

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1947 OF 2017

MANJU TEJBAL VISHWAKARMA AND ANR.)...PETITIONERS

V/s.

THE UNION TERRITORY OF DAMAN & DIU)...RESPONDENT

Mr.Samir Vaidya a/w. Mr.Kaustubh Marathe a/w. Ms.Mailaqua Mir,
Advocate for the Petitioner.

CORAM : A. M. BADAR, J.

DATE : 27th SEPTEMBER 2017

P.C. :

1 By this petition, petitioners are challenging proceedings in Special Case No.20 of 2016 pending against them on the file of the learned Special Judge under Protection of Children from Sexual Offences Act, at Daman.

2 Heard the learned advocate appearing for petitioners. By taking me through the First Information Report (FIR) lodged

by Police Officer Dinesh Vaja as well as statement of victim Sonam, the learned advocate vehemently argued that the prosecution could not invoke provisions of Section 11 of the Protection of Children from Sexual Offences Act (POCSO Act) as against petitioner no.1, who is mother of the victim. He further argued that the FIR itself is hearsay and cannot constitute as admissible evidence for framing Charge against the accused persons i.e. petitioners. In submission of the learned advocate for petitioners, allegation against petitioner no.2 / accused no.2 are also as vague as they can be. It is only averred that he had bad eye on the victim girl and therefore, this vague statement cannot make out an offence under Section 11 of the POCSO Act. At any rate, such statement cannot be considered as evidence sufficient to frame Charge for the offence punishable under Section 11 and made punishable under Section 12 of the POCSO Act.

3 I have carefully considered the submissions so advanced and also perused the FIR as well as the statement of victim minor female child recorded on 5th February 2016 by the

Judicial Magistrate First Class, Daman, as well as her statement under Section 161 of the Code of Criminal Procedure recorded on 4th February 2016. The petitioner is only disputing invocation of Section 11 of the POCSO Act made punishable under Section 12 thereof. Therefore, it will be appropriate to reproduce provisions of Section 11 of the POCSO Act, which reads thus :

11. 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.

4 In context of the instant case, it needs to be mentioned that if a person with sexual intent repeatedly or constantly follows or watches or contacts a child either directly or through other means, then he can be said to have committed an offence defined under Section 11 of the POCSO Act. The question whether the act was with sexual intent is a question of fact which needs to be adjudicated on appreciation of evidence adduced by the prosecution.

5 In the instant case, material on record shows that there are no averments that petitioner no.1, who is mother of the victim female child, has done any act against the victim, who is her daughter, with any sexual intent, and therefore, Section 11 of the POCSO Act made punishable under Section 12 thereof is infact

not invoked by the prosecution against petitioner no.1. So far as petitioner no.2 Valji Vadher is concerned, the victim female child in her statement recorded under Section 164 of Cr.P.C. has stated that petitioner no.2 Valji Vadher is having bad eye on her. In her statement recorded under Section 161 of the Cr.P.C., she has stated that petitioner no.2 Valji Vadher always used to see her with bad intention. Watching a female child with sexual intent comes under the mischief covered by Section 11 of the POCSO Act. Therefore, it cannot be said that there are no sufficient grounds to proceed against petitioner no.2 Valji Vadher for the offence as defined by Section 11 and made punishable under Section 12 of the POCSO Act.

6 In the result, proceedings in Special Case No.20 of 2016 pending on the file of the learned Special Judge under the POCSO Act, cannot be quashed.

7 The petition is, therefore, disposed of with these observations.

(A. M. BADAR, J.)