
SATISH VS. STATE OF MAHARASHTRA (2020) AND LIBNUS VS. STATE OF MAHARASHTRA (2021): CRITICAL ANALYSIS WITH REFERENCE TO POCSO ACT

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ABSTRACT

Sexual assault is an act in which one with intentions sexually touches the other person without that person's consent or will or physically forces a person against their will to enter into sexual act. Sexual violence includes child sexual abuse, fondling or unwanted sexual touching, rape, groping or torture of the person in a sexual manner. This research paper focuses on comprehensive analysis on whether skin to skin touch is necessary for the offence of sexual assault to be made out under the Protection of Children from Sexual Offences (POCSO) Act in corporation with the Supreme Court which set aside the controversial judgment which opens up an interesting debate as to what constitutes 'physical contact' for the purpose of attracting an offence defined under section 7 of the POCSO Act of the Bombay High Court and also the court clarifies further that a mere physical contact could be given the color of sexual harassment if it has an undertone of sexual nature or sexual purpose so as to summarize the most important ingredient of sexual assault is presence of sexual intent, not skin to skin contact. Is 'direct skin to skin touch is a sine qua non an essential ingredient to complete the act of physical contact'? Or is contact of the body of the victim by the perpetrator directly or indirectly, with or without clothes, enough? This paper also describes sections of POCSO act which mentions ingredients of sexual assault.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT

POCSO Act, 2012 was introduced by the Ministry of Women and Child Development in order to address the heinous crimes for sexual abuse and sexual exploitation of children. This Act has been enacted to protect children from sexual assault, sexual harassment, pornography, and provide for special courts for trial of such offences and related incidents to that. The Act was amended in 2019, so as to make provisions for enhanced punishments for various offences so as to ensure the safety and security of the victim and to deter the perpetrators.

INGREDIENTS OF SEXUAL ASSAULT UNDER POCSO ACT

POCSO ACT STATES WHOSOEVER,

1. With sexual intent touches the vagina, anus, penis or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or
2. Does any other act with sexual intention and there is involvement of physical contact without penetration¹.

Generally, to complete an offence of 'sexual assault', it needs to be established that the alleged act involves touch/physical contact with sexual intent. It is necessary to delve into the purposive interpretation of the section in order to protect children from sexual abuse of all kinds. The main key factors of the are "touch" "with sexual intention" and "particular body parts". As per as 'sexual intent'², it provides for the statutory presumption of existence of culpable mental state to commit such offence, which includes intention, motive, knowledge of a fact and the belief in, or the reason to believe, a fact.

Sexual harassment, which are relatively lesser sexual abuses and are punishable for up to imprisonment of either descriptive term or may be extended to 3 years of imprisonment. The element of touch or physical contact does not exist in this section³. A person is said to commit offence of sexual harassment upon a child when such person with sexual intent, makes any sound, or makes any gesture or exhibits any object or part of the body with wrong intentions or entices a child for pornographic purposes.

¹ Section 7 of POCSO Act

² Section 30 of POCSO Act

³ Section 11 of POCSO Act

TWO JUDGEMENTS PASSED BY NAGPUR BENCH OF BOMBAY HIGH COURT

SATISH VS. STATE OF MAHARASHTRA (2020), CASE NO.28/2017

FACTS OF THE CASE

1. Justice Pushpa Ganediwala of the Nagpur bench was hearing an appeal against the conviction in a case where a 39 year old man Satish had alleged to take a 12 year old child to his house on the pretext of giving her a guava groped her breast and also attempted to remove her salwar in December 2016.
2. Both victim and accused were residing in the same area. When victim had gone out to obtain guava she did not return back for a long time so the informant-her mother went in search of the victim, one lady Sau Divya who was staying nearby, told her that the accused had taken her daughter along with him to his house then the informant barged into the house of the accused.
3. The accused at that time came down from the first floor of the house and told the informant that he is unaware of the fact that where is her daughter...The informant then however went to the first floor as she heard some shouts coming from that room, when we went she found out that the room was bolted from outside.
4. She then opened the door and found her daughter crying in the room, and then her daughter told her the incident that took place in the room with her. At that time, victim tried to shout but the accused person pressed her mouth and thereafter left the room and bolted the door from outside.
5. After learning about the whole incident, the informant went to the police station along with her daughter to lodge the complaint.

JUDGEMENT OF THE CASE

The High Court in the appeal filed by the accused Satish acquitted him for the offence under Section 8 of the POSCO Act and convicted him for minor offences under sections 342⁴ and 354⁵ of Indian Penal Code. Justice Pushpa had held that the groping a minor's breast without removing her clothes did not fall into the category of sexual assault under section 7 of POCSO Act, this controversial judgment was passed on January 19.

⁴Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees , or with both

⁵ Whoever assaults or use criminal force to any woman, intending to outrage her modesty.

LIBNUS VS. STATE OF MAHARAHTRA(2021), CASE NO.07/2019**FACTS OF THE CASE**

1. The informant, mother of the victim used to be domestic worker at some houses in the town. On 11.02.2018 at about 8.00 o'clock, she had left her work after leaving her two daughters at home, on that same day her husband had gone out to village.
2. When the mother returned from the work at about 4.00 o'clock in the afternoon, she saw one person catching hold of a hand of her elder daughter and also saw her daughter raising her pant upwards, victim's mother therefore shouted and that person released the hand of her daughter and turned back.
3. Victim's mother then found that the said person was Libnus Francis who was residing nearby her house. He told her that he had come to see her husband as he had some work, when he found out that nobody is at home, he thereafter caught the hands of the victim and moved her frock upward with one hand and lowered her pant with the other hand and unzipped his pants.
4. All the ladies of the neighbor gathered search the accused but he was not found, thereafter mother along with her daughter and neighbors went to police station to lodge the report against Libnus.

JUDGEMENT OF THE CASE

In another controversial verdict, Justice Ganediwala ruled that "the acts of 'holding the hands of the prosecutrix' (female verdict), where the assault victim was a five year old girl or opened zip of the pant by the 50 year old man does not fit into the definition of sexual assault and cancelled the conviction of a man under POCSO, and will instead comes under the ambit of 'sexual harassment'" under section 354A (1), which deals with physical contact and advances involving explicit sexual overtures, is attracted in this case. The session court had convicted the man and ruled it to be "aggravated sexual assault" punishable under section 10 of POCSO and sentenced him to five years of rigorous imprisonment and fine of Rs 25,000 with a default simple imprisonment for six months. However, Justice Ganediwala set aside his conviction

under Section 8⁶, 10⁷ and 12⁸ of POCSO Act, but held him guilty under Section 354A (1), which carries a maximum imprisonment of three years.

Following these judgments, the Collegiums reversed its decision to recommend Justice Ganediwala as a permanent judge as a Bombay High Court judge and will have to revert back as a District Judge at the end of her ad hoc judgeship in the second week of February 2022. Last year, the centre had disagreed with the decision of collegiums' decision to give her two year extension in ad hoc judgeship and granted only one year of extension on the ground of her insensitivity towards children who are facing sexual abuse.

The collegiums, headed by Chief justice N.V.Ramana, justices U.U.Lalit and A.M. Khanwilkar approved the proposal of three other additional judges but due to controversial judgment the Supreme Court Collegiums has decided not to appoint Justice Pushpa V Ganediwala as a permanent judge of Bombay High Court.

SUPREME COURT REVERSED THE JUDGMENT OF BOMBAY HIGH COURT

Attorney General K K Venugopal had filed an appeal on the criminal side stating the apex court that this controversial judgment would set a 'dangerous and outrageous precedent' and is needed to be reversed. The top lawyers of the country has also said that going by the approach of the High Court, any person can get rid with the offence of sexual assault by just wearing surgical gloves, the learned senior advocate Ms. Geeta Luthra appeared for National Commission for Women, the advocate Mr. Rahul Chitnis appeared on the behalf of the State of Maharashtra, the amicus curiae⁹ Mr. Siddharth Dave to assist the court and the learned advocate Mr. Siddharth Luthra appeared on behalf of the Supreme Court Legal Services Committee for the accused Satish and the accused Libnus. Courts of different countries have given their judgments on the interpretation arising out of the terms defined in the provisions contained in their legislation. For example : In Regina vs. H(2005) 1 WLR 2005, the court of appeal while interpreting the word 'touching' contained in section 3 of the Sexual Offences Act, 2003 as in U.K., observed that the touching of clothing would constitute touching for the

⁶Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

⁷ Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

⁸ Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine

⁹ Friend of the court

purpose of said section 3 , similarly in *State of Iowa vs. Walter James Phipps* 442, the court of appeals of Iowa held that a lack of skin to skin contact alone does not as a matter of law put the defendant's conduct outside the definition of sexual activity, which has been defined in Section 702.17 of Iowa code.

The Tripura High court decision in *Tushar Singha vs. State of Tripura* and judgments of Delhi High court in *Jitender vs. State* and *Rakesh vs. State (GNCTD)* held that touching the breast of a child victim constituted sexual assault under section 7 of the POCSO Act, where court uniformly highlighted, where both the judgments have correctly interpreted the law, having regard to the overall Parliamentary intent, which led to enactment of POCSO.

Supreme Court ruled that skin to skin contact is not obligatory for a crime is to be considered as a sexual offence under the Protection of Children from Sexual Offences (POCSO) Act. Supreme Court reversed the controversial judgment of the Bombay High Court which held that skin to skin contact is needful to establish the offence of sexual assault. A bench comprising of Justice Uday Umesh Lalit, Justice S Ravindra Bhat and Justice Bela M Trivedi pronounced the judgment. Supreme Court went into the dictionary meaning of the words "touch" and "physical contact" and said that "touch" has been specifically used with regard to sexual parts of the body, whereas the word "physical touch" has been used for any other act. Therefore , the court ruled the "act of touching the sexual part of body or any other act involving physical contact, if done with 'sexual intent', would amount to 'sexual assault' within the ambit of section 7 of POCSO Act.

CONCLUSION

POCSO Act was enacted to protect the children from offences of sexual assault, sexual harassment, and pornography and to provide for establishment of special courts for trial of such offences and for the matter which are connected there with. The Act was created in order to pursue Article 15 of the Constitution of India which gives the state power to make special provisions for the children. The limitations in law in dealing with acts that determined the dignity and autonomy of women and children, ranging from behavior that is now termed as stalking to pornography, or physical contact, or other associated acts, which were not the subject matter of any penal law, were then recognized and appropriate legislative measures adopted, in some other countries. The fallacious interpretation of Section 7 of the POCSO was laid down in order to set free the accused of such an offence which should have been dealt

under POCSO Act and has now raised some controversy. It's the fact that whenever the suit is instituted under POCSO Act under special legislation, the same must be dealt under such special legislation.

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