

IN THE HIGH COURT OF PUNJAB AND HARYANA HIGH COURT
AT CHANDIGARH

(1) CRA-S-644-SB-2017 (O&M)
Date of decision: 02nd July, 2020

Surinder Singh @ Shinda ...Appellant

Versus

Union Territory, Chandigarh and another ...Respondents

(2) CRA-S-730-SB-2017(O&M)

Rupinder Kaur Aulakh ...Appellant

Versus

Union Territory, Chandigarh ...Respondent

(3) CRR-1087-2017 (O&M)

Ms. XXX (The prosecutrix) (Name withheld as per Section 33 of *the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act')*)

...Petitioner

Versus

Union Territory, Chandigarh and others ...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. J.S.Bedi, Sr. Advocate, with
Mr. Sonpreet Singh Brar, Advocate
for the applicant/appellant
(in CRA-S-644-SB-2017)
Mr. G.NMalik, Advocate
for the appellant
(in CRA-S-730-SB-2017)

Ms. G.K.Mann, Advocate,
for the petitioner (in CRR-1087 of 2017)
for the first informant
(in CRA-S-644-SB-2017)
(in CRA-S-730-SB-2017)

Mr. Y.S.Rathore, APP, UT, Chandigarh.

ANIL KSHETARPAL, J.

By this judgment, CRA-S-644-SB-2017 and CRA-S-730-SB-2017 as well as CRR No.1087 of 2017 arising from a common judgment passed by the learned trial court shall stand disposed of. Learned counsels representing the parties are ad-idem that these two appeals and a revision petition can conveniently be disposed of by a common order.

Two appeals have been filed by the convicts, whereas the revision petition has been preferred by the prosecutrix. Relavant part of the order of sentence reads as under:-

The convict Surinder Singh @ Shinda is sentenced as under:-

<i>U/S:120 r/w Section 120-B IPC</i>	<i>To undergo rigorous imprisonment for one year and to pay fine of Rs.500/- (Rs. Five Hundred only). In default of payment of fine, to further under imprisonment of same kind for 10 days.</i>
<i>U/S: 354-A r/w Section 120-B IPC:</i>	<i>To undergo rigorous imprisonment for three year and to pay fine of Rs.1000/- (Rs. One Thousand only). In default of payment of fine, to further under imprisonment of same kind for 20 days</i>
<i>U/S: 292 r/w Section 120-B IPC</i>	<i>To undergo rigorous imprisonment for one year and to pay fine of Rs.2000/- (Rs. Two Thousand only). In default of payment of fine, to further under imprisonment of same kind for 30 days.</i>
<i>U/S : 8 of POCSO Act</i>	<i>To undergo rigorous imprisonment for four years and to pay fine of Rs.2000/- (Rs. Two Thousand only). In default of payment of fine, to further under imprisonment of same kind for 30 days.</i>
<i>U/S 12 of POCSO Act</i>	<i>To undergo rigorous imprisonment for two years and to pay fine of Rs.1000/- (Rs. One Thousand only). In default of payment of fine, to further under imprisonment of same kind for 20 days</i>

Convict Rupinder Kaur is sentenced as under:-

<i>U/S: 120 r/w Section 120-B IPC</i>	<i>To undergo rigorous imprisonment for one year and to pay fine of Rs.500/- (Rs. Five Hundred only). In default of payment of fine, to further under imprisonment of same kind for 10 days.</i>
<i>U/S: 354-A r/w Section 120-B IPC:</i>	<i>To undergo rigorous imprisonment for three years and to pay fine of Rs.1000/- (Rs. One Thousand only). In default of payment of fine, to further under imprisonment of same kind for 20 days</i>
<i>U/S: 292 r/w Section 120-B IPC</i>	<i>To undergo rigorous imprisonment for one year and to pay fine of Rs.2000/- (Rs. Two Thousand only). In default of payment of fine, to further under imprisonment of same kind for 30 days.</i>

The police action was initiated on the basis of a complaint dated 07.11.2014, Ex. P-13 submitted by the prosecutrix which is in the language of the court and hence, considered appropriate to extract:-

*“To
The Senior Superintendent of Police
U.T.,Chndigarh.*

Subject: Complaint of Sexual Harassment trying to outrage modesty and other offences under I.T. Act against:-

1. Rupinder Kaur Aulakh, w/o Harinder Singh Aulakh, R/o House Number 320, Section 35-A, Chandigarh (Mother)

2. Surinder Singh alias Shinda r/o village Balongi, Police Station Kharar, District Mohali, Punjab, husband of sister of Rupinder Kaur Aulakh (Masad), who have breached the trust and sanctity of relationship and sexually harassed and outraged the modesty etc.

Respected Sir,

I, wish to seek your kind indulgence to the irony and plight of an accomplished daughter, who is 19 years old, pursuing her studies in B.A.(Hons.) in S.D.College, Sector 32, Chandigarh and had extreme trust, in the sanctity of relations that too the most pious relationship of mother as is hoped by any daughter. On the contrary, that daughter was completely disillusioned by her mother, who in connivance with her brother-in-law namely Surinder Singh has driven her daughter to near insanity and depression and drawn her into a cocoon.

1. That my family was complete till the time, my father was made to leave his own house in the year 2009. But I as well as my brother could not understand the circumstances, in which he was made to leave as we were too small at that time. We could not understand how our family broke and who was responsible for the same.

2. That on even of Lohri event at my house in 2011, he held my hand asked me to kiss him or let him kiss me. I Initially ignored it but he kept on repeating this request. It was quite shocking for me but I was helpless as my mother had all her inclination towards the culprit when I complained to my mother about it but she simply ignored it by saying that he is just like your father and a father can hug and kiss his daughter.

3. This incident happened for two three more times in 2012 and once in 2013 too on family gatherings or party at home. That as and when I protested for all these bad acts before my mother, she rebuked me and gave me

thrashes by saying that I am unnecessarily accusing Surinder Singh, who is providing all the amenities of life for them.

4. On 30.09.2014, when I was alone at my residence house No.320, Sector 35-, that my "Masad" Surinder Singh alias Shinda handed over a DVD to me stating that "it carries a porn video of my mother" and threatened that this will be made public if I do not make physical relations with him. The DVD is enclosed for your reference and further doing the needful.

5. That I also got some record pertaining to SMS of my mother and said Surinder Singh ion which they were exchanging very hurting and unexpected messages from their mobile no's 9781270777, 8427218877, 9855670777, 8427918877 and in two three messages it was specifically mentioned that my mother hould allure me so that I may also indulge in such activities with him. The copy of messages is enclosed herewith.

6. On 4.10.2014, I talked to my mother about DVD, she instead of consoling me started beating mercilessly stating that "I was defaming my mother and Masad". In the meantime my brother also reached there who saved me. I narrated entire incidents to him and handed over DVD to him told him not to hand over the same to anyone. Simultaneously I called up my father who also reached there and unaware of the scenario he called the police. Thereafter, he took us along with him. On the next morning, I was taken to General Hospital, Sector 16, Chandigarh as I was having internal injuries on my neck and back given by my mother. I am enclosing the OPD card of The General Hospital, Sector 16, Chandigarh.

I was totally perturbed, emotionally shattered and was unable to narrate the sequence of events which I faced in the house with my mother and said Surinder Singh during the span of five years. I remained under tremendous shock for many days and after persuasion and consoling by my father and other family members, I gained courage and confidence and narrated the above referred facts to my father with whom I am presently residing.

It is, therefore, requested that a stern action under the various penal laws may kindly be taken against both the culprits, so that a strong signal may travel in the society and no such mother and close relative could date to spoil the fabric of society and sacred relation.

Date: 07.11.2014

Your's Faithfully,
Sd/- (English)

(Name withheld as per provisions of 'POCSO Act')

It may be noted here that the aforesaid communication was drafted/scribed on 07.11.2014 however, delivered at the public window of the Police Department on 18.11.2014 leading to the registration of FIR No.8, dated 10.01.2015.

At this stage, it would be apt to note that the appellant-Rupinder Kaur is the mother of the prosecutrix whereas the appellant Surinder Singh @ Shinda is the husband of the sister of the appellant-Rupinder Kaur (In local dialect called 'Masar or Mause'). The statements of the prosecutrix as well as her elder brother under Section 164 of the Code of Criminal Procedure (hereinafter referred to as Cr. P.C.) were recorded on 13.01.2005 by the learned Judicial Magistrate Ist Class, Chandigarh. On conclusion of the investigation, the prosecuting agency filed a final report under Section 173 Cr.P.C. in the Court. The Court on finding that a *prima-facie* case is made out, charged the appellants for the alleged offences on 17.03.2015. The charges framed by the Court reads as under:-

“That from the period 2011 onwards in H.No.320, Sec 35 ac, Chandigarh and in the area of Chandigarh you above named accused in criminal conspiracy with each other agreed to do an illegal act, namely, sexually harassed and sexually assaulted Mehar Aulakh a minor female child, and in pursuance of above said agreement, send offensive messages through communication service and you thereby committed an offence punishable u/s 120-B IPC and within my cognizance.

Secondly during the above said period and place and in pursuance of above said criminal conspiracy you accused Surinder Singh @ Shinda made physical contact and advances involving unwelcome and explicit sexual overtures to above named minor female, and you thereby committed an offence punishable under Section 354-A of IPC read with Section 120-B IPC and within my cognizance.

Thirdly during the above said period and place and in pursuance of above said criminal conspiracy you accused

Rupinder Kaur Aulakh voluntarily caused simple hurt to above named female and you thereby committed an offence punishable u/s 323 IPC read with Section 120B IPC and within my cognizance.

Fourthly, during the above said period and place and in pursuance of above said criminal conspiracy you above named accused committed criminal intimidation by threatening above named minor female child with injury to her person and to impute unchastity to above named minor female child and you thereby committed an offence punishable u/s 506 IPC read with Section 120B IPC and within my cognizance.

Fifthly, during the above said period and place and in pursuance of above said criminal conspiracy you accused Surinder Singh @ Shinda illegally kept in your possession porn DVD containing obscene scenes to give the said DVD to give the same to above named minor female and you thereby committed offence punishable under Section 292 IPC read with Section 120B IPC and within my cognizance.

Sixthly, during the above said period and place, you above named accused Surinder Singh @ Shinda committed sexual assault upon above named female child in above said manner and you thereby committed an offence punishable under Section 8 of Protection of Children from Sexual Offences Act, 2012 Act and within my cognizance.

Seventhly, during above said period and place you above named accused Surinder Singh @ Shinda committed sexual harassment upon the above named female child and you thereby committed an offence punishable under Section 12 of Protection of Children from Sexual Offences Act, 2012 Act and within my cognizance.

Lastly, during above said period and place you above named accused send offensive messages through communication service against above named female and you both thereby committed an offence punishable under Section 66A of Information and Technology Act and within my cognizance.”

Both the appellants pleaded “not guilty”.

The prosecution in order to prove its case examined the following witnesses:-

1. PW1, the prosecutrix
2. PW2 Lady Constable Parvinder Kaur
3. PW3 Head Constable Sudershan Kumar, MMHC,

- Mator Police Station, Mohali
4. PW4 Inspector Harinder Sekhon, who was associated in the Investigation with the Investigating Officer.
 5. PW5 SI Bhupinder Singh, official associated in the investigation with the Investigating Officer.
 6. PW6 Jagbir Singh, Assistant Nodal Officer, IDEA Cellular Limited.
 7. PW7 Inspector Jaspal Singh, Investigating Officer.
 8. PW8 Satinder Singh, Clerk from the office of Civil Surgeon, Jalandhar, to prove date of birth of the prosecutrix.
 9. PW9 S.S.Baisoya, Sr. Scientific Officer, Ballistics, CFSL, Chandigarh.

The prosecution also produced the following documentary evidences:-

Ex P-1 to Ex.P-12- Copy of SMS messages.

Ex P-13 - Complaint

Ex.P-14 - Arrest Memo of Rupinder Kaur

Ex.P-15 - Personal search memo of accused.

Ex P-16 - Envelope

Ex.P-17 - Statement of Mehar Kaur.

Ex.P-18 - Statement of Yuvraj Singh.

Ex.P-19 - Personal search memo of Rupinder Kaur.

Ex.P-20 - Seizure memo of mobile phone Sony Ericson.

Ex.P-21 - Copy of entry of register No.19.

Ex.P-22 - Arrest memo

Ex.P-23 - Personal search memo.

Ex.P-24 - Identification memo of accused Shinder.

Ex.P-25 - Disclosure statement of accused Shinder.

Ex.P-26 - Seizure memo of LG mobile phone.

Ex.P-27 - Application form for mobile connection of Idea

Ex.P-28 - Form for number porting

Ex.P-29 - Authorization letter

Ex.P-30 - Copy of driving license

Ex.P-31 - Application form for mobile connection of Idea in the name of Avtar Singh

Ex.P-32 - FIR

Ex.P-33 – Orders of the Court.

Ex.P34 -

Ex.P-36 - Rough site plan

Ex.P-37 - Report of CFSL Expert

Ex.P-38 - Application moved before school for age verification of Mehar Aulakh.

Ex.P-39 - Report of school authority.

Ex.P-40 - Seizure memo of possession of birth certificate

Ex.P-41 - Copy of character certificate.

Ex.P-42 - Copy of certificate issued by CBSE

Ex.P-43 - Application before Registrar Deaths and Births, Jalandhar for verification of birth certificate.

Ex.P-44 - Report of o/o of Birth and Registrar, Jalandhar.

Ex.P-45 - Photocopy of entry in birth register.

Ex.P-46 to Ex.P-50- Photographs

Ex.M01 - Sealed parcels containing DVD.

Ex.M02 - DVD

Ex.M03 - Envelope.

Ex.M04 - Pen drive.

Ex.M05 - Parcel containing Mobile make LG

Ex.M06 - Mobile make LG

Ex.M07 - Parcel containing mobile make Sony Ericson.

Ex.M08 - Mobile make Sony Ericson.

After conclusion of the evidence produced by the prosecution, statements of the accused under Section 313 Cr.P.C. were recorded and they were confronted with the incriminating evidence. However, the appellants claimed innocence and hence, were given an opportunity to lead defence evidence.

In defence, the appellants examined DW1 Harkirat Singh, a Computer Expert and DW2 Mamta, a Maid working in the house of the accused-Rupinder Kaur and also produced following documentary

evidence:-

“Ex.D1 -Copy of supplementary statement of Mehar Kaur

Ex.D2 & Ex.D3- Writing of Mehar Kaur for mother

Ex.D4 to Ex.D16- Photographs

Ex.D17-Arrest information given to Mamta maid of accused Rupinder Kaur.

Ex.D18- DVD”

Learned trial court on appreciation of evidence and after considering arguments, convicted the appellants and passed the order of sentence as extracted above.

This Court has heard learned senior counsel Mr. J.S.Bedi assisted by Mr. Sonpreet Singh Brar, Advocate, representing Surinder Singh @ Shinda, Mr. G.N.Malik, the learned counsel representing Smt. Rupinder Kaur and Mr. Y.S.Rathore, Additional Public Prosecutor assisted by Ms. G.K.Mann, the learned counsel representing the prosecutrix in the revision petition at length and with their able assistance gone through the judgment along with the requisitioned record of the trial Court.

Learned senior counsel has submitted that the 'POCSO Act' came to be enforced with effect from 14.11.2012. Consequently, the appellant Surinder Singh @ Shinda could not be prosecuted under the POCSO Act with respect to alleged incidents which took place either prior to the enforcement of the POCSO Act or after the prosecutrix attained age of majority. The allegations of the prosecution with respect to alleged incidents for the period from 14.11.2012 to 07.12.2013 are vague and general. The prosecutrix while appearing in the Court has made certain significant improvements which prove that the prosecutrix is not telling the correct facts. The computer/laptop used for viewing, downloading and

making copies of the alleged DVD has not been produced at any stage. While referring to Ex.D2 and Ex.D3, the letters written by the prosecutrix to her mother it was submitted that the appellants have been falsely implicated. Although, as per the case of the prosecution, the house where alleged various incidents took place was being used as a paying guest for residence of the girls, however, no independent witness has either been associated or examined. Learned counsel has further tried to attribute motive to the prosecutrix for false implication of the appellants while contending that she is in love with a boy and since the appellants opposed the same, for that reason, she in collusion with her father has falsely implicated the appellants. He further drew attention of the Court to misreading of evidence on the part of the learned trial court in paragraph 29 of the judgment.

On the other hand, Sh. G.N.Malik, learned counsel representing Smt. Rupinder Kaur-appellant has submitted that the prosecutrix has been used as a pawn by her father on account of marital discord between her and her husband. There is unexplained delay of more than a month in registration of the FIR from the date of alleged last incident on 04.10.2014 and hence, the case of the prosecution is an after thought particularly when during this time, the prosecutrix was staying with her father. He further submitted that the trial court has failed to examine certain arguments of learned counsel noticed in paragraphs 38 and 39 of the judgment.

Learned Additional Public Prosecutor has supported the judgment of the learned trial court. Ms. G.K.Mann, who appeared for the prosecutrix, has also supported the submissions of Additional Public Prosecutor. She has further submitted that the sentence awarded by the

learned trial court is not commensurate with the offence and therefore, required to be enhanced. She also prayed for grant of compensation to the prosecutrix.

Before this Court proceeds to examine the arguments of learned counsels in detail, it would be appropriate to notice various provisions of the POCSO Act. This Act came to be enacted by Union of India in the year 2012 as a self contained comprehensive legislation inter-alia to provide deterrent punishment in order to protect children from the offences of sexual assault, sexual harassment and pornography. Efforts have been made to safeguard the interest and well being of child at every stage of the judicial process. Further efforts have also been made to incorporate child friendly procedures for reporting, investigation, recording of evidence during the trial of the case while establishing Special Courts for speedy trial of such offences. The word 'Child' has been defined in Section 2 (1)(d) of the Act to include any person below the age of 18 years.

Section 29 of the POCSO Act mandates Special Courts to presume that accused being prosecuted for committing or abetting or attempting to commit offence under Sections 3, 5, 7 and 9, has committed or abetted or attempted to commit the said offence, as the case may be unless the statutory presumption is rebutted by the defence. Section 29 is extracted as under:-

“29. Presumption as to certain offences.-Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

The significant expression is “shall presume”. This is contrary to the general presumption of innocence of the accused in majority of criminal trials. No doubt, of late, the Government has enacted various legislations providing for such mandatory statutory presumptions.

Section 4 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Evidence Act') provides for various kinds of presumptions . First 'may presume', second 'shall presume' and the last 'conclusive proof'. Section 4 reads as under:-

“4. “May presume”.—*Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.*

“Shall presume”.—*Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*

“Conclusive proof”.—*When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”*

Such presumptions can be presumptions of fact as well as presumptions of law. The presumptions can also be sub-divided in rebuttable presumptions and irrebuttable presumptions. The presumptions of facts are contained in Sections 86 to 88, 90 and 114, whereas rebuttable presumptions of law are contained in Sections 79 to 85, 89 and 105. similarly, irrebuttable presumptions of law are provided in the Evidence Act

by expression 'conclusive proof' in Sections 41, 112 and 113. The distinction between 'may presume' and 'shall presume' is apparent from the words used by the legislature. The words 'may presume' gives discretion to the court to presume a fact. Whereas the words 'shall presume' mandates the Court to presume a particular fact or set of facts unless and until, it is rebutted by the accused. The presumptions of law can be rebuttable or irrebuttable. The expression 'conclusive proof' refers to irrebuttable presumption of law in the Evidence Act.

It may be noted here that Section 139 of the Negotiable Instrument Act, 1881 also incorporates similar presumption mandating the court to presume that the holder of cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. The effect of presumption under Section 139 came up for interpretation before a larger Bench of the Hon'ble Supreme Court in **Rangappa vs. Sri Mohan, (2010) 11 SCC 441**. In the aforesaid judgment, the Court used the expression 'reverse onus'. It was held that the presumption is a rebuttable presumption and unless the accused successfully rebuts the presumption, a drawer of the cheque shall be presumed to have issued the cheque in discharge of liability. Of course, it was further held that standard of proof required for rebutting the presumption is 'preponderance of probabilities' and not 'beyond reasonable doubt'. The court further held that the accused can rebut the presumption even while pointing out deficiency/ lacuna/ contradiction/ improbability in the case of the prosecution itself and it is not necessary that the accused must lead evidence in defence to rebut the presumption. Paragraphs 27 and 28 are extracted as under:-

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the

legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of “preponderance of probabilities”. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

Still further, Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 also makes a provision mandating the Courts to draw a rebuttable presumption with respect to a culpable mental state of the accused. Still further, such provision also exists in Section 8 of the Schedule

Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989.

In the aforesaid situation, when the accused is put on trial under the POCSO Act, the Court is required to draw a rebuttable presumption and 'reverse onus' is on the accused to rebut the statutory presumption. Of course, such rebuttal is required to be proved on 'preponderance of probabilities' and not 'beyond reasonable doubt'. The accused can also attempt to rebut the aforesaid rebuttable presumption while pointing out improbabilities, contradictions and deficiencies in the evidence of the prosecution itself and it is not necessary for the accused to lead evidence in defence. A word of caution that such presumption, no doubt, uses the word 'shall', nevertheless, give rise to a rebuttable presumption as provided in Section 4 of the Evidence Act.

Now the stage is set to examine the evidence.

At this stage it would be apt to extract relevant part of the deposition of the prosecutrix in the Court:-

“On the eve of Lohri of 2011, accused Surinder Singh caught hold of my hand in the first bed room of our house and asked me to kiss him or let him kiss me. He repeated the aforesaid act three-four times but I did not allow him to do so. Thereafter, I narrated the incident to my mother Rupinder Kaur. In response thereto she replied that he is like her father and being father he can kiss or ask for even hugging. Thereafter, accused Surinder Singh gained more courage and he started doing all this repeatedly. My mother never stopped him from doing so.

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He used to touch my private parts, he used to hug me from behind. As and when I complained about his wrong behaviour before my mother, she used to thrash

me.

XX XX XX XX

It was on 26th of September, 2014, Rupinder Kaur had gone to the market by leaving her mobile phone on charging mode in the house. I checked her phone and found many unexpected chats between Rupinder Kaur and Surinder Singh and in one of such chat it was mentioned that come with red label and bring prosecutrix (name withheld) i.e. myself to Chail.

XX XX XX XX

On 30.09.2014, when I was all alone in my house, accused Surinder Singh @ Shinda today present in the court entered the house at about 3:30 PM. Finding me all alone, first he called me but I ignored him. Thereafter, accused Surinder Singh @ Shinda caught hold of my hand and placed in my other hand a DVD and he further told that in case I will not have physical relations with him, in that eventuality, he will download the DVD which was handed over to me on internet as the same contains porn movie on video pertaining to my mother, indulging with him in sexual activities.

COURT OBSERVATION:-

After viewing the DVD Ex.MO2, the accused Surinder Singh @ Shinda and Rupinder Kaur today present in the court are found to be indulged in sexual activities. The prosecutrix also identified the images of accused Surinder Singh @ Shinda and Rupinder Kaur in the DVD Ex.MO2 displayed in the court and stated that it is the same DVD which was handed over to her by accused Surinder Singh @ Shinda on 30.09.2014 and the said DVD was handed over by her to Police along with her complaint.

XX XX XX XX

The witness further deposed that after the registration of this case, both the accused used to visit my college and threatened me to withdraw my complaint otherwise my father and brother would be eliminated. I did not withdraw my complaint and ultimately the accused namely Surinder Singh @ Shinda fired gun shots upon my father and brother at Mohali on 08.12.2014. Case FIR has been registered at Mohali u/s 307 IPC and provisions of Arms Act. I am still under constant fear and threat in the hands of both the culprits.

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I had played the DVD on my Laptop on 1.10.2014. At that time, I was alone.

XX XX XX XX

Volunteered both the accused had been chasing me to the college to threat me. They used to humiliate me due to which my image was spoiled so I hardly attended my college.

XX XX XX XX

I do not remember the exact time when the accused asked to kiss on the eve of Lohri but it was night time when we were taking dinner. Volunteered it was between 9:00 PM to 10:00 PM. We were taking the dinner in the company of my Masar and Massi from Jalandhar, maternal uncle Paramjit Singh, friends of my brother and my brother. My mother was also there. We all were taking dinner in Varanda on the backside of our house. When I went to first room, accused Surinder Singh chased me to that room and there he asked me for a kiss.

XX XX XX XX

My mother was not present in the room where I was asked by accused Surinder Singh for a kiss.

XX XX XX XX

I state that my mother is involved in the crime of the present case and whenever I made complaint to her qua the facts/incidents mentioned in my examination-in-chief with effect from the year of 2011 onwards, she used to rebuke me, beat me and threat me.

XX XX XX XX

Again said I had signed the paper which was written by the police wherein I had stated that I did not want to live in the said house anymore.”

Now let's examine the arguments of learned counsel for the appellants.

First argument of learned counsel for the appellant is that the alleged offence committed prior to enforcement of POCSO Act cannot be made the basis to convict the appellant-Surinder Singh @ Shinda under the Act.

There cannot be any doubt about the correctness of the aforesaid argument. The POCSO Act was enforced on 14.11.2012, therefore, the incident which occurred on the eve of Lohri festival in 2011 cannot be made basis to try and convict the appellant under POCSO Act. Similarly, learned senior counsel is also correct in contending that with effect from 07.12.2013, the prosecutrix attained the age of majority and, hence, she cannot be invoke the provisions of the POCSO Act.

However, this is not the end. First of all, it needs to be clarified that 'Lohri' festival is celebrated in Northern part(s) of the country normally on 13th January each year. The prosecutrix was born on 07.12.1995. Thus, on the eve of Lohri festival in the year 2011, she was barely 15 years of age. However, on careful reading of the FIR as well as evidence of the prosecutrix, it is apparent that the appellant-Surinder Singh @ Shinda not only made sexual advances by making inappropriate physical contacts with the prosecutrix on the eve of Lohri festival in the year 2011 but such attempts were repeated on 2-3 more occasions in the year 2012 and once in the year 2013. Thus, the appellant continuously sexually assaulted and harassed the prosecutrix. Once the deposition of the prosecutrix is carefully read, she further alleges that the appellant-Surinder Singh @ Shinda repeated the aforesaid act 3-4 times. She has further stated that the appellant-Surinder Singh @ Shinda use to touch her private parts and hug her from behind. In this situation, the sexual overtures were not only made on the eve of Lohri festival in the year 2011 but repeatedly continued in 2012 and 2013 as well. The learned trial Court permitted Learned Counsels representing the accused to cross examine the prosecutrix at length during 8 different hearings. The prosecutrix has withstood the volley of questions put to her in the cross-examination. In her deposition, she has given detailed account of harassment meted out to her at the hands of the appellant-Surinder Singh @ Shinda. She has specifically deposed that the appellant- Surinder Singh @ Shinda sexually harassed, assaulted and molested her. No doubt, while registering the FIR, the prosecutrix did not specify the exact date or month as to when in the year 2013, the alleged incidents happened, however, the POCSO Act came into force in

November, 2012 and she attained the age of majority i.e. 18 years on 07.12.2013. Therefore, the argument of learned counsel that all the incidents are either before the enforcement of the Act came or after she attained majority does not stand close scrutiny. It may be noted here that Section 354-A IPC was brought in Statute Book with effect from 03.02.2013. The ingredients of Section 354-A IPC are overlapping with the offence provided under Section 7 of the POCSO Act.

Next argument of learned counsel that the prosecutrix has made improvements while deposing before the court needs to be examined in the context of the present case.

Here is a case where the prosecutrix, a daughter, has been compelled to allege that she was subjected to sexual overtures, advances, harassment and assault at the hands of her close relatives including her own mother. It must be kept in mind that her father had started living/residing separately from the family in the year 2009. Her family had broken down. It has also come in evidence that her mother was having sexual relations with Surinder Singh @ Shinda for which he used to visit their house regularly. In that context, if one carefully examines the alleged improvements which have been summarized by the learned senior counsel for the appellant while filing synopsis, this court is of the considered view that such alleged improvements are only explanations/elaborations of the allegations contained in the FIR. The prosecutrix while appearing in evidence has opted to give detailed account of each and every sexual assault and harassment explicitly.

Learned senior counsel for the appellant has compiled a table of the alleged improvements made by the prosecutrix while filing synopsis

which is extracted as under:-

<i>FIR</i>	<i>State under Section 164 of Cr.P.C.</i>	<i>PW1</i>
1) Alleged that on the eve of Lohri event at her house, in 2011, the appellant held the hand of the complainant and asked to kiss him or let him kiss	1) Alleged that on the eve of Lohri event at her house, in 2011, the appellant held the hand of the complainant and asked to kiss him or let him kiss	1) Alleged that on the eve of Lohri event at her house, in 2011, the appellant held the hand of the complainant and asked to kiss him or let him kiss.
2) Incident happened 2/3 more times in 2012 and once in 2013	2) The appellant used to visit our home and he used to make sexual advances towards the complainant, which he continued to do over the years	2) Alleged that the appellant repeated the incident ³ / ₄ times (no date, month or year)
3) That on 30.09.2014 when the complainant was alone at home, the appellant handed over the DVD to her stating that it carries porn video of her mother and threatened that this will made public if the complainant do not make physical relations with him.	3) That on 30.09.2014 when the complainant was alone at home, the appellant handed over the DVD to her stating that it carries porn video of her mother and threatened that this will made public if the complainant do not make physical relations with him.	3) Alleged that in the end of October or November 2013, the complainant was sitting beside her mother in her bedroom and was doing her homework, the appellant came there and asked her to go out the bedroom, she did not accede to his dictate and thereafter he pushed her outside the bedroom by holding her from her neck and thereafter bolted the bedroom from inside (First Time Improvement)

<i>FIR</i>	<i>State under Section 164 of Cr.P.C.</i>	<i>PW1</i>
4) On 04.10.2014, the complainant talked to her mother about DVD instead of consoling her, mercilessly beating given by the mother namely Rupinder Kaur.		4) He used to touch my private parts and he used to hug me from behind as and when she complained about this to her mother she used to thrash her. (no date, month or year and First Time Improvement).
5) On 4.10.2014, police was called and the complainant left the house with her father (No statement whatsoever was given to police on that day)		5) Further alleged that on 26.09.2014, Rupinder Kaur had gone to the market by leaving her mobile on charging mode in the house. The complainant checked her phone and found many unexpected chats between Rupinder Kaur and Surinder Singh and one of such chat it was mentioned that come with Red Label and bring Mehar i.e. Complainant to Chail. 6) That on 30.09.2014 when the complainant was alone at home, the appellant handed over the DVD to her stating that it carries porn video of her mother and threatened that this will made public if the complainant do not make physical relations with him.

With respect to incident of 30.09.2014, while referring to the deposition of the prosecutrix, in column No.3, learned counsel has shifted the same to item No.6 of column No.3. Similarly incident referred to in

item no.3 of column 3, the appellant-Surinder Singh @ Shinda has never been charged. The prosecutrix has just narrated an incident. Allegations contained in Item 4 of column 3, in the considered opinion of this Court, are elaboration of the allegations made previously. Once, the evidence of the prosecutrix, in given facts of the present case, is examined, this court does not find that she has tried to improve her case to such an extent to make it suspicious.

Learned senior counsel appearing for the appellant-Surinder Singh @ Shinda was empathic that there is lot of improvements in the statement of the prosecutrix and therefore, the case of the prosecution should be rejected by the Court. It may be noted here that slight change in the facts or alleged improvements are bound to happen being natural. One cannot be expected to have eidetic/photographic memory. Natural variation do happen and such depositions are considered and relied upon by the courts after its careful analysis.

Still further, it is well settled that FIR is not expected to be an encyclopedia of the entire case of the prosecution. An FIR is a mere first information sent to the prosecuting agency for setting criminal law in motion. In these circumstances, it is wrong to expect that in the FIR, complete detail of all the incidents must be disclosed. An FIR is not expected to contain the proposed evidence to be produced by the prosecution.

Next argument of learned counsel that the computer/laptop on which the prosecutrix had downloaded the alleged DVD to watch and make further copies has not been produced, is factually incorrect. On 21.01.2016, the prosecutrix did produce her laptop before the Court. It appears that the

learned senior counsel was not briefed properly.

Next argument of learned counsel for the appellant is based upon Ex.D2 and Ex.D3, two communications sent by the prosecutrix to her mother. In communication dated 03.03.2014, Ex.D2, the prosecutrix writes that her mother is most beautiful and hard working woman and she loves her. In the communication Ex.D3, dated 17.4.2014, the prosecutrix praises her mother while wishing her a happy birthday. On careful reading of Ex.D2 and Ex.D3, which were put to the prosecutrix when she appeared in the court, she has explained that she was hoping that her mother would mend her ways. Such communications do not lead the Court to believe that the entire case of the prosecution is incorrect.

Next argument of learned counsel for the appellant is with regard to non-joining of independent witnesses. No doubt, the prosecutrix has admitted that her mother was running a paying guest accommodation for girls from their house, however, it has been explained by the prosecutrix that at the relevant date i.e. on 04.10.2014 when she was given beatings by the appellant-Rupinder Kaur, the girls staying on the first floor of the house were on a tour to Goa. Still further, as noticed above, the prosecutrix although subjected to lengthy cross-examination has stuck to her stand. One must keep in mind that the prosecutrix found herself in unfortunate circumstances. On one hand her father had started residing separately from the family in the year 2009, whereas on the other hand her mother continued to maintain physical (sexual) relations with her brother-in-law. The prosecutrix faced sexual advances and harassment involving unwelcomed and explicit sexual overtures demanding sexual favour from the appellant Surinder Singh. She did not get required protection/support even from her

own mother. For the first time, when the incident took place on eve of Lohri festival in the year 2011, she was barely 15 years old. It has also come in evidence that the appellant-Surinder Singh @ Shinda used to carry a licenced pistol. The appellant Surinder Singh @ Shinda also used to help the family of the prosecutrix.

Next argument of learned counsel is with regard to a facebook post dated 08.12.2013. In this facebook post, the prosecutrix has thanked her uncle i.e. Surinder Singh @ Shinda for the gift given on her birthday. That also does not in any way prove that the case of the prosecution is false.

Next argument of learned counsel that the prosecutrix had a motive to falsely implicate the appellants as they were opposing her love affair with a boy of her age. In this regard, it may be noticed that the appellants have failed to prove that fact. In any case, the prosecutrix is resident of U.T. Chandigarh-a modern city. After attaining the age of majority on 07.12.2013, she was free to marry. The defence put forth by the appellants does not have any substance, particularly when it has come in evidence that marriage of the prosecutrix is going to take place with the aforesaid boy.

Next argument of learned counsel for the appellant with regard to misreading of evidence by the learned trial court while returning a finding in paragraph 29, is correct. There is a small misreading of evidence by the trial court with regard to the incident happened in October/November, 2013. However, that would not be sufficient in itself to set aside the detailed judgment supported by various other reasons. No doubt, in October/November, 2013, the appellant-Surinder Singh @ Shinda had pushed her out of the bedroom of her mother by holding her neck. It is

not the case of the prosecution that on that day Surinder Singh @ Shinda had touched her private parts or hugged her from behind at that time. To this extent, Learned trial court has erred.

Now let's examine the arguments of learned counsel for the appellant-Rupinder Kaur.

First argument of learned counsel does not stand close scrutiny as the father of the prosecutrix left the matrimonial home due to marital discord in 2009. The prosecutrix and her elder brother use to stay with the appellant-Rupinder Kaur. The prosecutrix never made any complaint to her father during the period of 5 years. She called her father on 04.10.2014 when she found herself in a desperate situation. Still further, the defence has failed to prove that the father of the prosecutrix (husband of the appellant-Rupinder Kaur) ever tutored the prosecutrix.

Next argument of learned counsel is with regard to delay in registration of the FIR, although, appears to be attractive in first blush, however, does not stand on deeper scrutiny. Surinder Singh @ Shinda handed over a DVD to the prosecutrix carrying a porn video recording of both the appellants performing sex in front of camera on 30.09.2014. She saw the porn video on 01.10.2014. She could not muster enough courage/strength to immediately confront her mother. She confronted her mother only on 04.10.2014. Her mother, the appellant-Rupinder Kaur, started beating her mercilessly. She, on getting an opportunity, called her brother and father for help. Once the father came to the house, being unaware of the scenario, he called the police. Still the prosecutrix did not disclose about the contents of the DVD to the police. She was in a dilemma.

On one side, she was concerned about the prestige of the family, whereas on

the other side the appellants were driving her crazy. After much deliberation, she drafted a complaint Ex.P13 on 07.11.2014 but did not hand over to the police for a period of 11 days i.e. 18.11.2014. These facts clearly show that the prosecutrix being a sensitive young child took her time before deciding to initiate action. In that context, it is relevant to note here that after 04.10.2014, she had started residing with her father. She has explained that she was not mentally prepared to give complaint to the police. She used to attend her college rarely because both the appellants had been chasing, humiliating and threatening her. Even the appellants went to the extent of spoiling her image. It was in these circumstances that the appellants were compelled to lodge the police complaint. Still further, it may be significant to note that the appellant-Surinder Singh @ Shinda alleged to have attacked and seriously injured her father and brother on 08.12.2014 by firing from his licensed pistol. The appellant-Surinder Singh @ Shinda has also been convicted in a separate criminal case registered under Section 307 IPC against which a separate appeal is pending. In these circumstances, delay of more than a month does not create any doubt on correctness of the case of the prosecution.

It is very rare that a daughter decides to prosecute her own mother. From the facts available on record, it is apparent that there was hesitation on the part of the prosecutrix to take re-course to legal action even after she was beaten on 04.10.2014 by her mother mercilessly. Thereafter, she took more than a month in resolving what must have been her inner conflict before deciding to approach the police. It is to be noted that on 04.10.2014, her father had called the police but she gave a statement to the police that she does not want to take legal action. That itself shows

that the prosecutrix was reluctant to take re-course to legal action against the accused. In this background, if the evidence of the prosecutrix is appreciated, this court does not find that the prosecution has failed to prove its case.

Next argument of learned counsel is with reference to the contentions noticed in paragraphs 38 and 39 of the judgment passed by the learned trial Court. In this regard, it may be noticed that the learned Sessions Court has noticed that the learned counsel appearing for the appellant-Rupinder Kaur has also taken certain objections apart from the arguments of Surinder Singh @ Shinda. The first argument is with regard to false implication of Rupinder Kaur at the instance of her father. It may be noted here that the aforesaid argument has already been dealt with by the Court in the previous part of this judgment.

Next argument of learned counsel is with reference to paragraph 39 of the judgment by the learned trial court. In paragraph 39, learned trial Court has noticed the argument of learned counsel for the appellants that the prosecutrix involved the present appellant in a false case to avoid payment of maintenance. This argument has also been dealt with by the trial Court in the same very paragraph and this court does not find any error in the same.

Now let's examine the revision petition filed by the prosecutrix.

It is relevant to note here that the learned trial court on appreciation of the evidence has passed the order of sentence after detailed deliberation. The order of sentence itself runs into 5 pages. Relevant aspects of the case have been duly considered. This Court does not find that the

order of sentence passed by the Special court require enhancement.

However, there is another aspect of the matter which needs little elaboration. It may be noted here that with effect from 03.02.2013, POCSO Act was amended by adding Section 42 which reads as under:-

*"42. **Alternate punishment.**-Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*

It is apparent that the Legislature itself has recognized that there is overlapping of acts or omissions constituting offences punishable under certain provisions of the Indian Penal Code as well as POCSO Act. It is for this reason, the legislature itself has made a provision that once the court finds offender guilty of such offence, liable to be punished under POCSO Act as well as Indian Penal Code, the court shall award punishment which is greater in degree. However, the sentence cannot be awarded both under POCSO Act and Indian Penal Code simultaneously with respect to the offences enlisted in the Section 42 of POCSO Act. Section 42 of the POCSO Act recognizes that the offence under Section 354-A overlaps to certain extent with offence under Sections 7 of POCSO Act. Thus, the learned trial court committed an error in convicting the appellant-Surinder Singh @ Shinda under Section 354-A IPC as well as Sections 8 of POCSO Act.

Accordingly, the sentence awarded to the appellant Surinder

Singh @ Shinda under Section 354-A is set aside.

Keeping in view the aforesaid facts, there is no ground to interfere except as referred above. Hence, both the appeals as well as the revision petition are dismissed.

2nd July, 2020
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No