

MHCC020124962017



Presented on : 02/11/2017
Registered on : 02/11/2017
Decided on : 12/02/2021
Duration : 03Y 03M 10D

Exhibit-21

**IN THE SPECIAL COURT FOR PROTECTION OF CHILDREN FROM
SEXUAL OFFENCES ACT, 2012 AT FORT, GREATER BOMBAY.**

POCSO SPECIAL CASE NO.519 OF 2017

(C.R. NO.180 OF 2017)

The State of Maharashtra] Prosecution.
(At the instance of N.M. Joshi Marg Police]
Station, Mumbai, vide C.R. No.180/2017.)]
V/s.

Sahar Ali Shaikh] Accused.

As per charge-sheet:

Aged: 22 years, Indian Inhabitant,]
Occ.: Service, R/o: Shah and Nahar]
Industrial Estate, Gala No.235, Sun Mill]
Galli, Lower Parel, Mumbai – 400 013.]

Mrs. Sulbha Joshi, Spl. PP. for the Prosecution/State.

Ms. Nargis Khan, Advocate for Accused.

**CORAM : H.H. The Addl. Sessions Judge
Mrs. M.A. Baraliya
The Designated Judge under
Protection of Children from
Sexual Offences Act, 2012.**

CR NO. : 15

DATED : 12th February, 2021.

(To avoid to disclose identity of victim, her name and names of her close relatives, school, are not disclosed in Judgment in view of provisions of Section 33(7) of Protection of Children from Sexual Offences Act, 2012).

: ORAL JUDGMENT :

Accused above named is facing trial for having committed offences punishable under Sections 354 and 354-A of the Indian Penal Code, 1860 (in short, "IPC") and under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (in short, "POCSO Act, 2012").

2. In brief, the case of prosecution is that on 17.09.2017, the prosecutrix -10 years old girl, had been to buy the bread to the nearby shop. While returning to home, she saw four boys were sitting out of the stationary shop and were laughing at her. She returned home. Later on she was going towards Jain Temple with her friend. Boys were still there. Out of four boys, one boy wearing black T-shirt came near to her and touched her private part and all boys including the boy wearing black T-shirt that is to say accused, were laughing at her. Having returned home she revealed the incident to her mother, who in turn told her husband on phone about it. Husband rushed to home. The victim then brought her pappa to the spot and pointed out the boy wearing black T-shirt. On noticing her papa, said boy ran away. On the same date, they approached the police station, where father lodged report Exhibit-11. Crime no.180/2017 came to be registered.

3. Investigation was put in motion. On the next date, accused came to be arrested. Victim's birth certificate (Exhibit-10) was

obtained. Statements of witnesses came to be recorded. Spot panchanama was prepared and charge-sheet came to be produced. Accused was bailed out. I framed Charge vide Exhibit-4 to have committed the offences punishable under Sections 354 and 354-A of the IPC and under Section 10 of the POCSO Act, 2012. Accused pleaded not guilty and claimed to be tried. His defence is of total denial and false implication. Prosecution has examined in all five witnesses. Statement of accused under Section 313 of the Code of Criminal Procedure (in short, "Cr.P.C.") came to be recorded vide Exhibit-20

4. I heard both sides at length. The following are the points for determination and my findings.

POINTS	FINDINGS
1. Whether prosecution proves that on 17.09.2017, on a road at Lower Parel, Mumbai, accused used criminal force to the prosecutrix -10 years old girl, by touching her private part and thereby outraged her modesty (Section 354 of IPC) ?	Yes.
2. Whether prosecution proves that on the above mentioned date, and place, accused made physical contact with the prosecutrix -10 years old girl, by touching her private parts and advances involving unwelcome and explicit overtures (Section 354-A of IPC) ?	Yes.
3. Whether prosecution proves that on the above mentioned date, and place, accused with sexual intention, touched the private part of the prosecutrix -10	Yes.

years old girl, and thereby committed offence of aggravated sexual assault **(Section 10 of the POCSO Act)** ?

4. Whether any offence has been committed by the accused. If yes, under which sections and under what charges ?

Accused has committed offences punishable under Sections 354 & 354-A of the Indian Penal Code and under Section 10 of the Protection of Children from Sexual Offences Act, 2012.

5. What Order ?

Accused is convicted.

REASONS FOR THE FINDINGS

POINTS NO.1 TO 4:

5. Since all points inter-alia being connected with each other, requires common discussion, so all points are considered together. To bring home the guilt of the accused, prosecution has examined in all five witnesses, which are as follows :-

- PW.1 is the father of the prosecutrix (Exhibit-9);
- PW.2 is Vinit (Exhibit-13), who is the panch witness for spot panchanama (Exhibit-14);
- PW.3 is the prosecutrix (Exhibit-15);
- PW.4 is PSI Rajesh Vijay Murudkar (Exhibit-16), who recorded the report (Exhibit-11), registered crime at Exhibit: 11-A, prepared spot panchanama Exhibit-14 and arrested accused vide arrest panchanama Exhibit-17.
- PW.5 is API Rajani Baban Umbarkar (Exhibit-18), who recorded

the statement of the victim girl on 18.09.2017.

6. PW-1 is the father who has deposed of approaching the police station on dated 17.09.2017, having come to know incident. He has also deposed that his daughter brought him down his building near the Sadanand shop. There the four boys were still sitting. Her daughter pointed out him one of the boy wearing black T-shirt. So they immediately approached the police station and lodged report. He has also described the said boy in his report. His testimony pertaining to birth date as, 14.10.2007, Exhibit-10, of victim, is not challenged. Her age 10 years old, on the date of incident is not in dispute.

7. PW-2 is the panch witness and also the friend of victim's father. Police prepared the panchanama of the spot (Exhibit-14) which is near Sadanand Stationary, Shop no.9, Lower Parel, Mumbai.

8. PW-3 is the victim -13 years old girl. Her testimony was recorded from the chamber of the Presiding Officer and accused was kept outside of the chamber just near the door, so that victim's testimony be audible to him. She was administered oath. As deposed by her, her birth date is 14.10.2007. The incident occurred on 17.09.2017. On that day it being Sunday, there was holiday. At about 6.00 p.m., she had been to buy bread. While going, she saw four boys were sitting out of the shop of stationary. They were laughing. She returned with bread to her home. Later on she was going towards Jain Temple with her friend, one boy out of the four came to her and touched her bums. All boys including the said boy laughed at her. The said boy was wearing black T-shirt. She returned to home and narrated incident to her mother. As she was scared, her mother immediately

called her papa on phone. She showed the said boy to her papa when he came to home. She has identified the said boy i.e. accused when shown to her. In cross-examination she has admitted that her papa apprehended the said boy and handed over to the police station.

9. PW-4 is PSI Rajesh Murudkar, who recorded the report (Exhibit-11), registered crime at Exhibit: 11-A and prepared spot panchanama Exhibit-14. On the next day on 18.09.2017, he apprehended the accused outside of the Shah and Nahar Industrial Estate, Lower Parel, Mumbai. He then arrested accused vide arrest panchanama Exhibit-17.

10. Last witness examined is WAPI Rajani who recorded the statement of the victim girl on 18.09.2017.

11. Ld. SPP appearing for the State having brought to my notice entire oral evidence has submitted that accused was unknown to the victim girl. She has identified him as wearing black T-shirt. She had pointed out the accused to her father who had also seen the said particular boy wearing T-shirt sitting with his friends by the side of the shop. She has submitted that on the arrest panchanama, the photo of the accused is affixed, wherein he is seen wearing black T-shirt. Her submission is that victim has identified the accused before the court from his photo and the T-shirt seen in his photo. There was sufficient time for the victim and her father to see the accused on the date of incident. So accused is the same boy is proved by the prosecution. She has further submitted that the accused had touched her bums, the private part, obviously with the intention to sexually assault upon her. There is no reason to disbelieve the victim and her father, who

immediately approached the police station and lodged the report promptly. The victim who was 10 years old at the material time felt insulted and scared too much by the incident that she disclosed it to her mother immediately. Police came in action immediately and the accused came to be arrested on the very next day, and identified by father. According to her, defence side has failed to bring strong evidence to disprove the facts. So she has submitted to convict the accused.

12. Contrary, ld. Advocate appearing for the accused has submitted that the complainant is the father of the victim. Her father's friend is panch witness PW-2. These are the interested witnesses. Investigating Officer has failed to record the statement of eye witness, particularly the friend with whom the victim was going to the Temple. This fact itself creates doubt in the case of the prosecution. Her submission is that there was no attempt on the part of the Investigating Officer to record the statement of any of the friends of the accused who were with him. further TI parade is not followed to prove that the accused was the same boy who touched the victim. Accused was unknown for the witnesses. Even the FIR has been lodged against the unknown person. So the identity of the culprit is not established beyond reasonable doubt. Further her submission is that according to father (PW-1), he received a call of his wife who said that somebody had teased his daughter. Ld. Advocate has submitted that there is much difference in between teasing and touching. Further her submission is that bums is not the private part as alleged by the victim. Regarding identity of accused she has submitted that the identity of the accused is doubtful for the reason that according to victim, the said boy

was apprehended by her papa and brought to the police station. Contrary to it, Investigating Officer (PW-4) says that the accused came to be arrested on the next day. Black T-shirt is not seized by the police. Her next submission is that though on that day it was Sunday, still some shops were open, as victim had gone to buy the bread. There was no attempt to collect the CCTV footages of the said site. Prompt investigation has not been carried out. Prosecution has failed to bring home the guilt beyond reasonable doubt. So she has submitted to acquit the accused.

13. It is a matter of record that FIR came to be lodged on the same day. Father (PW-1) has stated to have received the call of his wife that somebody had teased his daughter. So he rushed to his house and having returned to home, he came to know that one of the boy out of the four, had touched the private part of his daughter. Notably the father in his report has mentioned that one of the boy had touched the private part of his daughter. Wife might have not disclosed the full incident on phone to her husband. Calling over on a phone by wife to husband and as the husband says that the wife was scared, so he immediately rushed to home. The conduct of the father in rushing home immediately having received call itself shows that something more has happened with his daughter than teasing. It was telephonic conversation, so it is but natural that wife instead giving details, on phone, simply said that, their daughter had been teased. Avoiding to give details on phone does not mean that daughter was teased only without touching.

14. Victim (PW-3) and her father have consistently deposed that the accused had touched her private part. It is no doubt that the

victim in her statement before the police has not stated that the accused touched her private part means touched her bums. Before the Court she had deposed that the accused had touched her bums. The term private part is to be interpreted into the context what is meant by it in our society. Google might not be interpreting bums as private part as submitted by the ld. Advocate for the accused, but it is not acceptable interpretation as far as we Indians are concerned. For such interpretation I have to take the recourse of the provisions under the POCSO Act, 2012. Sexual assault is defined under Section 7 of the POCSO Act which says that:

“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.”

15. The accused has not touched either vagina, breast or anus of the girl, but touched her bums. The touching, as stated under Section 7 of the POCSO Act, 2012, if, is to the other organs, those categorized, then it must be with the sexual intention. So obviously touching bum of the girl cannot be said to be without sexual intention. The victim in her language said to her parents and before the police that accused had touched her private part. At the relevant time, she was hardly 10 years old. So she in her language expressed her ordeal. So there cannot be any confusion that she was not only teased but had been touched inappropriately by the accused. Accused and other three were at laughing her, when she been to buy bread. Second time when she was going still they were laughing at her. Past conduct of accused

laughing at her and then touching her manifests that it was all with sexual intention, to grab the chance. Sexual intention is the state of mind, may not necessarily to be proved by direct evidence, such intention is to be inferred from the attending circumstances of the case.

16. According to victim, the said particular boy was wearing black T-shirt. Victim has pointed the particular boy to her father wearing black T-shirt. It is a matter of record that the police didn't recover the said black T-shirt from the accused to confirm his identity. To me, it is the set back in the investigation of the police and innocent victim is not supposed to pay its cost. Importantly the photo of the accused on the arrest panchanama was shown to the victim and she has deposed that the said boy was wearing the same T-shirt on the date of incident.

17. The Investigating Officer (PW-4) has deposed (para no.3) that photograph 'A' of accused on arrest panchanama (Exhibit-17) was snapped in the police station. The accused on the next day 18.09.2017 was in the same T-shirt and the same is also seen wearing by him in the photo on the arrest panchanama Exhibit-17. The identity of the accused as the same culprit has been established as on the next day 18.09.2017, when he was arrested, he was in the same T-shirt.

18. Accused came to be arrested on 18.09.2017 as deposed by Investigating Officer Mr. Rajesh Murudkar (PW-4). Having apprehended accused, he was brought to the police station. Investigating Officer then called the complainant and his friend to the police station to identify the accused. As deposed by Investigating Officer (PW-4), the complainant has identified the accused and again

the statement of the complainant came to be recorded. Complainant (PW-1) similarly deposed (para no.3) that his additional statement came to be recorded on the next day to identify the accused. Father (PW1), had seen accused, on the very day of incident that too within very few minutes, as his daughter had pointed the said boy. On very next day same was was produced, and PW2 had an opportunity to identify him. So not conducting identification parade is not fatal to the case of prosecution.

19. The victim (PW-3) no doubt has admitted that her papa apprehended the said boy and handed over him to the police. However, the testimony of her father (PW-1) and Investigating Officer (PW-4) shows that the accused was not brought in the police station on the date of incident 17.09.2017. While considering such a contradiction, other suggestion given to her in cross-examination (para no.8) are material. It is suggested to her that her leg got touched to the leg of the said boy when she was going to bring bread and that there was an argument between her and the said boy. Obviously, the victim has denied such a suggestion. But the fact remains that the presence of the said boy that is to say the accused, on the relevant time, on the specific spot is not disputed. As the accused was apprehended on the very next day and was shown to the victim's father, accused is also seen in the same black T-shirt which he was wearing on the date of incident, so to me, the identity of the accused being the same boy has been established beyond reasonable doubt.

20. In the statement of accused under Section 313 of the Cr.P.C., to question no.9, he replied that he told the police that he didn't wear black T-shirt on that day, but in reply to question no.10 when his

photo, wearing black T-shirt, on arrest panchanama (Exhibit-17) was shown to him, he says that it is his photo though he denied that he is not the same boy who teased the girl. Notably, it is not the case that none of the four boys teased the victim nor touched her inappropriately. One of the boy had certainly touched her inappropriately. The question is then who is the said boy. Had the said boy was other than the accused, accused must have come before the Court with certain name of his friend who was with him on the date of incident and responsible for touching inappropriately to victim.

21. Accused is not coming with the specific defence except the denial when prosecutrix has come with the case that the accused before the Court had touched her bum. She was hardly 10 years old at that time. The incident occurred on Sunday at around 6.45 p.m. Some shops might be working as suggested by the ld. Advocate for accused. As however incident is supposed to have taken place, hardly within 2 – 3 seconds by touching the prosecutrix inappropriately, there is no question of noticing such an act by the people around so as to be eye witness of the incident. Even otherwise, very few people like to involve in such incident even though incident has been seen by them. So merely for the reason that there are no eye witnesses to the incident and that the friend who was with the prosecutrix has not been examined, cannot be the reason to discard and disregard the testimony of the victim girl. Accused by touching or patting on her, bums, has committed the act with full knowledge and intention to outrage her modesty and to assault her sexually.

22. Long back in the case famously known as butt slapping case, the accused Kanwarpal Singh Gill the then Director General of

Police was convicted, for slapping on the posterior of the prosecutrix an I.A.S. Officer, by the trial court, to have committed the offence of outraging modesty under section 354 and 509 IPC and was also sentenced, for imprisonment and fine. Accused filed appeal before Sessions Court, Hon'ble High Court, and also before Supreme Court. Sessions Judge confirmed the conviction but modified the nature and quantum of sentence. Hon'ble High court also maintained conviction and enhanced fine. **Hon'ble Supreme Court confirmed the verdict in Appeal no.1032 of 1998 judgment dated 27.07.2005.** It has been laid by Hon'ble Supreme Court, that *by touching the body of the complainant with culpable intention accused committed the offence punishable under section 354 and 509 of IPC.* Same analogy is applicable in the case in hand. As the victim was child 10 years old on the date of incident, provision of POCSO Act attracts for the similar kind of his act touching the posterior of the victim. Thus the prosecution has succeeded in proving that the accused has committed the said act with sexual intention and outraged her modesty. Accordingly, I record my finding on all points in affirmative.

23. It would be useful to refer the provision of Section 42 of the POCSO Act, 2012 while sentencing the accused. It says that :-

"42. Alternative punishment

Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree".

24. Section 354 of IPC provides minimum sentence up to one year whereas, the provision of Section 354-A of the IPC provides the maximum sentence up to three years. Section 10 of the POCSO Act, 2012 provides minimum sentence up to five years and maximum up to seven years. So, Section 10 of the POCSO Act, 2012 provides punishment greater in degree than provided under Sections 354 and 354-A of the IPC. The same act of the accused attracts the provisions of Sections 354 and 354-A of the IPC and so also Section 10 of the POCSO Act, 2012. In view of provision of Section 10, it is required to sentence the accused, having the provision of punishment greater in degree. So, accused is to be punished and sentenced under Section 10 of the POCSO Act, 2012 only. He is not required to sentence under Sections 354 and 354-A of the IPC, though he has been convicted.

25. Now it is a time to hear the accused on the point of sentence for committing offence punishable under Section 10 of the POCSO Act, 2012.

26. On the point of sentence, accused submits that he did not commit any such crime and he was not present on the spot. He submits that he is the only son of his parents and only earning member of his family. He has two married sisters. Learned Advocate appearing for the accused submits that lenient view may be adopted.

27. Contrary, learned SPP has submitted that such instances of inappropriately touching the girls on a road are on high. So she submits to impose the maximum sentence, so it will give a message to the society.

28. It is the duty of the Court to struck the balance between mitigating and aggravating circumstances, while imposing sentence on accused. Section 10 of the POCSO provides minimum punishment up to five years and which may extend to seven years. Even if the lenient view is adopted by this Court, Court has to sentence him minimum for five years and fine. The accused is the young boy. There are chances that he may cure in his habits. So considering his age factor, no other criminal antecedents, the nature of the crime, the gravity of the offence and that he comes from a poor family, to me, it would be justified if he is imposed with minimum sentence of five years with fine as provided under Section 10 of the POCSO Act. So, in the light of the aforesaid discussion, I proceed with the following order:

ORDER

- (1) Accused Sahar Ali Shaikh is hereby **convicted** under Section 235(2) of the Code of Criminal Procedure for the offences punishable under **Sections 354 and 354-A of the Indian Penal Code, 1860** and under **Section 10 of the Protection of children from Sexual Offences Act, 2012**, in Crime No.180/2017 registered by N.M. Joshi Marg Police Station, Bombay.
- (2) As I am proceeding to sentence the accused under Section 10 of the Protection of children from Sexual Offences Act, 2012, no sentence is imposed upon him for offences punishable under Sections 354 and 354-A of the Indian Penal Code, in view of provision of Section 42 of the Protection of children from Sexual Offences Act, 2012.
- (3) Accused Sahar Ali Shaikh is sentenced to suffer **Rigorous Imprisonment for five (5) years** and to pay a **fine of Rs.10,000/-**

(Rupees Ten Thousand only) under Section 235(2) of the Code of Criminal Procedure for the offence punishable under **Section 10** of of the Protection of children from Sexual Offences Act, 2012. **In default of payment of fine, he is further sentenced to suffer Rigorous Imprisonment for two (2) months.**

- (4) Set off of the period of detention already undergone by accused be given as per Section 428 of the Code of Criminal Procedure.
- (5) The accused is on bail, hence, his bail bond stands cancelled. He be taken in judicial custody. .
- (6) Marked and unmarked articles, if any, being worthless, be destroyed according to law after appeal period is over.
- (7) Copy of this judgment be provided with free of cost to accused as per Section 363(1) of the Code of Criminal Procedure.
- (8) Pronounced in open court.
- (9) As the matter is disposed off by this judgment the record and proceedings be sent to Record Department.



(M.A. BARALIYA)
Designated Judge under
Protection of Children from
Sexual Offences Act, 2012,
for Gr. Bombay.

12.02.2021.

Dictated on : 10th, 11th & 12th February, 2021.
Transcribed on : 10th, 11th & 12th February, 2021.
Signed by HHJ on : 15.02.2021.

CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER”		
UPLOAD DATE	TIME	NAME OF STENOGRAPHER
15.02.2021	11.55 a.m.	Bharat Kashinath Gaikwad
Name of the Judge		HHJ Mrs. M.A. Baraliya (CR No.15)
Date of Pronouncement of Judgment/ Order.		12.02.2021
Judgment/order signed by P.O. on		15.02.2021
Judgment/order uploaded on		15.02.2021