

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 532 of 2019

**Rohit Pal
Vs.
The State of West Bengal**

**For the Appellant : Mr. Kallol Mondal, Adv.
Mr. Krishan Ray, Adv.
Mr. Souvik Das, Adv.
Mr. Anamitra Banerjee, Adv.**

**For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Mr. Ranabir Roy Chowdhury, APP.
Ms. Faria Hossain, Adv.
Mr. Sandip Chakraborty, Adv.**

Amicus Curiae : Mr. Ayan Bhattacharjee, Adv.

**Heard on : 21.03.2022, 22.03.2022 and
24.03.2022**

Judgment On : 31.03.2022

Bibek Chaudhuri, J.

The appellant was convicted for committing offence punishable under Sections 448/354 of the Indian Penal Code and also under Section 8 of the Protection of Children from Sexual Offences Act. The Trial Court passed sentence of rigorous imprisonment for two (02) years and also to pay fine of Rs.10,000/- only, in default, simple imprisonment for six (6) months for the offence punishable under Section 8 of the POCSO Act. The learned Trial Judge also handed down punishment of fine of Rs.500/- ,in default, to undergo simple imprisonment for one month for the offence punishable under Section 448 of the IPC. However, no separate sentence was passed against the appellant for the offence under Section 354 of the IPC in view of the punishment under Section 8 of the POCSO Act. The appellant has assailed the judgment and order of conviction and sentence in the instant appeal.

Gangajal Ghati Police Station Case No.33 of 2017 was registered on 31st May, 2017 under Section 448 of the IPC and Section 8 of the POCSO Act. On the basis of a written complaint submitted by one Smt. Japamala Bouri alleging, *inter alia*, that the accused Rohit Pal came to their house in her absence and found the minor daughter of the *de facto* complainant who was aged about 13 years on the date of filing of the complaint playing in the house. Suddenly, the accused caught hold of

her hand and dragged her inside the house, pushed her and touched her breast and other parts of her body. He also kissed her on her face and thereby outraged her modesty. When the minor daughter of the *de facto* complainant cried out and struggled to set herself free from the clutches of the accused, Rohit fled away.

The accused was arrested during investigation of the case. The Investigating Officer examined the available witnesses and recorded their statement under Section 161 of the Code of Criminal Procedure. The statement of the victim girl was also recorded under Section 164 of the Code of Criminal Procedure. The victim girl and the accused were medically examined and on completion of investigation, the Investigating Officer submitted charge sheet against the accused under Section 448 of the IPC and Section 8 of the POCSO Act. The case was committed to the Court of the learned Special Judge under POCSO Act, Bankura for trial.

The learned Trial Judge framed charge against the accused person under Sections 448/354 of the IPC and Section 8 of the POCSO Act. The accused pleaded not guilty when the charge was read over and explained to him. Hence, the trial.

During trial, Prosecution examined 7 witnesses. Amongst them, the *de facto* complainant deposed as P.W.1, P.W.2 is the victim girl. P.W.3 Ram Chandra Bouri is the uncle of the victim girl. He is also the scribe of the written complaint. P.W.4 Sasthi Bouri is the father of the

victim girl and P.W.5 Smt. Jhilik Bouri is the aunt of the victim. P.W.6 is the husband of P.W.5. P.W.7, S.I. Abhirup Samanta is the Investigating Officer of this case.

It is submitted by Mr. Kallol Mondal, learned Advocate for the appellant that all the witnesses are closely related to the victim girl. They are the parents, uncles and aunts of the victim girl. Therefore, they are interested witnesses. It is submitted by the learned Counsel for the appellant that the law is tried with regard to the appreciation of evidence of independent witnesses that their evidence ought to be scrutinized with great care and caution if there are inherent contradictions in the evidence of the witnesses on behalf of the prosecution, who are closely related with each other, it is not safe to rely on their evidence alone to record conviction against the accused.

In order to substantiate his argument, he refers to the written complaint submitted by P.W.1 before the Officer-in-Charge of the jurisdictional police station against the accused. It is found from the FIR that the minor daughter of the *de facto* complainant was playing alone in their house. Taking advantage of the absence of her parents, the accused entered into the house and abused her with sexual intent. In her evidence P.W.1 stated that on the date of occurrence at about 12 noon she and her husband went to take bath in a pond of their house. While they were returning home, they heard cry of their daughter. They

rushed to the house and asked her as to why she is crying. Then the victim girl disclosed the incident to them.

The evidence of the victim girl does not match with the evidence of her mother. It is asserted from her evidence that on the date of occurrence at about 1:30 p.m., she was playing with her younger brother inside her house. At that time accused suddenly came there and inappropriately touched her body and kissed her. While he was kissing her, she fled away to their new house and reported the incident to her aunt. Subsequently, her parents returned after taking bath from a pond and on their arrival she narrated the incident to them.

Thus, from the evidence of the victim girl, it is found that she did not raise any hue and cry at the time of alleged incident but fled away from the place to their new house and informed the matter to her aunt. Thus, the evidence of P.W.1 to the effect that the victim was crying and hearing her crying, she and her husband rushed to the house ought to be held false and subsequent improvement of the prosecution story. Therefore, the evidence of P.W.1 should not be believed and ought to be discarded.

P.W.3, Ram Chandra Bouri is the uncle of the victim girl. He stated in his evidence that on the date of occurrence at about 1:30 p.m. when the minor daughter of his elder brother was alone in the house, the accused entered into their house illegally and touched her breast

inappropriately and also kissed her. When she raised hue and cry, he fled away. It is also found from the evidence of P.W.3 that he came to know about the incident from the parents of the victim girl and went to the local police station with them. He also asked the accused as to why he had done such misdeed. However, the accused declined to admit the allegation.

P.W.3 is the scribe of the written complaint, which he wrote under the instruction of P.w.1, Japamala Bouri. The said written complaint was marked as Exhibit.1 during trial of the case.

P.W.4 is the father of the *de facto* complainant. It is found from his evidence that he corroborated the evidence of P.W.1 in his examination-in-chief. It is also found from his evidence that after hearing the incident from his daughter, he and his two brothers went to the house of the accused and asked him as to why he committed such act upon the said minor girl. He flatly refused the allegation made against him. Only then the *de facto* complainant lodged a complaint against the accused.

From the evidence of the P.W.5, Jhilik Bouri, it is found that on the date of occurrence, she was present in her house. While she was coming, the victim girl was playing with her son on their varandah. Suddenly, she heard hue and cry of the victim girl and came to the varanda from the kitchen. She found that accused Rohit Pal was fleeing

away. The victim girl told her that the accused kissed and pressed her breast. P.W.5 also stated in her evidence that at the relevant point of time, the parents of the victim girl went to pond to take bath.

P.W.6, Laxman Bouri is another uncle of the victim girl.

It is stated by him that at the time of occurrence he was working in the agricultural field. He came to know about the incident from his brothers and their wives.

From the evidence of P.W.7 S.I. Abhirup Samanta who is the Investigating Officer in this case. It is ascertained that during investigation the statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure on 1st June, 2017. In her statement recorded under Section 164 of the Code of Criminal Procedure the victim stated that on the date of occurrence at about 1 P.M. she was playing with her brother in the house of her uncle. At that time the accused Rohit Pal came there and touched her breasts and kissed her. The victim girl informed the incident to her aunt. In the meantime, the accused Rohit Pal fled away from the spot.

From careful perusal of the entire evidence on record it is found that the contradictions complained of by the learned counsel for the appellant in the evidence of the victim girl and her mother and aunt is that while the victim girl stated that when the accused was kissing her, he fled away from the place where she was playing and narrated

the incident to her aunt (P.W.5). On the contrary, P.W.5 and P.W.1 stated that the victim girl raised hue and cry when the accused was committing offence as described above and hearing such hue and cry they rushed to the place of occurrence. It is also submitted by Mr. Mondal, learned advocate for the appellant that the de facto complainant stated that the victim was playing alone in their house. On the contrary, from the evidence of the victim girl as well as P.W.5 it is ascertained that the victim girl was playing with her younger brother on the veranda of the house of her uncle. Therefore, prosecution has failed to prove the actual place of occurrence. Had it been the case that the victim was playing with her brother, the said brother would have been the best witness to narrate the incident that happened with her on the date and time of occurrence but the younger brother of the victim girl was not examined by the prosecution during trial.

Mr. Mondal further submits that the allegation of sexual assault can be made against any person even where a person touches any part of the body of a minor girl, allegation can be made that he touched the body of the victim for sexual intent. Therefore, it is for the prosecution to prove beyond any shadow of doubt that the accused had sexual intent while touching her body. Mr. Mondal also refers to the medical report of the victim (Ext.4) where the Medical

Officer clearly recorded that the breasts of the victim girl was not developed. Therefore, the question of touching breasts by the accused did not arise at all. It is also submitted by him that nobody saw the accused kissing the victim girl. Therefore, false implication of the accused cannot be ruled out and the appellant was entitled to get benefit of doubt from the charge made out against him.

Mr. Saswata Gopal Mukherjee, learned P.P., on the other hand, submits that Section 7 of the POCSO Act defines sexual assault in the following words.

*"7. **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."*

A close look of the above mentioned provision shows that touching the vagina, penis, anus or breasts of the child or making the child touched the vagina, penis, anus or breasts of the offender or any other person with sexual intent does not only constitute the offence of sexual assault but whoever does any other act with sexual intent which involves physical contact without penetration amounts to sexual assault. The definition contained in Section 7 has reported three

distinct parts The first part is about touching the private parts of the child. The second part is to make the child touch the private parts of the offender or any other person and the third part involves any other act of physical contact with sexual intent. The use of "word" in Section 7 makes the provision abundantly clear that the different acts contemplated in Section 7 if done with sexual intent, consists the offence sexual assault. In the instant case it is stated by the victim girl that the accused touched different parts of her body and also kissed her. Why should a grown up man who is not related with the victim girl kiss her entering into her house when his guardians were not present in the house. The sexual intent of a person can be gathered from the specific contact of the accused and the surrounding circumstances. There cannot be any direct evidence of sexual intent. In the instant case entering into the house of the de facto complainant in the absence of her and her husband, touching the body of the victim girl and kissing her shows that the accused had sexual intent and, therefore, the act involves physical contact by the accused with the victim and he was rightly convicted under Section 8 of the POCSO Act.

As the specific case of the prosecution is that the accused pressed the breasts of the victim girl and during medicological examination it was noted by the Medical Officer that the breasts of the

victim girl was not develop, a question came to the mind of the Court that if a perpetrator of an alleged offence touches the chest of a child if it comes within the purview of Section 7 when the sexual intent of the offender is not proved.

On this respect Mr. Ayan Bhattacharjee, learned advocate was requested by this Court to make his submission as amicus curiae to assist the Court.

Mr. Bhattacharjee initiates his argument referring to a decision of a Co-ordinate Bench of this Court in **Bijoy alias Guddu Das vs. State of West Bengal** reported in **2017 CRI. L. J. 3893**.

Paragraphs 26, 27 and 28 of the said judgment are relevant and quoted below:-

"26. The scope and ambit of the offence of sexual assault under the aforesaid provision does not only extend to touching of the vagina of the victim but also to the touching of any part of her body with a sexual intent.

27. Judging the prosecution case from this perspective, I am of the opinion any minor variation in the evidence of the witnesses as to which part of the anatomy of the victim was touched would not bring the act of the appellant which was prompted by lascivious instincts beyond the culpable bounds of the aforesaid penal provision. Nor would such variation

improbabilise the very genesis of the prosecution case of physical touching of the victim by the appellant with sensual intent which is consistently supported by all the witnesses.

28. hence, I am of the opinion that the aforesaid evidence on record clearly proves the ingredients of the alleged offence and the conviction of the appellant is accordingly upheld.”

In the aforesaid decision it was held that the scope of offence of sexual assault extends to touching of any part of the body of the child with a sexual intent. It is also held in the said report that if the act of the accused was proved to have been prompted by lascivious instinct within the culpable bounds of the penal provision contained in Section 7 of the POCSO Act, the accused is held to be guilty for committing offence of sexual assault. Mr. Bhattacharjee also refers to a decision of Madhya Pradesh High Court in the case of **Farhan Khan versus State of M.P.** reported in **I.L.R. (2014) M.P. 1381**. The factual aspect of the above mentioned report is that the accused was alleged to have caught hold the hand of the complainant, a child and put his hand around her waist. Under such fact, it was decided that a person who does any other act with sexual intent which involves physical contact without penetration is subject to commit sexual assault cannot be marginalized in the circumstances and it cannot be said

that the act did not amount to sexual assault as per Section 7 of the POCSO Act.

It is submitted by Mr. Bhattacharjee that the term of any other act with sexual intent is of extreme significance because if the restrictive meaning is attributed to the aforesaid phrase, the purpose and object of the statute overlooked. In support of his contention Mr. Bhattacharjee refers to a decision of the Hon'ble Supreme Court in the case of **State of Maharashtra versus Marwanjee F. Desai and others** reported in **(2002) 2 SCC 318**. In the above mentioned decision the question that falls for consideration before the Supreme Court is as to whether an order of competent authority dropping the eviction proceedings initiated the issuing notice under Section 4(2) and resultant dismissal of the proceedings falls within the ambit of the words "every order" against which an appeal under Section 7 would be maintainable. In other words, if an appeal under Section 7 of the Bombay Government Premises (Eviction Act), 1955 is maintainable against an order of dropping the eviction proceeding under Section 4(2) of the said Act. The Hon'ble Supreme Court while interpreting the phrase "every order" held as follows:-

"The word "every", appearing in Section 7 immediately before the word "order", stands out to be extremely significant so as to offer an opportunity of appeal in the

event of there being an order against the Government. The legislature has deliberately used "every order" and if the restrictive meaning is attributed, as has been so done by the High Court, then the word "every" in any event becomes totally redundant but since the legislature avoids redundancy, every word used in the particular provision shall have to be attributed a meaning and attribution of any meaning to the word "every" by itself would negate the interpretation as found favour with the High Court. Use of the words "every order" indicates that it comprehensively covers all decisions reached by the competent authority under Section 4 or Section 5."

Thus it is submitted by Mr. Bhattacharjee that when there is no ambiguity in the provision, a statute must be interpreted in its ordinary grammatical meaning. Thus, "any other act with sexual intent which involves physical contact" means any touch of any part of the body of a child with sexual intent by the offender. The aforesaid provision is not restricted on particular parts of the body stated in the first part of Section 7.

The Hon'ble Supreme Court in **Rajinder Singh versus State of Punjab** reported in **(2015) 6 SCC 477** had occasion to interpret the words "any property or valuable security" with reference to the penal

provisions of Sections 304B, 306 and 498A of the Indian Penal Code. It was held by the Hon'ble Supreme Court that the word "any" is a word of width and would, therefore, include within it "property or valuable security" of any kind whatsoever. In paragraph 16 of the said judgment the Hon'ble Supreme Court referred to paragraph 36 of **Standard Chartered Bank versus Directorate of Enforcement, (2005) 4 SCC 530**. The said paragraph is reproduced below:-

"36. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape (see Murlidhar Meghraj Loya v. State of Maharashtra). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in Heydon's case. A common-sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. (See State of A.P. v. Bathu Prakasa Rao and also G. P. Singh on Principles of Statutory Interpretation, 9th Edn. 2004, Chapter 11, Synopsis 3 at pp.754 to 756)".

In **M/s Siddeshwari Cotton Mills (P) Ltd. Versus Union of India & Anr.** reported in **(1989) 2 SCC 458** it was held by the Hon'ble Supreme Court that the expression ejusdem

generis--'of the same kind or nature' –signifies a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus as preceding them. If a list or string or family of genus-describing terms are followed by wider or residuary or sweeping-up of words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words. The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus. The "ejusdem generis" rule then is not attracted and such broad construction as the subsequent words may admit will be favoured.

The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. This is a

presumption and operates unless there is some contrary indication.

In **Attorney General for India Versus Satish and another** reported in **AIR 2022 SC 13** a three-Judges Bench of the Hon'ble Supreme Court considered the expression 'sexual intent' used in Section 7 of the POCSO Act. It was argued on behalf of the accused that "sexual intent" having not been explained in Section 7, it cannot be confined to any predetermined form or structure and that it would be a question of fact, however, the expression physical contact uses in Section 7 has to be construed skin to skin contact cannot be accepted. As per rule of construction contained in the Maxim – "Ut Res Magis Valeat Quam Pereat", the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also needless to say that where the intention of the Legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. It was observed by the Hon'ble Supreme Court that that restricting the interpretation of the words "touch" or "physical contact" to "skin to skin contact" would not only be a narrow and pedantic

interpretation of the provision contained in Section 7 of the POCSO Act, but it would lead to an absurd interpretation of the said provision. "skin to skin contact" for constituting an offence of "sexual assault" could not have been intended or contemplated by the Legislature. The very object of enacting the POCSO Act is to protect the children from sexual abuse, and if such a narrow interpretation is accepted, it would lead to a very detrimental situation, frustrating the very object of the Act, inasmuch as in that case touching the sexual or non sexual parts of a body of a child with gloves, condoms, sheets or with cloth, though done with sexual intent would not amount to an offence of sexual assault under Section 7 of the POCSO Act. The most important ingredient for constituting the offence of sexual assault under Section 7 of the POCSO Act. The most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the "sexual intent" and not the "skin to skin" contact with the child.

Finally the Hon'ble Supreme Court in the aforesaid decision held that the interpretation of Section 7 on the premise of the principle of "ejusdem generis" would defeat the very legislative intent because a restrictive interpretation of the expression "any other Act" taking the aid of "ejusdem generis" Rule would defeat

the very legislative intent for which the POCSO Act is enacted. As per the settled legal position, if the specific words used in the Section exhaust a class, it has to be construed that the legislative intent was to use the general word beyond the class denoted by the specific words. So far as Section 7 of the POCSO Act is concerned, the first part thereof exhausts a class of act of sexual assault using in specific words, and the other part uses the general act beyond the class denoted by the specific words. In other words, 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, would be committing an offence of "sexual assault". Similarly, whoever does any other act with sexual intent which involves physical contact without penetration, would also be committing the offence of "sexual assault" under Section 7 of the POCSO Act.

In page 50 of **DC Dutta's text book of Gynecology published by Jaypee Brothers Medical Publishers (P) Ltd. New Delhi** Stages of Pubertal Development in Girls as described by Tanner in relation to breast as follows:-

Stage	Breast
Stage I	Prepubertal state, elevation of papilla only

Stage II	Breast buds and papilla slightly elevated, and side of labia areola begins to enlarge. (Median age: 9.8 years)
Stage III	Further enlargement of entire breast tissue
Stage IV	Secondary mound of areola and papilla projecting above the breast tissue. (Median age: 12.1 years)
Stage V	Areola recessed to general contour of breast. (Median age: 14.6 years)

However, pubertal development is delayed in the following common disorders-

- a) Precocious puberty
- b) Delayed puberty
- c) Menstrual abnormalities (amenorrhea, menorrhagia, dysmenorrhea)
- d) others (infection, neoplasm, hirsutism, etc.).

In the instant case, the victim girl stated in clear term before the Learned Magistrate as well as during trial that the

accused touched her breasts and kissed her. It is absolutely immaterial whether breasts of a 13 years old girl were developed or not. The specific part of the body of a girl of 13 years of age shall be held and term as breast for the purpose of Section 7 of the POCSO Act even if her breasts are not developed due to certain medical grounds.

Considering the lascivious act of the appellant as demonstrated by the victim girl this Court is fully satisfied that the victim girl was subjected to sexual assault by the appellant. The contradictions pointed out by the learned advocate for the appellant is of no consequence because the said contradictions are not material contradictions in respect of the specific Act committed by the appellant.

Now comes to the question of sentence. It is found from the order of sentence passed by the learned Trial Judge that he passed a sentence against the appellant to undergo rigorous imprisonment for two years with fine and default clause for the offence punishable under Section 8 of the POCSO Act. Section 8 of the Act refers to penal provision for sexual assault which shall not be less than three years, but which may extend to five years. The offender shall also be liable to fine. Therefore, the

learned Trial Judge passed sentence below, the prescribed minimum sentence contained in Section 8 of the POCSO Act.

The appellant was aged about 36 years at the relevant point of time when the offence was committed. He is a day labourer by occupation. He is facing trial for last five years. Considering both aggravating and mitigating circumstances, this Court is of the view that the appellant should be sentenced with minimum punishment as described in Section 8 of the POCSO Act.

Accordingly, the appeal is **allowed in part**. The order of conviction passed by the learned Trial Judge in Special Case No. 7 of 2017 is affirmed. However, the order of sentence passed by the Court below is set aside.

The appellant is sentenced to undergo rigorous imprisonment for three years and also to pay fine of Rs.10,000/-(Ten thousand) only, in default, to undergo simple imprisonment for three months for committing offence punishable under Section 8 of the Protection of Children from Sexual Offences Act.

The sentence of fine for committing offence under Section 448 of the IPC is affirmed.

Let a plain copy of this judgement duly certified by the Assistant Court Officer (ACO) of this Court be handed over to the appellant through his learned advocate free of cost.

Let a copy of this judgment along with the Lower Court Record be sent to the Court below for information and necessary action.

The appellant is directed to appear before the Court below to suffer sentence within 14 days from the date of communication of this judgment, failing which the learned Trial Court is at liberty to issue warrant of arrest against the appellant to serve sentence passed by this Court.

(Bibek Chaudhuri, J.)