IN THE COURT OF THE Special JUDGE :::::::::::: HAILAKANDI

Special (POCSO) (T-1) Case No. 04/2017

(Under Section 4 of the POCSO Act, 2012)

State

Versus

Budul Das

..... Accused.

PRESENT :- Sri D. Bhattacharjee, AJS, Special Judge, Hailakandi.

Appearance and particulars:-

For the State

:- Sri U.K. Das, Ld. Special Public Prosecutor.

For the Accused

:- Sri J.I. Choudhury and Sri J.U. Choudhury,

Ld. Advocates.

Dates of recording evidence of PWs. :- 18.09.2017, 12.10.2017, 04.12.2017,

02.01.2018 & 20.02.2018.

Dates of recording evidence of DWs. :-

29.09.2018.

Date of recording statement U/S 313 Cr.P.C. :- 14.03.2018.

Date of Argument

:- 14.11.2018.

Date of Judgment

:- 28.11.2018.

JUDGMENT

1. The prosecution case in brief is that on 03.05.2017 one Sri Chandan Das lodged an FIR with the Officer-in-charge Ramnathpur Police Station alleging inter alia that on 01.05.2017 the accused restrained his 4 (four) years old minor daughter (name withheld) in his house and attempted to do sexual intercourse but his daughter raised hue and cry and on hearing the hue and cry,

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his wife Smti Suniti Das went to the house of accused and found her daughter and the accused in naked condition inside the house. His wife recovered the child and informed the same to the neighbouring people. It is further alleged that due to the said acts of accused, the private part of his daughter was found swollen up and there was pain in her private parts. It is clarified that there was some delay in lodging the FIR as there was a talk of compromise.

- 2. On receipt of the FIR, the Ramnathpur P. S Case No. 115/17 was registered u/s 4 of the POCSO Act 2012. During investigation police visited the place of occurrence, recorded the statements of witnesses, got the victim medically examined, arrested the accused person and forwarded him to the court and after completion of investigation having been found prima facie case laid the charge sheet against the accused u/s 4 of the POCSO Act, 2012.
- This court being the court of original jurisdiction under the POCSO Act, furnished copies of relevant materials to the accused person and after hearing the learned Special Public Prosecutor and the learned Defence counsel and after perusal of materials available on record having been found sufficient grounds for presuming that the accused person has committed the offence, formal charge had been framed against him under Section 4 of the POCSO Act, 2012. The charge so framed was read over and explained to the accused to which he pleaded not guilty and claimed to be tried and hence, the trial.
- The prosecution in order to prove its case examined as many as 9 (nine) PWs including M.O. and I.O. The defence plea is of total denial. The accused person was examined u/s 313 of Cr. P. C. wherein he denied all such incriminating materials brought in evidence against him and pleaded that out of the grudge of land dispute, the case has been filed against him with false allegations. The defence side examined two DWs.
- **5.** Heard argument of the learned Special Public Prosecutor and the learned Defence counsel.



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POINT FOR DETERMINATION

Whether the accused person on 01.05.2017 in the evening at about 3 P.M. at village Garmurah Forest Village committed penetrative sexual assault on the victim, minor daughter of the informant and thereby committed an offence punishable under Section 4 of POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

6. The PW-1, Smt. Suniti Das has deposed that the victim is her daughter aged about 6 years. On the 1st day of May, 2017 at about 2:30 P.M., she was in her house and her husband viz. the informant was in the market and at that time, she heard sound of hue and cry of her six years old daughter in the house of accused Budul Das. Immediately, she went to the house of accused and saw the accused Budul Das and her daughter in naked condition. On seeing her, accused Budul Das hid himself and thereafter fled away. She has further stated that the wife of accused stays in Bengaluru along with her two sons. At the relevant time, Junaki, the daughter of accused was not in the house as she was in the house of her aunt. She informed the incident to the sister of accused namely, Mukta who advised her to inform the same to the village headman. The village headman referred her to the house of one Sudhanshu, the brother of accused. Accordingly, she went there who referred her to the house of Parimol, another brother of accused but ultimately, she did not get justice. In the night, her husband came, she narrated the entire incident to him and her husband lodged the case. She noticed injury in the vagina of her daughter. Her daughter reported her that the accused touched the vagina of her daughter with his penis. She applied ointment in the injury. After the incident, her daughter was medically examined.

In cross examination she has stated that there is a village path by the side of her house. The houses of Sudhangshu and Nokul Moni are situated nearby the house of accused towards east, the house of Biru is to the west and to the north the house of Monu Master is situated. Immediate after the incident, the accused fled away putting his house under lock and key. She denied

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the suggestion that she did not state before police that she noticed injury in the vagina of her daughter and she applied ointment in the injury. She also denied the suggestion that there is land dispute between her family and the accused person and in order to grab the land of accused, they have filed the case with false allegations.

7. The PW-2, victim, a six years old minor girl has deposed that the accused whom she addressed as Jetha (uncle) made her naked and touched her vagina with his penis.

In cross examination, she has stated that she was naked and immediately her mother came. Police came to her house and asked her about the incident and at this point, during cross examination the child started crying.

8. The PW-3, Sri Chandan Das, the informant of the case has deposed that the house of accused is situated at a distance of 15/16 nals from his house. On 01.05.2017 at about 9:30 P.M. he returned home from market and then his wife (Suniti Das) reported him that on that day at around 2:30 P.M. the accused committed some bad acts with his 5 years old minor daughter and when she (PW.-1) went to the house of accused, she found her daughter and the accused in naked condition. He has further stated that before his arrival from market, his wife reported the incident to the elderly village people. His wife told him that his daughter had been suffering from vaginal pain. On 03.05.2017 he lodged the FIR vide Ext.-1.

In cross examination, he has stated that the houses of Kuti Morol, Monu Master and Sunil Das are situated nearby his house. There is no house in between his house and the house of accused. The accused person has got two sons, two daughter and wife. The accused is aged about 60 years.

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In cross examination, he has stated that the accused is a married person and his wife and children reside in Bengaluru. He has further stated that in between his house and the house of Nibaran Das, the house of accused is situated. Near to his house, the houses of other relatives of the accused are situated. He denied the suggestion that his son wanted to disposses the accused from the khas land, failing which the instant case has been filed. The accused is aged about 60 years. The accused stays in his house alone.

- 10. The PW-5, Dr. Ranabijay Malakar has deposed that on 04.05.2017 he examined the victim at S.K. Roy Civil Hospital, Hailakandi and found no mark of violence present in her private parts. No spermatozoa was found. The age of the victim was found 5/6 years. Ext.-2 is the medical report.
- 11. The PW-6, Sri Uttam Das has deposed that the informant is his brother. After 7/8 days of the occurrence, he went to his house and then his wife, brother and sister-in-law reported him that the accused committed sexual assault on his niece.

In cross examination, he has stated that he did not see the occurrence.

12. The PW-7, Sipra Das has deposed that the informant is her brother-in-law. About 7/8 months back in an evening while she was taking bath in a pond, the mother of the victim came there raising commotion and reported her that the accused Budul Das did some bad acts with her minor daughter.

In cross examination, she has stated that she did not see anything. The accused is an aged person having his wife and children but at the relevant time, they were in Bengaluru.

13. The PW-8, Sri Pijush Kanti Roy, the Investigating Officer has deposed that he investigated the case.

In cross examination, he has stated that as per FIR, the date of occurrence is 01.05.2017 and the incident was reported to the police on 04.05.2017. In the FIR, the cause of delay is mentioned. The PW-1 did not state

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before him that she noticed injury in the vagina of the victim and applied ointment therein. He has further stated that since there was no neighbouring independent witness, he recorded the statements of witnesses who are relatives of the informant. The victim did not make any statement before him as she was crying only.

- **14.** The PW-9, S.I. Mukut Hazarika has deposed that he submitted charge sheet against the accused under Section 4 of the POCSO Act.
- 15. The DW-1, Ujjal Das has deposed that the distance between his house and the house of accused is around half mile. There is a road near the houses of the accused and the informant. About one year back one day while he was passing through the road he heard the accused rebuking the informant saying that why they discharged stool on the said path, he also asked the informant to construct a latrine. Thereafter, he left for his home. On the same day, in the evening he again came and found the victim and the daughter of accused as well as other children were playing. On the next day, he again came and while was passing through the road, he heard that the wife of informant was shouting and saying that there is no person in her favour in the village and also was shouting saying that the accused committed rape on her daughter. On hearing the same, he did not believe it. The 10/15 people sitting in the shop near the house of accused told him and his grand-father that such type of incident was not heard by them. He has further stated that the informant and the accused always quarrels each other regarding land as well as latrine. On the next day, the daughter of Budul Das aged about 10 years was in the home and she cooks food for her father. The informant Chandan Das has very bitter relation with all the villagers.

In cross examination, he has stated that he appeared in the court on being brought by the accused who paid his car fare. He does not know the wife of Budul Das. He does not know the names of wife and children of the informant. He was not invited in the meeting which was convened by the informant but his grand-father was present.

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The DW-2, Jyotish Chandra Das has deposed that about one and half years back, one day he and DW-1 were going through the road nearby the house of accused and informant and at that time, the DW-1 told him that the accused and the wife of informant were quarrelling regarding discharge of stool by the informant's family on the path of the accused to which the DW-1 interfered and settled the dispute of both the family. On the same day, they found the daughters of informant and the accused were playing. Thereafter, they proceeding at a little distance and near the house of accused and the informant, there is a shop in which they found 5/6 persons were sitting. On seeing him, those persons told him that the accused Budul Das committed rape on the daughter of informant. Then he sent two numbers of female to the house of informant to take stock of the situation and accordingly, he was reported by the females that no such incident of rape took place and the victim was playing with other girls.

In cross examination, he has stated that he cannot say the name of the females whom he sent to take stock of the situation. He was not asked for the bichar. The DW-1, Ujjal Das is not his relative.

- stated that at the relevant time the victim was aged 6 years. The PW-3, the father of the victim has stated that at the relevant time the victim was aged about 5 years. The PW-5, Medical Officer has deposed that on examination, it was found that the victim was aged about 5 to 6 years. The above evidence of the prosecution witnesses as regards age of the victim was not denied by the defence and hence, considering the consistency of all the material witnesses as regards age of the victim, it is established that at the relevant time the victim was aged about 6 years.
- 18. The PW-3, the informant has alleged in the Ext.-1, FIR that on hearing hue and cry of his minor daughter, his wife (PW-1) went to the house of accused and found his daughter and the accused in naked condition inside the house. It is further alleged that after recovery of his daughter, it was noticed that the private parts of his daughter was found swollen up and she felt pain therein.

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Now, coming to the evidence of PW-3, it is appeared that he is a reported witness as at the relevant time, he was not in his home and after his return his wife (PW-1) reported him about the incident. He was reported by the PW-1 that when she went to the house of accused, she found her daughter and the accused in naked condition, which shows that apart from victim, the PW-1 (mother of the victim) is also a very important witness in the case. The PWs.-4, 6 & 7 are also reported witness.

- adducing evidence in the court, she could not state about the occurrence in detail. It is very natural that a child of 6 years would not be able to understand all the acts and deeds like a matured person and therefore, it cannot be expected from a child of 6 years that she will narrate the entire incident in a decent and proper manner in detail. However, she has stated that the accused whom she addressed as uncle made her naked and by indicating with her finger stated that the accused touched her vagina with his penis and that apart she could not state anything and she started crying. Though the victim could not state the incident in detail but stated the most vital part of the incident. The defence failed to bring any contradiction in her evidence.
- 20. The Ld. Counsel for the defence during argument has submitted that it is completely unsafe to act upon the uncorroborated testimony of a child as there is every possibility of the child being tutored. As discussed above, the child was so shocked that after stating the incident to the court, she started crying and if the child was tutored, she would not have started crying. At the time of adducing evidence, when she recalled the said barbaric acts done upon her, tears came automatically in her eyes.
- 21. The Ld. Counsel for the defence has further submitted that had the accused committed any bad act with the victim, a 6 years old child, definitely the doctor who examined her would have found sign of injury in her private parts and therefore, it is clear that the entire case of the prosecution is out and out false. From the FIR, as well as from the other materials available on record, it is clear that the incident occurred on 01.05.2017 and the victim was



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medically examined on 04.05.2017 i.e. after 3 days of the occurrence and under such circumstances, it cannot be expected that any such minor injury would last for 3 days.

- daughter, when she went to the house of accused, she found her daughter and the accused in naked condition in the house of accused. After recovery of her child, she noticed injury in the vagina of her child and her daughter reported that the accused got his penis touched into her vagina. From the evidence of PW-8, Investigating Officer, it is found that the PW-1 omitted to state before police that she noticed injury in the vagina of her daughter, which is a very minor omission and that apart, there is no omission in the above testimony of PW-1. So what have been appeared from the evidence of PW-1 is that on hearing the sound of her daughter in the house of accused, she went there and found her daughter and the accused inside the house of accused in naked condition and after recovery, her daughter told her that the accused got his penis touched into her vagina.
- 23. The above evidence of PWs.- 1 & 2 are very much corroborative and consistent to the facts that the victim was found in the house of accused in naked condition. The accused was also naked and the accused got his penis touched with the vagina of the victim.
- Now, the question may arise as to how the victim went to the house of accused and how the accused got the opportunity in his house to do such type of things. The PW-1 has stated that the wife and two sons of accused reside in Bengaluru and his daughter who was residing with the accused was not in the home at the relevant time as she went to her aunt's house. The PWs.-4, 6 & 7 have also stated that the wife and children of the accused reside in Bengaluru. The above evidence of the prosecution witnesses makes it clear that at the relevant time, the accused was alone in his house. Further, the PW-3 has stated in his cross examination that there is no house in between his house and the house of accused person. The above evidence of the prosecution witnesses could not be disproved by the defence. Therefore, it is clear before this

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Court that the house of accused is near to the house of victim and at the relevant time, the accused was alone in his house and in such a situation, the accused had ample opportunity to take the victim in his house and to do the heinous acts.

- 25. The defence plea is that out of grudge of land dispute, the instant case has been filed against the accused only to harass him. The accused in his statement recorded under Section 313 of Cr.P.C. stated that there is a land dispute between him and the informant. It is further stated that the informant and his family members used his land for their latrine but his daughter closed the gate of the land and since then they started quarrelling with him and ultimately, they have filed the false case against him. In support of the defence case, two numbers of witnesses have been examined as DWs.-1 & 2. The DW-1, Ujjal Das has stated in his evidence that the DW-2 is his grand-father but the DW-2 in his cross examination has stated that the DW-1 is not his relative. Further, the evidence adduced by them itself shows that they have made out a third case. According to them, after knowing about the incident, they sent two ladies to the house of victim to take stock of the situation but it is an utter surprise they do not know the names of the ladies. Therefore, the evidence of DWs.-1 & 2 have been found highly unreliable and cannot be acted upon.
- As discussed above, the evidence of PWs.-1 & 2 have been found very much consistent, corroborative and trustworthy that the accused, who is a close door neighbour of the victim, took the victim in his house when he was alone and made himself and the victim naked and touched the vagina of the victim with his penis.
- Now, it is to be ascertained whether the accused committed the offence under Section 4 of POCSO Act. In the present context, I would like to refer Section 3 of the POCSO Act, 2012. Section 3 of the POCSO Act reads as follows:-

3. Penetrative sexual assault

A person is said to commit "penetrative sexual assault" if -

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- (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 to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to 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 to do so to such person or any other person.
- **28.** From the above definition of penetrative sexual assault, it is appeared that if the penis gets touched to any extent in any part of the vagina, the Section 3 of the Act would come into play.
- In the present context, the word "penetration" is the most 29. vital word to be interpreted in the light of the definition of rape as well as of penetrative sexual assault. What did the legislature contemplate by the expression, "penetration" in Section 375 of IPC and Section 3 of POCSO Act, 2012? This requires a threadbare discussion. The word "penetration" is not defined in the IPC. The word, "penetrate", as per 'The Concise Oxford Dictionary', means "the act or process of making way into or through something"; "to enter or pass through or force a way into or through". The dictionary meaning of the word, "penetration" was considered in the context of "rape" by the Hon'ble Supreme Court in Tarkeshwar Sahu v. State of Bihar (2006) 8 SCC 560 and it was held (vide para 12), "the word "penetrate", according to Concise Oxford Dictionary means, "find access into or through, pass through". Thus, the process of finding access through; making/forcing a way through; passing through something or finding access into; making/forcing a way Contd......P/12.



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into something, is "penetration". Here, the words, "through" and "into" strike the difference and those are clearly distinguishable, as evident from the word, "or" coming in-between. While in the former, there is passing through something i.e., there is an actual entry through something, in the latter, there is only a process of making or forcing a way into or towards something, without there being an actual entry through something. But, both are "penetration", going by the dictionary meaning. So, if the first meaning is attributed to the word "penetrate", in sexual intercourse, it would follow that the male organ must pass through vagina or it must make a way through vagina i.e., there must be an actual entry of penis through vagina. But, if the second meaning is applied, it would be sufficient, if penis finds an access into or makes/forces a way into or towards vagina, for which, there need not be any entry of penis through vagina. But, during such process of accessing, the male organ would necessarily and forcibly come into contact with some other portions of the external female private part. Therefore, going by the dictionary meaning, such penile- accessing towards vagina can also be treated as "penetration", in reference to sexual intercourse. Thus, it follows that ordinarily, the act of penis passing through vagina i.e., the actual entry of penis through vagina (penile-vaginal entry) is essential to constitute the "sexual intercourse", which is referred to in the opening of section 375 IPC. Whether such entry is complete, partial or slight, it will amount to such "sexual intercourse". But, as per the Explanation - 1, to the same section, it is sufficient if penis finds only an access into vagina, without there being an actual entry of penis through vagina and during such process, the male organ comes into contact with any other external portions of female genital organ such as, vulva/pudendum, labia majora, labia minora etc., and that would also constitute the "sexual intercourse" which is necessary for the offence of "rape".

30. For the purpose of clarifying this medico-legal aspect of the matter I would respectfully refer myself to a decision of the Hon'ble Gauhati High Court in *Haren Borah vs. State of Assam, 2011 (3) GLR 44*, where the Doctor after examining the victim opined that there was no sign of sexual intercourse and the hymen was intact and if the medical report is read with the

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evidence of Medical Officer, it is apparent that no rape is committed on the victim girl, but the Hon'ble High Court placing reliance on *M. P. Vs. Munna Choubey and Anr.*, reported in (2005) 2 SCC 710 and Tarkeswar Sahu Vs. State of Bihar (Now Jharkhand) reported in (2006) 8 SCC 560 has held that an attempt of penetration by penis touching labia majora or vulva in pudenda surely constitutes the offence of rape.

- Reverting back to the case at hand, it is found that the accused got touched his penis into the vagina of the victim and therefore, the said act of the accused comes within the four corners of the offence under Section 3 of the POCSO Act, the punishment for which has been prescribed under Section 4 of the Act.
- As regards delay in fling the FIR, the PW-1, the mother of the victim very categorically stated in her evidence that she was sent to the houses of many persons of her village for getting justice and when she was denied justice in the locality, she has come up with the present case.
- 33. In view of above discussion of evidence on record, it is arrived that the prosecution is able to prove its case against the accused person beyond all reasonable doubt and thus, the accused Budul Das is convicted under Section 4 of the POCSO Act, 2012.
- **34.** Heard the convict on the point of sentence. He has stated that he is an old aged person and pleaded for clemency.
- The facts and circumstances under which the incident occurred and taking into consideration all the aspects of the case including the age of the convict, this court is of the humble opinion that the following punishment would meet the ends of justice:
- 36. The convict Sri Budul Das is sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay fine of Rs.2,000/-in default, he shall undergo further R/I for 2 (two) months for the offence u/s 4 of the POCSO Act, 2012.



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37. The period of detention if any, already underwent by the convict during investigation or trial shall be set off from the sentence awarded.

38. The bail bond of the convict stands discharged.

39. Furnish a copy of this judgment to the convict immediately

free of cost.

40. Also, send copy of this judgment to the District Magistrate,

Hailakandi.

41. The Special (POCSO) Case is disposed of accordingly.

Given under my hand and seal of this Court on this the 28th day of November, 2018 in Hailakandi.

Hailakandi.
SPECIAL JUDGE

Special Judge,

HAILAKANDI

28.11.18

Dictated and corrected by me:

Special Judge, Hailakandi.

SPECIAL JUDGE HAILAKANDI

<u>Dictation is taken and transcribed by Samsher Bahadur, Stenographer</u> <u>Grade – III.</u>

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Appendix :-

Oral Evidences:-

PW-1, Suniti Das.

PW-2, Sibani Das.

PW-3, Chadan Das.

PW-4, Anjan Das.

PW-5, Rono Bijay Malakar.

PW-6, Uttam Das.

PW-7, Sipra Das.

PW-8, Pijush Kanti Roy.

PW-9, Mukut Hazarika.

Documentary Evidences:-

Ext.-1, Ejahar.

Ext.-2, Medical report.

Ext.-3, Laboratory report.

Defence evidences:

DW-1, Ujjal Das.

DW-2, Jyotish Chandra Das.

Special Judge, Hailakandi.

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