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Denial of Justice: A Paradox between Bombay High Court Judgments and POCSO Act

ABID FAHEEM¹ AND MEHREENA MANZOOR²

ABSTRACT

Last couple of days of this month were a nightmare for all those children who have survived any kind of sexual violence in their life. This month witnessed several insensitive judgments in sexual assault cases by the Nagpur bench of the Bombay High Court headed by the Justice Pushpa Ganediwala. Justice Ganediwala has handed down three acquittals under the POCSO Act, in three different cases, all within a week (Bar and Bench, 2021). Her third ruling where she ruled that direct “skin-to-skin contact” is necessary for sexual assault under POCSO Act (Scroll Staff, 2021) had caused the uproar and invited scathing criticism within the legal and child rights activists as well as laymen alike.

Sexual Violence against Children is a prevalent phenomenon in India and according to a study of the Ministry of Women and Child Development, every second child encounters sexual violence (Kacker et al., 2007). The NCRB data says that approximately 14 children are raped every single day in 2019 in India (National Crime Record Bureau, 2019). However, these alarming figures are still unable to shake our consciences to be serious about the problem to address it. We understand, however, that it has catastrophic life-long implications for a child's overall development but we are living in a state of denial and ignorance, preserving patriarchal dominance and absolute authority over a child.

The present article brings forth the issue of sexual violence against children in the wake of several insensitive judgments by an institution meant to protect them. The intention is not to just highlight the severity of the issue but also to realise the readers that it is a huge crisis, a pandemic that needs immediate attention and will-power to save our children from such horrors.

Keywords - Violence, Sexual Assault, Children, Girl, POCSO Act, Bombay High Court

I. INTRODUCTION

Imagine a child coming to her mother complaining about a person who has touched the child's private parts inappropriately; in response, the mother has to tell the child that the attempt wasn't

¹ Author is a Research Scholar at JNU, India.

² Author is a Research Scholar at JNU, India.

a sexual assault as the person hasn't touched the child underneath his or her clothes. This may sound pretty absurd, but this is what the recent Bombay High Court Judgment on Sexual Assault implies. On 19th January, in a very shocking and insensitive judgement, the Nagpur bench of the Bombay High Court, headed by Justice Pushpa Ganediwala, ruled that there must be "skin-to-skin contact" with sexual intent for an act to be deemed as sexual assault (Scroll Staff, 2021). According to the verdict, mere groping will not fall under the definition of sexual assault. The bench amended the order of the sessions court, which sentenced a 39-year-old accused to three years of imprisonment for sexually assaulting a 12-year-old girl child. It was her third ruling of sexual assault cases in a week, wherein all the three different cases, she handed down the acquittals under the POCSO Act (Bar and Bench, 2021).

During the hearing of her third case, Justice Pushpa Ganediwala concluded based on the definition of sexual assault given under section 7 of the POCSO act that the present case "*in the absence of any clear detail as to whether the top was discarded or whether he put his hand inside the top and pressed his breast*" would not be regarded as a sexual assault under this act because there is no direct physical (skin-to-skin) contact with sexual intent without penetration. However, it would certainly fall within the definition of the offence under Section 354 of the Indian Penal Code" (Scroll Staff, 2021). Section 7 of the POCSO Act defines sexual assault as "*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*" (*The Protection of Children from Sexual Offences (POCSO) Act*, 2012). However, this definition doesn't mention that there needs to be direct physical contact for an act to be considered sexual assault. Therefore, the judgment is problematic on many grounds as it crushes the intention of POCSO of punishing the sexual offenders of children and denies protection guaranteed by the law.

II. THE BOMBAY HIGH COURT JUDGMENTS AND SECTION 7 OF THE POCSO ACT

It is shocking to read the judgment of the Nagpur bench of the Bombay High Court headed by Justice Pushpa Ganediwala, that groping a child and pressing her breast wouldn't amount to sexual assault punishable with the POCSO Act. Instead, it would fall within the ambit of IPC section 354, which criminalizes outraging the modesty of a woman and entails a minimum sentence of imprisonment for one year, while Sexual assault under the POCSO Act entails minimum imprisonment of three years. The reason – the girl reportedly had her top on, and hence there was no skin-to-skin contact as her clothes were not removed while pressing her

breast. Anyone reading this judgment would feel disgusted and outrageous.

The major question here is what made the judge decide that it won't fall within the ambit of the POCSO act when the victim involved here was a child? If the courts are still dealing with the child sexual abuse cases according to IPC provisions and not the POCSO act, it defeats the whole idea of having a specific act for such crimes. The reason why POCSO has been enacted is because any grievous act perpetrated against a child is much more consequential and has a lifetime impact on the individual; this makes the acts of child assault or abuse more gruesome, which means punishment should be more stringent. But such judgments dilute the essence of the POCSO act by convicting the accused under other laws or provisions, thereby nullifying the effect of having progressive laws in the country.

The present interpretation of Section 7 of the POSCO Act, which defines sexual assault, is very problematic, and it gives a wrong message to society. It is true that section 7 of the POCSO Act mentioned that there should be physical contact, but it doesn't specify that there should be 'direct' physical contact. Therefore, the judgment implies that a sexual assault can only take place without clothes on is very insensitive and outrageous. This restrictive and narrow interpretation of this section focuses more on the term 'physical contact,' instead, the interpretation should have been derived from the term 'sexual intent,' which was quite evident in this case. The intent of the accused in this case was quite clear, but just because the child was rescued before the so-called skin-to-skin contact could happen, it doesn't make a ground for acquittal of such a person. Even the judge herself recorded in the verdict that "he gripped her breast and attempted to remove her clothes," but she still limited her judgment to the literal meaning of section 7 of the POCSO Act and concluded that since there was no skin-to-skin contact, the offence does not amount to be as sexual assault under this act. It is worth noting here that the aforementioned act does not clarify if "touching" should be physical in the sense that it must be "skin-to-skin." A mere loophole in the said definition can't be the reason to give benefits to the culprits and put a 12-year-old girl child in trauma and trivialize her by the very court which is meant to safeguard her from any kind of violence. The judgment further relied on the 'principle of proportionality' and observed that "the punishment for an offence should be proportionate to the seriousness of the crime," thereby implying that the offence in the question was not serious (Chander, 2021). This dilutes the gravity of the offence and gives enough freedom to the perpetrators to roam around freely after committing such gruesome acts. If the learned judge doesn't consider it as a serious act, then what can we expect from the perpetrators of such crimes.

III. EARLIER JUDGEMENTS

Such restrictive interpretations are not uncommon, particularly in the cases of POCSO. In *State v Bijender* (2014), a Delhi court acquitted a man under the POCSO Act and later convicted him of IPC offences (Vishwanath, 2021). The seven-year-old girl had testified, however, that the convict took her into the bathroom by force, slapped her, and tore her jeans. The Special Court ruled that the act of tearing the clothes of the victim did not imply physical contact even though there was sexual intention (Vishwanath, 2021). Apart from such insensitive judgments, there have been judgments of more responsible interpretations by various High courts, where the slightest of actions, done with sexual intent, have led to a conviction under Section 7. For instance, in *Ravi vs. State*, the Delhi High Court ruled that catching hold of the hand of the child survivor with sexual intent amounted to sexual assault. Similarly, in *Rakesh vs. state*, the Delhi high court, without delving into details as to whether the appellant had disrobed the child survivor or inserted his hand under her clothes, ruled that pressing the breast of the child survivor with sexual intent would amount to sexual assault as per section 7 and dismissed the appeal (Roy and Singhal, 2021).

IV. LEGAL AND SOCIAL IMPLICATIONS OF SUCH JUDGMENTS

The legal implications of these judgments are quite far reaching and consequential as they may have a drastic effect on other similar cases and may also lead to a fewer number of convictions under the POCSO act. Already the conviction rate for crimes reported under the POCSO act is low. According to the Crimes in India report published by NCRB, the conviction rate in 2019 for crimes reported under the POCSO act was 34.8% (National Crime Record Bureau, 2019). This may worsen because of such misinformed judgments. The judgment also disregarded section 29 of the POCSO Act, which provides a mandatory presumption of guilt against the accused in such cases (Chander, 2021). This will have repercussions on other ongoing cases related to child sexual abuse as the onus of proving the so-called “skin to skin” contact will lie on the victim. Further, this can be used to dilute the provisions in other similar laws by extension of the ‘ejusdem generis’ principle as in the absence of any concrete definition of ‘physical contact’ (Roy and Singhal, 2021), this interpretation can be employed to dilute the gravity of sexual assault, abuse and harassment in the sections of other laws too. Such judgments also disempower male children who have been abused since a male child who has been abused by an abuser without disrobing him will have no remedy either in POCSO or in the Indian Penal Code as section 354 only applies to women (Kini, 2021). This kind of definition of what constitutes as groping and sexual assault sets a dangerous precedent for

future cases of groping and sexual assault as it implies that sexual assault can only take place without clothes on (Bose, 2021). Such judgments have a ripple effect because they give wrong messages to police, criminals, and subordinate courts and contribute to impunity and denial of justice.

On the ground, these judgments may lead to an increase in the number of cases of sexual assault as less punishment might not act as a deterrent for the perpetrators of child sexual abuse. Such ill-informed judgments do not empower the victims but rather the abusers as they give a message that if abusers come and grope children's private parts through clothes, it doesn't constitute sexual assault. Further such judgments jeopardize the safety of children and hamper the agency of children to report sexual crimes as they may face anxiety over what constitutes a good touch or a bad touch. This will have negative psychological implications on children as they may feel incapable of deciding whether they have been assaulted or not, and this will, in turn, leave them more vulnerable to such crimes. Also, seeing their abusers get away with almost negligible punishment may add to the trauma of the victims of child sexual abuse and make them lose their trust in the justice delivery system.

V. WHY SHOULD WE BE WORRIED?

Every child is vulnerable, dependent, and innocent, be it a boy or girl. There is no difference in how little girls or boys are affected or feel when they are sexually assaulted. Perhaps, the only difference would be that the girl will be traumatized more, and the sexual assault of boys will go unnoticed. Because our patriarchal society yet to accept that male child also experiences sexual violence.

Sexual Violence against Children is a gross violation of basic human, social, and public health rights. It is one of the heinous crimes of the present day and, unfortunately, steadily increasing despite strict laws such as the POCSO Act. It doesn't manifest alone; rather, it is a ruthless combination of sexual violence, emotional violence, and physical violence. A child, especially a girl, has to cope with various kinds of sexual assault from home to street. It violates not only the dignity of the child but also the feeling, safety, and development. It is one of the most under-reported forms of child violence, where only 10% of cases are reported to be assaultive (Sharma and Gupta, 2004)

Though, it's difficult to estimate the real figure of violence against children due to silence over the issue in the name of family honor and shame, which makes it challenging to report. However, even though a large number of cases go unreported, the study by the Ministry of Women and Child development in 2007 documented a disturbing and sad reality of sexual

violence against children. According to the study, every second child is sexually abused; every fifth child subjected to severe forms of sexual abuse; 72% of the victims didn't report the crime to anyone; and only 3% of victims/families approach the police to file a case (Kacker et al., 2007). The World Health Organization reports that one in ten children in India is sexually abused, while some Non-Government Organizations report that five out of every ten girls and three out of every ten boys are sexually abused (Sharma and Gupta, 2004). The India Child Protection Fund (ICPF), in their report titled, 'Child Sexual Abuse Material in India,' documented the alarming reality of our society. The report recorded a 95% increase in child porn searches from March 24 to March 26 amidst lockdown (Pandit, 2020). These statistics are enough to shake our consciences towards such a prevalent heinous crime against children.

The adverse consequences of sexual violence against children can be devastating with both short-term and long-term consequences. It erodes the strong foundation of a healthy life a child needs. The impact of sexual violence can be enormously destructive, extending through every aspect of a children's life, affecting their health and education, restricting future life opportunities, and a drastic impact on their mental health. The long-term effects can be devastating, ranging from mental health problems such as anxiety, fear, depression, isolation, drug abuse, to other problems including but not limited to the feeling of betrayal, sexual feelings, hyper sexual activities, and social dysfunction such as delinquency, criminal behaviors, etc. Furthermore, sexual violence is a self-perpetuating phenomenon, and several studies indicated that children who had experienced violence in their childhood become the perpetrator of violence in their adulthood. In this regard, the present judgments nowhere help in resolving the issue but rather encourages child violence by exempting the perpetrators from the stringent punishments.

Therefore, we should worry about the rising cases of sexual violence against children and insensitivity towards it. We should remember that when children are sexually abused or assaulted, it is a violation of physical, mental, and emotional state. It leads to self-doubt where a child questions himself/herself, asking why it happened to him or her? Am I not important? Am I not counted? No one cares for me and so on.

VI. CONCLUSION

It is time to debate and shatter the conspiracy of silence about sexual violence against children. Though underreported, the statistics show that every second child is sexually assaulted in India. What more proof and statistics do we need to agree that it is today's most severe crisis, another pandemic with a pervasive denial. Our society is so sick that it makes such a serious issue as

an invisible crime and a denied social syndrome. Will society mourn only if a child is brought with a ruptured anus or a tiny vagina in sheds? But then it will be late, too late to cry and mourn. Maybe, we can cry for a few days and then go back to our comfortable bed to have a nice sleep, just like in the rape cases of Kathua, Hathras, or Unnao. And the perpetrator will be laughing at the consciences of our society as he would be sprung on bail now. Granting bail and welcoming perpetrators with garland is not a new phenomenon. The society has witnessed how a rally was organized in support of the accused in the brutal rape and murder of an 8-year-old girl from Kathua; two BJP MLAs also attended the rally, thereby glorifying such horrific acts (Shuja-ul-Haq, 2018).

In India, as per the registered police cases, approximately 14 children are raped every single day in 2019 (National Crime Record Bureau, 2019). This statistic poses a rather difficult question to be answered that if 14 children are being raped every single day, how many more children are otherwise sexually assaulted every single day? So, now the question we need to ask ourselves, do we still need to maintain the conspiracy of silence about what we are allowing to be done to our children?

Therefore, the judgment underlines the necessity of modifying the definition to remove even the slightest ambiguity and impart sensitization training to members of the judiciary so that they can get rid of the gender biases and entrenched patriarchy that are reflected in their judgments.

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