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A Tale of Two Judgments

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ABSTRACT

The two highly controversial judgements made by the Nagpur bench of the Bombay High Court, in the case of Satish vs State of Maharashtra and Libnus vs State of Maharashtra, which saw the HC judge disregarding Section 11 of the POCSO Act, which prohibits sexual assault involving any gesture intended to be sexual. Even the speaking of words and making of sounds with the intent of being seen or heard is concealed. These judgements rightly saw a huge amount of criticism all over the nation, and the Supreme Court should be applauded for its decision to stay the judgment.

Parliament passed the Protection of Children from Sexual Offences (POCSO) Act in 2012 to shield children and young people (under the age of 18) from sexual assault. It is intended to be a comprehensive legislation that protects society's most vulnerable members from sexual abuse, sexual harassment, and pornography while also safeguarding children at every level of the judicial process by providing child-friendly processes for monitoring, recording evidence, prosecution, and speedy trial by specified special courts. It imposes harsh penalties for 'sexual abuse,' 'aggravated assault,' and 'assault by a person in a position of confidence. 'People who traffic children for sexual purposes are also prosecuted. Both state departments, including the courts, are involved in seeking justice for traumatized children.

It is a law that ensures social justice and individual dignity, as stated in the Constitution's Preamble, aims to protect a child's life (as mandated by Article 21), and carries out the mandates of Article 39(e) — ensuring that children's "tender age" is not abused — and Article 39(f), which requires that children be given opportunities and facilities to develop in a healthy manner. This legislation is a national mission to ensure that children grow up in a safe environment free of suffering and exploitation.

In the cases of Satish vs State of Maharashtra and Libnus vs State of Maharashtra, a judge of the Bombay High Court recently made two judgments, setting aside the accused's convictions under Section 8 of the POCSO Act in the former and Sections 8, 10, and 12 in the latter. There were also charges brought under Section 354 of the Indian Penal Code. The first case involved

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a 12-year-old boy who was tricked into the accused's home, and the second case involved a five-year-old girl who was raped in her own home when her mother was away. The special court found both defendants guilty under the POCSO Act and the IPC. The High Court judge upheld convictions under the IPC, but acquitted both accused under the Act.

The factual finding that the child was lured into the accused's home, her breast was rubbed, and an attempt to undress her with sexual intent was upheld by the High Court in the case of Satish. Despite this, the perpetrator was acquitted simply because he had not removed the top or placed his hands inside it. The judge acquitted the convict under the POCSO Act, but upheld the conviction under Section 354 of the IPC, due to the lack of this "relevant information." There was no 'direct physical touch, i.e., skin-to-skin,' according to the prosecutor.

The judge in the Libnus case applied this argument when she said that actions such as "holding the prosecutrix's hands" or "opening the zip of one's trousers" were not sexual harassment, and the accused was released on the basis of the sentence served (five months). The fact that the genitals were visible went unnoticed. The acquittal in Satish's case was quickly stayed by the Supreme Court after the Attorney General raised the issue.

Pushpa V. Ganediwala, J., modified the appellant's conviction for sexually abusing a minor child by partially quashing his convictions for sexual abuse and aggravated sexual assault, both of which are punishable under Sections 8 and 10 of the POCSO Act.

The appellant/accused was found guilty of the crime under Sections 354-A(1)(i) and 448 of the Penal Code, 1860, as well as Sections 8, 10, and 12 read with 9(m) and 11(i) of the Protection of Children from Sexual Offenses Act, 2012.

Sexual harassment is described in Section 7 of the POCSO Act. It includes, among other things, "touching the child's breast" and "any other act of sexual intent that requires physical contact." It is not necessary to make skin-to-skin contact when touching the breast. In addition, 'physical touch' does not always imply 'skin-to-skin' contact. Wearing clothing is a part of one's physical self, and even pressing the breasts without removing the top will clearly come under Section 7. Touching isn't the same as pressing. The severity of the penalty does not excuse the introduction of a provision for 'skin-to-skin' contact. Reading the skin-to-skin touch into Section 7 would require the courts to rewrite the provisions, something they are reluctant to do. The judge lost sight of the Act's purpose, which was to protect children from sexual harassment. The Supreme Court has consistently emphasized the importance of remembering the law's intent. The popular Heydon's Rule of noting mischief that needs to be fixed must be held in mind (Justice RF Nariman in *Arcelor Mittal*, 2019).

Apart from that, even if the law in question is a criminal law, which is not to be interpreted broadly, even criminal laws must be granted a fair and logical natural construction in light of the purpose. The menacing issue that vulnerable children face has been addressed with harsh punishment. That cannot be a justification for limiting the application of Section 7 (as amended in 2019), which has increased the severity of the penalty. The High Court's approach goes against logic and common sense.

The judge also disregarded Section 11 of the law, which prohibits sexual assault involving any gesture of sexual intent. Even the speaking of words and making of sounds with the intent of being seen or heard is concealed. Abetment and attempts to commit these crimes are also covered in Chapter IV. Thus, sexual assault and sexual harassment are clearly described by Sections 7 and 11 of the POCSO Act as pressing the breast, even if it is from over the clothes worn, entering the house without the mother and holding hands, and unzipping trousers.

The judge's interpretation of Section 7 of the Act is contrary to its clear and normal meaning. It disregards both the law's purpose and the meaning of other provisions. It lacks legislative vision and ignores the Constitution's and the POCSO Act's responsibilities. Even as the SC collegium has withdrawn its recommendation to the government to confirm the additional judge of the Bombay High Court as a permanent judge, the CJI-led Bench of the Supreme Court deserves applause for staying the judgment.
