

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA (SB) 81 of 2022

Arup Kumar Sarkar

-vs.-

The State of West Bengal & Anr.

Mr. Bikash Ranjan Bhattacharjee, Sr. Adv.
Mr. Uday Shankar Chattopadhyaya,
Mr. Suman Shankar Chattopadhyaya,
Mr. Arka Prabha Bhattacharya,
Mr. Pronay Basak,
Mr. Debdipto Banerjee,
Mr. Gourab Das,
Ms. Trisha Rakshit.

...For the Appellant

Mr. Parsun Kumar Datta,
Mr. Subroto Roy.

... For the State

Mr. Somopriyo Chowdhury

...For the De facto complainant/O.P No.2

Reserved on : 31.01.2023.

Judgment on : 17.02.2023

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 17.05.2022 and 19.05.2022 passed by the Learned Judge Special (POCSO) Court cum, Additional Sessions Judge, 2nd Court, Asansol, Paschim Bardhaman in Sessions (POCSO) case no. 06/2017

wherein the learned Trial Court was pleased to hold the appellant guilty for commission of offence under Section 8/12 of the Protection of Children from Sexual Offences Act, 2012 and Section 354 of the Indian Penal Code and sentenced him as follows:

- (i) Rigorous Imprisonment for three years and fine of Rs.5000/- in default to suffer S.I. for six months for the offence under Section 8 of the POCSO Act.
- (ii) Simple Imprisonment for one year and fine of Rs.500/- in default to suffer S.I. for one month for offence under Section 12 of POCSO Act.

The genesis of the case relate to one 'Y' (hereinafter referred to as the 'complainant') lodging a complaint with the Officer-in-charge, Jamuria Police Station. The complainant alleged his daughter 'X' is a student of Class VII of Rajpur Nandi High School. For the last few days after coming home from school complainant's daughter complained that the appellant/librarian used to call her to the library and touched various places of her body and sexually assaulted her with bad suggestions. When 'X' protested and resisted such act the appellant threatened to destroy her future and her career as a student since he had connection with the Board and Council. The complainant at first ignored such complaint of his daughter but because of its recurrence he was forced to take steps and as such prayed for investigation to unearth the truth.

On the basis of the complaint Jamuria Police Station case no. 264/16 dated 05.08.2016 was registered for investigation under Section 8/12 of the Protection of Children from Sexual Offences Act, 2012 against the appellant Arup Kumar Sarkar and on completion of investigation charge-sheet dated 02.09.2016 was submitted before the learned Judge, Special Court under Section 8/12 of the POCSO Act.

After complying with the process of supply of copies, the learned Trial Court on hearing the prosecution and the defence was pleased to frame charge under Section 8/12 of the POCSO Act on 24.07.2017. The charges were read over to the accused/appellant to which he pleaded not guilty and claimed to be tried.

Prosecution in order to prove its case relied upon 11 witnesses which included PW1, 'X', the victim girl; PW2, 'Y', father of the victim girl, complainant; PW3, 'Z', mother of the victim girl; PW4, 'S' sister of the victim girl; PW5, Satyendranath Chatterjee, school teacher; PW6, Santanu Banerjee, school teacher; PW7, Anjana Bose, school teacher; PW8, Saoli Bose, school teacher; PW9, Tararani Batabyal, school teacher; PW10 Syama Prasad Chattopadhyay, Judicial Magistrate and PW11, S.I. Bhayesh Subba, investigating officer. The document which have been relied upon by the prosecution included Ext.1, statement under Section 164 of the Code of Criminal Procedure of the victim girl; Ext.2, written complaint; Ext.3, seizure list dated 10.08.2016; Ext.4, seizure list dated 13.08.2016; Ext.5, formal FIR;

Ext.6, sketch map; Ext.6/1, index. The material objects so relied upon by the prosecution included attested copy of attendance register of teacher (compared with the original) dated 04.08.2016 which was marked as MAT Ext.I and attested copy of attendance register of student (compared with the original) dated 04.08.2016 which was marked as MAT Ext.II.

PW1, 'X' victim girl deposed before the Court that on 04.08.2016 she had been to school at around 10.00 am and after attending two classes at about 12.15 pm she went to library class during her tiffin period to deposit a book which she had earlier borrowed. She requested the librarian Arup Sarkar to deposit her book and asked for a book on work education. The librarian/appellant represented that he would have to look for it and when she asked him to look for it and inform her, he held her waist and was going to touch her chest when she started screaming. The appellant thereafter left the waist and she returned to the staff room and informed her teacher Saoli Bose about the said incident when said teacher asked her to go to her class and stated that she would look after the matter. She then returned to class and after the 4th period media arrived as they were called by the teacher and her statement was recorded on mobile phone. She thereafter returned home and narrated to her parents regarding the incident. Her teacher called her parents to school and her father was advised to file a complaint with the police. Police asked them to go to Court. She had been to Court and narrated the facts before a Judge who recorded her statement. She also deposed that the judge who recorded her statement read over and explained the contents and thereafter

she signed on the same which was marked as Ext.1 and Ext.1/A. She identified the appellant who was present in Court.

PW2, 'Y' is the father of the victim girl who deposed that 'X' is his youngest daughter and she was studying at Class IX but at the time of incident she was a student of Class VII. On 04.08.2016 when she went to school and at the tiffin hour the victim had been to the library for bringing some books when the librarian of the library namely, Arup Sarkar touched on several parts of the victim's body and shut the door and told his daughter to come lonely and threatened her in various manner. The witness also deposed that the librarian Arup Sarkar caught hold of his daughter when his daughter tried to save her from him and somehow she came out of the library and she felt unwell. The witness narrated that his elder daughter was also a student of same school and at the relevant time she was also present there. She and other school teachers asked the victim about her condition. After school hours she went to her house and cried continuously and also vomited. Her mother asked her about her condition when she narrated the incident. He was cultivating his land when he was called to his house and the incident was narrated by his wife. On the next day he had been to Jamuria PS and lodged FIR against accused Arup Sarkar. He identified the written complaint which was marked as Ext.2/1. Witness also stated that the said FIR was written as per his instruction by one Santanu Babu and thereafter he signed on it. Police also interrogated the witness and collected some documents including the birth certificate of his youngest daughter/victim girl and a seizure list was prepared which he signed. He

identified his signature on the seizure list dated 10.08.2016 which was marked as Ext.3/1. Witness deposed that the victim girl 'X' was born in the year 2004 and also identified the accused in Court.

PW3, 'Z', mother of the victim deposed that she had two daughters namely 'S' and 'X'. 'S' is her elder daughter aged about 18 years and 'X' is aged about 14 years and a student of Class IX of Rajpur Nandi High School. She narrated that on 04.08.2016 one incident happened, at that time 'X' was a student of Class VII and on that date when she went to library of the school the accused who is teacher of the school touched the body of 'X' and threatened her when she shouted. Her daughter narrated the incident when she returned home and at that time her husband was not present there. Thereafter when her husband returned she narrated the incident and thereafter her husband 'Y' lodged complaint with the local police station and FIR was registered. Police also interrogated her.

PW4, 'S' is elder sister of 'X', she deposed that they are two sisters and her other sister 'X' is studying at Class X at the same school. The witness deposed that on 04.08.2016 at school an incident occurred with her sister when at the tiffin hours 'X' met her when she was crying and stated that Arup Sir/appellant molested her at the library room. Molester closed the window and touched various parts of her body and also used dirty language during that moment, somehow her sister came out from the room and narrated the facts. She stated that she felt bad hearing such incident and after school they

returned home and the matter was reported to her mother and her mother reported the same to her father. Police also interrogated her about the incident. She identified the librarian Arup Sarkar in Court.

PW5, is Satyendranath Chatterjee who is teacher of Rajpur Nandi High School. He deposed that on 04.08.2016 he was teacher-in-charge and the appellant/accused Arup Kumar Sarkar is the librarian. He deposed that at the relevant time he was away for Sarba Sikha Mission training for three days at Jamuria for which he had been attending training session from 10.00 am to 02.00 pm and after the training he used to come back to school as the school was situated close to the training venue. After his return to the school on the said date some school teachers narrated the incident with regard to the accused. The school teacher who reported are Anjana Ghosh, Tara Rani Batabyal and Arundhuti Naskar. They said that 'X' was misbehaved by the librarian. The investigating officer of the case visited the school and inspected the school, he also seized the attendance register of the students and the teaching staffs and thereafter returned the same. Witness identified the seizure list in respect of the attendance register seized by the police in his presence. He also identified his signature on the seizure list which was marked as Ext.4. Witness stated that attendance registers were returned by way of zimmanama. He pointed out that the original attendance of Arup Sarkar/accused dated 04.08.2016 showed his attendance in the school, the said attendance register was marked as MAT Ext.I. The witness also identified the original attendance register of the student including the presence of the

victim on 04.08.2016, the said attendance register was marked as MAT Ext.II. Witness also identified accused Arup Sarkar in Court.

PW6, is Shantanu Banerjee, the scribe of the FIR/written complaint. Witness identified his signature in the written complaint which was marked as Ext.2/2.

PW7, Anjana Bose is teacher of Rajpur Nandi High School. She narrated that on 04.08.2016 she was present in school and when she was sitting at the staff room with other colleagues when the student namely, 'X' came to the staff room during tiffin hours and stated that the librarian has improperly touched on her person. She identified the librarian Arup Sarkar in Court and stated that the police also interrogated her.

PW8, Saoli Bose is teacher of Rajpur Nandi High School at Jamuria. She stated that she was present on 04.08.2016, on the relevant date she was sitting at the staff room with other colleagues when one student namely, 'X' came to their staff room during tiffin hours and stated that the librarian of the school touched her improperly and advanced indecent proposal. She identified the accused/Arup Sarkar in Court and also stated that she was interrogated by the police.

PW9, Tararani Batabyal is a teacher of Rajpur Nandi High School, she identified the accused in Court. The witness deposed that she heard that one student namely, 'X' of Class VII told the teachers present at the staff room that

the librarian touched her and threatened her not to disclose the incident. He was interrogated by the police in course of investigation.

PW10, Syama Prasad Chattopadhyay, is a Judicial Magistrate. He stated that on 16.08.2016 he was posted at Asansol and in connection with Jamuria PS case no. 264/16 dated 05.08.2016 the victim girl was produced before him for recording judicial statement under Section 164 of Cr.P.C. and the said victim girl was identified by investigating officer. He recorded the statement of victim girl in presence of her father along with videography. Thereafter he asked certain questions to the victim girl who accordingly gave answers voluntarily which he recorded in his own handwriting. After recording the statement the same was read over and explained to the victim girl, thereafter she signed in both pages of the statement under Section 164 of Cr.P.C. The witness also signed the same. He identified the statement of the victim girl as also his seal and signature which was marked as Ext.1/2.

PW11, S.I. Bhayesh Subba is the investigating Officer of the case who narrated regarding the chronology and manner in which he carried out the process of collection of evidence and after completion of collection of such evidence he submitted charge-sheet before the Court.

Mr. Bikash Ranjan Bhattacharjee, learned senior advocate appearing for the appellant submitted that even if the facts are considered to be correct, prima facie no offence has been made out for holding the accused guilty and as such he should be acquitted from all the charges. It was submitted on behalf of

the appellant that the evidence taken as a whole fails to satisfy the ingredients of the offence particularly with reference to the interpretation of the term 'sexual intent' and he was falsely implicated in connection with the instant case. Drawing the attention to the evidence of the case particularly with regard to the statement of the victim and her father, learned senior advocate pointed out that there are deviation in the versions of the victim and her father. The presence of media itself reflects that there was a tendency of false implication which was with a design of magnifying the incident. According to the learned Advocate it was incumbent upon the trial Court to see consistency of the version of the victim both in the oral evidence deposed before the Court as well as her statement under Section 164 of the Code of Criminal Procedure and the deposition of the victim girl being contradictory the same cannot be relied upon with the aid of Section 29/30 of the POCSO Act, to arrive at a finding of guilt. The learned Advocate emphasized that the factum of 'sexual intent' having failed in this case, the act of touching the waist even if accepted to be true cannot by any stretch of imagination bring the acts as complained of within the ambit of POCSO Act. Rebutting the contentions of the learned Advocate for the complainant it was stated that the fact of the case relied upon being Attorney General for India –Vs. – Satish reported in (2022) 5 SCC 545 has no manner of application in the present case wherein the facts were completely different and the Hon'ble Supreme Court under the said set of facts interpreted the law. It was reiterated on behalf of the appellant that the provisions of Section 29 and 30 of the POCSO Act has no manner of application in the present case and the

jurisprudence of criminal law do not support at this stage without any factual foundation only with the aid of presumptions to convict any person. In order to substantiate his argument learned senior advocate relied upon *Subrata Biswas & Anr. –Vs. – State* reported in 2019 CRI. L.J. 4327. Drawing the attention of this Court to the reverse burden clause it was submitted that the accused cannot be called upon to prove the contrary. The phrase ‘is prosecuted’ as used in Section 29 of the Act which was emphasized in order to show that the prosecution cannot be absolved of all its responsibility for proving the charge. Paragraph 22 of the said judgment is set out as follows:

“22. The statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word “is prosecuted” in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on a preponderance of probability. Upon

laying the foundation of its case by leading cogent and reliable evidence (which does not fall foul of patent absurdities or inherent probabilities) the onus shifts upon the accused to prove the contrary. Judging the evidence in the present case from that perspective, I am constrained to hold that the version of the victim (PW-1) and her mother (PW-2) with regard to twin incidents of 24th March, 2016 and 18th April, 2016 if taken as whole, do not inspire confidence and runs contrary to normal human conduct in the backdrop of the broad probabilities of the present case.”

Reliance was also placed on Gautam Chandrakant Kairnar –Vs. – State of Maharashtra reported in AIR OnLine 2022 BOM 55, paragraph 34 to 37 of the said judgement relied upon by the appellant is set out as follows:

34. *The Black's Law Dictitionary defines the word “Presume” as-*

“to assume before hand; to suppose to be true in the absence of proof.” The Black's Law Dictionary further defines the word “presumption” as-

“Presumption - a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of fact-- most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.”

35. *A legal inference can be drawn only in the given facts i.e. only when legal and admissible evidence is adduced by the prosecution. The determinative question would be whether the presumption under sections 29 of the POCSO Act discharges the prosecution of proving its case beyond reasonable doubt? We are constrained to*

hold that the prosecution cannot be discharged of proving its case by way of such admissible evidence which would appeal to a prudent and a logical mind and hence, judicial conscience.

36. *It cannot be said that the presumption under section 29 of the POCSO Act is conclusive presumption which cannot be overcome by any additional evidence or argument. In legal terminology a presumption cannot be absolute presumption, as such, presumption would usually be mere fiction to disguise a rule of substantive law. A judgment in the court of law shall necessarily be governed by rule of evidence.*

37. *It is not sufficient to make an allegation, but it is incumbent upon the prosecution to establish the charge indicted upon the accused beyond reasonable doubt. The omissions and contradictions in the evidence adduced by the prosecution are of such magnitude that it would be difficult to place implicit reliance upon the evidence of P.W. 1 and P.W. 2. The accusation levelled by the prosecutrix do not appeal to a prudent mind and hence, do not inspire the confidence of the court. Hence, we are of the opinion that the charges levelled against the appellants are not proved beyond reasonable doubt. As a Constitutional Court, it is incumbent upon us to look for admissible evidence in accordance with law and the same is missing in the present case.”*

Mr. Somopriyo Chowdhury, learned Advocate appearing for the complainant submitted that in this case there are overwhelming materials to convict the appellant and there is no scope for interference by this learned Court in view of the factual circumstances which has been laid down by the prosecution and the principles of law which has been settled. Learned Advocate submitted that the victim was a student of Class VII. The accused at the

relevant point of time was in his mid fifties, the girl belonged to family of the farmers as would be reflected from the evidence. Evidence also reflected that the girl and the librarian both of them were present in school. The time period which has been reflected in the school register is inconsequential in view of the advantage sought by the appellant that he left at a time which was near about the time of the incident. The factum of touching the waist by the appellant is not disputed even by the appellant. What has been disputed is regarding advancing towards the chest or inappropriate touching or attempt to touch several parts of the body. To this effect learned Advocate emphasized on the interpretation of sexual intent as is defined under the Act and as interpreted in the judgment of the Hon'ble Supreme Court in Attorney General for India –Vs. – Satish (supra) that sexual intent is question of fact. Learned Advocate also drew the attention of the Court to Paragraphs 31, 35 to 39, 45 and 46 of the said judgment which is set out for the purpose of the present case.

“31. In both the cases, the main controversy centres around the interpretation of Section 7 of the Pocso Act. It is trite saying that while interpreting a statute, the courts should strive to ascertain the intention of the legislature enacting it, and it is the duty of the courts to accept an interpretation or construction which promotes the object of the legislation and prevents its possible abuse. As observed by the Supreme Court in J.P. Bansal v. State of Rajasthan [J.P. Bansal v. State of Rajasthan, (2003) 5 SCC 134 : 2003 SCC (L&S) 605] , a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather

the mens or sententia legis, the true intention of the legislature. It has been observed therein that : (SCC pp. 144-45, paras 12 & 16)

“12. Interpretation postulates the search for the true meaning of the words used in the statute as a medium of expression to communicate a particular thought. The task is not easy as the “language” is often misunderstood even in ordinary conversation or correspondence. The tragedy is that although in the matter of correspondence or conversation the person who has spoken the words or used the language can be approached for clarification, the legislature cannot be approached as the legislature, after enacting a law or Act, becomes functus officio so far as that particular Act is concerned and it cannot itself interpret it. No doubt, the legislature retains the power to amend or repeal the law so made and can also declare its meaning, but that can be done only by making another law or statute after undertaking the whole process of law-making.

16. Where, therefore, the “language” is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here. [See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests [Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests, 1990 Supp SCC 785 : AIR 1990 SC 1747] , SCC at p. 791, AIR at p. 1752; Shyam Kishori Devi v. Patna Municipal Corpn. [Shyam Kishori Devi v. Patna Municipal Corpn., AIR 1966 SC 1678] , AIR at p.

1682; A.R. *Antulay v. Ramdas Srinivas Nayak* [A.R. *Antulay v. Ramdas Srinivas Nayak*, (1984) 2 SCC 500 : 1984 SCC (Cri) 277] , SCC at pp. 518, 519.] Indeed, the Court cannot reframe the legislation as it has no power to legislate. [See : *State of Kerala v. Mathai Verghese* [*State of Kerala v. Mathai Verghese*, (1986) 4 SCC 746 : 1987 SCC (Cri) 3] , SCC at p. 749; *Union of India v. Deoki Nandan Aggarwal* [*Union of India v. Deoki Nandan Aggarwal*, 1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : AIR 1992 SC 96] , SCC at p. 330, AIR at p. 101.]”

35. The word “touch” as defined in the *Oxford Advanced Learner's Dictionary* means “the sense that enables you to be aware of things and what are like when you put your hands and fingers on them”. The word “physical” as defined in the *Advanced Law Lexicon*, 3rd Edn., means “of or relating to body....” and the word “contact” means “the state or condition of touching; touch; the act of touching...”. Thus, having regard to the dictionary meaning of the words “touch” and “physical contact”, the Court finds much force in the submission of Ms Geetha Luthra, learned Senior Advocate appearing for the National Commission for Women that both the said words have been interchangeably used in Section 7 by the legislature. The word “touch” has been used specifically with regard to the sexual parts of the body, whereas the word “physical contact” has been used for any other act. Therefore, the act of touching the sexual part of body or any other act involving physical contact, if done with “sexual intent” would amount to “sexual assault” within the meaning of Section 7 of the *Pocso Act*.

36. There cannot be any disagreement with the submission made by Mr Luthra for the accused that the expression “sexual intent” having not been explained in Section 7, it cannot be confined to any

predetermined format or structure and that it would be a question of fact, however, the submission of Mr Luthra that the expression “physical contact” used in Section 7 has to be construed as “skin-to-skin” contact cannot be accepted. As per the 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. 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 the 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 Act is the “sexual intent” and not the “skin-to-skin” contact with the child.

37. *At this juncture, it may also be beneficial to refer to the observations made by the foreign courts in the judgments cited by*

Ms Geetha Luthra, wherein the said courts while interpreting analogous provisions as prevalent in such countries, have held that “skin-to-skin contact” is not required to constitute an offence of sexual assault. It is not the presence or lack of intervening material which should be focused upon, but whether the contact made through the material, comes within the definition prescribed for a particular statute, has to be seen. Of course, the judgments of the said courts proceed on the interpretation arising out of the terms defined in the provisions contained in the legislations concerned and are not pari materia to the language of Section 7 of the Pocso Act, nonetheless they would be relevant for the purpose of interpreting the expression “touch” and “sexual assault”. In R. v. H [R. v. H, (2005) 1 WLR 2005 (CA)] , the Court of Appeal while interpreting the word “touching” contained in Section 3 of the Sexual Offences Act, 2003 as in force in UK, observed that the touching of clothing would constitute “touching” for the purpose of said Section 3. Similarly, in State v. Phipps [State v. Phipps, 442 NW 2d 611 (Iowa Ct App 1989)] the Court of Appeals of Iowa held that a lack of skin-to-skin contact alone does not as a matter of law put the defendant's conduct outside the definition of “sex act” or “sexual activity”, which has been defined in Section 702.17 of the Iowa Code.

38. *The act of touching any sexual part of the body of a child with sexual intent or any other act involving physical contact with sexual intent, could not be trivialised or held insignificant or peripheral so as to exclude such act from the purview of “sexual assault” under Section 7. As held by this Court in Balram Kumawat v. Union of India [Balram Kumawat v. Union of India, (2003) 7 SCC 628] , the law would have to be interpreted having regard to the subject-matter of the offence and to the object of the law it seeks to achieve. The*

purpose of the law cannot be to allow the offender to sneak out of the meshes of law.

39. *It may also be pertinent to note that having regard to the seriousness of the offences under the Pocso Act, the legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. It may further be noted that though as per sub-section (2) of Section 30, for the purposes of the said section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability, the Explanation to Section 30 clarifies that “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Sections 7, 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11, “sexual intent” would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of “culpable mental state” on the part of the accused.*

45. *The interpretation of Section 7 at the instance of the High Court on the premise of the principle of “ejusdem generis” is also*

thoroughly misconceived. It may be noted that the principle of “*ejusdem generis*” should be applied only as an aid to the construction of the statute. It should not be applied where it would defeat the very legislative intent. 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 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 view of the discussion made earlier, the prosecution was not required to prove a “skin-to-skin” contact for the purpose of proving the charge of sexual assault under Section 7 of the Act.

46. The surrounding circumstances like the accused having taken the victim to his house, the accused having lied to the mother of the victim that the victim was not in his house, the mother having found her daughter in the room on the first floor of the house of the accused and the victim having narrated the incident to her mother, were proved by the prosecution, rather the said facts had remained unchallenged at the instance of the accused. Such basic facts having been proved by the prosecution, the Court was entitled to raise the statutory presumption about the culpable mental state of the accused as permitted to be raised under Section 30 of the said Act.

The said presumption has not been rebutted by the accused, by proving that he had no such mental state. The allegation of sexual intent as contemplated under Section 7 of the Act, therefore, had also stood proved by the prosecution. The Court, therefore, is of the opinion that the prosecution had duly proved not only the sexual intent on the part of the accused but had also proved the alleged acts that he had pressed the breast of the victim, attempted to remove her salwar and had also exercised force by pressing her mouth. All these acts were the acts of “sexual assault” as contemplated under Section 7, punishable under Section 8 of the PocsO Act.”

Learned Advocate appearing for the complainant states that the statement of the victim girl under Section 164 of the Code of Criminal Procedure read with the deposition of the victim before the Court would amply make it clear that there was no bonafide intent of the appellant to touch the waist as added to that was an ill-design of inappropriately touching parts of the body including the chest as complained by the victim. Learned Advocate emphasized that the prosecution under Section 29 and Section 30 of the POCSO Act were incorporated as reverse burden of proof and it is a settled proposition of law that in all cases relating to POCSO Act the victim must be considered to be an injured witness. By drawing the attention to paragraph 8 and 21 of State of Punjab –Vs. – Gurmit Singh & Ors. reported in (1996) 2 SCC 384, it was submitted that on an appreciation of whole of the prosecution case the allegations made by the victim are to be considered in the background of the entire facts of the case as has been presented by the prosecution. Within

close proximity of time the victim girl complained to the teacher and the teachers having deposed the same regarding the complaint being received by the victim girl on the date of the incident reflects the truth of the incident. Paragraph 8 and 21 of the aforesaid judgment is relevant for the purpose of the present case which is set out as follows.

“8. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to

discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Tirlok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village Sarpanch and complained to him. The Sarpanch of the village also got in touch with the Sarpanch of Village Pakhowal, where in the tubewell kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Tirlok Singh PW 6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Tirlok Singh and his wife

when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination centre next morning at about 6 a.m. was “not believable” as “the accused would be the last persons to extend sympathy to the prosecutrix” are not at all intelligible. The accused were not showing “any sympathy” to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination centre so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural

inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an

injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

“A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same

weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.”

21. *Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not*

merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

Learned advocate also submitted that in this case even if the factual circumstances are appreciated the cross-examination on the part of the appellant in course of evidence would reflect only routine denial and no single circumstance could be advanced by the defence which lead to the false implication of the present appellant. Relying upon State of Maharashtra –Vs. – Gopal reported in 2020 SCC OnLine Bom 4339, learned Advocate submitted that the interpretations made by the appellant so far as the Section 29 and 30 of the POCSO Act are concerned is not applicable. Paragraphs 27 to 29 of the

said judgment which are relevant for the purpose of the case is set out as follows:

“27. *In so far as the intention of the accused behind touching the chest is concerned, in absence of any rebuttal material, the presumption under Section 30 of the POCSO Act would come into play. The statutory presumption of culpable mental status of the accused would apply in the case. Moreover, there is no explanation, nor there can be any explanation by the accused about his act of touching chest of a minor vulnerable girl. Since the victims were aged 9 years, the act of accused of sexual assault amounts to ‘aggravated sexual assault’, within the meaning of Section 9(f) of the POCSO Act, as the accused is teacher in educational institution. All the sexual assaults on children below 12 years amount to aggravated form of sexual assault, which is the case here.*

28. *While ordinarily there is a ‘presumption of innocence’ in relation to an accused, Section 29 of the POCSO Act reverses this position. Section 29 of the POCSO Act creates a ‘presumption of guilt’ on the part of the accused if he is prosecuted for committing, abetting or attempting certain offences. Section 29 reads 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 Section 9 of this 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.”

29. *In the context of Section 29, another provision of the POCSO Act, which is also required to be considered is Section 30 of POSCO Act, which is extracted herein below for ease of reference:*

“30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.- In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

Mr. Prasun Kumar Datta learned Advocate for the State submits that the prosecution has produced the best evidence and in such type of offence the sole testimony of the victim is sufficient to prove the charges against the appellant. The same has been shown by the prosecution in this case and the learned Trial Court has rightly convicted the appellant.

I have considered the submissions advanced by the learned Advocate appearing for the appellant, the complainant as well as the State. In this case it would be apposite before proceeding further to refer to the statement under Section 164 of Cr.P.C. of the victim girl which was marked as Ext.1 in this case. The victim girl before the Judicial Magistrate stated that she had been to library class for returning her book and for wanting a fresh book. She asked the librarian whether there is any book when he said that he had to search.

The victim asked the appellant to search for the book when the accused started closing the windows and asked her to come alone. When she turned for returning the accused caught hold of her waist and was trying to touch other parts of her body when the victim screamed and the librarian/accused left her. She thereafter left the place.

Learned Advocate for the appellant states that although in her deposition the victim girl stated that the appellant after getting hold of her waist was attempting to touch her chest but such allegations were missing in the statement of the victim girl under Section 164 of the Code of Criminal Procedure and drawing the attention to the letter of complaint which was addressed to the Inspector-in-charge by the father of the victim, appellant submitted that the same was vague as the allegations was that of touching the body of the victim girl at various places and sexually assaulting her with indecent proposal. According to the learned Advocate there is inconsistency in the version in respect of the accusation complained of and the charges which has been framed. Most of the evidence are hearsay evidence and it is only the victim whose version is to be relied upon and even if the sole version of the victim or the testimony of the victim in this case are relied upon the same being inconsistent it would be unwise to arrive at a finding of guilt.

In this case an assessment of the evidence shows that no case has been made out by the appellant regarding him being implicated falsely as there was neither any suggestion nor any issue raised in cross-examination or any

defence witness was cited. There is also nothing to show from evidence of the teachers i.e. PW5, PW7, PW8 and PW9 that they had inimical relation with the librarian/appellant. Further the most important consideration in this case is the evidence of the victim 'X' i.e. she was thoroughly cross-examined on behalf of the appellant but she remained unshaken and was firm on her stand. In fact, in respect of the specific suggestion with which she was confronted she replied "*Not a fact I stated falsely that the accused caught my waist and tried to touch my chest*". This particular suggestion also goes to show that the accused/appellant was very well aware regarding the charge which he is to answer, particularly, when the victim was examined as the first prosecution witness.

It is also seen in this case that the learned trial Court was pleased to convict the appellant under Section 8/12 of the POCSO Act and Section 354 of the Indian Penal Code. I have considered the evidences as a whole and I find that the nature of the act complained of and the evidence so adduced in support of the same do not bring it within the definition of Section 11 of the POCSO Act and as such the conviction and punishment imposed under the said provision is set aside.

There are two parts of the act complained of, the first part is holding the waist and the second part is trying to touch the chest, in view of the aforesaid act complained of the requirements of 'sexual intent' is satisfied in this case.

In *People –Vs. – Miller* reported in 98 ALR 913 and *Hicks –Vs. – Commonwealth* reported in 86 Va 223, it has been held—

“Mere intention to commit a specified crime does not amount to an attempt. It is also essential that the defendant, with the intent of committing the particular crime, does some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission thereof.”

In *Sudhir Kumar Mukherjee and Sham Shaw Lal –Vs. – State of West Bengal*, (1974) 3 SCC it has been held that—

“A person commits the offence of “attempt to commit a particular offence” when (i) he intends to commit that particular offence, and (ii) he, having made preparation and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.”

In *Malkiat Singh –Vs. – State of Punjab* reported in (1969) 1 SCC 157, it has been held that —

“In order to constitute “an attempt”, first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and third, such act must be “proximate to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely

suggestive or indicative of such intention, but, that it must be, that is, it must be indicative or suggestive of the intention.”

The fact complained of constitutes an offence, but falls short of touching the human organs referred to in Section 7 of the POCSO Act. There is a scope of widely interpreting the phrase ‘does any other act’, however, the accusation being distinct and clear and firmly deposed by the victim in Court, I am of the view that the provisions of Section 18 of the POCSO Act are to be invoked in this case as the very intention of the accused/appellant was to touch the chest. That being so the accused is convicted under Section 8 read with Section 18 of the POCSO Act and as such the sentences so prescribed under Section 18 of the POCSO Act being one and half of the longest term of the imprisonment provided for the offence is to be imposed in this case.

Thus the accused/appellant is sentenced to suffer Rigorous Imprisonment for 2 years and 6 months and fine of Rs.5,000/-, in default to suffer Simple Imprisonment for 6 months for the offence under Section 8 read with Section 18 of the POCSO Act.

Accordingly, CRA (SB) 81 of 2022 is disposed of with the sentence as modified above.

Pending applications, if any, are consequently disposed of.

The appellant is on bail his bail bond stands cancelled. He is directed to surrender before the learned Trial Court within a period of 72 hours.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)