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

Special (POCSO) Case No. 03/2018.

(U/S-506 of I.P.C. R/W Sec. 4 of POCSO Act, 2012)

The State of Assam

Versus

Sabul Mia @ Sabul Mullah

..... Accused.

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

Appearance and particulars :-

For the State

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

For the accused person

:- Sri R.A. Laskar, Ld. Advocate.

Dates of recording evidence of PWs.

:- 12.06.2018, 24.08.2018, 14.09.2018,

06.10.2018 & 02.01.2019.

Dates of recording evidence of DWs.

:- 07.03.2019 & 11.06.2019.

Date of recording statement u/s 313 CrPC:- 19.01.2019.

Date of Argument

:- 18.07.2019.

Date of Judgment

:- 31.07.2019.

JUDGMENT

In the present judgment, I do not propose to reveal the identity of victim girl in view of the provisions of Section 228A I.P.C. and Section 33(7) of the POCSO Act, 2012 and in pursuance of the observations made by the Hon'ble Supreme Court in para-4 in the case of State of Himachal Pradesh vs. Shree Kant Shekari (AIR 2004 SC 4404) the prosecutrix and her father (hereinafter referred to as 'victim' and 'A' respectively).



- The prosecution case in brief is that one 'A' lodged an FIR on 20.02.2018 with the Officer-in-charge, Lala Police Station alleging inter alia that on 19.02.2018 at about 1 P.M. he along with his minor daughter viz. the victim went to the house of accused to bring Tabij (talisman) for his ailing wife, then the accused took the victim inside his house and putting her under fear, forcefully committed rape on her. The accused threatened her not to disclose the same to anyone. Thereafter, the accused called him inside his house and gave a Tabij. When he returned home along with the victim, the victim narrated the entire incident to her mother, from whom he came to know about the occurrence and lodged the FIR.
- The Officer-in-charge, Lala Police Station on receipt of FIR registered the same vide Lala P.S. Case No. 52/2018 under Section 417/506 of I.P.C. read with Section 4 of POCSO Act, 2012.
- 4. During investigation, police visited the place of occurrence, prepared rough sketch map thereof and recorded the statements of witnesses. Forwarded the victim for recording her statement under Section 164 of Cr.P.C. and also conducted her medical examination. Police arrested the accused person and forwarded him to the court and after completion of investigation, having found prima facie case submitted charge against the accused under Section 417/506 of I.P.C. read with Section 4 of POCSO Act, 2012.
- 5. This court being the Special Court under the POCSO Act furnished copies of relevant materials to the accused person and after hearing the Ld. Special Public Prosecutor and the Ld. Defence counsel and after perusal of materials available on record having found sufficient grounds for presuming that the accused person Sabul Mia @ Sabul Mullah committed the offence, formal charge has been framed against him under Section 506 of I.P.C. read with Section 4 of POCSO Act.
- 6. The prosecution in order to prove its case examined altogether 7 PWs including M.O. & I.O. The defence plea is of total denial. The Contd.......P/3.



accused person was examined under Section 313 of Cr.P.C. wherein he denied all such incriminating materials brought against him by the prosecution and pleaded innocence. On the other hand, the defence examined as many as 3 witnesses.

7. Heard argument of the Ld. Special Public Prosecutor and the Ld. Defence counsel.

POINTS FOR DETERMINATION

- (I) Whether the accused person on 19.02.2018 at about 1 P.M. at village Kalacherra Goobil under Lala Police Station committed penetrative sexual assault on the victim, daughter of the informant and thereby committed an offence punishable under Section 4 of POCSO Act, 2012?
- (II) Whether the accused person on the aforesaid date, time and place committed criminal intimidation by threatening the victim not to disclose about the sexual assault upon her committed by him and thereby committed an offence punishable under Section 506 of I.P.C.?

DISCUSSION, DECISION AND REASONS THEREOF

8. Before entering into the merit of the case, at the very outset, it is apposite to go through the evidence available on record and accordingly, the relevant evidence adduced by the prosecution witnesses is reproduced below:-

The PW-1, Piarun Nessa Barbhuiya has deposed that she knows the accused person but does not know the informant. The accused is a Mulla by profession and many people visit his house at village Kalacherra. She does not know if any incident occurred in the house of accused person.

In cross examination, she has stated that the accused has his wife, matured sons and daughters. Sometimes, she works in the house of accused. Near the house of accused, there are houses of other people. There is a path in front of the house of accused and the people move over the path on foot as well as with vehicle.

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9. The PW-2, Monir Uddin Mia has deposed that the accused is his neighbour. He does not know the informant. He does not know if any incident occurred in the house of accused.

In cross examination, he has stated that about 3/4 months back, one Mulla from Anipur came to the house of accused and then there was a quarrel between them.

The PW-3, 'A', the informant of the case has deposed that the victim is his daughter. About 7/8 months back, one day at about 10 A.M. he along with his wife and the victim came to the house of accused, who is a Mullah by profession, for the treatment of his sick wife. Accordingly, the accused provided treatment to his wife. After two days, he again came to the house of accused along with his daughter viz. the victim and then the accused kept the victim with him and asked him to sit, keeping his face to the opposite direction. Then the accused inserted a bamboo cane measuring about 1 cubit inside the upper clothe of the victim and uttered some 'Mantra' and also threw some kind of oil on the victim, which he was witnessing. Thereafter, he returned back to his house along with the victim. He has further stated that in the home, the victim told something to his wife and his wife asked him whether the accused did some bad acts with the victim. After knowing the same, he lodged the FIR vide Ext.-1.

In cross examination, he has stated that there were many people sitting with him at that time. When the accused was doing Mullaki with the victim, he did not raise any objection. He did not notice any bad thing was being done by the accused with the victim. On the way to his house, the victim did not report anything to him. Even before lodging the FIR, he did not have any talk with the victim. He lodged the FIR after hearing the incident from his wife. He has further stated that the FIR was prepared by one Laden Mullah, who gave Rs.50/- to the victim. He denied the suggestion that he filed the case as per instructions of Laden Mullah.



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The PW-4, the victim, a minor girl has testified that on the

relevant day, when she came to the house of accused/Mullah with her father, accused gave her a small bamboo cane and asked her to go inside of his house. Accordingly, she entered inside and there was none in the room. Then the accused put off her lower garments and did her 'Asommani' and on being asked by the court, she stated that the accused committed bad acts with her on the sofa set. She has further deposed that at that time her father was outside the room. She did not raise any hue and cry as she was made disordered by the accused. Due to bashfulness, she did not disclose the incident to her father. When she reached home, she narrated the entire incident to her mother. Her statement was recorded under Section 164 of Cr.P.C. vide Ext.-2 and she was medically examined. She has further stated that after the incident, her mother expired.

In cross examination, she has stated that she does not understand the word 'bad acts'. In explaining 'bad acts', she has stated that the accused did the bad acts by inserting a small bamboo cane inside her upper garments and the accused removed her pant with his hand. She has further stated that she on her own volition made the statement before the Magistrate. While she was taken before Magistrate, one woman police and her father were with her. Nobody instructed her anything regarding the facts which she had stated before Magistrate.

stated that on 20.02.2018 the Officer-in-charge, Lala Police Station received an FIR from 'A' (informant) and accordingly, registered the same as Lala P.S. Case No. 52/2018. The Officer-in-charge endorsed him to take pre steps of investigation. On 22.02.2018 he received the FIR and started investigation and during investigation, he visited the place of occurrence, prepared rough sketch map thereof vide Ext.-4 and recorded the statement of informant and other witnesses. He has further stated that the place of occurrence is the residence of accused Sabul Mullah. On 20.02.2018 the Officer-in-charge, Sri Monirul Islam got



the victim medically examined and also got her statement recorded by Magistrate under Section 164 of Cr.P.C. He (PW-5) apprehended the accused and forwarded him to the court. After completion of investigation, he handed over the case diary to the O/C of Lala P.S. and accordingly, the O/C submitted charge sheet against the accused Sabul Mia @ Sabul Mullah under Section 417/506 of I.P.C. read with Section 4 of POCSO Act, 2012.

In cross examination, he has stated that during investigation, he did not find any clothe having semen stain. He did not seize anything in connection with the case. The informant could not produce any document to prove the age of victim.

- 13. The PW-6, Dr. Gunajit Das, Professor & HOD, Forensic Medicine, SMCH, Silchar stated that on 21.02.2018 he examined the victim in reference to the Lala P.S. case No. 52/2018 for age estimation and found the victim was aged above 14 years and below 16 years and Ext.-5 is the said medical report.
- 14. The PW-7, Monirul Islam, Officer-in-charge, Lala Police Station deposed that ASI Gautam Nath conducted preliminary steps of investigation. After completion of investigation, he submitted charge sheet against the accused under Section 417/506 of I.P.C. read with Section 4 of POCSO Act, 2012.
- age of the victim is to be determined. The victim while adduced evidence as PW-4 has stated that her age was about 12 years. The father of the victim has stated that the age of the victim was 17/18 years. The prosecution has not produced any document to prove the age of victim. This being the position, the Court has left with no option but to determine the age on the basis of medical evidence available on record. The PW-6, Dr. Gunajit Das after conducting radiological test has opined that the victim was aged above 14 years and below 16 years. The defence failed to demolish the said medical evidence. The proposition of law is



settled that the margin of error in radiological age is 2 years in either side. Therefore, even after addition of 2 years to the higher side, it is appeared that the victim was below 18 years of age at the relevant time and she was minor.

- The PWs- 1 & 2 have deposed that they do not know anything about the incident and it is very much acceptable because the victim did not disclose about the incident to anyone except her mother, moreover the PWs-1 & 2 are from the same village of accused.
- lodging Ext.-1, FIR has stated that when he returned home along with the victim from the house of accused, the victim told her mother that the accused committed rape on her inside his house but while he adduced evidence as PW-3, he did not state anything implicating the accused rather stated in cross examination that he did not notice any bad act was being done upon the victim by the accused. The PW-3 has stated in his evidence that he saw the accused inserting a small bamboo cane inside the upper clothe of his daughter and uttered some Mantra and then the accused threw some oil on his daughter. So, according to PW-3, on the relevant day, the accused did not commit any bad act with the victim. However, it is revealed from his evidence that the accused inserted a small bamboo cane inside the upper garments of the victim and when the victim reached her house she had narrated something to her mother and thereafter, the PW-3 filed the case.
- Though the PW-3, father of the victim did not implicate the accused for the reasons best known to him but the victim while adduced evidence has testified that on the relevant day, when she along with her father went to the house of accused, the accused told her to go inside and accordingly, she went inside of his house in a room where she was alone and then the accused put off her lower garments and did her "Asommani" on his sofa set and in explaining the word "Asommani", she has stated that the accused did bad acts with her on the sofa set and at that time, her father was outside the room. In



cross examination, the victim very categorically stated that the accused did bad acts by inserting a small bamboo cane inside her upper garments and also removed her pant with his hand. During cross examination of the victim, the defence could not bring out any contradiction and even failed to shake the credit of her testimony. The victim has testified that she made her statement before Ld. Magistrate under Section 164 of Cr.P.C. vide Ext.-2 and while she was cross examined on Ext.-2 statement, she in a very clear and cogent terms has stated that what she stated before Magistrate was stated by her on her own volition and nobody instructed her to make any such statement. Now, let us see what the victim has stated in her statement under Section 164 of Cr.P.C. vide Ext.-2. The victim has stated in the said statement that on the relevant day, when she went to the house of accused along with her father to bring Tabij for her mother, accused took her inside his house and her father was asked to sit outside. Then the accused put off her clothes and engaged in all the unacceptable things, the accused pressed her breast, undressed her lower garments and committed sexual intercourse with her. She has further stated that she could not raise hue and cry as the accused gagged her mouth.

19. From the evidence of victim before the court and the statements made by her before Magistrate, the only difference comes out is that in her evidence she has stated that the accused did her "Asommani" on the sofa set by removing her lower garments (pant) with his hand and in explaining the word "Asommani" she has stated that the accused did bad acts with her on the sofa set and while she made her statement under Section 164 of Cr.P.C., she has stated that the accused pressed her breast and undressed her lower garments and committed sexual intercourse with her. The victim is a minor girl who has got no enmity with the accused and therefore, there is no reason to disbelieve her evidence. In her statement under Section 164 of Cr.P.C., she has specifically in clear and cogent terms narrated the entire incident but while she adduced evidence, she did not state all such things but simply stated that the accused by removing her pant did bad acts with her on the sofa set in a room where nobody

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was present. Here, the question does arise as to why the victim did not narrate the incident elaborately while she adduced evidence and this might be due to bashfulness as at the time of deposition, the Ld. Advocates of both the sides and her father were present there. When she made her statement before Magistrate, presumably there was none except the Ld. Magistrate. What she has stated in her evidence is sufficient to understand that the accused took her in a room and put off her pant and committed bad acts with her on the sofa set and the said evidence receives corroboration from the statements made by her before the Ld. Magistrate at the very earliest possible opportunity. Further, the defence failed to bring out any contradiction in her evidence. On the basis of the evidence of the victim, it is very much clear before this Court that the accused did penetrative sexual assault on the victim.

- The father of the victim lodged the FIR after hearing the incident from his wife as the victim disclosed the incident for the first time to her mother. The mother of the victim is not alive and therefore, there is no scope to examine her. Except the mother, the victim did not state anything about the incident to anybody including her father. The father of the victim while adduced evidence, for the best reasons known to him made some statements as if the accused did not commit any bad acts with his daughter, but the victim by adducing evidence negated the testimony of her father and very categorically stated that the accused did bad acts with her in a room and at that time, her father was outside. It is worth mentioning that the entire trial was conducted by this Court itself and during examination of PW-3, the father of the victim, this Court realised that the father of the victim was deposing in the line of compromise.
- The medical report dated 21.04.2018 issued by Dr. R. Begum as available on record though not proved and exhibited by the prosecution, still it has been taken into consideration to reach just decision. The medical report reveals that on the next day of occurrence, the victim was Contd.......P/10.



medically examined but no evidence of recent sexual intercourse and no mark of violence over her body or private parts have been detected.

At this juncture, I respectfully referred myself to a decision 22. of the Hon'ble Supreme Court in Ranjit Hazarika vs. State of Assam, (1998) 8 SCC 635), in which it has been held that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no selfrespecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

23. In *Radhu v. State of M.P.*, (2007) 12 SCC 57 the honourable Supreme Court has held as follows:

6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires

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drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

- 24. For the purpose of clarifying the medico-legal aspect of the case, 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 evidence of Medical Officer, it is apparent that no rape is committed on the victim girl, but the Hon'ble High Court placing reliance upon *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.
- 25. In view of above, it is discernible that even if the medical report says that there is no evidence of recent sexual intercourse and marks of injury on the body or private parts of the victim, the possibility of rape cannot be Contd.......P/12.



ruled out. Further, the proposition of law has been settled that in a rape case, the conviction can be sustained only on the basis of sole testimony of prosecutrix if her testimony has been found to be otherwise relevant and creditworthy. In the instant case, the evidence of victim has been found to be highly corroborative with her earlier statements made before Magistrate and police, further the defence failed to bring out any enmity of the victim with the accused which has motivated her to testify falsely. The victim is a minor girl and there is nothing on record to hold the view that the victim with intent to harass the accused person made such false allegations.

- The defence side examined 3 witnesses. The DW-1 is the accused who has stated that prior to one month of incident, he had a dispute with another Mullah namely Laden Mullah out of monetary transaction. Thereafter, the informant 'A' came to his house along with his daughter and he provided necessary treatment to her in presence of her father but after 3 days, the informant lodged the FIR against him. The DW-2 has deposed that he saw one Laden Mullah was quarrelling with the accused. The DW-3 also stated about the dispute of the accused with a person of Karimganj. Though all the 3 witnesses were examined by the defence but their testimony has got no connection with the present case.
- witnesses by defence, it is appeared that the defence tried to establish that the informant filed the case on being instigated by one Laden Mullah but the informant denied the same. Moreover, the victim during her cross examination made it explicitly clear that Laden Mullah was not with her when she was taken to the court by police and she made her statement before Ld. Magistrate on her own volition without being influenced by others. Therefore, the defence evidence has been found to be highly unreliable and thus, discarded.
- 28. There are some statutory provisions in the POCSO Act, 2012 relating to presumptions of which Section 29 deals with presumption as to Contd.......P/13.



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certain offences and Section 30 deals with presumption of culpable mental state. The relevant provisions of law have been quoted below:

is prosecuted for committing or abetting or attempting to commit any offence under Sections 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. Presumption of culpable mental state.—(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."

- 29. In the light of above presumptions, if the evidence of the victim reads together with her statements recorded under Section 164 of Cr.P.C., it is surfaced that the accused committed penetrative sexual assault on the victim and the defence failed to rebut the presumptions.
- On evaluation of entire evidence on record, this Court comes to the conclusion that the prosecution is able to prove its case beyond all reasonable doubt and the accused Sabul Mia @ Sabul Mullah has been found guilty of committing offence of penetrative sexual assaulted on the victim. However, he is acquitted of the offence under Section 506 of I.P.C. as there is no material found attracting the offence.

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- 31. Accordingly, the accused person Sabul Mia @ Sabul Mullah is convicted under Section 4 of the POCSO Act, 2012.
- **32.** For hearing the convict on the point of sentence, he has been given 5 hours' time. Heard the convict on the point of sentence as well as his Ld. Counsel and also the Ld. Special Public Prosecutor. The convict has stated that he is the sole bread winner of his family comprising his wife and little children and has prayed for clemency.
- After having heard as above taking into consideration the nature and gravity of the offence committed and its impact on the society, this Court is of the opinion that the following punishment would meet the ends of justice.

The convict Sabul Mia @ Sabul Mullah is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years and to pay fine of Rs.10,000/-, in default, he shall undergo further rigorous imprisonment for 6 (six) months under Section 4 of the POCSO Act, 2012.

The period of incarceration already underwent by the convict during investigation and trial shall be set off from the sentence. The fine if realised shall be paid to the victim.

- 34. In the instant case, according to me, the victim is required to be adequately compensated and as such, the District Legal Services Authority, Hailakandi is hereby recommended to assess the quantum of compensation to be paid to the victim under the Victim Compensation Scheme after expiry of appeal period and if appeal is preferred against the judgment, then as per decision of the hon'ble appellate court.
- **35.** Furnish a free copy of this judgment to the convict immediately. The convict has been informed of his right to appeal before the Hon'ble Gauhati High Court.



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36.	Send copy of this judgment to the Ld. District Magistrate,
Hailakandi and the District Legal Services Authority, Hailakandi.	

37. The bail bonds of the accused person stand discharged.

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

 $\mbox{Given under my hand and seal of this Court on this the $31^{\rm st}$} \label{eq:Given under my hand and seal of this Court on this the $31^{\rm st}$} \ day of July, 2019 at Hailakandi.$

Special Judge, Hailakandi.

Dictated and corrected by me:

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, Piarun Nessa Barbhuiya.

PW-2, Monir Uddin Mia.

PW-3, Informant.

PW-4, Victim .

PW-5, Sri Gautam Nath.

PW-6, Dr. Gunajit Das.

PW-7, Sri Manirul Islam.

Documentary Evidences:-

Ext.-1, FIR.

Ext.-2, Statement of victim U/S 164 Cr.P.C.

Ext.-3, FIR Form.

Ext.-4, Sketch map of the place of occurrence.

Ext.-5, Medical report.

Ext.-6, Radiological report.

Ext.-7, Charge sheet.

Defence evidence:

DW-1, Accused Sabul Mullah.

DW-2, Azijur Rehman Mia.

DW-3, Altaf Hussain Barbhuiya.

Special Judge, Hailakandi.