
(2023) 03 CAL CK 0045

In the Calcutta High Court

Case No : Criminal Appeal (SB) No. 51 Of 2022, CRAN 2 Of 2022

Narattam Biswas @ Narottam Biswas.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 16-03-2023

Acts Referred:

Protection of Children from Sexual Offences Act, 2012 — Section 3, 5, 7, 8, 9, 9(m),
10, 11, 29, 30, 30(2)
Code Of Criminal Procedure, 1973 — Section 164, 313

Citation : (2023) 03 CAL CK 0045

Hon'ble Judges : Tirthankar Ghosh, J

Bench : Single Bench

Advocate : Md. Sabir Ahmed, Abdur Rakib, Biswajit Sarkar, Dhiman Banerjee,
Suman Biswas, Prasun Kumar Datta, Nirupam Dhali, Apalak Basu

Final Decision : Dismissed

Judgement

Tirthankar Ghosh, J

The present appeal has been preferred against the judgment and order of conviction and sentence dated 01.04.2022 and 02.04.2022 passed by the learned Additional Sessions Judge (POCSO Act), Islampur, Uttar Dinajpur in Sessions Trial No. 33/2019 arising out of POCSO Case No. 05 of 2019 wherein the appellant was convicted for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer Rigorous Imprisonment for six years and pay fine of Rs.1,00,000/- in default to suffer further Simple Imprisonment for 6 months.

The genesis of the case relates to a complaint lodged by one 'Y' with the Officer-in-charge, Chakulia Police Station, Uttar Dinajpur pursuant to which Chakulia PS Case No. 64/2019 dated 16.02.2019 was registered for investigation under Section 8/9(m) of the Protection of Children from Sexual Offences Act, 2012. The allegations made in the complaint were to the effect that the daughter of 'Y' namely, 'X' was aged about 9 years and was studying at Class III. She used to

take tuition from the appellant at his house. For a considerable period of time the appellant/accused started touching her daughter with bad intentions. Being afraid her daughter did not inform at home. On 09.01.2019 at around 7.30 in the morning her daughter went for tuition and accused in order to quench his sexual thirst touched the private parts and breast of her daughter and physically tortured her. At this her daughter felt severe pain and feeling ill she returned home weeping. When the complainant asked her, she informed regarding the aforesaid incident. It has been alleged that the accused had been oppressing her daughter since long for which she got mentally disturbed and as such there was delay in informing to the police station. She prayed for taking action against the accused.

The investigating agency on receipt of such complaint and after registration of the case proceeded with the investigation and after completion of the same filed charge-sheet being no. 107/2019 dated 04.04.2019 under Section 8/10 of the POCSO Act against the accused. The learned Court on receipt of charge-sheet was pleased to take cognizance of the offence on 04.04.2019 and after supply of the documents on which the prosecution proposed to rely was pleased to frame charge on 10.04.2019 under Section 8/9(m) of the POCSO Act. The said charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. It would be pertinent to state that subsequently on 11.03.2022 charge was altered under Section 10 of the POCSO Act and the contents of charge were again read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

Prosecution in order to prove its case relied upon 10 witnesses which included PW1, 'Y', complainant and mother of the victim girl 'X'; PW2, 'Z' mother of the other victim girl 'S'; PW3, victim girl 'X'; PW4, victim girl 'S'; PW5. Mahadeb Singh, scribe of the FIR; PW6, Dr. Sujit Kumar Saha; PW7, Dr. Deborup Mandal; PW8, Rita Biswas Sarkar, aunt-in-law of 'X'; PW9, Bristrit Subba, first investigating officer of the case and PW10, Parikshit Paul, second investigating officer of the case.

The documents which were relied upon by the prosecution included Ext.1, written complaint; Ext.2, Aadhar Card; Ext.3, seizure list; Ext.4, statement of PW2 under Section 164 of the Cr.P.C.; Ext.5, statement of PW3 under Section 164 of the Cr.P.C.; Ext.6, Medical Report; Ext.7, statement under Section 164 of Cr.P.C. of PW4; Ext.8, Medical Certificate; Ext.9, Statement under Section 164 of the Cr.P.C. of PW8; Ext.10, FIR; Ext. 11, rough sketch map with index; Ext. 12, seizure list.

The defence also examined one witness namely Jhuma Tarafdar Disha as the only witness, being DW1.

PW1, 'Y' is the complainant and the mother of the victim girl 'X'. She deposed before the Court that she lodged the case against accused/appellant Narottam Biswas and identified him in Court. She stated that an incident took place with

her minor daughter, namely, 'X'. Her daughter was born on 12.02.2010 and she is a student of Class III. She deposed that her daughter took tuition from the appellant in his house and on 09.01.2019 her daughter returned home after her tuition when she was crying, on being asked she expressed her inability to bear the pain which she had been feeling on her breast as it was pressed by the accused. The victim then reported that for a long period of time the accused was in the habit of inflicting such evil act upon her which she could not disclose. The witness thereafter enquired as to what prevented her from narrating the incident earlier when the victim complained that the accused used to threaten her and so she did not disclose anything to her. Witness further deposed that at the time of teaching, accused used to teach by sitting together with her, covering with a cloth and used to behave badly with her. The witness asked the wife of the accused and his brother as to what happened actually but there was no response by his wife and his brother for which she reported the incident to gram pradhan, subsequently there was a sitting in between her family along with gram pradhan but it yielded no fruitful result, as such she was forced to file the complaint with the police station. She stated that the complaint was drafted by Mahadeb Singh as per her instructions and she signed the same after knowing its contents. The signature of the witness was marked as Ext.1. The witness also deposed that the accused was arrested after the complaint was lodged and one 'Z' being mother of 'S' told her that the accused was rightly prosecuted as he did the same thing with her daughter 'S'. 'Z' also subsequently informed the police about the acts of the accused upon her daughter. The original birth certificate of her daughter along with Aadhar card was produced. The Aadhar card was marked as Ext.2. Birth certificate issued by the panchayat pradhan was marked as "x for identification".

PW2, 'Z' is the mother of the victim girl 'S'. She deposed that 'S' and 'X' took tuition from the appellant in his house. Her daughter usually expressed her unwillingness to go for tuition in the house of appellant and in spite of repeatedly asking her she declined to give any reason. When the incident between the accused/appellant and the victim 'X' was disclosed/exposed, her daughter told her that she had also suffered similar treatment from the accused/appellant. She narrated that her daughter told her she had been to the house of accused to take tuition and on each occasion the accused used to teach her by sitting side by side, covering her with a cloth and thereafter he touched her breast and also threatened her for not disclosing the incident to her parents, as there was CCTV camera inside his room which records everything. Her daughter felt pain on her breast but on being asked she refused to disclose anything, particularly when she observed the child's reaction at the time of bathing. After she got information, she had been to the police who asked her to come to Court where her statement was recorded. The said statement which was recorded by the learned Magistrate was identified by the witness which was marked as Ext.4. The witness also identified the accused in Court.

PW3, is the victim 'X', she deposed that the case was filed by her mother against

the accused. She identified the accused in Court. She narrated that she used to go for tuition everyday in the house of the accused and at that time he used to cover her with a cloth and thereafter he used to touch her breast and leg. One day she could not tolerate it and told him that she would disclose the same to her mother when he replied that if the same was disclosed to her mother he would show the incident in camera and would assault her whenever she came for tuition. She deposed that she along with 'S' used to take tuition in a batch. She narrated the incident to her mother when she was taken to the police and also produced before the doctor for medical examination. She also stated that she was taken to Court and her statement was recorded by a lady Judge who reduced the same into writing. She identified her signature and the statement which was marked as Ext.5. She also identified her signature in the medical report which was marked as Ext.6.

PW4, is the other victim girl 'S' who deposed that the case was filed by the mother of 'X' against the accused. She identified the accused in Court. She stated that she and 'X' used to go for tuition in the house of accused Narottam Biswas, at that time he used to sit in between them and cover her with a cloth and thereafter he used to touch her breast and leg which she could not bear. Accused also had been to the house of her uncle where she had gone for tuition with her elder brother when accused Narottam Biswas asked her elder brother to leave the room and thereafter embraced her with great force. At that time she along with 'X' told him that they would disclose the fact to their mother(s) when he told them that he would capture their pictures and also beat them. One day accused Narottam Biswas was arrested and she disclosed the incident to her mother. She also stated before the police and gave her statement before a female Judge. She identified her signature in the statement which was recorded and reduced into writing, the same was marked as Ext.7 series.

PW5, Mahadeb Singh is the scribe of the complaint/FIR. He identified the complaint which contained his signatures, the same were marked as Ext.1/1 and 1/2 respectively.

PW6 is Dr. Sujit Kumar Saha. He deposed that on 28.03.2019 accused Narottam Biswas was brought by police authorities for capability test and he examined him. On test he found there was nothing to suggest that the accused is not capable of performing sexual act. He identified the report which was written and signed by him, the same was marked as Ext.8.

PW7 is Dr. Deborup Mondal. He deposed that on 17.02.2019 the victim girl 'X' aged about 9 years was brought before him by a lady constable for her medical test. He conducted her medical test and prepared a report. The said report was prepared and signed by him and marked as Ext.6/1.

PW8 is Rita Biswas Sarkar who deposed that 'Y' lodged a complaint against accused Narottam Biswas. 'X' her niece was aged about 9 years who used to take tuition from Narottam Biswas. Narottam Biswas used to inflict physical torture

upon 'X' and on 09.01.2019 when she returned home from Raiganj at about 7.00 pm she found that mother of 'X' was crying. Thereafter on being asked mother of 'X' told her that Narottam Biswas touched the breast of 'X'. She further deposed that she stated the facts before the police as well as before the Court. Her statement was reduced in writing by the learned Magistrate. She identified her signature and the statement, which was marked as Ext.9 series.

PW9 is Bristrit Subba, on 09.01.2019 she was posted at Chakulia PS as Sub-Inspector. The then OC, Chakulia PS was the Investigating Officer of the case. The formal FIR was filled up by the then OC, Chakulia PS and he signed the same. She was acquainted with the signature of the OC, the formal FIR as such was marked as Ext.10. She deposed that she examined the victim girl as well as the de facto complainant and then she sent the victim girl for her medical examination. She visited place of occurrence, prepared rough sketch map with index which was marked as Ext.11. She arrested the accused and also identified the accused in Court. The witness deposed that she examined the available witnesses, seized the original birth certificate along with Aadhar Card of the victim by preparing seizure list which was subsequently returned on zimmanama to her mother. The signature in the seizure list which was prepared by her was identified and marked as Ext.3/1. She sent four witnesses namely, 'X', 'S', 'Z' and Rita Biswas Sarkar for recording their statement under Section 164 of Cr.P.C., subsequently she collected the copy of the statements. She also prepared the seizure list on 18.02.2019 which was made at Islampur Hospital, she identified the same which was marked as Ext.12. As she became sick she handed over the case to the Officer-in-charge, Chakulia Police Station.

PW10, Parikshit Paul, deposed that on 27.03.2019 he was posted at Chakulia PS as Sub-Inspector and the then Officer-in-charge, Chakulia PS endorsed the case to him for further investigation. He deposed that he only collected the capability test report relating to the accused and submitted charge-sheet within statutory period before the Court.

After the prosecution evidence was completed the trial Court proceeded for examination of the accused under Section 313 of Cr.P.C. and the appellant was confronted with 14 questions. After completion of examination under Section 313 of Cr.P.C. the defence was called upon to produce its witness. Accordingly one Jhuma Tarafdar Disha was produced by the defence before the Court as DW1. She deposed that she is a student of Class VI. Her father is engaged in business of fruits and they are two sisters and one brother. She studied at Ramkrishnapur Promod Dasgupta Memorial High School. Similar questions were asked by the learned Court to test the voluntariness of the said witness, thereafter the examination-in-chief was conducted on behalf of the accused when the witness stated that she was not taking any tuition from any tutor presently and earlier she used to take tuition from Narottam Biswas and she had been to the coaching class lastly in the year 2018. She deposed that Narottam Biswas at the time of tuition used to teach in a batch of 10 to 12 students. On being asked she stated

that she knew 'X' and 'S' as they were her friends and they used to take tuition with her from Narottam Biswas. On being asked regarding their tuition in the year 2019 she deposed that in 2019 she along with 'X' and 'S' went to the house of Narottam Biswas only one day and thereafter she heard that 'X's mother lodged a complaint against the teacher. She also deposed that Narottam Biswas was an ill tempered person and whenever any student could not prepare studies he used to beat them with stick. On being asked regarding the members who were present in the house of the Narottam Biswas she deposed that in the said house apart from Narottam Biswas, his parents, wife and his son and his brother along with his wife used to reside. She also answered to a specific question that all the family members were present in the house when they took tuition. She identified the accused in Court and further stated that the teacher did not teach in his own room on any day. In cross-examination, however, she stated that Narottam Biswas is the son of her aunt Nirmala Biswas.

Md. Sabir Ahmed, learned Advocate appearing for the appellant argued that the prosecution case is full of lacuna and inherently improbable which according to him would be dangerous to rely upon to arrive at a finding of guilt. Learned Advocate pointed out that the fact of the case reflected that PW3, victim divulged the incident to her mother, PW1 on 09.01.2019. The FIR was lodged on 16.02.2019 and there was no explanation regarding the delay. The delay was covered up in her deposition when for the first time in Court she narrated the fact of Salish. The prosecution witness no.2 'Z' according to him cannot be relied upon, as she did not lodge any complaint and only joined the prosecution case after the same was initiated at the instance of PW1. The said witness according to the learned Advocate cannot be relied upon as she has included in her version new facts which were not even available in the statement under Section 164 of the Code of Criminal Procedure. PW3 the victim girl in her cross-examination deposed that she had been to the house of the appellant along with PW4 'S' for tuition but the said fact was neither divulged in the FIR nor in the statement under Section 164 of the Code of Criminal Procedure. It was emphasized that the witness was not aware regarding the date and time of the incident which raises a doubt in the prosecution case. The fact of 'covering with cloth' was not stated by witness in her statement under Section 164 of Cr.P.C. and was for the first time introduced in Court at the time of her deposition in Court. Learned Advocate by referring to PW4 'S', submitted that the story of 'covering with cloth' was introduced by PW4, however, this witness stated that she divulged such incident to her mother on the date of arrest of the appellant, which is contradictory to what her mother i.e. PW2 deposed in Court. Learned Advocate for the appellant submitted that the first four witnesses examined by the prosecution are the main witness and they were bound to narrate consistent fact. The said four witnesses have improved the case to such an extent that version of one witness is differing from that of the other which makes the prosecution case inconsistent. It was argued on behalf of the appellant that the delay in lodging the complaint without any proper explanation, the exaggerated narration of facts by way of introducing

the story of 'covering with cloth' and the failure of the prosecution to establish the date, time and place of occurrence creates a lacuna which cannot be covered with the aid of presumption under Section 29 and Section 30 of the POCSO Act. In order to fortify his argument learned Advocate relied upon Attorney General for India – Vs. – Satish & Anr. reported in (2022) 5 SCC 545 and an unreported judgment being CRA 248 of 2019, Ganesh Orang –Vs. – State of West Bengal & Anr.

Mr. Apalak Basu, learned Advocate appearing for the complainant resisted the contentions advanced on behalf of the appellant and submitted that the issue relating to delay of lodging the First Information Report was dealt in the FIR itself where the complainant stated "because of mental disturbance she could not lodge the complaint" and an explanation was also provided by PW1 regarding a Salish which yielded no result. In cross-examination PW1 stated the date on which the said Salish took place, as such the learned Advocate submitted that having considered the background and the society to which the victim and her family belonged, there would necessarily be a reluctance to divulge such incident of sexual assault in the society. It was submitted that the delay has been properly explained and the appellant cannot claim benefit for the delay which has been because of reasons which were properly explained. Opposing the issue canvassed by the appellant in respect of the date, time and place of occurrence learned Advocate pointed out to the deposition of first four witnesses and submitted that there was nothing to disbelieve the same with regard to the place and time of occurrence. The appellant was trying to take advantage of minor inconsistencies and the evidence of the complainant and the victim would go to show that place, date and time of occurrence has been clearly stated. Additionally it has been submitted by the learned Advocate that if the version of the minor victims i.e. PW3 and PW4 are taken together the same on the face of it is unimpeachable version and they could not be shaken in cross-examination also. Their versions were corroborated by PW1, PW2 and further by PW8. The evidence of medical officer would also support the version of the complainant. Except for a suggestion to the prosecution witness no.1 that the instant case was initiated since tuition fees could not be paid there is nothing on record to disbelieve the prosecution case. The defence did not make out any case except for a mere denial. Learned Advocate also relied upon Attorney General for India – Vs. – Satish & Anr. reported in (2022) 5 SCC 545 and Pappu –Vs. – State of Uttar Pradesh reported in (2022) 10 SCC 321 for substantiating the case of the prosecution.

Mr. Prasun Kumar Datta, learned Advocate appearing for the State submitted that the prosecution has proved the case with the aid of the available witnesses and the best evidences being laid by the prosecution, there is no scope for interference with the judgment and order of conviction passed by the learned trial Court.

Before dealing with the deposition and submissions the statements of the

witnesses before the learned Magistrate recorded under Section 164 of Cr.P.C. are required to be considered, in order to assess their corroborative value.

PW3 'X', the victim girl in her statement under Section 164 of the Code of Criminal Procedure stated before the Judicial Magistrate that she went for tuition to Narottam Biswas, who at the time of teaching used to touch her breast and legs. He also threatened that if she reported the incident to her family members she would be able to see the same through the camera and thereafter assault her.

PW4 'S', the other victim girl in her statement under Section 164 of the Code of Criminal Procedure stated before the Judicial Magistrate that she along with 'X' used to take tuition from Narottam Biswas. Narottam Biswas used to sit in the middle of both of them and covered them with a cloth. Thereafter, he used to press the breast of both of them. One day she indicated to 'X' that they should report to their respective mothers when the appellant/Narottam Biswas came from behind and stated that if they reported to their mothers he would take photographs in the computer and would be able to know what has been divulged. Being threatened she could not divulge the same to her mother. One day at the time of Durga Puja she went to her aunt's house for studying and her elder brother went outside, at that time also Narottam Biswas touched her breast.

PW2 'Z' mother of 'S' in her statement under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate stated that her daughter 'S' used to take tuition from Narottam Biswas but she was reluctant to go to him and when she asked her, she did not assign any reason. At the time of bathing her daughter complained pain on her chest and also demanded some medicines. After getting the news of 'X' her daughter got confidence of complaining. She also stated that during Durga Puja when the appellant taught her daughter at her relation's house, he used to send their son at a different place and on some pretext press the breast of her daughter.

PW8, Rita Biswas Sarkar, in her statement under Section 164 of the Code of Criminal Procedure stated that under her guidance 'X' was brought up and it was she who arranged for private tuition under Narottam Biswas in the month of January. One day when she had been to Raiganj and returned at about 07.00 pm she found that 'Y' mother of 'X' was weeping and on query she reported that Narottam Biswas pressed the breast of her daughter and as such she was unwilling to go anywhere. She reported the incident to the members of the gram panchayat who deferred on different pretext, however, she came to know that another girl namely, 'S' also suffered and the issue was publicised, thereafter, Salish was held.

The learned Advocates 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) and submitted that sexual intent is question of fact. Paragraphs 31, 35 to 39, 45 and 46 of the said judgment are relevant for the present case, which is set out as follows:

"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."

On behalf of the appellant a tabular chart was formulated for a comparative appreciation of the 'Manner of Commission of offence in FIR', 'Statement under Section 164 of Cr.P.C.' 'in the deposition of the witnesses in Court' and 'Date, time and place of occurrence'. The said chart is set out as follows:

Manner of Commission
of Offence in
FIR

Statement U/S 164 of the Code

In Deposition

Date, Time and place of
occurrence

PW1

Appellant touched the private parts of PW3.

Not recorded

Appellant touched the private part of PW3 by covering
with cloth.

On 09.01.19,

PW1 informed him after returning from the Tuition.

PW3

Appellant touched the private parts.

Appellant touched the private part of PW3 by covering with cloth.

She failed to specify the date and time of occurrence.

PW4

Appellant touched the private part of PW3 by covering with cloth

Appellant touched the private part of PW3 by covering
with cloth

She failed to specify the date and time of occurrence.

The evidence of the victim 'X' whose mother lodged the complaint was 9 years old at the relevant time when the complaint was lodged as such minor inconsistencies in the background of whole of the evidence of the case as appearing should be taken into account. Throughout the evidence there is nothing on record to establish that there is a case of false implication. A plea has been taken by the accused for non-payment of tuition fees but such suggestion was not consistently advanced to each of the prosecution witnesses whose evidence has an impact on the prosecution case. The defence witness who has been tendered is not only relation of the accused, but her name to the extent that she also studied in the same batch with the victim girls were never introduced at least by way of suggestion to any of the prosecution witnesses including the minor victims PW3 and PW4. As such the defence story as introduced was for the first time created after the examination of the accused under Section 313 of Cr.P.C. and had never been confronted to any of the

prosecution witnesses. In Ganesh Orang's case (supra) what weighed with the Division Bench was unnatural behaviour of victim girl who visited the home of the accused even after she suffered forcible rape, there were no documents relating to the age of the victim girl to bring the charges within the ambit of the POCSO Act and the contradictory version of the prosecution witnesses including the delayed FIR. The factual circumstances in the present case are completely different and the interpretations in Attorney General for India –Vs. – Satish (supra) do not in any manner help the appellant but favours the prosecution.

In view of the aforesaid findings no interference is called for in the judgment and order of conviction and sentence dated 01.04.2022 and 02.04.2022 passed by the learned Additional Sessions Judge (POCSO Act), Islampur, Uttar Dinajpur in Sessions Trial No. 33/2019 arising out of POCSO Case No. 05 of 2019. The same is hereby affirmed.

Accordingly, CRA (SB) 51 of 2022 is dismissed.

Pending applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment for further reference, if required.

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.