

**Vinod Kumar Vs. State**

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**Court :** Delhi

**Decided On :** Dec-18-2014

**Judge :** Pratibha Rani

**Appellant :** Vinod Kumar

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

11. 12.2014 Pronounced on :18.12.2014 % + CRL.A. 1380/2014 VINOD KUMAR ..... Appellant Through: Mr.A.Chaubey and Mr.A.K.Mishra, Advs. versus STATE Through: ..... Respondent Ms.Rajdipa Behura, APP for the State. CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI PRATIBHA RANI, J.

1. This appeal has been preferred by the Appellant Vinod Kumar impugning his conviction under Section 10 of Protection of Children from Sexual Offence Act, 2012 read with Section 354/341 IPC vide judgment dated 16.07.2014 as well as sentence awarded to him vide order dated 22.07.2014.

2. The Appellant has been sentenced to undergo RI for five years with fine of Rs.2000/- and in default of payment of fine, to undergo SI for 15 days for committing the offence punishable under Section 10 of POCSO Act. However, no separate sentence was awarded for the offence punishable under Sections 354/341 IPC.

3. I have heard Mr.A.K.Chaubey, Advocate for the Appellant and Ms.Rajdipa Behura, APP for the State.

4. On behalf of Appellant, Mr.A.K.Chaubey, Advocate submitted that the Appellant was bed roll boy in Brahamputra Mail in the Compartment in which the Complainant (PW-2) alongwith her daughter (PW-1) was travelling on berth No.36 and 42. Learned counsel further submitted that there appears to be some confusion/misunderstanding on the part of PW-1 and PW-2 which has resulted in apprehension of the Appellant and registration of FIR against him. Learned counsel for the Appellant submitted that PW-1 A - the child victim has categorically stated that she had not seen the person who touched her at the time when she was sleeping. However, as per PW-1, the Appellant had touched her breast and hips when she entered washroom and Appellant also entered the washroom but it is clear improvement over the version recorded earlier in the FIR as no such allegations were made by PW-1 and PW-2 at that time. Further had there been any wrong committed by the Appellant when PW-1 was in the washroom, he would not have returned alongwith her to the berth where her mother was sleeping. Learned counsel for the Appellant submitted that the Appellant had wrongly been convicted under Section 10 of POCSO Act ignoring that the only act attributed to the Appellant was that he tried to chase and stop her way when PW-1 was going to washroom and at that time, she pushed the Appellant aside and returned to the berth where her mother was sleeping. It has been submitted by learned counsel for the Appellant that at the most it can be a case of sexual harassment, hence matter needs to be examined from the angle as to whether the act attributed to the Appellant is covered by Section 10 of POCSO Act or some lesser offence is made out.

5. On behalf of State, Learned APP submitted that PW-1 and PW-2 were only the passengers in Brahamputra Mail and they had no enmity with the Appellant. Learned APP for the State further submitted that PW-1 - the child victim has specifically stated that in the washroom, the Appellant touched her breast and hips to show that how other person molested her. Learned APP for the State submitted that act of the Appellant gives the impression that passengers are not safe even in a running train, hence the Appellant, who tried to molest a young child in the

washroom when passengers were sleeping, has been rightly convicted under Section 10 of POCSO Act as the child victim was under 12 years of age.

6. In order to appreciate the rival contentions and with a view to arrive at the conclusion as to exactly what is the nature of the offence committed by the Appellant, it is necessary to reproduce the contents of the written complaint Ex.PW2/A which was handed over by PW-2 - mother of the child victim at PS Old Delhi Railway Station on the basis of which FIR No.12/2013 was registered. The complaint Ex.PW2/A reads as under : To The SHO Old Delhi Railway Station. Subject : Complaint against molestation. Sir, I was travelling with my daughter A in Brahmaputra Mail on 26.1.13 in II A.C. At around 4.30 am near Tundla Station the bed roller boy (Vinod Kumar) tried to molest my daughter who was sleeping on berth no.36. She opposed and tried to call me but I was in deep sleep. I could not hear her. She pushed him aside and went to the toilet and he followed her chase. He tried to stop her way in the toilet also. She managed to push her aside and came back into the coupe and shouted. I woke up and came down and she started crying. The boy entered behind her and cooked a new story that some one on opposite berth was trying to molest her and he was trying to save her. I have apprehended the boy on spot whose identity is established as Vinod Kumar S/o Shri Balbir Singh (who is working as a bed roll boy) and produced him before you. Kindly take action as per law. Sd/- english 7. The above complaint attributes two acts to the Appellant : (i) he tried to molest her daughter (child victim) who was sleeping on berth No.36, and (ii) the Appellant followed the child victim when she was going to toilet and tried to stop her way but the child victim managed to push him and come back into the coupe and shouted.

8. The prosecution has examined four witnesses in all in support of its case. While PW-1 - A is the child victim, PW-2 Dr.(Major) Harshita Surange is the Complainant and mother of the child victim. PW-3 HC Santosh is the Duty Officer and a formal witness and PW-4 SI Suresh Kumar is the Investigating Officer. For our purpose, statement of PW-1 A - the child victim and PW-2 Dr.(Major) Harshita Surange - the Complainant is relevant.

9. PW-1 A - the child victim has deposed that she alongwith her mother was travelling from Allahabad to Delhi in Brahamputra Mail. While number of berth of child victim was 36, that of her mother was 42 in two tier AC Coach. PW-1 A - the child victim has stated that at about 4.00 am, while she was sleeping, she felt that somebody was touching her body. She got up and tried to awake her mother by calling her and shaking her but her mother was in deep sleep. Thereafter, PW-1 left for washroom. She saw the accused standing outside the washroom and as soon as she entered the washroom, he also entered the washroom and started asking as to who was the person sleeping on the berth adjacent to her berth and whether he was her father and thereafter on the pretext of showing how that person was touching her, the Appellant also touched her chest and hips. towards her berth. She pushed the Appellant and rushed She cried loudly and her mother got up. The Appellant also followed her to the berth where her mother was sleeping. The Appellant was apprehended and handed over to the police at Old Delhi Railway Station.

10. In her cross examination, she was questioned about the person who touched her when she was sleeping and she answered that she could not see that person. She has also stated that when she left for washroom, the Appellant was sitting at the berth below her berth and was not present outside the washroom. The child victim also stated that the seat where the Appellant was sitting was approximately in the middle of the compartment. PW-1 - A - the child victim has also stated that whatever she disclosed to her mother about the incident, was reported by her mother to the police. She has denied the suggestion that Appellant was sitting at the seat meant for bed roll boys near the toilet when she went to washroom. She has volunteered that he followed her and reached there.

11. PW-2 Dr.(Major) Harshita Surange - mother of the child victim has stated that on 26.01.2013 she alongwith her daughter was returning from Allahabad to Delhi in Brahamputra Mail. They were travelling on berth No.36 and 42 and both berth were side upper berth. Her daughter woke her up and at that time she saw that Appellant was chasing her and her daughter informed that Appellant had followed her to the washroom. She apprehended that boy and called the T.T. Identity of the Appellant was revealed as Attendant/Bed Roller on the said coach. On reaching

Delhi, she made complaint Ex.PW2/A to the police in writing. She also furnished a copy of birth certificate of her daughter to the police.

12. From the complaint Ex.PW2/A and the endorsement Ex.PW4/A made thereon, it is established that it was the Appellant Vinod Kumar who was produced before the police by the Complainant alongwith her written complaint Ex.PW2/A. The contents of complaint Ex.PW2/A and testimony of PW-1 A disclosed two incidents : (i) PW-1 felt that someone tried to touch her but she could not see that person. She tried to wake up her mother by calling and shaking her but she did not wake up; and (ii) PW-1 A went to washroom and the Appellant followed her and tried to stop her way but she managed to push him aside and returned to her berth. The Appellant also came near her berth and cooked up a story that he was trying to save her.

13. From the above, it is proved that the accusation against the Appellant is that he followed her to washroom and tried to stop her way. Although in her testimony before the Court, the child victim A has stated that when she entered the washroom, that boy also entered the washroom, which is not in consonance with the initial version as recorded in PW2/A which describe the act of the Appellant only to the extent of following A and stopping her way when she was going to washroom. Thus, so far as the act of feeling some touch when PW-1 was sleeping on the berth is concerned, she herself has stated that she could not see the person who touched her while she was sleeping. The learned Addl. Session Judge has convicted the Appellant for committing the offence punishable under Section 10 of POCSO Act read with Section 354/341 IPC mainly on the ground that at the time of occurrence, the child victim was 11 years, 10 months and 16 days old, thus below 12 years of age and the act amounts to aggravated sexual assault as defied under Section 9 (m) of POCSO Act which provides that commission of sexual assault on the child below twelve years is aggravated sexual assault.

14. Section 9 of POCSO Act deals with aggravated sexual assault, which is punishable under Section 10 of the said Act. In order to ascertain as to under which Section the act committed by the Appellant falls, it is necessary to refer to Section 11 of the said Act. Section 11 reads as under:Section 11. Sexual

harassment-A person is 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; or (iii) shows any object to a child in any form or media for pornographic purposes; or (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or (vi) entices a child for pornographic purposes or gives gratification therefore. Explanation.-Any question which involves sexual intent shall be a question of fact.

15. After considering the version given by PW-2 - mother of the child victim in her complaint Ex.PW2/A, which has been made immediately on arrival at Delhi and the version about the incident being mentioned as per details given by the child victim, at the most, ingredients of Sec.11 of POCSO Act can be said to have been proved against the Appellant.

16. Since the punishment provided for committing the offence under Section 11 of POCSO Act is up to three years and fine, learned counsel for the Appellant submitted that Appellant had been in custody for the last about six months, he is a young boy and has also lost his job and in these circumstances, the substantive sentence of the Appellant may be reduced. It has also been submitted by learned counsel for the Appellant that the child victim appears to have misunderstood the act of the Appellant though he infact wanted to help her and had there been any criminal intent on his part to assault the child victim, he would not have come back with the child to the berth, rather when PW-1 was returning to her berth, he would have disappeared in the train. Learned counsel for the Appellant prays that in view of above circumstances, the period of sentence to be undergone by the Appellant in default of payment of fine may be reduced to facilitate his early release.

17. After examining the contents of complaint Ex.PW2/A and the testimony of PW-1 A - the child victim and PW-2 Dr.(Major) Harshita Surange - mother of the child victim, I am of view that the prosecution has been able to prove that the Appellant had followed and tried to stop her way when PW-1 left her berth to use the washroom. Thus, I find that the offence proved against the Appellant is under Section 11 of POCSO Act, which is punishable under Section 12 of the said Act and provides imprisonment of either description for a term which may extend to three years and shall also be liable to fine. .

18. In the facts and circumstances of the case and the submissions made by learned counsel for the Appellant, the conviction of the Appellant under Section 10 of POCSO Act is converted to Section 11 of POCSO Act and the substantive sentence awarded to him is reduced from five years to one year. The fine of Rs.2000/- imposed on him is maintained, however, it is ordered that in default of payment of fine, the Appellant shall undergo S.I. for three days.

19. As per nominal roll of the Appellant, as on 14.11.2014, he has undergone six months and nine days and also earned remission of twenty-five days.

20. Appeal stands allowed in above terms. On completion of above sentence, the Appellant be set at liberty, if not wanted in any other case.

21. A copy of this order be also sent to concerned Jail Superintendent for compliance. TCR be sent back alongwith copy of this order. (PRATIBHA RANI)  
JUDGE DECEMBER18 2014 st

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