

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 27.03.2023
Pronounced on: 06.04.2023

+ **CRL.A. 22/2023 & CRL.M.(BAIL) 29/2023**

SONU@BILLA

..... Appellant

Through: Mr. Ashish Dahiya, Advocate

versus

**STATE, THROUGH SHO, PS PASCHIM
VIHAR EAST**

..... Respondent

Through: Mr. Naresh Kumar Chahar,
APP for the State with W/S
Surbhi Aggarwal, P.S.
Paschim Vihar East

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

J U D G M E N T

Index to the Judgment

FACTUAL BACKGROUND	2
ARGUMENTS OF LEARNED COUNSELS	3
EVIDENCE AND TESTIMONIES OF WITNESSES	5
SECTION 354C OF IPC. VOYEURISM: ANALYSIS AND FINDINGS.....	8
(i) Private Act vs. Public Act.....	11
(ii) Reasonable Expectation	12
CONCLUSION	17

SWARANA KANTA SHARMA, J.

1. The instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C') has been filed on behalf of appellant against the judgment of conviction dated 15.11.2021 and order on sentence dated 15.12.2021 in Session Case No. 234/14 titled as "*State vs. Sonu @ Billa*" arising out of FIR bearing no. 730/2014, registered at Police Station Paschim Vihar East, Delhi for the offences punishable under Section 354C of the Indian Penal Code, 1860 ('IPC') and Section 12 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') whereby the appellant has been convicted by learned Additional Sessions Judge-07 (POCSO), West Tis Hazari Courts, Delhi ('Trial Court') for having committed offence under Section 354C of IPC and Section 12 of POCSO Act, and has been sentenced to undergo rigorous imprisonment for one year and fine of Rs.2000/-, and in default of payment of fine, to undergo simple imprisonment for one month.

FACTUAL BACKGROUND

2. Briefly stated, necessary for the adjudication of present appeal are that the present FIR was registered on the basis of a complaint lodged on 24.09.2014 whereby it was alleged that when the victim used to sit outside her house, the appellant used to look at her with sexual intent and whenever she used to go to take bath, the appellant used to stand outside the bathroom on different pretexts and used to peep inside the bathroom. It was also stated that he used to pass vulgar remarks, comments and gestures against her. It was also

alleged that one week prior to registration of the FIR, when the victim was sitting on a chair outside her house, the appellant had thrown iron wire ring towards and when she had objected, he had passed lewd comments against her. The victim had lodged complaint and on the basis of the same, present FIR was registered under Sections 354C/509 of IPC and Section 12 of POCSO Act. The statement of victim was recorded under Section 164 Cr.P.C. and after investigation, the chargesheet was filed under Sections 354C/509 of IPC and Section 12 of POCSO Act. Charges were framed by the learned Trial Court under Sections 354C/354D of IPC and Section 12 of POCSO Act.

3. After concluding evidence and hearing arguments, the appellant was convicted by the learned Trial Court for committing offence under Section 354C of IPC and Section 12 of POCSO Act, and was sentenced as mentioned in preceding paragraphs.

ARGUMENTS OF LEARNED COUNSELS

4. Learned counsel for the appellant has assailed the judgment passed by the learned Trial Court on the ground that the Court has convicted the appellant on the basis of assumptions, presumptions, conjunctures and surmises. It is argued that the learned Trial Court did not appreciate that there were material contradictions in the statements of the witnesses and therefore, they are not reliable. It is also argued that the prosecution has not been able to prove its case beyond reasonable doubt. It is also stated that learned Trial Court did not appreciate that the allegations leveled by the victim that appellant

used to peep inside the bathroom whenever she used to take bath had been made with *mala fide* intention as the family of the victim and the appellant had strained relations and they were trying to grab each other's *jhuggi* and also used to fight with each other on one pretext or the other. It is also argued that no independent witness has been examined by the prosecution. It is also argued that the learned Trial Court did not appreciate that the police officials had obtained signatures of the victim on a paper on which only one or two lines were written which makes her testimony doubtful. It is also argued that victim is a well educated college going girl who should not have signed a paper without going through its content. It is also argued by learned counsel that PW-3 himself has admitted that the FIR was registered after someone's help or influence. It is further contended that the date of birth of the victim could not be proved since PW-2 i.e. mother of victim and PW-3 i.e. father of victim gave different statements before the Court regarding her date of birth i.e. 16.03.1997 which is the date of her adoption, however, they did not know her actual date of birth. It is stated that the date of birth in the school record cannot be relied upon in the present case since the mother of the victim herself admitted that she did not know the actual date of birth of the victim, and even the school authorities were unable to inform the Court about the correct date of birth of the victim. It is also argued that the act of taking bath was at a public place as it was admitted by the witnesses i.e. in the street outside the *jhuggi* of the victim and therefore, the same will not be covered under Section 354C IPC. It was also argued that the act of taking

bath in the bathroom situated outside the *jhuggi* of the victim on a public place can be equated with a person taking bath in water parks, swimming pools, lakes, ponds or even while taking bath in rivers at religious places. It is, therefore, stated that the impugned judgment be set aside.

5. Learned APP for the State, on the other hand, argues that there is no illegality or infirmity in the order of the learned Trial Court since the testimony of the victim in the Court as well as her statement under Section 164 Cr.P.C. is consistent and does not suffer from any infirmity. It is also argued that the appellant used to peep inside the bathroom whenever she used to take bath with sexual intent and also used to pass vulgar remarks, comments and gestures against her. It is further stated that the statements of the witnesses are consistent in this regard.

6. This Court has heard arguments addressed on behalf of appellant and the State and has perused the material on record.

EVIDENCE AND TESTIMONIES OF WITNESSES

7. Learned Trial Court has convicted the appellant primarily on the ground that there was no discrepancy in the statement of the victim as well as her parents PW-2 and PW-3 and since they had supported the prosecution case in totality and have thus proved that the appellant used to peep inside the bathroom when victim used to take bath. The offence under Section 12 of POCSO Act was held to be made out since in view of Section 30 of POCSO Act, the culpable mental state of appellant was presumed as he had intentionally

peeped into the bathroom and had passed vulgar comments against the victim despite several warnings by the victim and her parents, and the appellant had failed to rebut the said presumption in his defence that he did not have such mental state. It was also reasoned that the prosecution has been able to prove commission of offence under Section 11 of POCSO Act since the presumption under Section 30 of POCSO Act could not be rebutted.

8. This Court notes that PW-1 i.e. the victim has deposed that in August/September, 2014, when she was a student of B.A. First Year, the appellant used to stand with his friends outside the bathroom, situated outside her house, and used to peep inside the bathroom when she used to take bath. It was stated that he also used to stare at her with sexual intent whenever she used to sit outside in the street. When she had informed her parents about his conduct, they had gone to his house, however, the parents and sister of the appellant had picked up quarrel with them and had passed comments against her. She has also deposed in her testimony that one day while she was sitting with her parents in the street and there was no power supply, the appellant had thrown a ring of iron wire at her, and when she had objected to the same, the appellant had hurled obscene abuses at her which had led to a quarrel between the parents of the appellant and the parents of the victim. Thereafter, a complaint was lodged with the police which has been duly proved as Ex.PW1/A. During investigation, the victim also gave her statement under Section 164 Cr.P.C. and also identified the appellant in the Court. A perusal of the cross-examination would however, reveal that she has admitted

that there used to be frequent quarrels between her parents and the parents of the appellant. She also admitted in her cross-examination that appellant had not spoken a single word to her directly and used to talk with his friends, but whenever she used to tell appellant not to indulge in passing of such comments, he used to pass bad comments. The mother of victim i.e PW-2 has also stated that for fear of altercation with the appellant and other persons, who are their neighbours, she did not lodge the complaint earlier, though she knew that the appellant used to tease her daughter, and it was only when one day, when the appellant threw a ring of iron wire at her daughter in the presence of her husband, the quarrel took place. She also deposed in her testimony that since they are living in a *jhuggi*, they used to use the open space in front of their *jhuggi* as a bathroom which has small walls. They used to put curtains at the time of using the bathroom. She deposed that she has seen the appellant once or twice, trying to peep inside the bathroom, when her daughter used to take bath and that she had also objected to the same to the appellant as well as his mother. However, they had picked up quarrel with her and therefore, the present complaint was lodged. Her testimony further reveals that on 16.03.1997, she had adopted the victim when she was 22 days old, but she did not know her actual date of birth. PW-3 i.e. the father of victim stated similar facts as stated by PW-2 in her statement. He also deposed that he had seen the appellant standing near the bathroom when his daughter was taking bath and when he had objected to the same, the appellant had told him that he will not move from there as it was a common place. When he had

lodge the complaint with the police, the appellant was apprehended, but had been let off by the police and the appellant had made fun of him telling him that he could not do anything against him. Due to this, PW-3 had got the present FIR registered. He also stated that he had tolerated the acts of the appellant for two or three months but could not tolerate anymore. It was also stated by him that the date of birth of his daughter is 16.03.1997 and when she was adopted, she was 28 days old. PW-4 proved the date of birth of the victim as per school record to be 16.03.1997, which was based on the declaration of the father when the child was admitted in the school. In the cross-examination, PW-4 has admitted that no documents were provided by the parents of the child at the time of her admission as they had no knowledge of it. The other witnesses are formal in nature. PW-2 was again examined by the Court as CW-1 to prove the age of victim, who placed on record the original grade sheet of matriculation issued by CBSE of his daughter. In his cross-examination, he stated that the date of birth was based on a birth certificate issued by MCD.

SECTION 354C OF IPC. VOYEURISM: ANALYSIS AND FINDINGS

9. Voyeurism has been introduced as a sex crime against women in India by way of The Criminal Law (Amendment) Act, 2013. Since the appellant has been convicted and sentenced inter alia under Section 354C of IPC, it would be appurtenant to refer to the said provision, which is reproduced as under:

“354C. Voyeurism.—Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.—For the purpose of this section, **“private act”** includes an **act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear;** or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.—Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.”

(Emphasis supplied)

10. Explanation 1 to Section 354C clarifies the meaning of ‘private act’. When the definition of voyeurism is read along with the explanation, it would include within its ambit, an act of watching carried out by the perpetrator in a place used by a woman/victim where she is engaged in a ‘private act’ which, in the circumstances,

would reasonably be expected by her to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear, or where she is using a lavatory, or where she is doing a sexual act that is not of a kind ordinarily done in public, and she has reasonable expectation that she would not be observed by the perpetrator or any other person at behest of the perpetrator; or where she consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated.

11. Learned counsel for the appellant had two-fold arguments, *firstly* that it is an admitted fact that the appellant stays in the *jhuggi* next to the *jhuggi* of the victim. Since the bathroom was situated in the common area outside their *jhuggies*, he could not have been convicted for voyeurism as he was merely standing outside his house which was his right. Secondly, it was argued that in the present case, the bathroom used by the victim being situated at a common public place cannot be termed as a 'private area' but a 'public place' and thus the act of bathing at such 'public place' cannot be held to be a 'private act'. He argues that in case, this Court holds to the contrary, in that case, several thousands of persons can be prosecuted merely for their presence at public places such as water parks, swimming pools, lakes, ponds or even while taking bath in rivers at religious places.

12. This Court, however, does not agree with the aforesaid contentions of learned counsel for the appellant as the same are contrary to law and cannot be interpreted in the way he argues.

(i) Private Act vs. Public Act

13. As regards the first argument advanced by the learned counsel for appellant, it is to be noted that the bathroom in question was situated in an open area, but it was not an open public place as suggested by learned counsel for appellant. It is clear from the statements of the witnesses that the bathroom had small walls and a curtain used to be drawn at the time of taking bath by the victim. The contention that the act of taking bath cannot be considered a 'private act' as it was being done in a public place is not only meritless but also absurd. Taking bath in a bathroom by any person, whether a male or a female, is essentially a 'private act' as it is taking place inside the four walls of the bathroom.

14. In the present case, though, it is true that the bathroom was constructed outside the *jhuggi* of the victim at a public place, but it constituted of a covered four walled structure being used as a bathroom. The entrance of the bathroom used to be covered with a curtain at the time of taking bath, therefore, it cannot be held that the bathroom was a open public place. Similarly, there can be no doubt that the woman taking bath therein will be considered to be engaged in a 'private act' of taking bath and having reasonable expectation of not being seen by anyone.

15. The argument of the learned counsel for the appellant that the act of taking bath by the victim in the present case, instead of being a 'private act' became a 'public act' is totally meritless. Merely because a structure which is being used as bathroom by a woman does not have a door but only a curtain and temporary walls and it is

situated outside her house does not make it a public place and the contention that the act of taking bath by the victim became a 'public act' instead of being a 'private act' for the said reason has to be outrightly rejected. It will also amount to holding that in case a woman takes bath in the bathroom inside her house, it remains a 'private act' and if she takes bath in a covered bathroom which is outside her house, will become a 'public act', which will be irrational. This Court therefore holds that the bathroom in question in this case was not a public place and the act of taking bath therein was a 'private act'.

(ii) Reasonable Expectation

16. The concept of 'reasonable expectation' of privacy plays central role to adjudicate a case under Section 354C of IPC. The word 'reasonable expectation' has not been defined; however, it will have to be assessed in the facts and circumstances of each case depending on the place and manner in which the offence was committed. It cannot be denied that a woman taking bath inside a closed bathroom will reasonably expect that her privacy was not invaded and she was not being seen or watched by anyone as she is behind closed walls behind a curtain. The act of a perpetrator peeping inside the said bathroom will certainly be regarded as invasion of her privacy.

17. The objective behind introducing the present offence was to curb sexual crime against women and to protect their privacy and sexual integrity. The law has to ensure that all citizens are able to

enjoy a peaceful life with peace of mind having assurance that their privacy is respected and such kind of trespass and mischief will attract the criminality of voyeuristic behavior of the perpetrator of the crime. The sexual integrity of every person has to be respected and any violation of the same should be dealt with a stern hand.

18. In the present case, the victim while doing her day-to-day activities, was being harassed by the present appellant, as he used to peep inside the bathroom when she used to take bath having 'reasonable expectation' of not being seen. It stood proved from the testimony of the witnesses. When the ingredients of Section 354C are thus tested in the factual situation of the present case, this Court finds the case squarely covered by the definition of Section 354C IPC read with Explanation 1 which defines the 'private act'.

19. The second argument of the learned counsel for appellant was that if the reasoning of the learned Trial Court is accepted and it is not set aside, it will amount to holding that people can be prosecuted for their mere presence at public places where women may be taking bath such as religious places, holy rivers, swimming pools, etc.

20. This Court while strongly disagreeing with the contention of the learned counsel for the appellant observes that while advancing this argument, learned counsel for the appellant should have kept in mind that while people take holy dip in rivers or water bodies considered as holy, they are not bathing in the same, but are taking holy dips. Such religious places, without an iota of doubt, will be public places, however, the act of taking holy dip cannot be equated with taking bath by a woman behind four walls with curtain drawn

who would expect that she is behind four walls with the covered entrance, and will thus have reasonable expectation that while taking bath, she will not be observed by anyone. Thus, taking holy dip at the religious places cannot be equated with the closed bathroom where a female is taking bath. However, even in that case, there will be 'reasonable expectation' that photographs or videos of such women, even while taking bath at such public places are not taken or videos created. Even in those cases, it will amount to invading her privacy. No person has a right, even in that situation, to take her photographs, videos etc. as envisaged under Section 354C of IPC and the Explanation thereto.

21. Be that as it may, this argument also needs to be rejected outrightly on another ground that the act in the present case cannot be equated to such public places as the bathroom in question was a closed covered structure.

22. Therefore, this Court holds that the victim in the present case had reasonable expectation and rightly so, as envisaged under Section 354C IPC read with Explanation 1 thereto, to attract the provisions thereof.

23. This Court, therefore, reaches a conclusion that there is no infirmity as far as conviction under Section 354C of IPC is concerned as the statements of all the witnesses including the victim and her parents are consistent and the minor discrepancies in the cross-examination are of no consequence.

24. To sum up, the acts of the appellant in the present case were not merely trivial and ill-mannered behavior, but also amounted to

breach of privacy of the victim and would attract the criminality as envisaged under Section 354C of IPC.

AGE OF VICTIM: WHETHER ESTABLISHED OR NOT?

25. As far as conviction under Section 12 of POCSO Act is concerned, this Court is of the opinion that PW-2 and PW-3 have admitted in their examination-in-chief as well as in cross-examination that they did not know the exact date of birth of the victim. They have also admitted that the victim was adopted by them though they stated that the victim was about 22-28 days old when she was adopted. Thus, it is pertinent to take note of the following facts:

(i) no adoption date has been placed on record, and there is no evidence as to how and from whom the victim had been adopted; (ii) there is also no evidence on record as to on what basis the parents concluded that victim was 22-28 days old on the day when she was adopted.

26. Moreover, the concerned witness of the school also deposed that they did not know the exact date of birth of the victim and the date of birth of the victim was mentioned on the basis of declaration made in the admission form by the father of the victim. In this regard, the father and mother of the victim have already stated that they did not know the exact date of birth of the victim. Further, when the father of victim was again examined as CW-1 by the learned Trial Court, the Trial Court relied on the CBSE Matriculation Certificate for the purpose of date of birth. In this regard, the learned Trial Court should have noted that the date mentioned in the

Matriculation Certificate was essentially based on the declaration made by the father of the victim in the admission form, which according to the witnesses already stands admitted, was on the basis of some guess work and they did not know the exact date of birth of the victim. The date of birth, thus, mentioned on the basis of a guess work and rather without any cogent basis was mentioned in the Matriculation Certificate as per rules and regulations of CBSE. Though, the date of birth mentioned in the Matriculation Certificate has to be taken to be true in the circumstances as the judicial precedents suggest, in the present case, the victim is the adopted daughter of PW-2 and PW-3, who not only failed to place on record any document regarding the adoption of the child, but also the birth of the child or regarding the biological parents of the child for this Court to believe that she was born on the day which they had declared in the school where she was admitted.

27. Though they state that she was only 22-28 days old on the day of adoption, no MCD certificate has been produced on record regarding date of birth of the victim. The victim was studying in college at the time of incident and as per statement of PW-3 in the Court, she was about 17 years of age on the date of incident. Since the date of adoption and not date of birth has been mentioned in the school certificate, therefore, the learned Trial Court committed an error by relying on a date of birth, which as per admission of parents of victim in this regard, was based on assumptions.

CONCLUSION

28. In respect of the conviction of appellant under Section 12 of POCSO Act, this Court holds the view that the prosecution was not able to prove that the victim was less than 18 years of age at the time of incident. Since the age of the victim could not be proved to be less than 18 years, conviction of the appellant under POCSO Act cannot be sustained. In view thereof, impugned judgment dated 15.11.2021, to the extent of conviction of appellant under Section 12 of POCSO Act, is set aside.

29. The social context of crimes cannot be lost sight of by the Courts. The Courts need to remain alive to the social realities in such cases where the victim due to her poverty did not have luxury of having a bathroom inside her house, but had a make shift bathroom outside her own house. The act of the appellant peeping inside the bathroom which unfortunately, only had a curtain on the entrance of the bathroom instead of a door, would certainly attract the criminality under Section 354C of IPC. Needless to say, such an act would certainly put a woman under embarrassment and constant fear of being observed while she takes bath even behind the four walls of a make shift bathroom. Thus, there are no reasons to interfere with impugned judgment and order on sentence passed by the learned Trial Court as far as conviction under Section 354C of IPC is concerned. The impugned judgment dated 15.11.2021 and order on sentence dated 15.12.2021, insofar as they relate to conviction and sentencing under Section 354C of IPC, are hereby upheld.

30. Accordingly, the present appeal along with pending application is disposed of in above terms.

31. The judgment be uploaded on the website forthwith.

32. Since the appellant is in judicial custody, a copy of this judgment be sent to the Superintendent, Central Jail No. 2, Tihar, for intimation to the appellant.

SWARANA KANTA SHARMA, J

APRIL 06, 2023/zp



नित्यमेव जयते