



IN THE COURT OF SPECIAL JUDGE-(POCSO ACT) AT BALLIA
(Presided Over by Sri Pratham Kant, HJS)
Sessions Case /725/2022

State of UP, through Station House Officer PS Sikandarpur, Ballia.
....Prosecution

VERSUS

Subhash Gond son of Late Bala Gond aged about 55 years resident of Vil-
lage & Post Karmauta, PS Sikandarpur, District Ballia.

....Accused

Case Crime No. 193 of 2022, PS Si-
kandarpur, Ballia.
Offences punishable under Section
376AB of IPC and Section 5(m)/ 6 of
Protection of Children from Sexual
Offences Act.

Counsel for State (Prosecution): Special Prosecuting Officer Sri Rakesh
Kumar Pandey, Advocate,
Counsel for appearing for the accused: Sri Harsh Narain Singh, Advocate.

FORM B

Date of Offence	31.07.2022
Date of FIR	31.07.2022
Date of Charge-sheet	19.09.2022
Date of Framing of Charges	10.10.2022
Date of commencement of evidence	11.08.2023
Date on which judgment is reserved	26.09.2024
Date of the Judgment	03.10.2024
Date of the Sentencing Order, if any	03.10.2024

Accused Details:

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Wheth-er Acquit-ted or con-victed	Sentence Imposed	Period of Detention Undergone during Trial for purpose of section 428, Cr.PC
A-1	Subhash Gond	01.08.2022		Sec. 376AB of IPC & 5(m)/6	Con-victed u/ Sec. 354B of	1. u/s 10 of Act imprisonment for 6 years and fi-	

				of POCSO Act	IPC and 9(m)/1 0 of POCSO Act	ne of Rs. 25000/-. De- fault sen- tence of 6 months.	
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FORM C

LIST OF PROSECUTION/DEFENCE/COURT WITNESSES

A. Prosecution

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WIT- NESS, PANCH WITNESS, OTHER WITNESS)
PW1	Victim	Victim
PW2	Mr. B	Informant
PW3	Dr. Ruby	Expert Witness/Medical Witness.
PW4	Inspector Yogesh Yadav	Police Witness & Investigating Officer
PW5	Head-Constable Laxmi Kant	Police Witness
PW6		

B. Defence Witnesses, if any:

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EX- PERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
DW1	NIL	

C. Court Witnesses, if any:

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EX- PERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
CW1	NIL	

LIST OF PROSECUTION/DEFENCE/COURT EXHIBITS

A. Prosecution:

Sr. No	Exhibit Number	Description
1	Exhibit Ka-1/PW1	Statement under Section 164 CrPC
2	Exhibit Ka-2/PW2	Written Information by informant
3	Exhibit Ka-3/PW2	Seizure Memo of undergarment of victim
4	Exhibit Ka-4/PW3	Medical Report
5	Exhibit Ka-5/PW3	Supplementary Medical Report
6	Exhibit Ka-6/PW4	GD Entry of arrest of accused
7	Exhibit Ka-7/PW4	Rough Site-plan
8	Exhibit Ka-8/PW4	GD entry for change of offences
9	Exhibit Ka-9/PW4	Receipt from Regional FSL, Ramnagar, Varanasi
	Exhibit Ka-10/PW4	Charge-sheet
	Exhibit Ka-10/PW5	GD entry for registration of FIR
	Exhibit Ka-10/PW5	Chik FIR

B. Defence:

Sr. No	Exhibit Number	Description
1	Exhibit D-1/DW1	NIL

C. Court Exhibits

Sr. No	Exhibit Number	Description
1	Exhibit C-1/CW1	NIL

D. Material Objects:

Sr. No	Material Object Number	Description
1	MO1	
2	MO2	

JUDGMENT
(Delivered on 03-10-2024)

1. The police of Police Station Sikandarpur, District Ballia, have presented charge-sheet against the accused person namely Subhash Gond son of late Bala Gond for the offences punishable under Sections 376AB of IPC and Section 5(m)/6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as the Act or POCSO Act) in the Case Crime No. 193/2022 and arraigned him for trial.
2. Section 33(7) of the Act provides that the Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The Explanation appended to the said provision further explains that for the purposes of this subsection, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. In view of this constraint the informant/de-facto complainant is hereinafter referred to as 'Mr. A', while the victim is referred to as 'the victim' in the course of discussion in this judgment.
3. The background facts in a nutshell are as follows: The informant Mr. A son of (name withheld) resident of village & post Karmauta PS Sikandarpur, district Ballia submitted a written information Exh. Ka-2 to SHO, PS Sikandarpur to the effect that on 31.07.2022 at about 6:00 PM when his daughter aged about 5 years was playing near his house, the accused who is his neighbour, finding her alone took the victim to his hut and inserted his finger in her vagina or it is not fully clear. The accused has committed indecent behavior with the victim who informed her family members after returning to her home and accordingly they came to know. Upon enquiry from Subhash he is not ready to divulge anything. He therefore requested for taking

appropriate legal action on his written information. On the basis of above written information the FIR No. 193/2022, **Exh. Ka-12** was registered at PS Sikandarpur on 31.07.2022 at around 22:59 hours for offences punishable under section 376AB of IPC and Section 5/6 of POCSO Act against accused Subhash Gond.

4. The investigation of the aforesaid FIR was undertaken by Inspector Pankaj Kumar Singh who during investigation recorded statement of witnesses, prepared site-plan, arrested the accused, obtained medical evidence and thereafter he was transferred to GRP, Mau. Thereafter the investigation was undertaken by Inspector Yogesh Yadav who during investigation copied statement of victim under Section 164 CrPC and age determination on the basis of ossification test, forwarded undergarments of victim to FSL and concluding investigation submitted Charge-sheet dated 19.09.2022 forwarding accused Subhash Gond for trial of offences punishable under Section 376AB of IPC and Section 5(m)/6 of the Act.
5. On 27.09.2022 cognizance upon the Charge-sheet was taken by my learned predecessor. After ensuring compliance of Section 207 & 208 of Cr.P.C. charges for offences under Section 376AB of IPC as well as Section 5(m)/6 of the Act were framed against accused person on 10.10.2022 by my learned predecessor to which the accused person denied and claimed trial.
6. The prosecution, in order to, prove its case had examined 5 witnesses and proved as many as 12 documents as documentary evidence and closed its evidence while Defence had not examined any witnesses nor adduced any documentary evidence.
7. **PW 1**, Victim, is since aged about 4-5 years even from her physical appearance as such she was had been examined by the Court by conducting a preliminary examination of the victim to assess her capability to understand the questions put to her and to give rational answers thereto. Thereafter the Court concluded that the victim is able to answer few questions and therefore her statement was recorded by the Court in which she deposed that she does not recall the date and time of incident. She was playing on the road where he came and he took her and started fingering her. His name is Subhash. He started fingering in her part of urination. She had mentioned this fact to the Police. Her statement was recorded in the Court also. With the permission of the Court, the envelope containing her statement under Section 164 of CrPC was opened and shown her photograph and thumb impression on the said statement which she identified and thereafter the same was marked as **Exhibit Ka-1**. She further stated that she made disclosure of correct facts before the Magistrate. The witness was then read-over her statement under Section 164 of CrPC. She deposed that she had told the Magistrate that Subhash Gond came to her house and holding her hand re-

moved clothes and put his hand and thereafter ran away. This was statement made to the Magistrate.

8. **PW 2**, Mr. A is the first informant of the present case. He had deposed that he is having three children and his youngest daughter is named victim (name withheld). She was born in February, 2018. About 13 months back the victim was playing in front of her house in the evening at about 6:00 PM, and then his neighbour Subhash took her in his hut and after removing her panty put his finger in her intimate part. He at that time went out-side of village for earning through manual labour and when he returned to home by 6:00 PM, his daughter had while weeping disclosed about the incident and thereafter he went to the house of Subhash Gond and enquired from him, but he kept mum. Then alongwith his daughter he went to Karmauta Chatti and there informed a person about the incident and got the application scribed and put his signature thereon and submitted at the police station on which the case was registered. He then identified written application which is part of record and which had been marked as **Exhibit Ka-2**. The investigation officer (IO) has recorded his statement and also enquired from his daughter. He is semi-literate and is only able to put his signature. His daughter was not admitted in the school yet she used to go to the government school for studies. On the date of incident his daughter was wearing a black coloured panty which was got removed by the lady constable and the IO prepared seizure memo of the panty. The seizure memo of black coloured panty is part of record which bears his signatures which he identified and marked as **Exhibit Ka-3**. There was no animosity between him and Subhash Gond.
9. **PW 3**, Dr. Ruby, Medical Officer, Community Health Centre, Sikandarpur, Ballia had deposed that at 1:30 PM, the victim with her father alongwith lady constable Pooja Singh came at CHC Sikandarpur for her medical examination. She conducted internal and external examination of the victim, however, no marks of injury was found. She had not prepared any slide of the vaginal smear of the victim as there were no marks of injury on the external and internal parts of victim. For age determination the x-rays of right wrist and right elbow was conducted which were found not fused. The medical examination report which is part of record has been prepared by her in her own handwriting which she confirmed and marked as **Exhibit Ka-4**. Supplementary report is also part record which is also in her handwriting and bears her signatures and which she confirmed and marked as **Exhibit Ka-5**. She had mentioned the age of victim to be 3 years in the Supplementary report on the basis of the report of the medical board formed by Chief Medical Officer, Ballia. The report of the medical board is also part of record. The IO had recorded her statement.

10. **PW4** is Inspector Yogesh Yadav who deposed that in the year 2022 he was posted as Station House Officer of PS Sikandarpur. His previous IO Inspector Pankaj Kumar Singh who had conducted previous investigation and prepared CD No. 1 to 9 by dictating on CCTNS Computer Operator. He had worked with Inspector Pankaj Kumar Singh and therefore he identifies his handwriting and signature. After transfer from PS Sikandarpur, Inspector Pankaj Kumar Singh was posted as In-charge of GRP, Mau. Due to falling in the bathroom he had suffered with brain hemorrhage. Due to injury on the head he is unable to speak or walk, which fact is known to him. In this case he had undertaken investigation from CD 10 onwards to CD 22 which got prepared on CCTNS by dictation. The informant Mr. A had submitted a written application Exh. Ka-1 on 31.07.2022 at about 6:00 PM at the Police Station Sikandarpur on the basis of which Case Crime No. 193 of 2022 under sections 376AB of IPC and Section 5/6 of the Act was registered at PS Sikandarpur and the investigation was undertaken by the then SHO Inspector Pankaj Kumar Singh who on 01.08.2022 after noting the Chik FIR and GD entry for registration prepared CD 1 and also recorded statements of Head Muharir Laxmi Kant and of the de-facto complainant Mr. A and also noted the statement of the victim under Section 161 CrPC recorded by Lady constable and the panty of the victim was taken into possession. Thereafter statement of lady constable Khushbu Patel and MLR was noted. On 01.08.2022 the CD 2 was prepared in which the arrest of accused Subhash Gond son of late Bala Gond resident of village Karmauta, PS Sikandarpur, district Ballia was effected from Sikandarpur Bus-stand at the information of police-informant by Inspector Crime Ramayan Singh, PS Sikandarpur Ballia. The GD No. 11 dated 01.08.2022 at 9:25 hrs. about arrest of the accused was prepared by Inspector Crime Ramayan Singh by dictating on CCTNS. The said GD is part of record bearing signatures of Inspector Ramayan Singh which he identified and which was marked as **Exhibit Ka-6**. Thereafter on 01.08.2022 the spot inspection of the place of incident was conducted by Inspector Pankaj Kumar Singh at the instance of the victim and the de-facto complainant. The said rough site plan is part of record which is in handwriting and bears signature of Inspector Pankaj Kumar Singh and marked as **Exhibit Ka-7**. Since the victim was aged about 5 years as such further investigation carried out for offence under section 5(m)/6 of the Act instead of Section 5/6 of the Act. For this purpose the GD entry No. 51 dated 01.08.2022 at 15:57 hrs. was prepared by Inspector Pankaj Kumar Singh by dictation to CCTNS computer operator, which is part of record and which bears initials of Inspector Pankaj Kumar Singh he identified and was marked as **Exhibit Ka-8**. On 02.08.2022 in CD 4 the details of the medical examination of victim was noted. On

10.08.2022 in CD 5 the details about obtaining further remand of the accused has been noted. On 11.08.2022, CD 6 was prepared noting the details of medical examination. On 12.08.2022, CD 7 was prepared in which the fact about enquiry of the caste of accused Subhash Gond from the office of SDM, Sikandarpur, Ballia was noted. On 16.08.2022 the CD 8 was prepared wherein recording of statement of the victim under Section 164 CrPC before Magistrate has been noted. On 17.08.2022, CD 9 was prepared wherein for age determination of the victim on account of non-availability of Radiologist, her reference from Azamgarh to BHU hospital has been noted. On 22.08.2022 CD 10 was prepared in which due to transfer of previous IO Inspector Pankaj Kumar Singh, the investigation was undertaken by the witness who had noted the previously prepared CDs details. On 23.08.2022, CD 11 was prepared for obtaining further remand of the accused. On 23.08.2022, CD 12 was prepared in which the statement of victim under Section 164 CrPC was copied. On 05.09.2022, CD 13 was prepared wherein prayer for further remand of accused was made. On 05.09.2022, CD 14 was prepared in which request for age-determination report of the victim was requested. On 08.09.2022, CD 15 was prepared in which the x-ray report of the victim was noted as well as the age-determination report of the victim wherein her age of 3 years was radio-logically determined. The supplementary medical report was also noted. On 08.09.2022, CD 16 was prepared in which the panty of victim was seized and sealed alongwith lady constable Garima Singh and sent to Forensic Science Laboratory, Ramnagar, Varanasi was noted. On 11.09.2022, CD 17 was prepared in which it was noted that the material sent to FSL, Ramnagar, Varanasi was returned as the material was not sent alongwith sample seal and rubber stamp. On 14.09.2022 CD 18 in which the innerwear of victim her panty duly sealed alongwith sample seal and after removing defects through CO Sikandarpur, sent through special messenger Constable Praveen Jaiswal was noted. On 16.09.2022, CD 19 was prepared in which due to certain defects the material could not be submitted at FSL and thereafter removing those defects the material was sent through special messenger Constable Pawan Kumar which was submitted at FSL, Ramnagar, Varanasi. On 17.09.2022, CD 20, further remand of the accused was prayed for and the receipt from FSL, Ramnagar, Varanasi of case file no. RFSL(VAR)/3527 Bio/509/2022 dated 17.09.2022 Case Crime No. 93/2022 which is part of record which bears the signature and stamp of the Director of FSL, Ramnagar, Varanasi, which is marked as **Exhibit Ka-9**. On 18.09.2022, CD 21 was prepared in which report about non availability of any caste certificate for de-facto complainant and statement of medical officer Dr. Ruby Kumari, lady constable Puja Singh was recorded, the receipt

from FSL, Ramnagar, Varanasi was noted, statement of constable Pawan Kumar Yadav was recorded. On the basis of the investigation carried till that date, statement of de-facto complainant, statement of victim under section 161 & 164 CrPC, observing rough site plan, observing medical report, finding sufficient evidence against accused Subhash Gond son of Bala Gond resident of village Karmauta, PS Sikandarpur, Ballia for offences under Section 376AB of IPC and section 5(m)/6 of the Act the charge-sheet No. 141/2022 was prepared by dictation on CCTNS computer operator and sent to the Court. The charge-sheet in 3 pages is part of record and bears his initials and which is marked as **Exhibit Ka-10**.

11. **PW5** is Head Constable Laxmi Kant, posted at PS Bhimpura, district Ballia had deposed on oath that on 31.07.2022 he was posted as Head Constable at PS Sikandarpur, district Ballia on which date the de-facto complainant resident of village Karmauta PS Sikandarpur, Ballia submitted a written-information about fingering with his own daughter victim aged 5 years by accused Subhash Gond resident of village Karmauta, PS Sikandarpur, district Ballia and on the basis of which by dictating to CCTNS computer operator he prepared GD entry dated 31.07.2022 at 22:54 hrs. The copy of the GD entry about registration of FIR is part of record on which due to oversight the time 22:54 hrs. has been mentioned as 10:54 hrs. The copy of the GD entry about case crime No. 193 of 2022, under Section 376AB of IPC and 5/6 of POCSO Act, PS Sikandarpur, district Ballia which bears his initials and which he identified was marked as **Exhibit Ka-11**. Thereafter chik FIR of case crime No. 193 of 2022 was got scribed by exactly copying the written complaint by dictating to CCTNS computer operator. The chik FIR in 3 pages is part of record which bears initials of the then SHO Inspector Pankaj Kumar Singh, which he identified and marked as **Exhibit Ka-12**.

12. Thereafter prosecution closed its evidence.

13. After conclusion of prosecution evidence the statement of accused person was recorded under section 313 of Cr.P.C. Besides denying the circumstances appearing against him in the prosecution evidence the accused person has taken defence that the entire prosecution story is a falsehood concocted by the informant and the Police. They had been falsely implicated in the case and all witnesses have falsely deposed and documents have been concocted by prosecution. He had been falsely implicated due to animosity. The Gram Pradhan of village Karmauta was Smt. Meenu wife of Udaibhan, who is aunt of the de-facto complainant and during the last Gram Panchayat elections, he had not supported her regarding her candidature for Gram Pradhan and due to this animosity he had been framed in this wholly false and fabricated case. However, no documentary or oral

evidence was produced by accused person in his defence despite the fact that he had proposed to adduce evidence in his defence.

14. I have heard learned Special Prosecuting Officer (POCSO Act) **Shri Rakesh Kumar Pandey** and learned Counsel for accused **Shri Harsh Narain Singh** and with their able assistance perused the entire record of present case.
15. Under Section 354(1) (b) of Cr.P.C. the following points for determination arises for decision of this Court:
 - a. Whether the prosecution had been successful in proving that the victim was aged 5 years so that she may be regarded as child as defined in Section 2(d) of the Act? **Affirmative**
 - b. Whether the prosecution had been successful in proving that the accused person has committed rape of women under 12 years of age? **Negative**
 - c. Whether the prosecution had been successful in proving that the accused person has committed aggravated penetrative sexual assault on a child below 12 years? **Negative**
16. The charges framed against the accused persons in the present case are for offences under sections 376AB of IPC as well as Section 5(m)/6 of the Act. For offence under section 376AB, it is to be proved that the accused person has committed rape as defined in section 375 on the victim who is aged less 12 years. For offence under section 5(m) it is to be proved that the accused person has committed aggravated penetrative sexual assault as defined in section 3 of the Act on the victim aged less than 12 years.
17. The prosecution case regarding rape or aggravated penetrative sexual assault of the victim is primarily based on the testimonies of PW1 the victim. Initial version of the case comes from first informant/de-facto complainant who is father of victim in the form of written information to SHO PS Sikandarpur dated 31.07.2022, **Exh. Ka-2**. The versions of both PW1 and PW2 had already been mentioned above.

DETERMINATION OF POINT NO.1

Age of the victim:

18. This Court exercise jurisdiction based on the fact that the victim is a child defined under section 2(d) of the Act. Therefore, the fact of the age of the victim whether had been proved by the prosecution, is to be determined. In Written information, **Exh. Ka-2** the age of the victim has been mentioned about 5 years. The victim is the youngest of the three children he have as had been deposed by the de-facto complainant as PW2 and that she was born in February 2018. During his cross-examination he stated that he got married in the year 2009 and his wife had died in April 2022. He is having three children amongst whom the eldest was born after about 1½ of marriage whose date of birth is 25th February but does not recall the year. The

second child is about 3-4 years younger to the eldest whose date of birth is 5th October but year he does not recall. The victim was described to born on 19 February but could not recall the year. After about 3½-4 years of birth of the victim his wife has died. When the deposition of PW2 is considered as whole it shows that the date of birth of the victim as per his deposition is 19.02.2018. Similarly PW1 who is victim herself had deposed she is aged 5 years while the Court has ascertained prima-facie her age to be between 4-5 years. She has also stated that she is enrolled in a school but could not name the school. In her cross-examination she has deposed that she studies in class 1 but does not know the colours. She mentioned black coloured string she was wearing in her neck as blue coloured. No other question about her age or date of birth was asked in her cross-examination by defence. PW3 is the medical officer who had deposed that she had got the radiological examination of her right wrist and right elbow done which were found not fused. She further deposed that the medical board formed by CMO Ballia had determined her age to be 3 years which she had mentioned in supplementary medical report **Exh. Ka-5**. During her cross-examination she had deposed that she had prepared Exh. Ka-5 on the basis of the report of medical board determining the age of victim to be 3 years and not more than that. In *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263 and *Mahadeo v. State of Maharashtra*, (2013) 14 SCC 637, it had been laid that the principles which applies for determination of age of the juvenile are equally applicable to determination of age of the victim of sexual offences. Similarly section 34 provides for determination of age of child under the provisions of Juvenile Justice Act, 2015 which also includes a victim. The JJ Act, 2015 prescribes method of determination of age of juveniles under Section 94 under which top preference is accorded to the education certificates while second preference is given to date of birth certificate issued by local bodies and lastly the ossification test is to be used for determination of age. In the present case the educational certificate mentioning date of birth of victim or her birth certificate issued by local bodies have not been adduced and as such the last option of ossification test is to be relied upon. In present case the de-facto complainant PW2 had deposed that the date of birth of victim is 19.02.2018 whereas doctor PW3 had given opinion that the age of the victim on the date of her examination on 05.08.2022 is about 3 years. It is settled principle of law that the result of ossification test merely gives an estimation of the age and does not accurately determine the age. If the date of birth mentioned by PW2 is taken then the victim was aged about 4 years at the time of incident. In view of the above evidence it can be concluded that the prosecution has been successful that the vic-

tim was aged 4 years on the date of incident and as such was a child defined under Section 2(d) of the Act.

DETERMINATION OF POINT NO.2 & 3

Absence of clear allegation:

19. The primary defence argued by the learned defence counsel in his arguments is about absence of clarity in allegation against the accused. He pointed out that in Exh. Ka-2, the de-facto complainant PW2 had mentioned that the accused has finding the victim alone took him in his hut and fingered in her vagina or could not become clear. The accused has committed indecent conduct. In this regard PW2 had in his testimony deposed that he had went for earning through manual labour at the time of incident and it was victim who had informed while weeping about the incident. In his cross-examination PW2 had stated that the written complaint Exh. Ka-2 and medical report Exh. Ka-5 is before him which he confirms. At the time of medical examination of the victim, the doctor had enquired about reasons for her medical examination, which he had informed. While the statement of the victim under Section 164 of CrPC recorded, he was present and Magistrate had enquired from victim about the incident but no enquiry was made from him. Whatever, his daughter had informed to the Magistrate he had heard it. He accepted that in Exh. Ka-2 he had got written that the accused has inserted finger in vagina of victim or it is not wholly clear whereas during medical examination he had stated that accused has rubbed her vagina with finger. In variance to above the victim had in her statement under section 164 CrPC stated that accused had put his hand in her vagina. He stated that he himself has not seen the incident. He further accepted while submitting Exh. Ka-2 at the Police-station against the accused and before registration of the FIR he could not know what was the real incident that took place with his daughter. That is why he got written in Exh. Ka-2 that in her vagina by finger or it is not clear the accused has committed assault. His daughter had told him that the accused of this case held her and was raping her. Again said he was also inserting finger. In Exh. Ka-2 he had told the scribe that the accused of this case was making physical relation with his daughter. He further deposed that he had stated his fact to the IO in his statement under Section 161 CrPC. If the scribe or the IO had not mentioned this fact then he cannot explain the reason thereof. Now the three versions of the incident had led to the arguments of the learned defence counsel that the victim was not able to convey the actual incident and there is every possibility that the de-facto complainant had misinterpreted the incident allegedly in-

formed by the victim. These facts have to be appreciated keeping in mind the fact that PW2 is not an eye witness while the victim is aged about 4 years as determined above. The victim who is such of tender age, she may not have vast vocabulary nor could be expected to understand the sexual conduct on the part of the accused and therefore whatever she has stated at different stages of the investigation and trial her explanation of incident may have been recorded differently by the person recording it and as such there was variance in her statement made to her father in Exh. Ka-2, made to Magistrate in Exh. Ka-1, made to doctor in Exh. Ka-4 and finally made in her deposition as PW1. The variance appears as regard to the fringe and not with regard to the core of the incident.

Testimony of the victim examined as child witness

20. The law with regard to evaluation of the testimony of a victim of sexual offence had been settled by Hon'ble Apex Court in catena of judgments including in *Raju v. State of M.P.*, (2008) 15 SCC 133 : (2009) 3 SCC (Cri) 751 where after referring previous law on the subject it was laid as follows:

Ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

21. Further in *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316 it has been laid as follows:

Insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely.

22. Moreover, in *Ranjit Hazarika v. State of Assam*, (1998) 8 SCC 635 : 1998 SCC (Cri) 1725 the Hon'ble Court observed as follows:

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. Similarly in *Ganesan v. State*, (2020) 10 SCC 573 : (2021) 1 SCC (Cri) 76, it has been held that as per the settled proposition of law, even there can be a conviction based on the sole testimony of the victim, however, she must be found to be reliable and trustworthy.
24. The above laid principle of law enjoins this Court to accept the testimony of the victim of the case since she is treated at par with an injured witness and should not insist upon corroboration of such testimony. Thus, the most important witness to this case is the victim herself. At this stage it is appropriate to refer to the evidence of PW1, the victim who had deposed that while she was playing in the lane the accused took her and fingered in her vagina. During her cross-examination she had deposed that she cannot identify the accused even after seeing him. She has come to Court along-with her father whose name is Mr. A. Whatever she has deposed today, she had deposed at instance of her father. Whatever she has deposed in her examination in chief that Subhash Gond lifted her from the road and brought her, is her correct statement. Subhash has not lifted her from her house while playing. On that day she was wearing only a frock and was not wearing anything else. When she was enquired about finger, she shown her finger and when folding fingers shown to her and she stated that it is fist. Subhash had not inserted his fist but has touched with his finger and shown her finger. She has not been told by her father the facts about fingering. She has not been told by anyone about fingering. There was no one at the house of Subhash. The house of Subhash is situated afar from her house. She cannot tell when and what she has stated to the Police or in the Court. There is dispute between her family and Subhash Gond and due to animosity they have got a false case registered against him. She has told the male police officer about incident. However, she does not recall what she has told to the police. She does not recall what she has stated to the Magistrate in her statement under Section 164 CrPC. What she has deposed today has not been told by her father. When she has been shown her statement under Section 164 CrPC and asked, she stated that she cannot recall what has been written therein. In her statement under Section 164 CrPC she has stated that accused has put his hand, this fact is correct. When she was asked whether the accused has put his finger in her vagina or his hand, she stated that it was his hand. She denied the suggestion that due to animosity with accused he had been falsely indicted in the false case.
25. Though the law requires this Court to examine testimony of a child witness with caution and must subject to close scrutiny. In *Surya-*

narayana v. State of Karnataka (2001) 9 SCC 129; *Golla Yelugu Govindu v. State of A.P.*, (2008) 16 SCC 769; (2010) 4 SCC (Cri) 430 the Hon'ble Apex Court had laid the law as follows:

The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.

26. Thus when the testimony of the victim is subjected to close scrutiny and is examined with caution, shows that the victim had testified only with regard to touching her vagina by finger. However, there is no reference of insertion of finger to any extent by the accused person. From the above statement of the victim it is clear that there is lack of consistency in her statement with regard to nature of incident. Initially she was not able to clearly communicate the actual incident to her father and as such in Exh. Ka-2, PW2 has given a doubtful description of the incident. Thereafter in her statement under Section 164 CrPC, Exh. Ka-1, the victim has told to the Magistrate that the accused had come to her house and took her to his house and after removing her undergarments put his hands inside her. In her testimony in the Court she has deposed that the accused has inserted his finger in her vagina and denied that fist was inserted. It is to be appreciated that the victim is aged 4 years at the time of incident and therefore, having limited vocabulary may have described the incident differently by mentioning fisting, fingering, fingering with oil applied. Even the fact that she has deposed that she was wearing only frock on the day of incident and nothing else has also be appreciated considering her age. In fact PW 4 has deposed that on 01.08.2022 itself the panty of the victim was collected by the IO. Thus victim was wearing a black panty with her frock. PW3 had deposed in her cross-examination that she had enquired about the incident that took place with the victim and her father Mr. A who had told the incident which was scribed by the accompanying Constable Puja Singh in the column about summary of incident to the effect that "Mr. A had told that accused Subhash Gond has applied oil on his hand and inserted fingers in the vagina of the victim." In column 15(f) of Exh. Ka-4, it is mentioned that Subhash Gond has rubbed with finger of his hand on vagina of victim. In addition to these in column 15C it has been denied by the victim that the accused has abused emotionally or used any restraint or threatened to use weapon or object or given verbal threats or had lured her. It has also been recorded that ejaculation has taken place outside vagina. In addition to this in Exh. Ka-4 it is also recorded that the hymen of victim is intact and there is no injury is visible on her labia majora, labia minora, fourchette or perineum of victim. Thus the testimony

of the victim so far as touching of her vagina by the accused appears to be consistent by his finger and touching by fist appears to be misinterpretation by the person who had noted her statement. So far as her statement that she had deposed at the instance of her father/de-facto complainant PW2 appears to be a tactics employed by learned defence Counsel during her cross-examination as she had specifically denied that she was told about fingering by anyone.

Completion of the offence of rape or penetrative sexual assault

27. The victim as PW1 had deposed that the accused had inserted his finger in her vagina. For the purpose constitution of the offence of rape it is necessary that there is insertion to any extent a part of the body into the vagina. Similar is the provision of section 3 of the Act which defines similarly the offence of penetrative sexual assault. Therefore, penetration is must for constitution of both the offences. Without there being specific evidence about penetration this Court cannot conclude that the accused has caused penetrative sexual assault on the victim or her rape by inserting his finger in her vagina. It is also important that PW2 had deposed in his cross-examination that the vagina of his daughter got ruptured and there was bleeding from her vagina. He himself had seen that vagina of the victim was ruptured and blood was oozing from her vagina. He further deposed that the statement about putting hand in her vagina or rubbing her vagina with finger is wrong while the statement about inserting finger is correct. When he returned from work he found that his daughter was at the house of Subhash Gond with him. He then accepted that he had stated in his statement under Section 161 CrPC that when he returned from work he found victim at his house and the statement that the victim on his return found at house of Subhash Gond is incorrect. He could not recall from whom he got the complaint scribed but the complaint was scribed at around 6:00 PM. He went to the PS for getting FIR registered alongwith his daughter and 3-4 persons from village. He reached to the PS with his daughter and others by about 7:30 PM and after furnishing information got the FIR registered. He could not explain if the FIR mentions that it got registered at some other time. He also could not tell the time at which the FIR was registered. He had mentioned in the complaint Exh. Ka-2, that his daughter was playing outside the house from where the accused lifted her and took her in his hut. He had dictated this statement in the complaint Exh. Ka-2, but he himself had not seen his daughter playing in front of his house nor that the accused lifted his daughter and taking her to his hut. He also got it is scribed in complaint Exh. Ka-2, that the accused had misbehaved with his daughter, but he himself not seen that what misbehaviour accused has done with his daughter nor could have seen with his own eyes. He returned back to home by 6:00 PM and in his complaint Exh. Ka-

- 2, he has mentioned 6:00 PM as time of incident. The incident has not taken place before him but the actual time of incident was 6:00 PM. His daughter was playing on the kharanja lane on the side of his house. He had pointed out to the IO the spot where his daughter was playing at the time of preparation of rough site plan and if the IO had not marked the spot of playing in the rough site plan, then he cannot give reasons for the same. The house of Mohan Gond is situated in the North of the place of incident while in the Western side the house of Munna Gond and in the East the house Phulwari Sharma is situated and in the South side the house of Saral Gond is situated. His house situated in the southern side of spot of incident and between his house and spot of incident, the house of Devendra Gond and Jagdish Gond is situated. At the time of incident there was light. In between none of person have informed that he had seen the accused lifting his daughter nor had been seen himself. The houses situated in the East, West, North and South as mentioned above if had not been shown in the rough site plan by the IO, then he cannot render any explanation. He does not where the incident has taken place. There is no social relationship between the accused and his family nor there is talking terms.
28. Thus the de-facto complainant as well as the victim has accepted that there is pre-existing animosity between their family and accused whereas in his examination in chief PW2 had denied any previous animosity. In *Ramesh Baburao Devaskar v. State of Maharashtra*, (2007) 13 SCC 501, it has been held that, "Enmity, as is well-known, is a double edged weapon. Whereas, existence of a motive on the part of an accused may be held to be the reason for committing crime, the same may also lead to false implication." Thus the admission of animosity with accused may had been the reason for commission of the offence in question while at the same time he may have been falsely implicated in this case. Though PW2 had deposed that he had himself seen that vagina of victim was bleeding while, the report of FSL, Ram Nagar, Varanasi dated 13.10.2022 is also on record which under Section 293 of CrPC admissible in evidence without formal proof, shows that there no blood was found on the panty of victim which was seized during the investigation by IO. Thus the evidence of PW2 with regard to bleeding from vagina of victim has been falsified by the above report of FLS. However, law is also that, it is the duty of the Court to separate the grain from the chaff, and the maxim "*falsus in uno falsus in omnibus*" has no application in India as held by Apex Court in *Nisar Ali v. State of U.P.* AIR 1957 SC 366 : 1957 Cri LJ 550. PW2 is not an eyewitness and therefore his statements are based primarily on the information furnished by the victim regarding the incident. Therefore it is the testimony of the victim which has to be convincing so that it can be concluded

that accused has committed rape on the victim. The victim had been found above believable with regard to lifting her from the lane in front of her house and took her to his hut and thereafter touched her vagina from his finger. Though at one stage she had stated that she had been told by her father what she has to state in the Court. However, further deposition shows that she had specifically denied that her father had told what she has to depose. Thus, no other reason is available on record to return finding that her deposition as to core of offence in question is doubtful.

29. Thus, it is apparent that the victim had stated about insertion of finger into her vagina. However, it not clear as neither there any injury was found on her genitals nor the blood was found on her panty seized on the date of registration of FIR. It is to be noted that in *Madan Gopal Kakkar v. Naval Dubey*, (1992) 3 SCC 204, during examination of victim aged about 8 years after 5 days of incident the Doctor found that an abrasion on the medial side of the labia majora and redness around the labia minora though hymen was intact. The Hon'ble Apex Court concluded that there was partial penetration within the labia majora or vulva or pudenda, which in legal sense is sufficient to constitute to rape. However, the medical evidence by PW3 is to be effect that no signs of injuries found on either internal or external part of the body of the victim. Thus, there is no evidence that there was any signs of inflammation on any part of the vagina of the victim though her medical examination conducted on 01.08.2022 while date of incident is 31.08.2022 i.e. after 1 day whereas in the above referred judgment the medical examination conducted after 5 days and still the doctor found signs of inflammation on the part of vagina of the victim. Therefore, this Court is of considered opinion that in the present case there was only touching of vagina of victim by the accused and there was no penetration. As such the accused cannot be convicted for rape or penetrative sexual assault as above.
30. There is existing dispute between him and accused and on the basis of which he had got complaint Exh. Ka-2 registered having mere doubt. He had denied the suggestion that no incident had taken place and his daughter had not told anything but on account of animosity with accused, he had got this false case registered against the accused. However, he accepted that at the time of incident the victim was aged 3 years and was not able to explain anything to him.
31. Learned Defence Counsel had pointed out to the evidence of PW4 who had deposed that during the course of investigation he had not pointed out the spot where the victim was playing in the lane nor the house of the de-facto complainant had been marked. The defects as pointed out in Exh. Ka-7, rough site plan can be regarded as the

most oversight of the then IO. The law is settled in *Hema v. State*, (2013) 10 SCC 192 : (2013) 4 SCC (Cri) 755 as follows:

Any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent.

32. In the light of above laid law the evidence when analysed shows that it is not the case of prosecution that the victim was lifted by the accused from his house. It is the case that while victim was playing in the lane in front of her house she was lifted by the accused. Therefore the defect in Exh. Ka-7 does not have adverse bearing on the prosecution case and no benefit can be accorded to the accused from this defect.
33. At this stage it is apt to refer the law laid by Hon'ble Apex Court in *Shamim v. State (GNCT of Delhi)*, (2018) 10 SCC 509 as these aspects must be kept in mind invariably while appreciating the evidence of any witness. The Court observed as follows:

"12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it."

34. In the light of above laid law by Court the discrepancies in the statements of all 2 witnesses of fact are in the opinion of this Court

are not material so as to shake credibility of the said witnesses. The sequence of events as proved from prosecution evidence clearly establishes that the accused person when found the victim all alone took her in his hut and after removing her panty he was touching her vagina though he could not enter his finger into her vagina. The accused had not taken any plea that he had no sexual intention but had refuted the entire prosecution and alleged false implication. In the absence of any defence evidence rebutting the prosecution evidence, this Court therefore concludes that the prosecution had not been able to prove rape or penetrative sexual assault of the victim by the accused.

35. Now another aspect to be seen is whether the accused had used criminal force on victim with intent to disrobe her. As discussed earlier the victim as well as the de-facto complainant PW2 had deposed that the accused had removed the underwear of the victim and was fingering her vagina. This fact had clearly established from both the said witnesses and which had not been able to rebut by the defence either in their cross examination or by their defence evidence. The plea that the Gram Pradhan of village Karmauta was Smt. Meenu wife of Udaibhan, who is aunt of the de-facto complainant and during the last Gram Panchayat elections, he had not supported her regarding her candidature for Gram Pradhan and due to this animosity he had been framed in this wholly false and fabricated case, remains an unsubstantiated plea. No evidence was tendered by the defence in this regard. In her election for Gram Pradhan, Smt. Meenu must have not found support from number of residents of village, but it is not defence case that she had been nursing grudge against all such persons. This plea remains a mere spacious plea without any substance and therefore liable to be rejected. In the light of proved facts discussed above it can be concluded that the accused had disrobed the victim and was touching her vagina. Thus, in ultimate analysis, the accused person are proved to have committed offence punishable under Section 354B of IPC and 9(m) of the Act though no substantial charge for above offences were framed against the accused. However, taking help of provisions of Section 222 of CrPC this Court has concluded that the prosecution is able to prove offences punishable under Section 354B of IPC and 9(m) of the Act against the accused.
36. Thus, in the ultimate analysis, it is to be held that the prosecution has successfully proved its case under section 354B of IPC as well as section 9m/10 of the Act as such his is held guilty and convicted under aforesaid sections while prosecution had been unsuccessful in proving offence under Section 376AB of IPC as well as Section 5(m)/6 of the Act and accordingly he is acquitted from charges of

said offences. Let the convict be heard on the question of sentence in post lunch session.

Dated: 03.10.2024

(Pratham Kant)
Special Judge (POCSO Act)
Court No. 8, Ballia.

03.10.2024: Post lunch

37. Matter called for hearing on the question of sentence. Shri Rakesh Kumar Pandey, Special Prosecuting Officer (POCSO Act) and learned Counsel for convict Shri Harsh Narain Singh came present with the convict in custody.
38. I have heard the convict as well as his counsel and the learned SPO (POCSO Act), on the point of sentence.
39. Convict has stated that he is aged 55 years old and his family is dependent upon his earnings. It has also been submitted that he belongs to poor strata of the society and therefore he may be dealt with leniency in award of sentence. The convicts further stated that he is not previous convict. In this way, the convict has groveled for mercy. On the other hand the learned SPO (POCSO Act) had submitted that the convict has committed offences in neighbourhood where a large section of the society in the locality was affected by the crime of convict and as such should be punished exemplarily to set deterrent and restore faith of the society.
40. With regard to sentencing in *State of Punjab vs. Bawa Singh*, (2015) 3 SCC 441, Hon'ble Apex Court had observed the guiding principles as follows:

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and the society cannot long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence by having regard to the nature of the offence and the manner in which it was executed or committed. Imposition of sentence without considering its effect on the social order in many cases may in reality be a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

41. In *Ankush Shivaji Gaikwad vs. State of Maharashtra*, (2013) 6 SCC 770 the Apex Court also directed to keep provisions of Section 357 while awarding sentence as follows:

66. To sum up : while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best dis-

closed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 CrPC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

42. Hon'ble Supreme Court had reiterated above position in *State of H.P. v. Vijay Kumar*, (2019) 5 SCC 373. The aforesaid aspects are to be considered in passing the sentencing order in the present case.

43. The offence under section 354B of IPC is punishable with imprisonment upto 7 years and shall also be liable to fine, while offence under section 9(m)/10 of the Act is punishable with imprisonment upto 7 years and shall also be liable to fine. On the other hand Section 42 of the Act provides for alternate punishment when act of accused amounts offence under IPC and the Act, then the maximum punishment is to be awarded from the both such punishment and accordingly the convict is being punished under Section 10 of the Act.

44. The evidence in present case shows that it was a case of misuse of confidence reposed by the victim aged 4 years on the convict and sexually assaulted such a girl. Therefore, in order to restore faith of society in criminal justice delivery system such offences must be dealt with iron hands. Despite all this, it is a time honoured principle of criminal jurisprudence that the sentence must commensurate with the gravity of the offence committed by the convict. While taking into consideration the entirety of attending circumstances concerning the convict and his family, it will be in fitness of things, the convict is sentenced in the following manner.

ORDER

Convict Subhash Gond son of Late Bala Gond is awarded following sentences for the aforesaid offence under section 10 of the Act sentence of imprisonment for 6 years and fine of Rs. 25000/-. In default of payment of fine the convict shall undergo a further sentence of 6 months.

It is hereby specifically ordered that all the substantive sentences awarded in the present case as well as in the aforesaid cases shall run concurrently. The period of, detention, if any, already undergone by the convicts, during inquiry, investigation and trial of this case, shall be set off against the imprisonment awarded to them in terms of Section 428 CrPC.

It is further ordered that out of the above fine an amount of Rs. 20000/- shall be awarded as compensation to the family of victim under Section 357 of CrPC after realization and rest towards state exchequer. Let a copy of this judgment be granted free of cost to the convict.

(Pratham Kant)
Special Judge (POCSO Act),
Court No.8, Ballia

This judgment has been dated, signed and pronounced today in open Court.

Dated: 03.10.2024

(Pratham Kant)
Special Judge (POCSO Act),
Court No.8, Ballia