

**In the High Court of Punjab and Haryana at Chandigarh**

**Criminal Revision No. 207 of 2016**  
**Date of Decision: 16.05.2016**

Anuj Kumar

.....Petitioner

Versus

State of Haryana

.....Respondent

**CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY**

Present: Mr. Tarunveer Vashist, Advocate  
for the petitioner.

Ms. Dimple Jain, AAG, Haryana.

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**ANITA CHAUDHRY, J(ORAL)**

1. This revision petition is directed against the order dated 15.9.2015 passed by the Additional Sessions Judge, Kurukshetra.
2. The backdrop of the case is necessary to appreciate the issue raised by the petitioner. The victim made a complaint upon which FIR No. 362 dated 4.8.2015 was registered under Section 12 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO' for short) and Section 3 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 ('SC and ST Act' for short) at Police Station Shahbad, District Kurukshetra. Statement of one more victim was recorded and challan was presented under Section 12 of the POCSO Act and Section 3(1) (xi) of SC and ST Act.
3. Annexure P-1 is the complaint made by the victim on 4.8.2015 and the same reads as under:-

*"I, (name withheld) studying in 10<sup>th</sup> standard in Govt.*

*Senior Secondary School, Kalsana. Sh. Anuj Tyagi, the Science Teacher of our school, time and again calls me alone and says that I should befriend him. He also says that in case I do not do it, then he will fail me and that in case I disclose it to anybody else, then I would earn disrepute whereas he would not be loser. Another student named Parvinder Kaur of 11<sup>th</sup> standard of my school was also harassed by him. Today, I along with my mother and Parvinder Kaur and her father have come present and moved complaint. Action may please be taken.”*

4. Supplementary statement (Annexure P-5) was made by the complainant on the same lines.

5. In the statement recorded under Section 164 Cr.P.C., the second victim made the following statement:-

*“When I was in 10<sup>th</sup> standard, Anuj Sir asked me to meet him all alone. When accompanied by my friend I went to him, he felt annoyed and said that he would not teach me from the next day. When I upgraded to 11<sup>th</sup> standard, he asked me to reply in yes or no. I asked for what purpose. Then he said to me that it was beyond my ability. Then he asked if he should leave her, to which I replied in the affirmative. He was holding my hand. I left from there. Today, when in the meeting, we informed the Principal, the Principal said that we were under misunderstanding. Then the other girl student was also called. On asking of our Madam, both of us penned down all about the*

*occurrence in our note book and put the same in the Complaint Box. Then I came to my home from where my father and uncle all went to school. My maternal uncle also accompanied them. Principal Sir said to them that we were having misunderstanding. I said to the Principal that there could be misunderstanding to one but not to all. I want to go home.”*

6. After investigation, challan was presented. The Trial Court framed charges under Section 9 of the POCSO Act and Section 3(1)(xi) of the SC and ST Act on 15.9.2015. The accused filed an application seeking alteration/amendment of the charge pleading that the offence that was said to have been committed would not fall within the definition of sexual assault much less the aggravated sexual assault under Section 10 of the POCSO Act and the charge was liable to be altered and at the most it would constitute an offence under Section 12 of the POCSO Act and the challan was presented under Section 12 of the POCSO Act.

7. The Trial Court dismissed the application and observed as under:-

*“9. It is true that charge can be altered or amended at any stage but in the peculiar facts and circumstances of the case, there is no requirement to act upon the application in hand, as the exigencies of the case do not warrant or necessitated.*

*10. It is clear from the definition of 'sexual assault' that whosoever touches the part of body of the child as prescribed in section 7 or does any other act with sexual intent which involves physical contact without penetration*

*is said to commit sexual assault.*

*11. As alleged accused Anuj Kumar proposed the victims to have friendship with him and as per the narration given by one of the victim(s), accused Anuj allegedly caught hold her hand on the alleged date and offered her, who was public servant and was also staff of an education institution and their statements were available at the time of framing of charge, according to which, prima-facie it seemed that he committed aggravated sexual assault, punishable under section 10 of the Protection of Children from Sexual Offences Act, 2012 and charges were framed there under.*

*12. On a consideration of broad probabilities of the case based upon total effect of the statements of witnesses and documents produced on record, the charges in question have been framed against accused Anuj Kumar Accordingly. There is no omission in date, time or occurrence etc. while framing of charge, which requires alteration at this advanced stage of trial. It has been held time and again that if an accused is charged of an offence, a Court can convict him of another offence provided the latter is a lesser offence.*

*The statements of victims as PW-1 and PW-2 have already been recorded. They have been fully cross-examined by the defence. Trial is likely to be completed. Only one witness namely Gurmail Singh, DSP remains to be examined.*

*At this stage, no comment can be given about the gravity of the offence or genuineness and veracity of statements made by the witnesses during trial, which would touch the merits. It is not a case where any prejudice is going to be caused to defence in any manner on account of non-alteration of charge, in the peculiar facts and circumstances of the case.”*

8. I have heard both the sides.

9. The submission on behalf of the petitioner was that the sexual assault is defined in Section 7 of the POCSO Act and the Trial Court has misread the section and charge has been framed under Section 9 of the POCSO Act whereas the case would clearly be covered under Section 11 of the POCSO Act. It was urged that the Trial Court got swayed with the fact that all the witnesses had been examined and they have filed an affidavit that they would not seek recall or ask for further cross-examination of any prosecution witnesses and they had no intention to delay the trial and the charge should be altered.

10. The submission of the State counsel was that in the statement recorded under Section 164 Cr.P.C., the victim had alleged that the petitioner had touched the child and had held her hand and he was incharge of an educational institution he could only be tried under the aggravated form.

11. Sections 7 of the POCSO Act reads as under:-

**“Sexual assault :** *Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast 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. ”*

12. Sections 9 of the POCSO Act reads as under:-

***“Aggravated sexual assault :***

*(a) Whoever, being a police officer, commits sexual assault on a child—*

*(i) within the limits of the police station or premises where he is appointed; or*

*(ii) in the premises of any station house whether or not situated in the police station to which appointed; or*

*(iii) in the course of his duties or otherwise; or*

*(iv) where he is known as, or identified as a police officer; or*

*(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child—*

*(i) within the limits of the area to which the person is deployed; or*

*(ii) in any areas under the command of the security or armed forces; or*

*(iii) in the course of his duties or otherwise; or*

*(iv) where he is known or identified as a member of the security or armed forces; or*

*(c) whoever being a public servant commits sexual assault on a child; or*

*(d) whoever being on the management or on the staff of a jail, or remand home or protection home or*

*observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or*

*(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or*

*(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or*

*(g) whoever commits gang sexual assault on a child.*

*Explanation.—when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or*

*(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or*

*(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or*

- (j) *whoever commits sexual assault on a child, which—*
  - (i) *physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or*
  - (ii) *inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or*
- (k) *whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or*
- (l) *whoever commits sexual assault on the child more than once or repeatedly; or*
- (m) *whoever commits sexual assault on a child below twelve years; or*
- (n) *whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on*



*such child; or*

- (o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or*
- (p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or*
- (q) whoever commits sexual assault on a child knowing the child is pregnant; or*
- (r) whoever commits sexual assault on a child and attempts to murder the child; or*
- (s) whoever commits sexual assault on a child in the course of communal or sectarian violence; or*
- (t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*
- (u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public.”*

13. Sections 11 of the POCSO Act reads as under:-

**“Sexual harassment** : A person is said to commit sexual harassment upon a child when such person with sexual intent,-

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with*

- the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or*
- (ii) *makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or*
- (iii) *shows any object to a child in any form or media for pornographic purposes; or*
- (iv) *repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or*
- (v) *threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or*
- (vi) *entices a child for pornographic purposes or gives gratification therefor.*

*Explanation- Any question which involves “sexual intent” shall be a question of fact.”*

The victim in her complaint had stated that the Science Teacher used to call her alone time and again and asked her to develop friendship and if she did not, he would fail her in the subject. She was also threatened that in case she revealed it to anyone, she would only earn disrepute and he had nothing to lose. She had named another student who had been harassed. In the statement under Section 164 Cr.P.C., the other victim had

stated that the accused had held her hand. The Trial Court after examining the statements, that were before it, had framed the charge under Section 9 of the POCSO Act and Section 3 of the SC & ST Act. The petitioner was aggrieved and moved an application seeking alteration of the charge asserting that the allegations did not fall under the aggravated sexual assault.

The Trial Court in para 10 of its order referred to the definition of sexual assault and was of the view that the petitioner was the staff of an educational institution and *prima facie* the case would fall under the aggravated sexual assault which was punishable under Section 10 of the POCSO Act. It noted that the case was at an advanced stage and if the Court ultimately finds that the conviction cannot be recorded under the aggravated form, the Court could examine it and even record the conviction under the lesser offence.

Section 7 of the POCSO Act is contained in two parts. One of the victim had stated that the petitioner had held her hand. It is for the Trial Court to examine whether it was with sexual intent as those are the words used in the Section. The legislature had made it clear that if the “*act is with sexual intent*” which involved “*physical contact*” without penetration then it would fall within the definition of Section 7 of the POCSO Act and not otherwise. It would be for the prosecution to bring home the charges. It is settled that if the Court finds the accused guilty of a graver offence and if the charge is framed of a lesser offence, no conviction can be recorded and Court may order a retrial after framing charge again but it can be *vice versa*. The act of touching the child is attributed whether it was with sexual intent or

otherwise, is for the Trial Court to examine. No prejudice has been caused to the petitioner.

I find no merit in the revision and is dismissed.

**(ANITA CHAUDHRY)**  
**JUDGE**

**May 16, 2016**  
**Gurpreet**