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**CASE COMMENT: SONU KUSHWAHA v. STATE OF UP**- Yash Singh<sup>1</sup>**ABSTRACT**

Recently, the Allahabad High Court, in its judgment has held that according to the provisions of the POCSO Act, penetration of the penis into the mouth of an individual aged as a child would not constitute aggravated penetrative sexual assault and thus, reversed the order of the Fasttrack court constituted for taking the cognizance of the case by commutating the sentenced period.

This case comment analyses the case of Sonu Kushwaha v. State of Uttar Pradesh. This case comment would showcase how a wrongful interpretation of the facts and circumstances of the case as well as of the provisions of the said Act can erode the letter and spirit of the POCSO Act. This case comment will also reveal the reasoning of the judge's reasoning behind delivering the verdict and how a mere wrongful interpretation can be proved to be a dangerous precedent.

In the course of the discussion on the case, the author will try to differentiate between penetrative and aggravated penetrative sexual assault. The author will also pen down some earlier judgments that have been dealt with under the ambit of the POCSO Act and have proved to be detrimental to the conscience of society, especially on the developmental aspects of children.

**KEYWORDS**

POCSO Act, Aggravated Penetrative Sexual Assault, Section 4, Section 6

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## INTRODUCTION

POCSO Act, 2012<sup>2</sup> is one of the facets of child rights in India against the menacing “sexual abuse”. The Act has been formulated and institutionalized under the rulebook with the objective - “To protect children from offenses of sexual assault, sexual harassment, and pornography and provide for the establishment of Special Courts for the trial of such offenses and matters connected therewith.”<sup>3</sup> Although these pronouncements look fascinating on the paper, the chapter of implementation and interpretation of its provisions sometimes go in the wrong direction and due to such fiascos committed; one case arose in the Allahabad High Court by the name of Sonu Kushwaha v. State of UP<sup>4</sup>. This case has been one of the erroneous judgments from one of the majestic courts of India that would have set a dangerous precedent and would have crippled the society if the judgment had not been stayed by the Hon’ble Supreme Court. Just because of mere wrongful interpretation and idea built around the facts and circumstances of the case specifically while making a distinction between “Aggravated Penetrative Sexual Assault” and “Penetrative Sexual Assault”, the judge went on to deliver an extraneous verdict which had, for the time being devastated the true letter and spirit of the POCSO Act.

## FACTS

In 2016, in Chirgaon town in Jhansi, UP, “the accused Sonu Kushwaha went to the complainant’s (Sri Dev Singh) house and took his son of age 10 years, with him to a nearby temple at Hardaul. There, the accused gave Rs. 20 to complainant’s son i.e. victim and said to suck his penis. Accused, Sonu Kushwaha put his penis into the mouth of the victim. Thereafter, the victim came to the house having that Rs. 20. At this, the complainant’s nephew Santosh asked the victim that from where he got Rs. 20, then the victim told him the entire happening occurred to him. The accused also threatened the victim not to disclose the incident to anybody. The complainant then lodged an FIR against the accused and a plethora of charges had been framed against him. He was slapped with Section 377 of IPC, Section

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<sup>2</sup>Protection of Children from Sexual Offences Act 2012

<sup>3</sup>Wcd.nic.in, POCSO Act, 2012 (2013)  
<<https://wcd.nic.in/sites/default/files/POCSO%20Act%2C%202012.pdf>> accessed 2 Dec 2021

<sup>4</sup>Sonu Kushwaha v State of UP (Allahabad High Court, 18 November 2021)

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506 of IPC, Section 3 of POCSO Act, and also Section 4 of the POCSO Act. When the Fastrack Court specially constituted for POCSO cases took cognizance of the case, it convicted and sentenced the accused under Section 377 of IPC with rigorous imprisonment for seven years and to pay a fine of Rs. 2000 and in default of payment of fine, three months additional imprisonment. Under Section 506 of IPC, one year of rigorous imprisonment and a fine of Rs. 1,000 and in default of payment of fine, one-month additional imprisonment, and under Section 6 of POCSO Act, ten years rigorous imprisonment and a fine of Rs. 5,000 and in default of payment of fine, three months additional imprisonment. Apart from this, all sentences had been ordered to run concurrently.<sup>5</sup> Aggrieved by the above-mentioned decision of the Special Court, the accused appealed to the Hon'ble High Court of Allahabad and pleaded that he was wrongfully convicted under the said provisions and instead, he had committed the offense under Section 9(m) of the POCSO Act.<sup>6</sup>

### APPLICATION OF RELEVANT LAWS

The Sonu Kushwaha case found many laws applied during the proceedings of the same and led to the delivery of the verdict, some of the relevant laws are:

- **SECTION 3 (POCSO Act, 2012)** - "A person is said to commit "penetrative sexual assault" if - (a) he penetrates his penis to any extent into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts to any extent, any object or a part of the body not being the penis into the vagina, the urethra or anus of the child or makes the child do so with him or any other person; or (c) he manipulates any part of the body of the child to cause penetration into the vagina, urethra, anus or any part of a body of the child or makes the child do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child do so to such person or any other person."<sup>7</sup>
- **SECTION 4 (POCSO Act, 2012)** - "Whoever commits a penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less

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<sup>5</sup> Sonu (n 3)

<sup>6</sup> POCSO Act 2012, S. 9 (m)

<sup>7</sup> POCSO Act, S. 3

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than seven years but which may extend to imprisonment for life, and shall also be liable to fine.”<sup>8</sup>

- **SECTION 5 (POCSO Act, 2012)** - Since Section 5 is very wide in its ambit, so only Clause (m) of the Provision shall be taken into consideration which states that “whoever commits penetrative sexual assault on a child below twelve years is said to commit aggravated penetrative sexual assault.”<sup>9</sup>
- **SECTION 6 (POCSO Act, 2012)** - “Whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine, or with death.”<sup>10</sup>
- **SECTION 377 (IPC)**- “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”<sup>11</sup>
- **SECTION 506 (IPC)** -“Whoever commits, the offense of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If the threat is to cause death or grievous hurt, etc. and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offense punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”<sup>12</sup>

These were the different statutory provisions that were made applicable against the accused in the above-mentioned case.

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<sup>8</sup> POCSO Act, S. 4

<sup>9</sup> POCSO Act, S. 5(m)

<sup>10</sup> POCSO Act, S. 6

<sup>11</sup> Indian Penal Code, S. 377

<sup>12</sup> IPC 1860, S. 506

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## ISSUES

Apart from the wide ambit of the provisions of the POCSO Act, the Hon'ble Judges in the Sonu Kushwaha case dealt with the facts of the case in such a manner that it led to various complexities. The first and the foremost issue is whether "Penetration of Penis into the mouth of a child aged 10 years will not amount to Aggravated Penetrative Sexual Assault taking into view Section 5 (m) of the act." The second issue is whether the Judges misinterpreted the facts and circumstances of the case due to which the perpetrator's sentence was commuted to 7 years of imprisonment as compared to the original imprisonment of 10 years given by the lower court." The third issue that pertains to the judgment is whether "the said judgment sets a detrimental precedent against the provisions of International Treaties and Conventions on Child Rights to which India is a signatory of as well as of certain statutory provisions applicable within the contours of India."

## JUDGMENT

The Hon'ble High Court of Allahabad after taking cognizance of the facts and circumstances of the case held that "offense committed by the appellant (accused) neither falls under Section 5/6 of POCSO Act nor under Section 9(m) of POCSO Act because there is penetrative sexual assault in the present case as the appellant has put his penis into the mouth of the victim. Putting a penis into the mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into the category of penetrative sexual assault which is punishable under Section 4 of the POCSO Act. After going through the records and provisions of the POCSO Act, the court is of the opinion that the appellant should be punished under Section 4 of the POCSO Act because the act done by the appellant falls under the category of penetrative sexual assault. Penetrative sexual assault being a lesser offense from aggravated penetrative sexual assault is legally permissible to convict the appellant therein."<sup>13</sup>

Thus, the High Court had modified the decision of the Special Court by changing the provision for convicting the accused from "Section 6" to "Section 4 of the POCSO Act".

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<sup>13</sup> Sonu (n 3)

Furthermore, the High Court remained in consonance with the Special Court only on charging the same fine of Rs. 5000 as prescribed by the lower court during the appellant's conviction.

## CRITICAL ANALYSIS

The Sonu Kushwaha case which got appealed and modified by the Hon'ble High Court of Allahabad has marked a row of controversy around it just because of mere wrongful interpretation by the Judges after taking into consideration the facts and figures of the case. Since it was noted by the High Court that the age of the child, rather victim is 10 years and on the contrary, Section 5 (m) of the Act itself mentions that "penetrative sexual assault committed against a child of age below 12 years will amount to Aggravated Penetrative Sexual Assault", the judges committed a gross mistake on their part by misinterpreting Section 5 (m) with Section 3 and naming the offense to be punishable under Section 4. Even when the Special Court rightly pointed out the age of the victim and placed the perpetrator under Section 5 and punishable under Section 6, the court out-rightly ignored this fact and presided with a notion in the wrong direction.

The court failed to prosecute the case from a moral point of view, keeping into consideration the definition of the Child "To be of any person under 18 years" mentioned explicitly under Section 2 (1) (d) of the POCSO Act and the worst part is that the victim himself was a child of only 10 years which is a fragile age to see such unprecedented incidences happening around him. The court failed to undertake the fact that such incidences and the judgment itself of commuting the sentenced order of the lower court, can have wide repercussions on the growth and progress of the child. Firstly, the child would remain in a constant state of fear from stepping on remembering the deplorable past events, Secondly, the child would be reluctant in stepping outside his home and into the society with the fear of facing different members, and Thirdly, the physical, mental, and psychological growth of the child would gradually get deteriorated. On the contrary, when the perpetrators commit such offenses and get out of jail on a sentence commuted to a much extent, they predilate towards committing the same offense again and thus in turn, become habitual offenders thereby dilapidating the very motto of the Act and therefore, the incidences of crime against children increases.

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If the court had considered these arguments, their judgment would not have been compromised by the wrongful misinterpretation to such an extent. Also, the judgment would set a wrongful and pernicious precedent for the future course of adjudication and would imprint a wrong impression on society. Furthermore, the judgment can also prove to be detrimental to India's assented International Treaties and Conventions like the United Nations Convention on the Rights of the Child, 1990<sup>14</sup> under which Article 34 states that "The government should protect children from sexual exploitation (being taken advantage of) and sexual abuse, including by people forcing children to have sex for money, or making sexual pictures or films of them."<sup>15</sup> And such an unhealthy judgment has been passed in such a subcontinent where Article 15 (3) of the Indian Constitution states that "This article shall not prevent from making special provisions for children."<sup>16</sup> Hence, the said case failed itself to be a salubrious and a salutary one, and thanks to the stay put by the apex court on the case, it cannot act as a precedent for the future course of adjudication.

## CONCLUSION

The Sonu Kushwaha case has been delivered with many complexities embedded in it due to misinterpretation of laws. Apart from this, the debate around the wide ambit of the provisions of the POCSO Act has been rekindled by this case and subsequent judgments have been pronounced due to misinterpretation of laws like "the 'skin to skin' judgment of the Bombay High Court, which held that pressing the breast of a child without removing her clothes will not amount to 'sexual assault' under Section 7 of the POCSO Act. While setting aside this judgment, the Supreme Court held that the law has to be given an interpretation that gives effect to the intention of legislature instead of defeating it."<sup>17</sup> Due to the wide ambit of the POCSO Act, sometimes judges misinterpret its provisions tend to deliver erroneous judgments which become detrimental to society and thus, the whole essence of the POCSO Act gets diluted. Thus, Judges need to pay utmost care and caution while prosecuting cases pertaining to this Act, they must convict the accused with stricter punishments to set and must

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<sup>14</sup> Ohchr.org, Convention on the Rights of the Child (2004)  
<<https://www.ohchr.org/documents/professionalinterest/crc.pdf>> accessed 7 Dec 2021

<sup>15</sup> ibid

<sup>16</sup> Constitution of India, Article 15(3)

<sup>17</sup> Barandbench.com, 'Aggravated Penetrative Sexual Assault under POCSO Act: What the Allahabad High Court missed' (2014) <<https://www.barandbench.com/columns/aggravated-penetrative-sexual-assault-pocso-act-allahabad-high-court-missed>> accessed 7 Dec 2021

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uphold the spirit and objectives of the said Act while taking into view, the fragile state of children and their future and if proper justice is not provided to them, it can inflict serious implications not only on the children and the society but also to the dignity of the Judiciary and in turn, the “Democracy” and the “Rule of Law” would get compromised. Therefore, a holistic approach should be taken while dealing with such kinds of cases, and the Legislature too ought to revisit the Act and come up with more deliberations and amendments like the POCSO (Amendment) Act, 2019 to amend certain clauses of the 2012 Act<sup>18</sup> to uplift the cause of the protection of children from sexual offenses and safeguard the letter and spirit of the POCSO Act.



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<sup>18</sup> POCSO (Amendment) Act 2019

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