REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1410 OF 2021
(@ SPECIAL LEAVE PETITION (CRL) NO. 925 OF 2021)

ATTORNEY GENERAL FOR INDIA .... APPELLANT(S)

VERSUS

SATISH AND ANOTHER .... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1411 OF 2021
(@ SPECIAL LEAVE PETITION (CRL) NO. 1339 OF 2021)

NATIONAL COMMISSION FOR WOMEN .... APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER.... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1412 OF 2021
(@ SPECIAL LEAVE PETITION (CRL) NO. 1159 OF 2021)

THE STATE OF MAHARASHTRA .... APPELLANT(S)

VERSUS

SATISH .... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1413 OF 2021
(@ SPECIAL LEAVE PETITION (CRL) NO. 5071 OF 2021)

THE STATE OF MAHARASHTRA .... APPELLANT(S)

VERSUS

LIBNUS .... RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 1414 OF 2021
(@ SPECIAL LEAVE PETITION (CRL) NO. 7472 OF 2021)

SATISH ... APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA .... RESPONDENT(S)

J U D G M E N T

BELA M. TRIVEDI, J.

1. Leave granted in all appeals.

2. The four Appeals filed by the appellants - Attorney General for India, by the National Commission for Women, by the State of Maharashtra and by the appellant-accused Satish respectively, arising out of the Judgment and Order dated 19.01.2021 passed in Criminal Appeal No. 161 of 2020 by the High Court of Judicature at Bombay, Nagpur Bench, and the Appeal filed by the Appellant-State of Maharashtra, arising out of the Judgment and Order dated 15.01.2021 passed in the Criminal Appeal No. 445 of 2020 by the

same Nagpur Bench, encompass similar contextual legal issues, and therefore, permit us this analogous adjudication.

I. Factual matrix in case of the Accused-Satish :-

3. The Extra Joint Additional Sessions Judge, Nagpur (hereinafter referred to as the Special Court) vide the Judgment and Order dated 5th February, 2020 passed in the Special Child Protection Case No. 28/2017 convicted and sentenced the accused-Satish for the offences under Sections 342, 354 and 363 of the Indian Penal Code (for short 'IPC') and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (For short POCSO Act). Being aggrieved by the same, the accused-Satish had preferred an appeal being Criminal Appeal No. 161 of 2020 in the High Court of Judicature at Bombay, Nagpur Bench. By the Judgment and Order dated 19th January, 2021, the High Court disposed of the said appeal by acquitting the accused for the offence under Section 8 of the POCSO Act, and convicting him for the offence under Sections 342 and 354 of the IPC. The accused was sentenced to undergo rigorous imprisonment for a period of one year and to pay fine of Rs. 500/- in default thereof to suffer R.I. for one month for the offence under Section 354 and to undergo imprisonment for a period of six months and to pay fine of Rs. 500/- , in default thereof to suffer R.I. for one month for the offence under Section 342 of IPC.

4. The case of the prosecution before the Special Court as emerging from the record was that the informant happened to be the mother of the victim aged about 12 years. The accused-Satish was residing in the same area where she was residing i.e. Deepak Nagar, Nagpur. On 14.12.2016 at about 11.30 a.m., the victim had gone out to obtain guava. Since she did not return back for a long time, the informant-mother went in search of the victim. At that time, one lady Sau Divya Uikey who was staying nearby, told her that the neighbouring person (the accused) had taken her daughter along with him to his house. The informant, therefore, went to the house of the accused. The accused at that time came down from the first floor of his house. The informant having made inquiry about her daughter, the accused told her that she was not there in his house. The informant, however, barged into the house of the accused to search her daughter as she heard the shouts coming from a room situated on the first floor. She went to the first floor and found that the door of the room was bolted from outside. She opened the door and found her daughter who was crying in the room. On making inquiry as to what had happened, her daughter told her that the accused had asked her to come with him and told her that he would give her a guava. He took her to his house. He then pressed her breast and tried to remove her salwar. At that time, the victim tried to shout but the accused pressed her mouth. The accused thereafter left the room and bolted the door from outside. The informant, on having learnt such facts, went to the

Police Station along with her daughter to lodge the complaint. The said complaint was registered as Crime No. 405/2016 at Police Station Gittikhadan, Nagpur. It was further case of the prosecution that when the police rushed to the spot, they saw that the accused was trying to commit suicide by hanging himself. He, therefore, was sent to the hospital for treatment. The spot panchanama was drawn and the statement of the victim was got recorded under Section 164 of Code of Criminal Procedure before the Magistrate. After the completion of the investigation, the charge-sheet was filed in the Special Court, Nagpur against the accused. The Special Court after appreciating the evidence on record, passed the Judgment and Order of conviction and sentence as stated hereinabove.

5. The High Court in the appeal filed by the accused-Satish acquitted the accused for the offence under Section 8 of the POCSO Act and convicted him for the minor offence under Sections 342 and 354 of IPC by making following observations:

> *"18 . Evidently, it is not the case of the prosecution that the appellant removed her top and pressed her breast. The punishment provided for offence of 'sexual assault' is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. Considering the stringent nature of punishment provided for the offence, in the opinion of this Court, stricter proof and serious allegations are required. The act of pressing of breast of the child aged 12 years, in the absence of any specific details as to whether*

> *the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of 'sexual assault'. It would certainly fall within the definition of the offence under Section 354 of the Indian Penal Code. For ready reference, Section 354 of the Indian Penal Code is reproduced below:*
>
> *"354.* ***Assault or criminal force to woman with intent to outrage her modesty. -*** *Whoever assaults or uses criminal force to any woman, with the intention to outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."*
>
> *19. So, the act of pressing breast can be a criminal force to a woman/girl with the intention to outrage her modesty. The minimum punishment provided for this offence is one year, which may extend to five years and shall also be liable to fine.*
>
> *20 to 25 ----------*
>
> *26. It is not possible to accept this submission for the aforesaid reasons. Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration.*

6. The above observations/findings made by the High Court, have caused the Attorney General for India, the National Commission for Women and the State of Maharashtra to file the appeals before this Court. The accused has also filed the appeal challenging his conviction for the offences under Section 354 and 342 of the IPC.

II. <u>Factual matrix in the case of the Accused-Libnus</u> :-

7. The Additional Sessions Judge, Gadchiroli (hereinafter referred to as the Special Court) vide the judgment and order dated 5th October, 2020 passed in the Special POCSO case no. 07/2019 convicted and sentenced the accused-Libnus s/o Fransis Kujur for the offences punishable under Section 448 and 354-A (1)(i) of IPC and Sections 8 and 10 read with section 9 (m) and 12 of the POCSO Act. Being aggrieved by the same, the accused-Libnus had preferred an appeal being Criminal Appeal No. 445 of 2020 in the High Court of Judicature at Bombay, Nagpur Bench. Vide the Judgment and Order dated 15th January, 2021, the High Court maintained the conviction of the accused for the offences under Sections 448 and 354-A(1)(i) of the IPC read with Section 12 of the POCSO Act and set aside the conviction of the accused for the offences under Sections 8 and 10 of the POCSO Act. The High Court considering the nature of the alleged acts and the punishment provided for the alleged offences, modified the sentence imposed by the Special Court to the extent he had already undergone, and directed to set him free.

8. The case of the prosecution before the Special Court as emerging from the record was that the informant happened to be the mother of the victim aged about five years. The informant used

to do domestic work at some houses in the town, for which she had to leave home at about 8.00 o'clock in the morning and return at about 4.00 o'clock in the afternoon. On 11.02.2018 at about 8.00 o'clock, she had left for her work leaving her two daughters at home. On that day, her husband had also gone out to village Chavela. When she returned home at about 4.00 o'clock in the afternoon, she saw one person catching hold of a hand of her elder daughter i.e. victim, and also saw her daughter raising her pant upwards. She, therefore, shouted and asked, who he was and what was he doing. The said person released the hand of her daughter and turned back. Thereupon, she found that the said person was Libnus Fransis who was residing nearby her house. He told her that he had come to see her husband as he had some work. When he started leaving, the informant saw that the zip of his pant was open. She, therefore, started shouting and abusing him. On hearing the shouts, her neighbours, namely, Chhaya Dnyanbaji Pagade, Sayabai Kailas Barsagade and Madhuri Santosh Kohchade, came rushing to her house and in the meantime the said Libnus F. Kujur ran away. When she inquired her daughter as to what had happened, her daughter told her that the said Kujur came home asking about her father. When she told him that her father had gone to a village and her mother had gone out for the work, the said Kujur caught her hands and moved her frock upward with one hand and lowered her pant with the other hand. He, thereafter, unzipped his pant and showed his penis to her and then asked her

to lay down on wooden cot. Her daughter, thereafter, started crying. All the ladies gathered there tried to search the accused but he was not found. Thereafter, the informant alongwith her minor daughter, and her neighbours Chhaya Dnyanbaji Pagade and others went to the Gadchiroli police station to lodge the report against Libnus. The said report of the informant came to be registered as the Crime bearing No. 63/2018 at the said police station for the offences punishable under Sections 354-A (1)(i) and 448 of the IPC and Sections 8, 10 and 12 read with Section 9(m) and Section 11(i) of the POCSO Act. After the completion of the investigation, the charge-sheet was filed before the Special Court, Nagpur. The Special Court after appreciating the evidence on record passed the Judgment and Order of Conviction and sentence as stated hereinabove.

9. The High Court in the appeal filed by the accused-Libnus while setting aside the conviction for the offences under Sections 8 and 10 of the POCSO Act and maintaining the conviction for the offences under Sections 448 and 354-A(1)(i) of IPC read with Section 12 of the POCSO Act observed as under:

> *"9. In the case in hand undisputedly, the age of the prosecutrix is five years. If the offence of 'sexual assault' is proved against the appellant/accused, the prosecutrix, being of age below twelve years, the conviction has to be recorded for the offence of 'aggravated sexual assault'.*
>
> *10. The punishment for aggravated sexual assault is imprisonment of either*

description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

11. The appellant/accused is prosecuted for the charge of 'aggravated sexual assault'. As per the definition of 'sexual assault' a 'physical contact with sexual intent without penetration' is essential ingredient for the offence. The definition starts with the 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 or does any other act with 'sexual intent.....' The words 'any other act' encompasses within itself, the nature of the acts which are similar to the acts which have been specifically mentioned in the definition on the premise of the principle of 'ejusdem generis'. The act should be of the same nature or closure to that. The acts of 'holding the hands of the prosecutrix' or 'opened zip of the pant' as has been allegedly witnessed by PW-1, in the opinion of this Court, does not fit in the definition of 'sexual assault'.

12. The minimum sentence of this offence is five years imprisonment. Considering the nature of the offence and the sentence prescribed, the aforesaid acts are not sufficient for fixing the criminal liability on the appellant/accused for the alleged offence of 'aggravated sexual assault'. At the most the minor offence punishable under Section 354-A(1) (I) of the IPC r/w Section 12 of the POCSO Act is proved against the appellant.

13. In this view of the matter, the prosecution could establish that appellant/accused entered into the house of the prosecutrix with the intention of outraged her modesty or sexual harassment as defined u/s 11 of the POCSO Act. Therefore, the conviction of the appellant/accused for the offence

punishable under Sections 448 and 354-A(1)(i) of the IPC r/w Section 12 of the POCSO Act is maintained. The punishment provided for the offence u/s 345-A(1)(i) of the IPC and Section 12 of the POCSO Act is sentence for a term which may extend to 3 years or/and fine or with both. The punishment for the offence of house trespass is imprisonment for a term upto one year and fine upto Rs.1000 or with both. It is informed that till date the appellant/accused has undergone total imprisonment of about 5 months".

10. Being aggrieved by the said Judgment and Order passed by the High Court, the State of Maharashtra has filed the present appeal.

Submissions:

11. We have heard the learned Attorney General for India Mr. K.K. Venugopal, the learned senior advocate Ms. Geeta Luthra appearing for the National Commission for Women, the learned advocate Mr. Rahul Chitnis appearing on behalf of the State of Maharashtra, the learned amicus curiae Mr. Siddharth Dave to assist the Court and the learned senior advocate Mr. Siddharth Luthra appearing on behalf of The Supreme Court Legal Services Committee for the accused–Satish and the accused Libnus.

12. The learned Attorney General for India, Mr. K.K. Venugopal expressing grave concern about the manner in which the provisions contained in the POCSO Act were interpreted by the High Court, vehemently submitted that such interpretation would lead to

devastating effect in the society at large. According to him, the High Court could not have acquitted the accused-Satish mis-interpreting the provisions contained in Section 7 on the ground that there was no direct physical contact i.e. skin to skin contact made by the accused with the victim. He submitted that all the alleged acts of the accused i.e. taking the victim to his house, trying to remove her salwar, pressing her breast and pressing her mouth when she started shouting, were the acts amounting to "sexual assault" within the meaning of Section 7 punishable with Section 8 of the POCSO Act.

13. Supplementing the said submissions made by the learned Attorney General, the learned Senior Counsel Ms. Geeta Luthra relied upon the objects and reasons for enacting the POCSO Act to submit that since the sexual offences against women were not adequately addressed by the existing laws, the POCSO Act was specifically enacted to protect the children from the offences of sexual assault, sexual harassment and pornography. Ms. Luthra also relied upon the views of the Parliamentary Committee appointed for the purpose of examining the Bill with regard to the Protection of children from sexual harassment to submit that the sexual offences as defined in Clauses 3 and 7 of the Bill intended to cover all the likely situations required to be covered thereunder. Ms. Luthra also relied upon a number of judgments of various courts of the United Kingdom and of the United States of America, as also of

this Court to emphasis the legislative intent behind enacting the POCSO Act. Taking the court to the dictionary meaning of the word 'touch', 'physical contact' and 'sexual intent', she empathetically submitted that the legislature has interchangeably used the words 'touch' and 'physical contact' in Section 7 and therefore, restricting the meaning of the word 'physical contact' to 'skin to skin contact' would be a narrow interpretation of the said provision, defeating the very object of the Act. She also pointed out that the High Court had grossly erred in applying the principle of 'ejusdem generis', which otherwise should not apply where it would defeat the object of the enactment. Similarly, according to Ms. Luthra, the Rule of Lenity also would not be applicable, there being no obscurity or uncertainty in the provisions of the POCSO Act.

14. The learned senior advocate Mr. Siddharth Dave, appointed as an *amicus curiae* also took the Court to the scheme of the POCSO Act, and specifically to Sections 2 and 3 to submit that what is important for the purpose of Section 7 is "sexual intent". Bisecting Section 7 into two parts, Mr. Dave submitted that the first part thereof pertains to the act of touching with sexual intent the vagina, penis, anus or breast of the child or making the child touch the said organs of such person or any other person, and the second part pertains to 'any other act' with sexual intent which involves physical contact without penetration. Thus, according to him, in both the limbs of Section 7, the *mens rea* i.e. culpable mental state - the

sexual intent of the person accused of the said offence is very material. Pressing into service Section 29 & 30 of the POCSO Act, Mr. Dave submitted that the Court is required to presume the existence of culpable mental state on the part of the accused, and it is for the accused to prove in defence that he had no such mental state with respect to the act charged as an offence. Mr. Dave also relied upon the unreported judgments of various High Courts to buttress his submission that touching in an indecent manner with culpable mental state, would amount to "sexual assault" within the meaning of Section 7 of the said Act, even though there was no 'skin to skin contact' between the victim and the accused.

15. Mr. Rahul Chitnis, learned advocate appearing on behalf of the State of Maharashtra adopting the submissions made by the learned Attorney General for India, Ms. Geeta Luthra and learned amicus curiae Mr. Siddharth Dave, submitted that if the interpretation of section 7 of the POCSO Act made by the High Court is accepted, the very object of the Act would be negated.

16. Per contra, Mr. Sidharth Luthra, learned senior advocate appearing for the accused in both the cases, relied upon various provisions of the POCSO Act and of the IPC to submit that the offence under Section 354 of IPC has a different connotation and different effect, which could not be incorporated for the purpose of interpreting Section 7 of the POCSO Act. According to him, the

phrases ‘sexual intent’, ‘touches’ and ‘physical contact’ have not been defined in the POCSO Act, however the explanation to Section 11 states that any question which involves ‘sexual intent’ shall be a question of fact. Placing reliance on the decision of the Bombay High Court in case of ***Bandu Vithalrao Borwar v/s State of Maharashtra***, in Criminal Appeal No. 50 of 2016, decided on 17.10.2016, he submitted that the expression “sexual intent” can not be confined to any predetermined format or structure. He further submitted that unlike POCSO Act, the IPC offence under section 354 uses the terms ‘assault’ and ‘criminal force’. However, since ‘sexual assault’ is defined under the POCSO Act, the definition of the words ‘assault’ or ‘criminal force’ contained in IPC cannot be imported into the POCSO Act, though permitted under section 2(2) of the POCSO Act. While fairly conceding that the first part of Section 7 of the POCSO Act, which pertains to the act of touching the private parts of the child, may not require ‘skin to skin contact’, he however submitted that so far as, the second part i.e. “ the other act with sexual intent which involves physical contact without penetration” is concerned, ‘the skin to skin contact’ is required to be proved by the prosecution.

17. As regards the presumption under Sections 29 and 30 of the POCSO Act, Mr. Luthra tried to draw an analogy from similar provisions contained in the NDPS Act and submitted that the presumption and reverse burden of proof on the accused makes it

difficult for an accused to prove his innocence. Therefore, any interpretation other than the strict interpretation would expand the scope of the offence and would not further the constitutional objective of Article 21. In this regard, he has placed reliance on the decisions of this Court in the Case of ***Noor Aga vs. State of Punjab and Anr[1],*** ***Sakshi vs. Union of India [2]*** and ***R. Kalyani vs Janak C. Mehta & Ors[3].***

18. Invoking the Rule of Lenity, Mr. Luthra submitted that this rule of statutory construction requires a court to resolve statutory ambiguity in a criminal statute in favour of the accused or to strictly construe the statute against the State. In this regard, he has relied upon the decisions of the United States Supreme Court in the case of ***"The United States vs. Wilt Berger[4]; Connally v. General Construction Co.[5]*** and in case of ***United States vs. Kozminski[6]*** .

19. Mr. Luthra, learned senior counsel also took the Court to the oral evidence adduced in both the cases and submitted that there were number of contradictions in the evidence of the informant and the witnesses examined by the prosecution and that it would be risky to convict the accused for the alleged offences under the POCSO Act on such unreliable and sketchy evidence.

1. 2008 (16) SCC 518
2. 2004 (5) SCC 518
3. 2009 (1) SCC 516
4. 18 US 76 (1820)
5. 269 U.S. 385 (1926)
6. 487 U.S. 931 (1988)

Legal Provisions:

20. Before adverting to the rival submissions made by the learned counsels for the parties, apt would be to refer to the relevant provisions of the POCSO Act. As the long title of the Protection of Children from Sexual Offence Act, 2012 states, the Act has been enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for the matters connected therewith or incidental thereto.

21. Section 7 pertaining to "sexual assault" reads as under:

> *"7. 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.*

22. Section 8 providing for the punishment for sexual assault, reads as under :

> *"8 - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.*

23. Section 9 of the Act enumerates as to what is said to commit aggravated sexual assault. Clause (m) of the said provision being relevant is reproduced as under:

9(m)- whoever commits sexual assault on a child below twelve years;

24. Section 10 for providing Punishment for aggravated sexual assault –

> *"10- whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine".*

25. Section 11 pertains to "sexual harassment" - A person said to commit sexual harassment upon a child when such person with sexual intent -

> *"(i) – utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or*
>
> *(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person;*
>
> *(iii) to (vi) .....*
>
> *Explanation – Any question which involves "sexual intent" shall be a question of fact.*

26. Section 12 for providing punishment for sexual harassment

> *"12 – whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also liable to fine."*

27. Sections 29 and 30 pertaining to the statutory presumptions read as under:

> *"29 -When a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."*
>
> *"30 - (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
>
> *(2) For the purposes of this 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".*
>
> *Explanation – In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.*

Analysis:-

28. In both the cases, the main controversy centers 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 the case of ***J.P. Bansal vs. State of Rajasthan & Anr. Reported in AIR (2003) SC 1405,*** a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or *s*ententia legis, the true intention of the Legislature. It has been observed therein that :

> ***"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 [AIR 1990 SC 1747 at p. 1752, Shyam Kishori Devi v. Patna Municipal Corpn. [AIR 1966 SC 1678 at p. 1682); A.R. Antulay v. Ramdas Sriniwas Nayak [(1984) 2 SCC 500, 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 [(1986) 4 SCC 746, at p. 749); Union of India v. Deoki Nandan Aggarwal [AIR 1992 SC 96 at p. 101).]"

29. In the case of ***Balaram Kumawat Vs. Union of India & Ors. reported in (2003) 7 SCC 628,*** this Court while elaborately discussing the basic rules of interpretation observed as under:

"20. *Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of "ex visceribus actus" should be resorted to in a situation of this nature.*

21. *In State of W.B. v.Union of India (AIR at p. 1265, para 68), the learned Chief Justice stated the law thus:*

"The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

22.*The said principle has been reiterated in R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] (AIR at p. 89).*

> ***23.*** *Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so.*

> ***26.*** *The courts will therefore reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. [See Salmon v. Duncombe [(1886) 11 AC 627 : 55 LJPC 69 : 55 LT 446 (PC)] (AC at p. 634).] Reducing the legislation futility shall be avoided and in a case 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. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [See BBC Enterprises v. Hi-Tech Xtravision Ltd. [(1990) 2 All ER 118 : 1990 Ch 609 : (1990) 2 WLR 1123 (CA)] (All ER at pp. 122-23).]"*

30. So far as the object of enacting the POCSO Act is concerned, as transpiring from the statement of objects and reasons, since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically provided for nor were they adequately penalized, the POCSO Act was enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide

for establishment of special Courts for trial of such offences and for matters connected therewith and incidental thereto. While enacting the said Act, Article 15 of the Constitution which empowers the State to make special provisions for children, and the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, as acceded to by the Government of India, prescribing a set of standards to be followed by all the State parties in securing the best interest of the child, were also kept in view. The POCSO Bill intended to enforce the rights of all children to safety, security and protection from sexual abuse and exploitation, and also intended to define explicitly the offences against children countered through commensurate penalties as an effective deterrence.

31. Now, from the bare reading of Section 7 of the Act, which pertains to the "sexual assault", it appears that it is in two parts. The first part of the Section mentions about the act of touching the specific sexual parts of the body with sexual intent. The second part mentions about "any other act" done with sexual intent which involves physical contact without penetration. Since the bone of contention is raised by Ld. Senior Advocate, Mr. Luthra with regard to the words "Touch", and "Physical Contact" used in the said section, it would be beneficial first to refer to the dictionary meaning of the said words.

32. 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 Edition, 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.

33. 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.

34. 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 statue, 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 concerned legislations 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 ***Regina v. H (2005) 1 WLR 2005,*** the Court of Appeal while interpreting the word "touching" contained in Section 3 of the Sexual Offences Act, 2003 as in force in U.K, observed that the touching of clothing would constitute "touching" for the purpose of said Section 3. Similarly, in ***State of Iowa V. Walter James Phipps 442 N.W.2d.611*** 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 Iowa Code.

35. 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 trivialized 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 case of ***Balaram Kumawat Vs. Union of India*** (supra), 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.

36. 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 Section 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 Section 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.

37. This takes the Court to the next argument of Mr. Luthra that there being an ambiguity, due to lack of definition of the expressions - "sexual intent", "any other act", "touching" and "physical contact", used in Section 7, coupled with the presumptions under Sections 29 and 30 of the Act, the reverse burden of proof on the accused would make it difficult for him to prove his innocence and, therefore, the POCSO Act must be strictly interpreted. In the opinion of the Court, there cannot be any disagreement with the said submission of Mr. Luthra. In fact it has been laid down by this Court in catina of decisions that the Penal Statute enacting an offence or imposing a penalty has to be strictly construed. A beneficial reference of the decisions in the case of ***Sakshi vs. Union of India reported in (2004) 5 SCC 518, in the case of R. Kalyani vs Janak C. Mehta & Ors reported in (2009) 1 SCC 516 and in the case of State of Punjab v. Gurmeet Singh (2014) 9 SCC 632*** be made in this regard. However, it is equally settled legal position that the clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole Statute relating to the subject matter. The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their

whole life, and may also have an adverse effect on their mental state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective.

38. The invocation of "Rule of lenity" at the instance of Mr. Luthra, learned senior Advocate is also thoroughly misconceived. Placing reliance on the various judgments of the **United States Supreme Court in case of *Ladner vs. United States, 358 US 169; United States vs. Kozminski, 487 US 931; United States vs. Wiltberger, 18 US 76*,** Mr. Luthra had sought to submit that the "Rule of Lenity" requires a court to resolve statutory ambiguity in a criminal statute in favour of the accused, or to strictly construe the statute against the State. The said submission of Mr. Luthra cannot be accepted in view of the settled proposition of law that the statutory ambiguity should be invoked as a last resort of interpretation. Where the Legislature has manifested its intention, courts may not manufacture ambiguity in order to defeat that intent. In this regard, Ms. Geetha Luthra has rightly relied upon the precise observations made by the Court of Appeal, California, in case of ***The People vs. REID II, 246 Cal. App. 4Th, 822*** as follows:

> *"[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.' [Citation.]" (Bifulco v. United States (1980) 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L.ED.2d 205.) " 'the rule ... applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.' " (People v. Avery (2002) 27 Cal. 4Th 49, 58, 115 Cal. Rptr.2d 403, 38 P.3d 1.) "Where the Legislature has manifested its intention, courts may not manufacture ambiguity in order to defeat that intent." (Bifulco v. United States supra, at p. 387, 100 S. Ct. 2247.) Additionally, "ambiguities are not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent. (People v. Cruz (1996) 13 Cal. 4Th 764, 783, 55 Cal. Rptr. 2D 117, 919 P. 2d 731.)"*

39. It is also trite that a court should not be over zealous in searching for ambiguities or obscurities in words which are plain. ***(IRC vs. Rossminster Ltd. (1980) 1 AllER 80).*** So far as the provisions contained in Section 7 of the POCSO Act are concerned, the court does not find any ambiguity or obscurity so as to invoke the Rule of Lenity.

Conclusion:

40. In the light of the afore-discussed legal position, if the findings recorded by the High Court are appreciated, it clearly emerges that the High Court fell into error in case of the accused-Satish in holding him guilty for the minor offences under Sections 342 and 354 of IPC and acquitting him for the offence under Section 8 of the POCSO

Act. The High Court while specifically accepting the consistent versions of the victim and her mother i.e. informant about the accused having taken the victim to his house, having pressed the breast of the victim, having attempted to remove her salwar and pressing her mouth, had committed gross error in holding that the act of pressing of breast of the child aged 12 years in absence of any specific details as to whether the top was removed or whether he inserted his hands inside the top and pressed her breast, would not fall in the definition of sexual assault, and would fall within the definition of offence under Section 354 of the IPC. The High Court further erred in holding that there was no offence since there was no direct physical contact i.e. "skin to skin" with sexual intent.

41. 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.

42. 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.

43. So far as the case of the other accused-Libnus is concerned, the High Court vide its impugned judgment and order, while maintaining the conviction of the accused for the offences punishable under sections 448 and 354-A(1)(i) of the IPC read with Section 12 of the POCSO Act, has acquitted the accused for the offence under Sections 8 and 10 of the POCSO Act. Pertinently the High Court while recording the finding that the prosecution had established that the accused had entered into the house of the prosecutrix with the intention to outrage her modesty, also held that the acts "holding the hands of the prosecutrix" or "opened the zip of the pant" did not fit in the definition of sexual assault. In the opinion of the Court, the High Court had fallen into a grave error in recording such findings. When the alleged acts of entering the house of the prosecutrix with sexual intent to outrage her modesty, of holding her hands and opening the zip of his pant showing his penis, are held to be established by the prosecution, there was no reason for the High Court not to treat such acts as the acts of "sexual assault" within the meaning of Section 7 of the POCSO Act. The High Court appears to have been swayed away by the minimum punishment of five years prescribed for the offence of "aggravated

sexual assault" under Section 10 of the POCSO Act as the age of the prosecutrix was five years and the sexual assault if committed on the victim who is below 12 years is required to be treated as the "aggravated sexual assault" as per Section 9(m) of the Act. However, neither the term of minimum punishment nor the age of the victim could be a ground to allow the accused to escape from the clutches of Section 7 of the POCSO Act. The alleged acts of the accused in entering the house of the prosecutrix with sexual intent to outrage her modesty, holding her hands and unzipping his pant showing his penis to the prosecutrix having been held to be proved by the prosecution, they would certainly be the acts falling within the purview of the "sexual assault" as contemplated in the second part of Section 7 i.e. "..... or does any other act with sexual intent which involves physical contact without penetration". The Court, therefore, has no hesitation in holding that the accused-Libnus had committed an offence of "sexual assault" within the meaning of Section 7 of the POCSO Act and the prosecutrix being below the age of 12 years, he had committed an offence of "aggravated sexual assault" as contemplated under Section 9(m) of the said Act, liable to be punished with the imprisonment for a term not less than five years under Section 10 of the POCSO Act. In that view of the matter, the judgment and order of the High Court insofar as it has set aside the conviction of the accused-Libnus for the offences under Section 8 and 10 of the POCSO Act is liable to be set aside, and the

judgment and order of conviction and sentence passed by the Special Court is required to be restored.

Order

44. In the aforesaid premises, the judgments and orders dated 19.01.2021 and 15.01.2021 passed by the High Court of Judicature at Bombay, Nagpur Bench, at Nagpur in Criminal Appeal No. 161 of 2020 and Criminal Appeal No. 445 of 2020 respectively are hereby quashed and set aside; and the judgments and orders dated 05.02.2020 and 05.10.2020 passed by the Extra Joint Additional Sessions Judge, Nagpur in Special Child Protection Case No. 28 of 2017 and by the Special Court, Gadchiroli in POCSO Case No. 07/2019 are restored.

45. Accordingly, the accused-Satish is hereby convicted for the offences punishable under Section 8 of the POCSO Act and under Sections 342, 354 and 363 of the IPC. He is directed to undergo rigorous imprisonment for a period of three years and to pay fine of Rs.500/- and in default thereof to suffer simple imprisonment for a period of one month for the offence under Section 8 of the POCSO Act. Since he has been sentenced for the major offence under Section 8 of the POCSO Act, no separate sentence is imposed upon him for the other offences under the IPC.

46. The accused-Libnus s/o Fransis Kujur is hereby convicted for the offences punishable under Sections 354-A (1)(i) and 448 of the

IPC as also for the offences under Sections 8, 12 and 10 read with Section 9(m) of the POCSO Act. He is directed to undergo rigorous imprisonment for a period of five years for the offence under Section 10 of the POCSO Act and to pay fine of Rs. 25,000/- (Rupees twenty five thousand only) and in default thereof to suffer simple imprisonment for a period of six months. Since he has been sentenced for the major offence under Section 10 of the POCSO Act, no separate sentence is being imposed upon him for the other offences under the IPC and the POCSO Act.

47. Both accused – Satish and Libnus are directed to surrender themselves before the concerned Special Courts, within four weeks from today.

48. Before parting, it may be noted that in the case of the accused-Libnus, the State of Maharashtra while filing the Appeal before this Court had not produced the certified copy of the judgment of the High Court, however, had produced a copy of a certified copy, wherein the High Court had recorded acquittal of the accused for the offence under Sections 8, 10 and 12 of the POCSO Act, while maintaining his conviction under Sections 448 and 354-A(1)(i) of the IPC, whereas in the copy of the impugned judgment of the High Court downloaded by the respondent-accused produced on record by the learned Advocate for the accused, the High Court had recorded the conviction of the accused for the offence under Sections 448 and 354-A(1)(i) of the IPC read with Section 12 of the POCSO Act. There being a discrepancy in the said two copies of the

impugned judgment of the High Court, the learned Advocate for the respondent-accused had filed an I.A. bringing to the notice of the Court about such discrepancy. The Court, therefore, had vide its order dated 27.10.2021 directed the Registrar of the High Court to send the certified copy of the decision of the High court dated 15.01.2021 passed in Criminal Appeal No. 445 of 2020. Accordingly, the Assistant Registrar of the High Court of Bombay, Nagpur Bench, has sent the certified copy of the said judgment.

49. It is very surprising to note that the Registry of High Court of Bombay, Nagpur Bench, has certified the copy of the impugned judgment by affixing the stamp on the back side of every page of the judgment which is blank. The said copy of the judgment appears to have been downloaded from the website and, therefore, does not bear even the signature or the name of the concerned judge at the end of the judgment. The certificate that the said copy is a true copy of the judgment, is also not written at the foot of the judgment as contemplated in Section 76 of the Indian Evidence Act. Such a practice, if followed by the Nagpur Bench of the Bombay High Court, may allow the miscreants to manipulate or commit mischief in the judicial orders which are used as the public documents having great significance in the judicial proceedings. The Registrar General of the Bombay High Court, therefore, is directed to look into the matter and ensure that proper procedure for preparing the certified copies of the judgments/orders of the Court in accordance with law is followed.

50. All the five appeals stand disposed of accordingly.

51. It will be failure on our part if we do not extend gratitude of appreciation for the enormous assistance rendered by learned Senior Advocate Mr. Siddhartha Dave, learned Amicus Curiae, Mr. Siddharth Luthra, learned Senior Advocate, appearing on behalf of the accused through Supreme Court Legal Services Committee, Ms. Geetha Luthra, learned Senior Advocate appearing for National Women Commission and all other advocates who have appeared in the matter.

The initiative taken by the learned Attorney General for India Mr. K.K. Venugopal in filing the appeal with all sense of expressing his concern in the cause also deserves to be appreciated.

.....J.
[UDAY UMESH LALIT]

NEW DELHI
18.11.2021

.....J.
[BELA M. TRIVEDI]

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO1410 /2021
(@ SLP (CRL) NO. 925/2021)

ATTORNEY GENERAL FOR INDIA ...APPELLANT(S)

VERSUS

SATISH AND ANOTHER ...RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 14112021
(@ SLP (CRL) NO. 1339/2021)

NATIONAL COMMISSION FOR WOMEN ...APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA
AND ANOTHER ...RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1412/2021
(@SLP (CRL) NO. 1159/2021)

THE STATE OF MAHARASHTRA ...APPELLANT(S)

VERSUS

SATISH ...RESPONDENT(S)

WITH

CRIMINAL APPEAL No.1413/2021
(@ SLP (CRL) NO. 5071/2021)

THE STATE OF MAHARASHTRA ...APPELLANT(S)

VERSUS

LIBNUS ...RESPONDENT(S)

WITH

CRIMINAL APPEAL No.1414/2021
(@ SLP (CRL) NO. 7472/2021)

SATISH ...APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA ...RESPONDENT(S)

O R D E R

S. RAVINDRA BHAT, J.

1. I begin this concurring opinion with a preface that I completely and unreservedly agree with the findings and conclusions recorded in the comprehensive judgment of Justice Bela Trivedi. I also hasten to add that I deem this effort not as an attempt to speak for the sake of speaking, and thereby adding little value to Justice Trivedi's analysis, but only essentially to point to a slightly different direction, which is the need to interpret the statute in the context of the circumstances that resulted in its birth.

2. The judgments under appeal remind one of a passage from Lewis Caroll's *Alice in Wonderland*, where he describes what words (or expressions) mean and whether they have an intrinsic meaning at all:

> *"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."*

> *"The question is," said Alice, "whether you* can *make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master—that's all."*

3. To place the matter in perspective, what is in issue is the true interpretation of the expression *"with sexual intent touches the vagina, penis, anus or breast of the child"* at someone's behest. Such an act, under Section 7 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO" hereafter) is an offence of *sexual assault,* and punishable under Section 8. According to the interpretation placed by the High Court, for any act to be an offence, the touching of any of the parts mentioned by the statute (vagina, penis, anus or breast) must be of the organ, and there should be a *"skin to skin"* contact.

4. I do not see the need to recount the facts or the arguments, which have been fairly and accurately set out in Trivedi, J's judgment. Instead, I proceed with the task of interpretation of provisions of POCSO, and the proper rule of interpretation which should be adopted in such cases. Long ago, in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.*[1] this court observed the need to contextualise the provisions of any law which requires interpretation, even while focussing on its text:

> *"If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."*

1 (1987) 1 SCC 424

5. The question then is whether "touching" has an intrinsic meaning, as Alice said, or whether it means only something that judges say it means, no more, no less.

6. One time tested and well accepted mode of interpreting a statute, especially a new statute, is to apply the "mischief rule" – first spoken of in *Heydon's case*[2] which contains a four-point formula, acting as an aid in construing a new law or provision. These are *firstly,* what was the common law before the making of the Act; *secondly* what was the mischief and defect for which the common law did not provide; *thirdly* what remedy Parliament resolved and appointed to cure the disease plaguing the society; and *lastly* the true reason of the remedy. The judgment in *Heydon's case* also emphasised that courts always have to interpret the law so as to suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. This rule was approved, and its purport explained, in *Kanwar Singh v. Delhi Administration*[3] thus:

> *"It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will advance the remedy and suppress the mischief."*

7. The aim of such statutory construction was put, pithily and simply in *Swantraj & Ors. v. State of Maharashtra*[4]*:*

> *"Every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking the cue from the rule in Heydon's(1) case of suppressing the evil and advancing the remedy."*

---

2 76 ER 637
3 1965 (1) SCR 7
4 (1975) 3 SCC 322

8. This court recollects its decision in *Eera v. State (NCT of Delhi)*[5] where the mischief rule was commended and applied, specifically in relation to POCSO.

9. To gather the mischief which Parliament wished to eliminate, it would be necessary to briefly trace the history of the law, which existed before POCSO was enacted. The Indian Penal Code ("IPC" hereafter) criminalizes assault or use of criminal force which outrages a woman's modesty (by Section 354). The expression "criminal force" is defined in Section 350 and "assault" is defined in Section 351. These require an element of application of physical force, *to women*. The expression "modesty" was another limitation as older decisions show that such a state was associated with *decorousness*[6] of women. This added a dimension of patriarchy and class.[7] One cannot be unmindful of the circumstances in which these provisions were enacted by a colonial power, at a time, when women's agency itself was unacknowledged, or had limited recognition. Further, women in India were traditionally - during the time of enactment of IPC, in the mid nineteenth century - subordinated to the care of their fathers, or their husbands, or other male relatives. They had no share in immovable property; notions of gender equality were unheard of, or not permitted. Women had no right to vote. Quite naturally, the dignity of women – or indeed their autonomy, was not provided for.

10. The advent of the Constitution of India revolutionized- at least in law, all that. Regardless of gender, race, caste, religion or region, or all of the acknowledged sectarian and discrimination enabling barriers, everyone enjoyed

---

5 2017 (15) SCC 133

6 *Rupan Deol Bajaj* v. *K.P.S Gill* (1995) 6 SCC 194

7 Section 354 (or any other provision of the IPC) does not offer a statutory definition of the term 'modesty', and over time, was interpreted broadly, contemporaneously with the developing and acknowledged role of women in society, to overcome its inherently colonial and patriarchal origins. Yet, there were hangovers, as noticed as recently as in *Kalias & Ors. v. State of Maharashtra* (2011) 1 SCC 293 wherein the abhorrent argument that a tribal woman's 'modesty' was distinct owing to the 'inferiority' of tribal people who live in torn clothes or no proper clothes was rejected for being totally unacceptable in modern India.

equality of law, and equal protection of law (Article 14). Further, the provision in Article 15 (1) proscribed discrimination by the state (in all its forms) on various grounds, including gender. Article 15 (3) enabled the state to enact special provisions for women and children.

11. The limitations in law in dealing with acts that undermined the dignity and autonomy of women and children, ranging from behaviour that is now termed "stalking" to pornography, or physical contact, and associated acts, which were not the subject matter of any penal law, were recognized and appropriate legislative measures adopted, in other countries.[8] These have been alluded to in Trivedi, J's judgment, in detail. These laws contain nuanced provisions criminalizing behaviour that involve unwanted physical contact of different types and hues, have the propensity to harass and discomfit women and minors (including minors of either sex), or demean them.

12. In India, the Law Commission's 146th report (1993), 156th report (1997) and 172nd report (2000) dealt with some of these and associated issues. The 172nd report recommended changes to the definition of rape, expanding its scope, and also incorporating the expanded definition of sexual assault. These, and India's ratification of the UN Convention on the Rights of Children, 1992 (which required nation states to adopt suitable legislation to combat coercion of children in sexual activity, exploitative use of children and children's exploitation for pornography), formed the background and basis for enacting POCSO. The Statement of Objects and Reasons for POCSO, cites the UN Convention, and further states that:

> *" …The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the "study on child abuse: India 2007" conducted by the*

8 Sections 2, 3, 6, 7 and 78 of the UK Sexual Offences Act, 2003; Part V: Sexual Offences, Public Morals and Disorderly Conduct (Sections 151-153), Criminal Code, 1985 of the Dominion of Canada, Section 5, 6, 7, 15 of the Criminal Law (Sexual Offences and related matters) (Amendment) Act, 2007, enacted by the Republic of South Africa and amendments to laws enacted by the New South Wales, Victoria and New York Penal Laws by their legislatures.

> *Ministry of Women and Child Department. Moreover, sexual offences against children are not adequately addressed by the extent laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected.*
>
> *It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence. It is, therefore, proposed to enact a self-contained comprehensive legislation inter-alia to provide for protection of children from the sexual offences and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the Judicial process, incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences."*[9]

13. Parallelly, it would be useful to notice that the IPC was sought to be amended; through the introduction of a Bill in 2012, which for some reason, did not see the light of the day; instead, the amendments were made, through an Ordinance[10] which was later replaced by a Parliamentary Act.[11] These amendments enhanced the punishment for certain offences (including Section 354) and introduced new offences engrafted into the IPC, such as sexual harassment (Section 354A) which is an offence involving unwelcome sexual advances or physical contact, demand or request for sexual favours, forceful exhibition of pornography to women or making sexually coloured remarks; assault or use of criminal force to woman with intent to disrobe (Section 354B), or abets the doing of such act; voyeurism (Section 354C) which is defined as the act of a man watching or capturing the image of a woman engaged in private activities (e.g. undressing), when the woman presumes she is assured of privacy and does not expect anyone to be watching; stalking (Section 354D) which means following a woman and making or attempting to make contact (either

---

9 The statement of objects and reasons was noticed by this court in *Alakh Alok Shrivastava v. Union of India* (2018) 17 SCC 291 where the court observed that

> *"The POCSO Act has been legislated keeping in view the fundamental concept under Art. 15 of the Constitution that empowers the state to make special provisions for children and also Article 39(f) which provides that the state shall in particular direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."*

10 Criminal Law (Amendment) Ordinance, (No. 3) of 2013

11 Criminal Law (Amendment) Act, (Act No. 13) of 2013

physically or through electronic media) for personal interaction, despite a clear disinterest being displayed by the woman.

14. With this backdrop, one has to analyse the provisions of POCSO. Its Chapters II and III outline the different kinds of sexual offences from which children need protection. Part A of Chapter II addresses *penetrative sexual assault* on a child under Section 3 of the Act. Part B deals with circumstances in which such penetrative sexual assault assumes an *'aggravated'* nature, under Section 5 of the Act. Part C defines *sexual assault* under Section 7 of the Act. Part D deals with *aggravated sexual assault* under Section 9 of the Act. Part E outlines *sexual harassment* under Section 11 of the Act. Chapter III deals with using a child for pornographic purposes.

15. The punishment for these offences is directly proportionate to the severity of the offence. Penetrative sexual assault (Section 3) is punishable by imprisonment of not less than ten years which may extend to imprisonment for life, in addition to payment of fine under Section 4; aggravated penetrative sexual assault (Section 5) carries a rigorous imprisonment term of twenty years which may extend to the natural life of the offender under Section 6. Sexual assault (Section 7) carries imprisonment of not less than three years, and can be extended up to five years with fine under Section 8; aggravated sexual assault (Section 9) is punished by imprisonment of not less than five years and up to seven years with fine under Section 10; and sexual harassment (Section 11) is punished by a term which may extend up to three years with fine under Section 12. Punishment for using a child for pornographic purposes involves an imprisonment term of not less than five years and fine for a first-time offence, and up to seven years for a repeated offence.

16. The punishment is also inversely proportionate to the autonomy exercisable by the child, with offences against children below the age of 12

years falling under the 'aggravated' nature, thus subject to greater terms of imprisonment and fine. Sexual assault is also of an 'aggravated' nature under Sections 5 and 9 of the Act when committed by a person in a position of authority or those exercising authority over children in their care. These sections provide a long list of examples, including police officer, member of armed for security forces, public servants, management personnel, or personnel of a jail, remand home, protection home, observation home, management or staff of a hospital, management or staff of an educational institution or religious institution; relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child; in the ownership, or management, or staff, of any institution providing services to the child; position of trust or authority of a child, etc.

17. Section 7 of POCSO, which is the provision involved, therefore, has to be viewed having regard to the mischief rule, the background and history leading up to the enactment of the legislation (including the amendments to IPC in 2013) and to its objects. It reads as follows:

> *"7. Sexual assault-*
>
> *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."*

18. A plain reading of Section 7 would show that the expression "assault" has a meaning entirely removed from the definition of "assault" in Section 351 of IPC. The latter involves an overt gesture, or *preparation* by one person, that causes another to apprehend that the former would use *criminal force* upon the intended victim. The emphasis of Section 7 is to address the felt social need of outlawing behaviour driven by *sexual intent.*

19. The structure of Section 7 can be conveniently parsed in the following manner:

> *"Whoever,*
> *i. 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,*
> *ii. or does any other act with sexual intent which involves physical contact without penetration*
> *is said to commit sexual assault."*

20. A close analysis of Section 7 reveals that it is broadly divided into two limbs. Sexual assault, under the first limb is defined as the *touching* by a person - with sexual intent - of four specific body parts (vagina, penis, anus or breast) of a child, or making a child *touch* any of those body parts of "such person" (i.e. a clear reference to the offender) or of "any other person" (i.e. other than the child, or the offender). In the second limb, sexual assault is the doing of *"any other act with sexual intent which involves physical contact without penetration"*.

21. The use of the expression "touch" appears to be common, to the first and second parts, of the first limb. "Touch" says the Cambridge Dictionary[12] is

> *"to put your hand or another part of your body lightly onto and off something or someone."*

22. Collins Dictionary[13], likewise, states that

> *"Your sense of touch is your ability to tell what something is like when you feel it with your hands."*

23. "Contact" on the other hand, which is used in the second limb, has a wider connotation; it encompasses - but is not always limited to – 'touch'. While it is not immediately apparent why the term 'physical contact' has been used in the second limb, its use in conjunction with "*any other act*" (controlled by the overarching expression "with sexual intent"), indicates that 'physical

12 https://dictionary.cambridge.org/dictionary/english/touch accessed at 16:55 hrs on 15.11.2021.
13 https://www.collinsdictionary.com/dictionary/english/touch accessed at 16:57 hours on 15.11.2021.

contact' means something which is of wider import than 'touching'. Viewed so, physical contact without penetration, may not necessarily involve touch. The "other act" involving "physical contact" may involve: direct physical contact by the offender, with any other body part (not mentioned in the first limb) of the victim; other acts, such as use of an object by the offender, engaging physical contact with the victim; or in the given circumstances of the case, even no contact *by the offender* (the expression "*any other act*" is sufficiently wide to connote, for instance, the victim being coerced to touch oneself).

24. Parliamentary intent and emphasis, however, is that the offending behavior (whether the touch or other act involving physical contact), should be motivated with *sexual intent*. Parliament moved beyond the four sexual body parts, and covered acts of a general nature, which when done with sexual intent, are criminalized by the second limb of Section 7. The specific mention of the four body parts of the child in the first limb, and the use of the controlling expression "sexual intent" mean that every touch of those four body parts is *prima facie* suspect.

25. The circumstances in which touch or physical contact occurs would be determinative of whether it is motivated by 'sexual intent'. There could be a good explanation for such physical contact which include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact. Also relevant is where it takes place and the conduct of the offender before and after such contact. In this regard, it would be useful to always keep in mind that "sexual intent" is not defined, but fact-dependent – as the explanation to Section 11 specifies.

26. The inference by the High Court that "touch" cannot necessarily involve contact with a child's sexual body parts (in one of these cases, the breast) through clothes, is based on a disingenuous argument. Unsurprisingly, that

argument had its roots in other jurisdictions. In *Regina v H*[14] the UK Court of Appeal, whilst interpreting the words "*touching includes (a) with any part of the body; (b) with anything else or (c) through anything, and in particular, includes touching amounts to penetration*" per Section 79 (8) of the UK Sexual Offences Act, repelled an argument on that the individual accused of an act in relation to a victim, that involved grabbing *"her track-bottoms by the area of the right pocket"* was not "touching". It was observed by the court, that

> *"The opening words of section 79 (8) are "Touching includes touching" and in particular "through anything". Subsection (8) is not a definition section. We have no doubt that it was not Parliament's intention by the use of that language to make it impossible to regard as a sexual assault touching which took place by touching what the victim was wearing at that time."*

27. Likewise, in *State of Iowa v Walter James Fippes*[15] as well as *State of Iowa v Kris Kanon Pearson*[16] the court had to consider whether a "sex act" or "sexual activity" (criminalised by Section 709.1, 709.3 and 709.17) meant only sexual contact between two or more persons, i.e., through penetration, mouth and genitalia or by contact between genitalia of one person and that of another. In both the judgments, the argument that contact or touch through clothing did not amount to an offence, was decisively rejected. The test indicated (per *Pearson*) was that prohibited contact occurs when: (i) specified body parts or substitutes touch and (ii) intervening material would not prevent participants, viewed objectively, from perceiving that they had touched. Interestingly, in these decisions one comes across the argument that what is an offence is one that involves direct or "skin to skin" touch or contact.

28. These decisions only serve to highlight at once the human ingenuity in their making in like situations, as well as the limit of such creativity- given that it is repetitive. Therefore, as noted earlier, unsurprisingly, an argument that direct contact (opposed to an indirect contact which can be perceived by the victim) found favour with High Court. In my opinion, such an interpretation not

14 2005 (1) WLR 2005
15 442 NW 2d 611 (Iowa App. 1989).
16 514 NW 2d 452 (Iowa 1994).

merely limits the operation of the law, but tends to subvert its intention. It has the effect of *"inventions and evasions"* meant to continue the mischief, which Parliament wished to avoid.

29. The fallacy, therefore, in the High Court's reasoning is that it assumes that indirect touch is not covered by Section 7- or in other words is no "touch" at all. That provision covers and is meant to cover both *direct* and *indirect* touch. In plain English, to touch is to engage in one of the most basic of human sensory perceptions. The receptors on the surface of the human body are acutely sensitive to the subtleties of a whole range of tactile experiences. The use of a spoon, for instance, to consume food - without touching it with the hand - in no way diminishes the sense of touch that is experienced by the lips and the mouth. Similarly, when a stick, or other object is pressed onto a person, even when clothed, their sense of touch is keen enough to feel it. Therefore, the reasoning in the High Court's judgment quite insensitively trivializes - indeed *legitimizes* - an entire range of unacceptable behaviour which undermines a child's dignity and autonomy, through unwanted intrusions. The High Court, therefore clearly erred in acting on such interpretation, and basing its conviction of and awarding sentence to the respondents; as it did they were guilty of sexual assault. In the case of Satish, the conviction is to be under Section 8. In the case of Libnus, the appropriate conviction is of aggravated sexual assault, under Section 10.

30. During the hearing, a few decisions of High Courts were cited. In *Dulal Dhar v. State of Tripura*[17] the complained act was of grabbing the victim, forcibly kissing her and trying to undress her. The judgment noted that touching of the named parts was not the only set of acts that were criminalized, and remarked that "*the legislature in its wisdom has used very wide language which states that 'does any other act with sexual intent which involves physical contact'….pulling the girl's uniform involves physical contact with sexual intent*."

17 2015 SCC Online Trip 188

31. Similarly, the Tripura High Court decision in *Tushar Singha v. State of Tripura*[18] and judgments of Delhi High Court in *Jitender v. State*[19] and *Rakesh v. State (GNCTD)*[20] consistently held that touching the breast of a child victim constituted sexual assault under Section 7, punishable under Section 8. In all these judgments, the courts uniformly highlighted the 'sexual intent' of the offender. I am of the opinion that those judgments (of the Tripura and Delhi High Court) have correctly interpreted the law, having regard to the overall Parliamentary intent, which led to the enactment of POCSO.

32. Another reason why the High Court's reasoning in the impugned judgment is unacceptable is that the term 'contact' is comprehended in the expression 'force' under Section 349 of IPC in such manner, that the causing to any substance motion, change of motion, etc. which *"brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling"*.[21] Section 2(2) of POCSO enacts that *"The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1974 (2 of 1974), [the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)] and the Information Technology Act, 2000 (21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts"*. The idea of 'contact' by a person with another through their clothing would hence, imply a physical contact. This is because of a combined operation of Section 2(2) of

---

18 Crl. (A) J/2/2020, decided on 04.05.21
19 Crl. (A) 564/2019 decided on 19.03.20
20 2018 SCCOnline Del 1179
21 349. **Force**.—A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

First — By his own bodily power.

Secondly —By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly — By inducing any animal to move, to change its motion, or to cease to move.

POCSO and Section 349 of IPC. Crucially, neither Section 7 nor any other provision of POCSO even remotely suggests that 'direct' physical contact unimpeded by clothing is essential for an offence to be committed.

33. In the end, I cannot resist quoting Benjamin Cardozo that *"the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."* It is, therefore, no part of any judge's duty to strain the plain words of a statute, beyond recognition and to the point of its destruction, thereby denying the cry of the times that children desperately need the assurance of a law designed to protect their autonomy and dignity, as POCSO does.

34. I concur with the reasons and conclusions recorded by Justice Bela Trivedi, and with the additional observations indicated above, agree that the appeals of the Attorney General and the National Commission for Women, should be allowed; the appeals of the accused should, likewise, be dismissed in the two appeals filed against the judgment of the Bombay High Court, Nagpur Bench. Accordingly, I agree with the modification of conviction and the sentences imposed on the accused, Satish and Libnus. The appeals are disposed of in the above terms.

35. At the end, I would record my gratitude and appreciation for the invaluable assistance provided by Mr. K.K. Venugopal, learned Attorney General for India, Mr. Siddharth Luthra, learned Senior Advocate appearing on behalf of the accused through Supreme Court Legal Services Committee, and the amicus curiae appointed by the Court Mr. Siddhartha Dave, learned Senior Advocate as also all other learned counsel who have assisted the Court in these proceedings.

.....J.
[S. RAVINDRA BHAT]

NEW DELHI,
NOVEMBER 18, 2021.