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**(2016) 11 MP CK 0016**  
**In the Madhya Pradesh High Court**  
**Case No : Criminal Appeal No. 490 of 2014**

Vasudev @ Kalu

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision : 07-11-2016**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 354, Section 354A  
Protection of Children from Sexual Offences Act, 2012 — Section 7, Section 8

**Citation : (2017) 1 JabLJ 304**

**Hon'ble Judges : Shri Rajendra Mahajan, J.**

**Bench : Single Bench**

**Advocate : Shri K.S. Rajput, Advocate, for the Appellant; Shri R.N. Yadav, learned Panel Lawyer, for the Respondent/State**

**Final Decision : Partly Allowed**

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## Judgement

Shri Rajendra Mahajan, J.—Feeling aggrieved by the impugned judgment of conviction and order of sentence dated 29.01.2014 passed by the Sessions Judge Khandwa and Special Judge under the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act") in Special Case No.62/2013, convicting the appellant under Sections 354-A of the IPC and 7 r.w. 8 of the POCSO Act and thereby sentencing him to suffer on first count RI for two years with a fine of Rs. 500/- and second count RI for three years with a fine of Rs. 500/- with default stipulations and directing that all the punishments of imprisonment shall run concurrently, the appellant has preferred this appeal under Section 374(2) of the Cr.P.C.

2. The prosecution case in nut shell is as under:-

2.1 On 02.10.2013 at about 10:20 a.m. the victim-girl (PW-2) accompanied with her mother Shalini (PW-3) lodged an oral FIR at Police Station Chhaigaon Makhan of Khandwa district stating that she is a student of 10th class and commutes from her native village Chhaigaon Makhan to Khandwa town to attend her regular and computer classes. On the self-same-day at about 7:30 a.m., she

was waiting for a public transport at the Bus Stand Chhaigaon Makhan to go to Khandwa. At that time, appellant-accused Vasudev @ Kalu, who is of her caste and who and she reside in the same locality in Chhaigaon Makhan, came close to her and told her that he loved her and made some unpleasant remarks. Thereafter, he caught hold of her hands with sexual intent. She got her hands freed and went running to her house. There, she reported the matter to her mother Shalini and grand-mother Sarita (PW-5), neighbour Suresh (not-examined) and others (not named in the FIR). She has also stated in the FIR that on earlier occasions the appellant made sexual advances to her and put up her posters.

2.2 Upon the oral report of the victim-girl, Assistant Sub-Inspector Shriram Patidar (PW-6) scribed the FIR Ex.P-4 and registered a criminal case against the appellant at Crime No.232/2013 under Sections 354-A IPC and 7 r.w. 8 POCSO Act. He and Probationer Sub-Inspector Archana Singh Chouhan (PW-4) investigated the case. He prepared the spot map Ex.P-5 at the instance of the victim-girl, and recorded case diary statements of the victim-girl, her mother, grand-mother and neighbour Suresh. Archana Singh Chouhan seized the progress card Ex.P-3 of the 8th class of the victim-girl from her mother vide seizure memo Ex.P-6 for the purpose of her date of birth and also arrested the appellant vide arrest memo Ex.P-7.

2.3 Upon completion of the investigation, a charge-sheet was laid in the court of the Sessions Judge-cum-Special Judge Khandwa under the POCSO Act for the prosecution of the appellant under Sections 354-A IPC and 7 r.w. 8 POCSO Act.

3. The learned Sessions Judge-cum-Special Judge framed the charges against the appellant under Sections 354-A IPC and 7 r.w. 8 POCSO Act. The appellant abjured his guilt and claimed to be tried. In the examination under Section 313 of the Cr.P.C., the appellant has denied the evidence and circumstances adduced by the prosecution against him. He has taken the defence of false implication. However, he has not adduced any evidence in support of his claim either documentary or oral.

4. Upon a critical appraisal of the entire evidence on record, the learned trial Judge for the reasons assigned in the impugned judgment has concluded that at the time of alleged incident the victim-girl was minor and the offences with which the appellant is charged are proved beyond a reasonable doubt. He has, accordingly, convicted and sentenced the appellant as indicated in para-1 of this judgment.

5. The learned counsel for the appellant has submitted that the victim-girl in the FIR Ex.P-4 and her evidence has stated that the appellant had stuck 4 to 5 posters in his handwriting at the Bus Stand Chhaigaon Makhan in which he has stated that "He loves her very much and wants to marry her". However, the police had not seized any poster from the said place as stated by the victim-girl in the course of investigation. After referring to the proceedings of the trial court

of various dates, he submitted that the appellant puts his thumb impression which shows that he is totally illiterate person. As such, the victim-girl has given false evidence on the point that the appellant had pasted posters of hers in his hand-writing at the Bus Stand Chhaigaon Makhan. He submitted that the victim-girl has stated in her evidence and the FIR that on earlier occasions the appellant had also passed on sexual remarks upon her. However, she could not explain away why she had not lodged the report against the appellant earlier. He submitted that if the statement of the victim-girl is accepted on the face value, then at the most it is a case of simple outraging of modesty of the victim-girl by the appellant which is punishable under Section 354 IPC. Therefore, the learned trial Judge has erred in convicting and sentencing the appellant under Sections 354-A IPC and 7 r.w. 8 POCSO Act. He submitted that the learned trial Judge has given maximum punishment to the appellant under Section 7 r.w. 8 POCSO Act. Thus, the learned trial Judge has committed a legal error in sentencing the appellant under Section 354-A IPC in view of the provisions of Section 42 POCSO Act. He submitted that in support of the case the prosecution has not examined any independent witness as the remaining two witnesses of the alleged incident are none other than the mother and the grand-mother of the victim-girl, therefore, it is but natural that they would support the statement of the victim-girl. Thus, the learned trial Judge has erred in placing explicit reliance upon the statements of the victim-girl, her mother and grand-mother. He submitted that as per the records the age of the appellant at the time of alleged offence was 20 years, that he had no previous conviction and that the maximum punishment under Section 354-A IPC is RI for three years or fine or both and in the Section 7 r.w. 8 POCSO Act the maximum punishment is RI for five years and shall also be liable to fine. Therefore, the appellant fulfils the requirements of Section 361 Cr.P.C. Under the circumstances, the learned trial Judge ought to have granted the benefit of probation in view of a decision reported in the case of Ratan Lal v. The State of Punjab (AIR 1965 SC 444). Moreover, the learned trial Judge has not given any reason in the impugned judgment for not granting him such benefit, whereas mentioning of reasons for not granting the benefit of probation is mandatory in view of a decision rendered by this court in the case of Balbeer Singh v. State of M.P. (2012 (2) MPHT 50). He alternatively submitted that the appellant remained under trial prisoner in the case for 14 days and thereafter he has been on bail till today, that he had deposited the fine amount as imposed, that he had no previous conviction and that at the time of alleged incident he was merely 20 years old illiterate person. Under the circumstances, if this court affirms the conviction and sentence as recorded by the learned trial Judge, the jail sentence of the appellant be reduced to the period already he had undergone and if necessary the fine amount may be enhanced reasonably.

6. In response, while making reference to the incriminating pieces of evidence, the learned Panel Lawyer has contended that the conviction and sentence of the appellant are fully justified.

7. I have considered the rival submissions made across the Bar by the learned

counsel for the parties and perused the entire material on record.

8. The victim-girl has deposed that her date of birth is 23.03.1997. Her mother Shalini (PW-3) has stated that the police seized her (the victim-girl) progress report Ex.P-3 of the 8th class from her possession in which her date of birth is written as 23.03.1997. Sunil Malviya (PW-1) is the Head Master of the Government Neelkantheshwar Middle School, Khandwa of which the victim-girl had been the student up to 8th standard. On the basis of the school records, he has deposed that the date of birth of the victim-girl is recorded as 23.03.1997. He has also proved that the progress report Ex.P-3 issued by the school bears his signature. From the perusal of the cross-examinations of the aforesaid prosecution witnesses, I find that the defence has not challenged the date of birth of the victim-girl even remotely. The date of incident as per the FIR Ex.P-4 is 02.10.2013. Therefore, on the date of the incident the age of the victim-girl was 16 years 6 months and 9 days. In view of the above, the learned trial Judge has rightly held that the victim-girl was minor on the date of alleged incident.

9. The victim-girl has testified that on the date of incident at about 7:30 a.m. she was waiting for a passenger-bus at the Bus Stand Chhaigaon Makhan for proceeding to Khandwa to attend the computer classes. At that time, the appellant seized of her hands and told her that he loved her and wanted to marry her, otherwise, he could do anything. Thereupon she got her hands extricated from him and went running to her house, where she reported the matter to her mother Shalini (PW-3) and grand-mother Sarita (PW-5). She and her mother came back to the bus stand in search of the appellant. But, he had fled away therefrom. She has also deposed that the appellant had also glued 4 to 5 posters there in his hand-writing stating that he loved her and wanted to marry her. She has also deposed that the appellant had been harassing her for 15 days before the incident. During that period, whenever she came out of her house, the appellant used to follow her and make comments upon her. She has stated in para-11 of her cross-examination that she had removed all the posters put up by the appellant at the Bus Stand Chhaigaon Makhan, and the size of a poster was near about a page of a copy. She had given two posters to the police at the time of lodging the FIR.

10. Upon a perusal of the entire record of the trial court, it is evident that none of the I.Os. had seized the posters, and the court proceedings of the trial of various dates of hearing and bail papers of the appellant show that the appellant puts his thumb impression. This means that the appellant is a totally illiterate person. The victim-girl has stated in her evidence that soon after reporting the incident to her mother and grand-mother at her residence. Her mother Shalini went with her to the Bus Stand Chhaigaon Makhan in search of the appellant. Upon a perusal of the deposition of Shalini, I find that she has not stated that she saw the posters there. Thus, the statement of the victim-girl on the point of putting up posters by the appellant is not reliable.

11. The victim-girl has stated that the appellant had been following and stalking

her for about 15 days before the incident. In view of the above, she ought to have lodged the police report, but she had not lodged the same and has not given any reason in her statement in this regard. In para-10 of her cross, she has admitted that first time she narrated her mother and grandmother that she was being eve-teased by the appellant on the date of incident itself. Moreover, her aforesaid statement has not been corroborated by the evidence of her mother and grand-mother. Thus, the statement of the victim-girl on the aforesaid point is not reliable.

12. From the perusal of the depositions of Shalini (PW-3) and grand-mother Sarita (PW-5), I find that they have corroborated the statement of the victim-girl to the extent that on the date of incident she narrated them that the appellant had seized her by her hands and told her that he loved her and wanted to marry her. Therefore, I conclude that the victim-girl's evidence is reliable only to the extent that on the date of incident the appellant had caught hold of her hands, saying her that he loves and wants to marry her.

13. Now, the point for consideration before me is whether the aforesaid act of the appellant falls under the ambit of sexual harassment as defined in Section 354-A(1) IPC. The Section reads as under:-

"A man committing any of the following acts-

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) a demand or request for sexual favours; or
- (iii) showing pornography against the will of a woman; or
- (iv) making sexually coloured remarks;

Shall be guilty of the offence of sexual harassment."

Upon the proved act against the appellant vis-a-vis the provisions of the aforesaid Section, I am of the confirmed view that the act of the appellant does not amount to sexual harassment to the victim-girl. Thus, the learned trial Judge has grossly erred in law convicting the appellant under Section 354-A IPC.

14. Section 7 POCSO Act which is made punishable under Section 8 of it is given below:-

"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."

It is already held by me that the statement of the victim-girl is reliable only to the extent that on the date of occurrence the appellant had caught hold of her hands, saying that he loves her and wants to marry her. Upon the reading of provisions of Section 7 POCSO Act meticulously and carefully, in my opinion mere

taking hold of hands of the victim-girl by the appellant with the aforesaid expressions does not amount to sexual assault. Therefore, the learned trial Judge has grossly committed an error in law convicting the appellant under Section 7 r.w. 8 POCSO Act.

15. Section 42 POCSO Act reads as under:-

"Where an act or omission constitutes an offence punishable under this Act and also under Sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-C, 376-D, 376-E or Section 509 of the Indian Penal code, 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 under this Act or under the Indian Penal code as provides for punishment which is greater in degree."

Upon the plain reading of the aforesaid Section, it is crystal clear that if a court finds an accused guilty of any offence of the IPC mentioned in the above Section and any offence of the POCSO Act, then the court shall punish the accused for greater degree of punishment. But, the learned trial Judge has punished the appellant under both the Sections 354-A IPC and 7 r.w. 8 POCSO Act overlooking the provisions of aforesaid Section. Thus, the learned trial Judge has also committed a legal error in sentencing the appellant in both the Sections.

16. As already stated that the prosecution has proved its case to the extent that on the date of occurrence the appellant caught hold of hands of the victim-girl in public place uttering the expressions of love and marrying her. Therefore, in my opinion it is a case of simple outraging of modesty of the victim-girl by the appellant. Hence, the offence committed by the appellant is punishable under Section 354 IPC.

17. In view of the aforesaid discussion, it is held that the learned trial Judge is totally wrong both in law and in fact in convicting and sentencing the appellant in Sections 354-A IPC and 7 r.w. 8 POCSO Act in place of convicting and sentencing him under Section 354 IPC. Therefore, the appellant's conviction is altered to Section 354 IPC in place of the aforesaid Sections.

18. As per the record of the trial court, the age of the appellant at the time of incident was 20 years. There is no evidence on record that the appellant is previously convicted in a criminal case. Under the circumstances, in view of the law laid down in Ratan Lal's case (supra), I am of the confirmed opinion that it is a fit case to grant benefit of probation to the appellant. Accordingly, convicting the appellant under Section 354 IPC, it is ordered that the appellant shall be released on probation of good conduct under Section 4 of the Probation of Offenders Act, 1958 instead of further sentencing him in the said Section upon his entering into a personal bond in the sum of Rs. 25,000/- (rupees twenty five thousand only) with one solvent surety of the same amount to the satisfaction of the trial court to appear and receive sentence when called upon during the period of two years starting from the date of execution of the bonds. The appellant shall

execute aforesaid bonds before the trial court within three months after the receipt of the record concerned with a copy of this judgment by the trial court, failing which the learned Presiding Judge of the trial court shall send him to jail to suffer RI for one year deducting the period of detention of 14 days when he remained in judicial custody in the case. The bail-bonds shall stand cancelled. After executing the bonds by the appellant, the fine amount be refunded to him if paid in view of the law laid down by this court in Saligram v. State of M.P. (1978 MPWN (1) 436).

19. Accordingly, this appeal is partly allowed in the aforesaid terms and conditions.