Ajay Chaubey, Sr. Panel Counsel.

CORAM:

HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, MEMBER(JUDICIAL).

HON'BLE LT GEN SHASHANK SHEKHAR MISHRA, MEMBER (ADMINISTRATION).

ORDER(ORAL)

JUSTICE DHARAM CHAND CHAUDHARY, MEMBER(JUDICIAL).

Heard.

(2) The applicant herein is a convict. He has been tried by General Court Martial on the following charges:

“1. Did between 1030h and 1130h on 12 Oct 2021 made physical contact and advances involving unwelcome and explicit sexual overtures with Ms Bhavita Rai, then

Senior Wing Girl Cadet in that he touched her breast and lower waist inside the Commanding Officer's Office at No.1 Naval Unit NCC, 08 Southern Avenue, Kolkata, thereby committed an offence of Sexual Harassment punishable under Section 354A(2) of the Indian Penal Code, 1860 read with Section 77(2) of the Navy Act, 1957.

2. Did between 1100h to 1300h on 15 Aug 21 with sexual intent touch the waist, breast, thighs and vagina of Victim – 2, then Senior Wing Girl Cadet(then Minor), inside the Commanding Officer's Office at No.1 Naval Unit NCC, 08 Southern Avenue, Kolkata, thereby committed an offence of Aggravated Sexual Assault under Section 9(b)(iii) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 read with Section 77(2) of the Navy Act, 1957.”

(3) Applicant has not been held guilty so far as the charge no.1 is concerned. The charge no.2 has however been held to be proved against him and as a result thereof, he has been convicted and awarded the sentence, rigorous imprisonment for 60 calendar months(5 years), dismissal with disgrace from Naval services and fine to the tune of Rs.10,000 together with other consequential penalties involved therein.

(4) Aggrieved by the findings of conviction and sentence so recorded against him, OA(A) No.1/2024 has been filed in this Court on several grounds; however, mainly that charge no.2 of which he has been held guilty not framed on the basis of the complaint made by the victim no.2 or anyone else on her behalf and rather it is on the basis of the allegations against him that he assaulted victim no.2 also sexually surfaced during the investigation of the complaint made by the father of victim no.1 the said charge has been falsely framed against him. Therefore, charge no.2 framed against him has no basis and as such the same has been framed against him illegally and without there being any evidence, even prima facie, available against him on record. Also, that

the evidence recorded by the General Court Martial is highly contradictory, inconsistent, and rather the prosecution witnesses have improved their version at each and every stage of the proceeding i.e. inquiry, investigation and trial. No findings of conviction as such could have been recorded against him. The findings to the contrary recorded against him are stated to be the result of misappreciation and misleading of the evidence produced by the prosecution.

(5) The allegations against the applicant in a nutshell are that during his tenure as Commanding Officer No.1 NU NCC Kolkata, a complaint was received against him from the father of victim no.1, the then Senior Wing NCC Girl Cadet(name withheld), dated 29.08.2022 by the ADG NCC WB & Sikkim Directorate Kolkata, with the allegation that the accused had subjected his daughter/victim no.1 to sexual harassment. Consequently, court of inquiry was held and on the basis of the proceedings thereof the case was forwarded to the authorities for initiation of disciplinary action against the appellant/convict.

(6) As a matter of fact, the convict on his superannuation from the Naval services was reemployed on 29.02.2020. However, later on after this incident he was released from service on 05.02.2023. The appellant during the course of inquiry/trial was attached with INS Netaji Subhash on 30.06.2023. It further transpired during the de novo investigation conducted in this matter that he has sexually assaulted the victim no.1, a minor, in his office. He allegedly outraged her modesty and as such committed an offence punishable under the Protection of Children from Sexual Offences Act, 2012(for short, POCSO Act).

(7) It is during the investigation of the complaint made by the father of victim no.1 it further transpired that the convict has also assaulted sexually the victim no.2 on 13.08.2021 and 15.08.2021. It also transpired during the investigation that the incidents were brought to the notice of the then Chief Instructor, and GCI, examined as DW3 and DW4, respectively during the course of trial conducted in this matter. On the basis of the inquiry and investigation conducted, the appellant was prima facie found to have committed an offence punishable under Section 354A(2) of the Indian Penal Code, 1860 read with Section 77(2) of the Navy Act, 1957, and it is how Charge no.1 came to be framed against him.

(8) As per further case of the prosecution, during the investigation it further established that the convict has subjected victim no.2 also on 13.08.2021 and 15.08.2021 sexually and thereby committed the offence under Section 9(b)(iii) of the POCSO Act punishable under Section 10 thereof read with Section 77(2) of the Navy Act, 1957.

(9) On the completion of investigation the charges as aforesaid were framed against the convict and he has been tried by General Court Martial. Prosecution has examined 10 witnesses in all, while the convict has examined 5 witnesses in his defence. On the conclusion of trial the General Court Martial has held the convict guilty of charge no.2, however, no case against him was found to be made out qua charge no.1.

(10) The findings of conviction and sentence recorded against the convict have been assailed by him on several grounds in the present OA(Appeal) he filed in this Court. MA No.31/2024 filed previously by the appellant was dismissed as withdrawn with liberty reserved to file afresh. This is how this application came to be filed with a prayer to suspend the sentence passed against him during the pendency of the appeal in this Court.

(11) Mr Kanchan Das, Advocate, representing the appellant/convict has pointed out from the records various discrepancies in the evidence produced by the prosecution and also different versions given by the witnesses qua the occurrence at different stages of the proceedings, i.e., court of inquiry(C.O.I.), summary of evidence(SOE), and trial. According to him, the PWs have not supported the prosecution case on material aspects. Also that the conviction and sentence has been recorded by the GCM without there being any cogent and reliable evidence available on record. It has also been brought to our notice that the statement made by the victim no.2 is inconsistent and full of embellishments hence cannot be relied on without corroboration thereto from independent witnesses. The other witnesses, however, have improved their version by making different statements at different stages of the inquiry and trial. The applicant who retired in the rank of Commanding Officer is an aged person and as such there is no question of him having committed any such offence and that too when he has his own family residing with him.

(12) Mr Ajay Chaubey, learned Sr. Panel Counsel, on the other hand, while repelling the submissions made by learned counsel for the appellant/convict has strenuously

contended that the convict who has committed an offence heinous in nature and that too in his office by outraging the modesty of victim no.2, a minor at that time, and subjected her to aggravated sexual assault is not entitled to be admitted on bail on suspension of the sentence of rigorous imprisonment awarded against him.

(13) We have analysed the submissions made by learned counsel on both sides and also gone through the record available at this stage.

(14) Although on both sides the evidence available on record has been pressed into service, yet in our opinion it may not be proper to evaluate and elaborate the same as in that event, prejudice is likely to be caused to the case of either party when the OA(A) to be heard and disposed of. However, suffice it to say, learned counsel representing the appellant/convict, has successfully made out a case warranting suspension of the sentence awarded against the appellant/convict by the GCM. The sentence awarded against the accused under Section 10 of the POCSO Act read with Section 77 of the Navy Act is to undergo 5-year rigorous imprisonment, The convict seems to be in custody for some time during the course of investigation and trial. How after his conviction and awarding sentence against him he is serving out the sentence in the Presidency Jail Kolkata with effect from September 11, 2023.

(15) We are in agreement with Mr Kanchan Das, learned counsel, that the appeal is likely to take considerable time for hearing and disposal because this Bench virtually did not function regularly for want of appointment of Judicial Member. Thus old appeals of this nature are pending for disposal from the last so many years. In case the

appellant/convict is allowed to serve out the sentence without suspension thereof during the pendency of the appeal he filed, he will serve out the sentence awarded against him and at the end thereof the very purpose of filing the same is likely to be frustrated.

(16) The appellant/convict, who has retired from service from the rank of Commander in the Indian Navy and is residing with his family at Flat 2F, 2nd Floor, Padma Patra Housing Cooperative Society, DA 161/1, Street 255, New Town, Kolkata, can be believed to have roots in the society. We therefore see no possibility of his absconding or not available to serve out the remaining sentence in the event the appeal filed by him before this Bench is ultimately dismissed. He is not a habitual offender as nothing to this effect has come on record or brought to our notice during the course of hearing. He has served the Indian Navy for a long period and nothing has come on record to suggest that he has indulged in any illegal activities and committed any offence. Otherwise also, suitable restrictions can be imposed on him to restrict his movement while granting him bail and suspension of sentence passed against him.

(17) This Bench has been fortified, while arriving at the conclusion herein above, by the judgment of the Hon'ble Supreme Court in Criminal Appeal No.603/2022 titled Jeetu Khatik vs. State of Chhattisgarh.

(18) As a matter of fact, convict Jeetu Khatik had kidnapped the victim, a 9-year-old girl, intentionally to outrage her modesty by using criminal force to assault her sexually.

The Hon'ble Supreme Court on taking note of the facts and circumstances of the case and the record has ordered to suspend the sentence awarded against him.

(19) The High Court of Sikkim in a similar case titled Saroj Pradhan vs. State of Sikkim has suspended the sentence passed against the convict, again allegedly committed the offence punishable under Section 10 of the POCSO Act like in the case in hand.

(20) Support has also been drawn on behalf of the appellant/convict from the judgment passed by the Hon'ble Supreme Court in Special Leave to Appeal(Crl) No.5191/2021 titled Satender Kumar Antil vs. Central Bureau of Investigation and others and its connected matters. In this Judgment, the Hon'ble Supreme Court for the purpose of consideration of a prayer made for the grant of bail has divided the categories/types of offences. The case of this nature falls under category A. It has been held that in case the accused is found to have cooperated during the investigation of case and on filing the chargesheet against him appears before the trial court on service by way of ordinary summons/bailable warrant he should be granted bail without taking him into custody, however, with the caveat that in a case the accused have not cooperated in the investigation nor appeared before the investigating officer nor answered summons he may not be entitled to the benefit of the guidelines so framed.

(21) For all the reasons hereinabove this application succeeds and the same is accordingly allowed. Consequently the sentence awarded against the appellant/convict shall remain suspended during the pendency of the appeal, however, subject to his furnishing personal bond to the tune of Rs.50,000 with one solvent surety in the like

amount to the satisfaction of the Registrar(I/C) of this Bench. The appellant/convict shall also abide by the following conditions:

- (a) He shall not leave the territory of India, save and except the prior permission of this Court, and in case a passport-holder shall surrender the same before the Registrar(I/C) of this Bench who will retain the same in safe custody;
- (b) He shall continue to inform the Registrar(I/C) of this Bench in first week of each and every calendar month the place of his abode duly attested by the Councillor/Sarpanch/Ward Panch of the area concerned; and
- (c) He shall not commit any offence while on bail.

(22) The violation of any of the conditions herein above shall entail cancellation of the liberty of bail granted to him.

(23) Before parting, it is made clear that the observations made hereinabove are restricted only for the purpose of decision of this application and the same should not be construed to be the findings on merits in the appeal in any manner whatsoever.

(24) The application is accordingly disposed of.

OA(A) No.1/2024.

List on 05.09.2024.

LT GEN SHASHANK SHEKHAR MISHRA

HON'BLE MEMBER(A)

JUSTICE DHARAM CHAND CHAUDHARY

HON'BLE MEMBER(J)

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