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# SATISH V. THE STATE OF MAHARASHTRA A JUDGEMENT WHICH SHOOK THE PEOPLE'S CONSCIENCE

*By- Nikhil Hans*

*Law Student, Chanakya National Law University, Patna*

### ABSTRACT

The present blog is a legal analysis of the flawed judgement given by the Hon'ble Bombay High Court which says physical contact without skin-to-skin contact does not amount to sexual assault under the POCSO Act. In the present work, two sub-issues have been raised i.e. *firstly*, whether there was stricter proof and serious allegations available to the Court to secure the conviction? and *Secondly*, whether Physical contact involves both direct (skin-to-skin) and indirect (*without skin-to-skin*) contact? These two above sub-issues have been answered in here with the help of legal provisions and judicial pronouncements which in turn will answer the central issue of the present literary work i.e., whether groping a minor's breast without skin-to-skin contact amounts to sexual assault under section 7 of the POCSO Act? In the present work, misinterpretation on the part of the Hon'ble Bombay High Court as to 'sexual assault'

provision has been corrected. It also provides suggestions as to amendments which require to be brought into the POCSO Act to make the 'sexual assault' provision more precise and specific so that such misinterpretation of laws in the future could be avoided.

### INTRODUCTION

The Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as the POCSO Act*), a comprehensive law introduced to protect children against sexual assault, harassment and pornography. However, a recent judgement by the Hon'ble Justice Pushpa V. Ganediwala (Bombay High Court) in the case of *Satish v. The State of Maharashtra*<sup>1</sup> shows lacunae on the part of the judiciary as to the explicit interpretation of the sexual assault<sup>2</sup> provision. It was held that considering the stringent nature of punishment provided for the sexual assault under the POCSO Act, stricter proof and serious allegations are required. "*The act of pressing of breast of the*

<sup>1</sup> Cri. App. 161 of 2020 (Bom. H.C.) (Unreported).

<sup>2</sup> The Protection of Children from Sexual Offences Act, 2012, Act No. 32, Acts of Parliament, § 7.

*child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of 'sexual assault'.*" Moreover, the Hon'ble High Court observed that as such, there is no direct physical contact i.e., skin-to-skin with sexual intent without penetration therefore, it would not amount to 'sexual assault'. In general, groping a minor's breast without skin-to-skin contact does not amount to sexual assault under the POCSO Act.

The judgement disturbed the people's conscience and was severely criticized by activists and child rights bodies.<sup>3</sup> The Hon'ble Supreme Court has put the order on hold on submission of the Attorney General KK Venugopal that the order is unprecedented and likely to set a dangerous precedent.<sup>4</sup> Though the order has just been stayed, issues and interpretation are yet to be decided. Therefore, an effort has been put through this literary work to analyse the judgement and interpretation of sexual assault under the POCSO Act. The present work, thus,

<sup>3</sup> The Wire Staff, *SC Stays Bombay HC's 'Groping Without Skin-to-Skin Contact Isn't Sexual Assault' Order*, THE WIRE (Jan. 27, 2021), *SC Stays Bombay HC's 'Groping Without Skin-to-Skin Contact Isn't Sexual Assault' Order* (thewire.in).

will provide the reader with a more precise and specific interpretation of the sexual assault provision so that its misinterpretation in the future could be avoided. Cognizance in the present case has taken place under section 354, 363 and 342 of the IPC<sup>5</sup> and section 8 (*punishment for sexual assault*) of the POCSO Act.<sup>6</sup> However, in the present literary work, the point of discussion will be sexual assault because dispute relates to the interpretation of sexual assault only.

#### **FACTS OF THE CASE.**

The appellant/accused took the prosecutrix (*victim*) aged 12 years, on the pretext of giving her guava, in his house and pressed her breast and attempted to remove her salwar.

#### **ISSUE:**

**Whether groping a minor's breast without skin-to-skin contact amounts to sexual assault under Section 7 of the POCSO Act?**

The Hon'ble Bombay High Court was of the interpretation that *firstly*, considering the

<sup>4</sup> *Attorney General for India v. Satish and Anr.*, Special Leave Petition (cri.) Diary No(s). 2286/2021.

<sup>5</sup> The Indian Penal Code, 1860, Act No. 45, Acts of Parliament.

<sup>6</sup> The Protection of Children from Sexual Offences Act, 2012, Act No. 32, Acts of Parliament.



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stringent nature of punishment provided for the offence, stricter proof and serious allegations are required. *Secondly*, physical contact should take place directly (*skin-to-skin*).

- **Consistency in testimonies and, facts and circumstances are itself equivalent to stricter proof and serious allegations.**

The court has been given discretion under Section 114 of the Indian Evidence Act, 1872<sup>7</sup> and under precedent given by the Hon'ble Supreme Court in *Syad Akbar v. State of Karnataka*<sup>8</sup> to draw presumptions of facts which it thinks likely to have happened, from the experience and observation of the human mind, springs of human action, the usages and habits of society and ordinary course of human affairs which is in relation to the facts of the particular case. Also, in the case of *Ganesan v. State*<sup>9</sup>, *Vijay v. State of Madhya Pradesh*<sup>10</sup> and *State of Himachal Pradesh v. Raghubir Singh*<sup>11</sup> the Hon'ble Supreme Court held that as per the settled proposition of law, if the court finds the victim reliable and trustworthy then on the basis

of the victim's sole testimony, conviction of the accused can be secure.

The fact of the present case clearly states that mother of the victim went to the house of the appellant/accused, she probed about her daughter (victim) but the accused refused her presence, she searched for her daughter and found her crying in a room (*in the appellant's house*) bolted from outside. Mother brought her daughter out of the room and her daughter narrated the incident to her.<sup>12</sup> Thus, the testimony of the mother would be relevant and admissible under Section 6 of the Evidence Act, 1872.<sup>13</sup>

Moreover, immediately after the incident, the victim narrated the incident to her mother and on that basis, the FIR was lodged and on material point of facts, the testimonies of both, mother and daughter are consistent.<sup>14</sup>

Therefore, considering the above given provision, precedent and facts, there were sufficient reasons to believe on the part of the Hon'ble Bombay court that the incident of pressing of breast has taken place.

<sup>7</sup> The Indian Evidence Act, 1872, Act No. 1, Acts of Parliament.

<sup>8</sup> (1980) 1 SCC 30.

<sup>9</sup> (2020) 10 SCC 573, ¶9.

<sup>10</sup> (2010) 8 SCC 191, ¶15.

<sup>11</sup> (1993) 2 SCC 622, ¶22.

<sup>12</sup> Cri. App. 161 of 2020 (Bom. H.C.) (Unreported).

<sup>13</sup> The Indian Evidence Act, 1872, Act No. 1, Acts of Parliament.

<sup>14</sup> Cri. App. 161 of 2020 (Bom. H.C.) (Unreported).

- **Physical contact involves both direct (*skin-to-skin*) and indirect (*without skin-to-skin*) contact.**

Sexual assault has been defined under Section 7 of the POCSO Act<sup>15</sup> as whoever, with sexual intent touches or makes the child touch the vagina, penis, anus or breast of her or of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. As per the definition, necessary ingredients of the provision are as follows: i) Act must have been committed with sexual intent and ii) Act must involve physical contact either by way of “touching” or by way of “any other act” (i.e., the act should be of same nature or closure to that) without penetration.

The Hon’ble Bombay High Court interpreted physical contact here as direct one (*i.e. skin-to-skin*) and contended that the appellant/accused pressed the victim’s breast but there is no specific detail as to whether physical contact was direct (*i.e. the accused pressed the victim’s breast by removing her top or he inserted his hand inside the top and pressed her breast*); therefore, the act

does not amount to sexual assault as there was no sexual intention.

However, the “*physical contact*” was not appropriately interpreted by the Hon’ble Bombay High Court. Reasonable and prudent interpretation of physical contact involves both direct (*skin-to-skin*) and indirect (*without skin-to-skin*) contact. This interpretation gives force to the provision of sexual assault because only then the provision can be enforced fruitfully. Furthermore, in the case of *Rakesh v. State (GNCTD of Delhi)*<sup>16</sup> and *Sathish Kumar v. State*<sup>17</sup>, the Hon’ble Delhi and Madras High Courts respectively, have not bothered to go into the details of whether pressing of the breast has taken place by way of direct or indirect physical contact and have relied merely on the facts that the accused has pressed the victim’s breast to hold the accused liable under sexual assault.

There are numerous other precedents available from other High Courts in India where, even in the absence of specific details as to direct and indirect physical contact, the accused has been convicted for the sexual assault. In the case of *Md. Jaffur Uddin v. The State of Tripura*<sup>18</sup>, the

<sup>15</sup> The Protection of Children from Sexual Offences Act, 2012, Act No. 32, Acts of Parliament.

<sup>16</sup> Cri. App. 432 of 2017 (Delhi H.C.) (Unreported).

<sup>17</sup> Cri. App. 496 of 2015 (Madras H.C.) (Unreported).

<sup>18</sup> Cri. App. (J) 16 of 2017 (Tripura H.C.).



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Hon'ble High Court convicted the accused under sexual assault for touching various parts of the victim. In *Rizwan Rana v. State of Kerala*<sup>19</sup>, the Hon'ble High Court convicted the accused under sexual assault as the accused caught hold of victim's right hand and forcibly embraced her. In the case of *Ravi v. State*<sup>20</sup>, the Hon'ble Delhi High Court convicted the accused under sexual assault as accused caught hold of the victim's hand with sexual intent involving physical contact.

Therefore, considering the above precedents, interpretation of "touch" and "physical contact" in the said provision would involve both direct (*skin-to-skin*) and indirect (*without skin-to-skin*) contact. In general, the act which involves physical contact either by way of skin-to-skin or without skin-to-skin with sexual intent without interpretation would amount to sexual assault under the POCSO Act.

### LEGAL ANALYSIS

A closer look at the issues raised in the judgement gives the following outcomes: *Firstly*, the facts that the victim (just 12 years old) was found crying by her mother in the house of the

appellant/accused and immediately after the incident, the victim narrated the incident to her mother. On material point of facts, the testimonies of both, mother and daughter were found consistent. Therefore, it fulfils the requirements of stricter proof and serious allegation. Hence, the presumption of the fact that pressing of the breast has taken place can be inferred here and accused can be convicted on the sole testimony of the victim. *Secondly*, from the numerous precedents available to us on the subject of sexual assault, it has already been established that section 7 of the POCSO Act is applicable in both the scenario (*i.e. in the case of skin-to-skin and without skin-to-skin contact*). In the present case, the interpretation laid down by the Hon'ble Bombay High Court was irrational and inappropriate because deviation from already existing precedents requires appropriate reasoning which is nowhere given by the court. Therefore, pressing of the breast by the accused in the present case would fall under sexual assault.

### CONCLUSION AND SUGGESTIONS

The POSCO Act is more deterrent in nature and its objective is to protect the children against

<sup>19</sup> Cri. App. 898 of 2015 (Kerala H.C.) (Unreported).

<sup>20</sup> Cri. App. 657 of 2017 (Delhi H.C.) (Unreported).



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sexual assault, harassment and pornography. According to National Crime Record Bureau, in 2018, a total of 109 children were sexually abused every day in India, which is 22% more than that of the previous year. Furthermore, 32,608 and 39,827 cases were reported under the POCSO Act in 2017 and 2018, respectively.<sup>21</sup> In 2019, POCSO cases raised 19% which constituted 31.9% of overall crimes against children.<sup>22</sup> At times when offences against children are increasing, setting out such a precedent could be detrimental for society because it will weaken the deterrence effect of the sexual assault provision.

Therefore, to avoid similar misinterpretation in the future, there is a need to make the provision of sexual assault more precise and specific by adding an explanation proviso in section 7 of the POCSO Act saying - “Touch” and “Physical contact” includes both skin-to-skin and without skin-to-skin touch. Furthermore, we can borrow into the POCSO Act general interpretation of

“touching” given under the UK’s Sexual Offences Act 2003 which includes touching –

- a) with any part of the body,
- b) with anything else,
- c) through anything, and in particular,

includes touching amounting to penetration.<sup>23</sup>

<sup>21</sup> Press Trust of India, *22% Jump in Cases of Child Sexual Abuse In 2018, Says Report*, NDTV (Jan. 12, 2020, 11: 54 AM), 22% Jump In Cases Of Child Sexual Abuse In 2018, Says Report (ndtv.com).

<sup>22</sup> Bharti Jain, *Centre claims better enforcement as POCSO cases rise 19% in 2019*, THE TIMES OF INDIA (Oct. 2, 2020, 09:32 AM), <https://timesofindia.indiatimes.com>

[/india/centre-claims-better-enforcement-as-pocso-cases-rise-19-in-2019/articleshow/78440200.cms#:~:text=Of%20the%201.48%20lakh%20crimes,5.9%25%20as%20compared%20to%202018.](https://timesofindia.indiatimes.com/india/centre-claims-better-enforcement-as-pocso-cases-rise-19-in-2019/articleshow/78440200.cms#:~:text=Of%20the%201.48%20lakh%20crimes,5.9%25%20as%20compared%20to%202018.)

<sup>23</sup> Sexual Offences Act, 2003, § 79(8).