

IN THE COURT OF THE SPECIAL JUDGE ::::::::::::::: HAILAKANDI.

Special (POCSO) (T-1) Case No. 13/2017

(Under Section 8 of the POCSO Act)

State

-Versus-

Ajay Kumar Roy @ Piklu Accused.

**PRESENT : Shri D. Bhattacharjee, AJS,
Special Judge, Hailakandi.**

Particulars and Appearances :-

For the State : - Shri U.K. Das, Ld. Public Prosecutor.

For the Accused : - Shri K.U. Laskar, Ld. Advocate.

Dates of recording prosecution evidence:- 19.12.2017, 27.04.2018, 14.05.2018,
25.05.2018 & 12.06.2018.

Date of recording statement U/S 313 Cr.P.C. :- 20.06.2018.

Date of Argument :- 19.07.2018.

Date of Judgment :- 02.08.2018.

JUDGMENT

1. The prosecution case in brief is that on 26.08.2017 one Rakhi Paul lodged an FIR with the Officer-in-Charge Hailakandi Police Station alleging inter alia that her daughter Suparna Paul is a student of class III of Vidyasagar English Medium School. The son of accused is also a student of the said school of Nursery Class. On 09.08.2017 she took her daughter to the school at about 9 AM and leaving her daughter in the school, she left for home. On that day, when her daughter returned home from school, her daughter reported that when she was alone in the school, the accused came and on being found her alone in the classroom, entered there and touched various parts of her body and

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also started kissing her. In the meantime, other students of the school started arriving in the school and then the accused left her. When she reported the said incident, the informant and her husband did not pay any heed rather stated that she being a small child the accused treated her with love and affection. On 25.08.2017 at about 2 PM after the school was over, her daughter informed her that in the morning when she was going towards her classroom, the accused person called upon her and then out of fear, she went to the Warden of the school and then the accused left the school. The husband of the informant immediately went to the school but found none in the school and on the next day, they went to the school and informed the entire matter to the school authority. The School authority made endeavour to speak with the accused person but found his phone switched off.

2. On receipt of FIR, Hailakandi P.S. Case No. 523/2017 was registered under Section 8 of POCSO Act, 2012 and S.I., N.K. Dey was entrusted to investigate the case. During investigation police visited the place of occurrence, recorded the statements of witnesses, got the statement of victim recorded under section 164 of Cr.P.C., arrested the accused person and forwarded him to the court and after completion of investigation having been found prima facie case submitted charge sheet under Section 8 of POCSO Act, 2012.

3. This Court being the Special Court under the POCSO Act in exercising original jurisdiction, furnished copies of relevant materials to the accused person in compliance with Section 207 of Cr.P.C. After hearing the Ld. Public Prosecutor and the Ld. Defence counsel and after going through the materials available on record, having been found sufficient grounds for presuming that the accused person has committed the offence, formal charge has been framed against him under Section 8 of 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.

4. The prosecution in order to prove its case examined

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altogether 8 PWs including I.O. The plea of defence is of total denial. The accused person was examined under Section 313 of Cr.P.C. wherein he denied all such incriminating materials brought in evidence against him by the prosecution witnesses. The defence declined to adduce any evidence.

5. Heard argument of Ld. Public Prosecutor and the Ld. Defence counsel.

POINT FOR DETERMINATION

Whether the accused person on 09.08.2017 at about 9 A.M. in Ward No.-I, Hailakandi Town caused sexual assault to the victim, daughter of the informant Smt. Rakhi Paul and thereby committed an offence punishable under Section 8 of the POCSO Act?

DISCUSSION, DECISION AND REASONS THEREOF

6. Before proceeding further, at the very outset it is apposite to go through the evidence available on record. The relevant part of evidence adduced by the prosecution witnesses is reproduced below:

The PW-1 victim of this case, a 9 years old girl and a student of Class- III, has deposed that at the relevant time she was a student of Class-III of Vidyasagar English Medium School. On 09.08.2017 at about 9 A.M. when she went to school on being taken by her father and after leaving her in the school, her father returned back. At that time, there was no student in the school, only two female staffs were there in another room. Her class starts at 9:30 A.M. and as such, she reached the school 30 minutes before the scheduled time. Then she started drawing National Flag in the blackboard of her class. In the meantime, one person, the father of Debojit student of Kid Zone came to the school. The father of Debojit came into her class and sat behind her in a chair and caught hold of her. He kept his hand in her mouth and started touching her body. He touched her chest, lifted her skirt and gave a puppy at her cheek. In

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the meantime, her friend Khaleda Begum Mazumder came and started calling her and then the father of Debojit left the place.

She has further stated that on 25.08.2017 the father of Debojit again called her while she was in the school, in presence of her friends saying "Mona Edike Esho" (come here), in the meantime, warden of her school came and then the accused left the place. He informed the same to her parents about both the incidents. She has further stated that police took her to the court and her statement was recorded by a Magistrate vide Ext.-1.

She has clarified that the father's name of Debojit is Puklu and identified in the dock.

In cross examination, she has stated that her class room is in the first floor and in the first room of the first floor, all the teachers sit. She did not disclose the incident to her teachers but narrated the entire incident to her friend Khaleda and also to her music teacher Miss. Monti. She denied the suggestion that on 09.08.2017, she pushed Debojit on the ground and Debojit started crying, then the father of Debojit came and scolded her in front of others and as such her mother filed the instant case against the accused viz. the father of Debojit. She has further stated that on 25.08.2017 while she was about to enter into the class room, the accused called her and there was no guardian present in the school. She did not disclose about the said incident of 25.08.2017 to anyone except her mother. She denied the suggestion that she gave her statement before the Magistrate on being tutored by her mother.

7. The PW-2, Smt. Rakhi Paul, mother of the victim has deposed that at the relevant time, the victim was 9 years old and was studying in Class-III in Vidyasagar English Medium School. On 09.08.2017 in the morning she took her daughter to school and after leaving her there she returned home. At 2 P.M. her daughter returned home from school and reported her that there was a scuffling between her (victim) and son of accused and regarding the said incident she called upon the accused but he did not turn up. Then in the next morning she went to school and complained the same but no response had been

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received from their end and therefore, she lodged the FIR vide Ext.-2.

In cross examination, she has stated that the contents of FIR were not read over to her.

8. The PW-3, Manna Paul, father of the victim has deposed that on the relevant day he took her daughter to the school. Thereafter, in the evening his daughter returned home and reported them that there a tussle between her and son of the accused. He informed the same to the school authority but they did not pay any heed. Thereafter, his wife lodged the FIR against the accused due to inaction of school authority.

In cross examination, he has stated that he does not know what is written in the FIR lodged by his wife. His daughter did not disclose anything to him about the incident.

9. The PW-4, Sri Ratan Lal Dey, Principal of the said school has deposed that the victim is a student of his school. In the month of June/July 2017, one day, the father of victim came to him and complained that a guardian of student of nursery class of his school did some ill-treatment to his daughter viz. the victim and then he (Principal) told him (father of the victim) to reveal the identity of the said guardian but he could not do so. Then he assured him that he would identify the guardian and would arrange a meeting to resolve the issue and then the father of the victim left the school. After 5/6 minutes, the father of the victim again appeared in the school along with a large number of people and police and pressurized him to reveal the name and address of the said guardian but since he was not aware about the same, he made an enquiry and found him (accused) as some "Roy". Thereafter, the police,father of the victim and rest the people left the school.

In cross examination, he has stated that the father of victim had told him that before 20/25 days, the incident occurred, then he asked him as to why he did not inform him immediately after the incident and why he waited for such a long period.

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10. The PW-5, Khaleda Begum Mazumder has deposed that at the relevant time of occurrence, she was a student of Class-IV of Vidyasagar English Medium School. She does not know whether the son of accused is a student of their school or not. One day she came to school in the morning and found the victim alone sitting in a room, then she called her and both of them went for playing. Thereafter, the pray was started. She does not know anything more as the victim did not disclose her anything.

11. The PW-6, Smt. Dipa Deb, care taker of Vidyasagar English Medium School has deposed that in the month of last July, one day guardian of the victim wanted to meet the principal and accordingly, he was allowed to meet and they had some discussion. On the same day, police came to the school and asked her whether any occurrence took place in the school but she replied in negative. Later on, she heard that the accused touched the cheek and chest of the victim but she cannot say the name of the person from whom she learnt the same.

In cross examination, she has stated that she opens the school at 8:40 A.M. She and one Asha Chanda were entrusted with the duty of care taker of the pupils. There is only one hall in the school, separated by plywood partitions and the partitions were half in height and one room can be seen from the other through the partition. From 9 A.M. onwards, students and staff start reaching school. There are two gates in the school and the gate which has been set up at the entry of class room, no one can be allowed to enter inside it. From the said entry gate, she and Asha Chanda receive students and take them to their respective class room.

12. The PW-7, Smt. Asha Chanda has deposed that about one year back, the guardian of victim came to the school and accordingly he met with principal and had conversation. In the meantime, police came and asked her whether she knew anything but she replied in negative.

In cross examination, she has stated that she and Dipa open the gate of the school and in the last gate, they remain and take students

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to their classroom. Guardians are not allowed to enter inside the second gate of the school. In case of urgency, with prior permission of the principal, they allow any person to enter inside the second gate.

13. The PW-8, S.I. Nirmal Kanti Dey has deposed that on 26.08.2017 the Officer-in-charge received an FIR from one Smt. Rakhi Paul and registered it as Hailakandi P.S. Case No. 523/2017. The Officer-in-charge has entrusted him to investigate the case and during investigation, he visited the place of occurrence, prepared a rough sketch map thereof vide Ext.-4, recorded the statements of witnesses and got her statement recorded under Section 164 of Cr.P.C. and after completion of investigation, police submitted charge sheet against the accused under Section 8 of POCSO Act, 2012.

In cross examination, he has stated that he did not examine the teacher namely Monti.

14. The Ld. Counsel for the defence has at the very outset of his argument strenuously submitted that the entire case of the prosecution is false and based on a got up story only to harass the accused person.

15. The allegation levelled in the Ext.-2, FIR is that when the victim was alone in the class room, the accused touched her body and kissed her. In the instant case, victim is a 9 years old girl and student of Class-III. She adduced evidence as PW-1.

In *Suryanarayana v. State of Karnataka, (2001) 9 SCC 129*, the Hon'ble Supreme Court has held as follows:

5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on

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being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

6. This Court in *Panchhi v. State of U.P.* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] held that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law (vide *Prakash v. State of M.P.* [(1992) 4 SCC 225 : 1992 SCC (Cri) 853] ; *Baby Kandayanathil v. State of Kerala* [1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] ; *Raja Ram Yadav v. State of Bihar* [(1996) 9 SCC 287 : 1996 SCC (Cri) 1004] ; *Dattu Ramrao Sakhare v. State of Maharashtra* [(1997) 5 SCC 341 : 1997 SCC (Cri) 685]).

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Therefore, on the basis of above referred principles of law, before acting upon the evidence of a child witness, the court must have to scrutinize the evidence with great care and caution to rule out the possibility of the child being tutored.

16. The victim has deposed that while she was alone in the class room at 9 A.M., the accused entered into her room and touched her chest and other parts of her body. The accused also lifted her skirt and gave puppy at her cheek. In her statement under Section 164 of Cr.P.C. vide Ext.- 1, she has stated that at 9 A.M. while she was alone in her class room, the accused entered into her class room, pressed her mouth, undressed her and almost made her naked. The above evidence and the earliest statement of victim clearly raised finger towards the accused of committing the offence against the victim. Since, the victim is a child of very tender age, her evidence has to be scrutinized with great care and caution.

17. The victim has stated in her evidence as PW-1 that when the accused person was doing such bad acts with her, her friend Khaleda Begum Mazumder came and then the accused left the place. In Ext.-1 statement under Section 164 of Cr.P.C., the victim has stated that when the accused made her almost naked, her friend Khaleda came into her room calling her and then the accused went away, she has further stated that on seeing her in nude condition, her friend Khaleda ran away. In the instant case, the parents of the victim viz. the PWs.- 2 & 3 are reported witness. The other witnesses could not depose anything as regards the matter in issue. The only witness in the instant case is the PW-5 Khaleda Begum Mazumder, the friend of the victim, who according to the victim had seen her in naked condition. Now, let us see what the PW-5 states. The PW-5 has stated that on the relevant day, when she came to school in the morning, she found the victim sitting in a room alone and thereafter, both of them went for play and thereafter, pray started and that apart, she did not state anything. Had the PW-5 seen the accused in the class room of victim and the victim in nude condition, definitely the PW-5 would have stated the same before court but she did not state anything to that effect.

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18. In the FIR it is stated that on the relevant day the mother of the victim took the victim to the school but the PW-1 stated in her evidence that on the relevant day, her father brought her to the school.

19. The evidence of PW-2, mother of the victim reveals that on the relevant day at about 9 A.M. she took her daughter to the school and at about 2 P.M. the victim returned home and reported her that she had scuffling with the son of accused and regarding the said scuffling, she called upon the accused but did not turn up and thereafter, in the next morning, she went to school, informed the authorities but on being not taken any action, she filed the case. There is a gulf of difference between the evidence of victim and her mother. The PW-3 father of the victim also stated that there was tussle between his daughter and the son of accused but when the school authority did not take any action, his wife lodged the FIR. The victim in her evidence as well as in her statement recorded under section 164 of Cr.P.C. has stated that after the occurrence she reported the incident to her parents but the victim's testimony does not receive any support even from the evidence of her parents.

20. The PW-4, Principal of the school has not stated anything about the incident. The PW-6 Dipa Deb is a reported witness but she could not say from whom she came to know about the incident. She has further stated that she and PW-7 are working as care-taker of the school. The PWs.- 6 & 7 have stated that there are two gates in the school premises. The school is on the first floor of the building and the second gate is just at entry point in the second floor and no one can enter inside the said second gate without prior permission of the principal. It is further found from their evidence that they receive students from the second gate up to their respective class rooms. The evidence of these witnesses are compelled me to think that since the two wardens remain on duty in the second gate and without prior permission of principal nobody can enter inside the gate, how the accused person entered inside the said second gate. Further, had the accused person entered inside the gate on the relevant day, the PWs.-6 & 7 would have seen him.

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21. In the light of above discussion of evidence, the following facts have been come to light:-

- (i) *The victim stated that while she was alone in class room, the accused entered into her classroom and touched her body and made her nude and in such a situation, the PW-5 Khaleda arrived and saw her but, the PW-5 Khaleda did not state anything to that effect.*
- (ii) *The victim in her evidence has stated that she reported the incident to her parents and from the Ext.-2 FIR it is revealed that the mother of the victim lodged the FIR on being reported by the victim but the parents of the victim had given a complete different statements while adduced evidence. They have stated that their daughter and the son of accused had a scuffle, centring around which they filed the case.*
- (iii) *The PWs.- 6 & 7 warden of the school have stated that every day they open the gate of school and in the entry gate, they receive students and without prior permission of the principal, nobody is allowed to enter inside the entry gate. Had the accused entered inside the gate, both of them would have seen the accused but they did not state anything to that effect.*

22. In view of above, it cannot be ruled out that the victim adduced evidence and made her statement on being tutored and thus, it would not be safe to act upon the evidence of sole child witness in order to bring home the charge. Accordingly, this Court is of the considered view that the prosecution has failed to prove its case against the accused person beyond all reasonable doubt.

23. *The accused person Ajay Kumar Roy @ Piklu is acquitted of the offence under Section 8 of the POCSO Act. Set him at liberty forthwith.*

- 24.** The bail bond of the accused person stand discharged.
- 25.** The Special (POCSO) case is disposed of accordingly.

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Given under my hand and seal of this Court on this the 2nd
day of August, 2018 at Hailakandi.

Aug-08-18

Dictated and corrected by me:

Special Judge,
Hailakandi.
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Special Judge, Hailakandi.
SPECIAL JUDGE
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Dictation is taken and transcribed by Samsher Bahadur, Stenographer
Grade – III.

Appendix :-

Oral Evidences :-

PW-1, Victim.
PW-2, Smt. Rakhi Paul.
PW-3, Sri Manna Paul.
PW-4, Sri Ratanlal Dey.
PW-5, Khaleda Begum Mazumder.
PW-6, Smt. Dipa Deb.
PW-7, Smt. Asha Chanda.
PW-8, Sri Nirmal Kanti Dey.

Documentary Evidences :-

Ext.-1, Statement of victim.
Ext.-2, Ejahar.
Ext.-3, FIR Form.
Ext.-4, Sketch map of the place of occurrence.
Ext.-5, Charge sheet.

Defence did not adduce any evidenc.

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