IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon Present: Smti. B. Kshetry Special Judge, Kamrup, Amingaon Special Sessions (POCSO) case No.19/2018 U/S- 354 of IPC R/W Section 8 of the POCSO Act, 2012. State of Assam -Versus-Mohammad Ali @ Syed Moinuddin Ali s/o- Md. Faizur Rahman @ Faiz Ali Resident of vill - Hamlakur P.S.- Mukalmuah Dist- Nalbari -----Accused Appearance: Mr. A.K. Baruah. Ld. Addl. Public Prosecutor -----for the State Mr. Jeherul Islam, Ld. Advocate -----for the accused evidence:03.11.2018, 10.01.2019, 17.01.2019,

16.03.2019, 31.05.2019, 13.08.2019, 05.11.2019.

Date of Argument: 19.11.2019, 17.12.2019

Date of Judgment: 21.12.2019

<u>JUDGMENT</u>

- 1. The brief facts of the case is that on 22.06.2016, complainant Dhananjay Das lodged an ejahar stating that on 22.06.2016 at about 12 p.m at noon accused Mohammed Ali touched the private part of the complainant's minor daughter while she was sleeping. Hence, this case.
- 2. On the basis of the said ejahar, Sualkuchi P.S Case No. 113/2016 U/S- 354/448 of IPC R/W Section 8 of the POCSO Act, 2012, was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S- 354/448 of IPC 8 of the POCSO Act, 2012,.
- 3. The case was duly transferred and this Court, after going through the case record and hearing both the parties, framed charge U/S- 354 of IPC R/W Section 8 of the POCSO Act, 2012, against accused person— Mohammad Ali @ Syed Moinuddin Ali. The aforesaid charges was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined 7 (seven) witnesses including the informant and the victim girl.

5. POINT FOR DETERMINATION:-

(I) Whether the accused person on 22.06.2016 at about 12 noon assaulted or used criminal force on the Complainant's minor daughter with the intent to outrage her modesty, and thereby committed an offence punishable under section 354 of IPC?

(II) Whether the accused person on the same date, time and place entered the house of the informant and committed sexual assault upon the minor daughter of the informant, and thereby committed an offence punishable under section 8 of the POCSO Act, 2012 ?

DISCUSSION, DECISION AND REASONS THEREOF

6. In this instant case, accused is charged u/s 8 of POCSO Act.

Now , Section 8 of POCSO Act, 2012 provides "whoever commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 3 years but which may extend to 5 years, and shall also be liable to fine."

7. Now, Section 7 of the POCSO Act deals with Sexual Assault

7. Sexual assault -

"Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." The punishment for sexual assault is laid down under Section 8 of POCSO Act.

8. To decide the above sections of law, let us go through the evidences of the witnesses on record alongwith the relevant documents.

9. PW1 is the victim. She stated that the incident took place on 22.06.2016 at about 12 noon. At the relevant time, she was sleeping in the bed inside her house while her mother was in the kitchen preparing tea and her father was outside in the courtyard. PW1 further stated that on the relevant day the accused, who is the carpenter by profession was working in their house. He was making ready the door of their house. PW1 testified that while she was in her sleep , the accused came and pressed her breast. As PW1 woke up and shouted, the accused fled away from the room leaving the work halfdone. Thereafter, PW1 told the incident to her parents. She stated that her father lodged the ejahar on that very day. Police recorded her statement and brought her before the Magistrate for recording her statement U/S 164 Cr.p.c. Exibit 1 is the statement and Exibit 1(1) is her signature. This witness stated that she was 16 years old at the time of occurrence.

In her cross examination PW1 stated that she did not submit any age related document before the police. She stated that the accused fled away from their house by leaving his tools. P.W.1 also stated that on the date of occurrence, the accused brought another helper with him with work. P.W.1 denied the defence suggestion that the accused had been working in their house since few days before the occurrence and he had to get some money from them for his work and on the date of occurrence, in the evening time, accused came to collect his payment but her father and brother instead of making payments to him assaulted him badly.

10. PW2 Sri Dhananjay Das is the informant and father of the prosecutrix. He stated that the incident took place on 22.06.2016 at about 12 noon. Prosecutrix was 16 years old at that time. He testified that accused, who is carpenter had come to their house to do some work relating to fitting of a door. PW2 further stated that the accused sent him outside to take measurement of the wooden door before fitting the same. At that the prosecutrix was sleeping on the bed in a room inside the house while his

wife was preparing tea in the kitchen. Then they heard the shouts of the prosecutrix. PW2 and his wife went near her. They saw that the accused was near the prosecutrix and as they entered the room, the accused came outside. On enquiry, prosecutrix told them the accused touched her breast while she was sleeping and uttered obscene words at her. In the mean time, the accused fled away. Thereafter PW2 lodged the F.I.R. Exhibit 2 is the F.I.R. and Exhibit 2(1) is his signature. Police seized the original Birth Certificate of the prosecutrix and give it in the zimma of P.W.2. Exhibit 3 is the seizure list and Exhibit 3(1) is his signature. Material Exhibit A is the H.S.L.C Admit card of the prosecutrix.

In his cross-examination, PW2 disclosed that the wife of the accused had given a case against him and his elder son Hitesh Das. P.W.2 denied the defence suggestion that the accused was working in his house before the date of occurrence and the accused had to get money from him and that on the evening of the date of occurrence, accused had come to their house to collect his money but they confined him in the house and beat him up.

11. PW3, Smt. Manju Das is the mother of the Prosecutrix. She stated that incident took place two years ago at 12 noon. Prosecutrix was 16 years old at that time. At the relevant time, PW3 was preparing tea in the kitchen and the accused, who is a carpenter was fitting a door of their house. This witness further stated that Prosecutrix was unwell and was sleeping inside the room. The accused sent the informant(PW2) outside the room to take measurement of the door. Then, PW3 heard the shouts of the prosecutrix and she came near her. She saw the accused standing near the Prosecutrix. As they came into the room, the accused fled away. Then, the prosecutrix told that the accused pressed her breast while she was sleeping. Thereafter, her husband lodged the ejahar.

In her cross-examination P.W.3 disclosed that that the accused had a helper also while working in their house on the relevant day. She denied the suggestion of the defence side that the accused had to get money from them for the other works done by him earlier and that on the relevant date in the evening, when the accused came to their house to get his money, they assaulted him and locked him inside the house.

12. P.W.4, Sri Srimanta Das is the brother of the victim. He stated that the incident took place in the year 2016 at 12 noon. He was in the shop attached to their house. Prosecutrix was sleeping inside the house as she was unwell. Accused, who is a carpenter came to their house for the first time for fitting the door of the house. This witness stated that his father was sent out of the house to take measurement of the door while his mother was preparing tea in the kitchen. Then, they heard the prosecutrix shouting and came near her. Accused was standing near the Prosecutrix and as they entered inside the room, accused came out and fled away. Prosecutrix then told that the accused touched her breast while she was sleeping. Then she woke up and shouted.

In his cross-examination P.W.4 denied the defence suggestion that the accused used to come to their house for other works on earlier occasions and they had to make payments to him and that on evening of the relevant date, the accused came to their home for money but there they did not give him the money but they assaulted him and confined him inside the house.

13. P.W.5, Smti. Sontara Das knows both the parties. She deposed that the incident took place about 2 ½ years ago at 12.30 p.m. P.W.5 stated further that prosecutrix was studying in class-X. At the relevant time, she had come to the grocery shop of the informant and heard Manju Das, the wife of the informant shouting in her house that the accused, who is a

carpenter had come to their house for some work but he should be doing only his work and not do any other act.

In his cross-examination, P.W.5 stated that the accused used to work in the houses of the other people of the locality and he had also worked earlier in the house of the informant.

- 14. P.W.6, Sri Samir Das deposed that informant is his uncle and his uncle told him that the accused had come to their house to do some wooden work and he touched the body of the prosecutrix while she was sleeping. PW6 confirmed his signature Exibit 3(2) in the seizure list (Exibit 3).
- 15. P.W.7, S/I Amar Ghosh is the Investigating Officer of this case. He deposed that on 22.06.2016, he was working as Attached Officer at Sualkuchi P.S. On that day, the informant—Dhanjay Das lodged an ejahar in Sualkuchi P.S. A G.D. Entry was made vide No. 508 dated 22.06.2016. Thereafter O/C, Sualkuchi P.S registered a case bearing Sualkuchi P.S Case No.113/2016 U/S-354/448 of IPC R/W Section 8 of POCSO Act, 2012 and directed him to investigate the case. Accordingly, P.W.7 visited the place of occurrence along with the staffs on that very day. P.W.7 recorded the statement of the informant in the police station. P.W.7 recorded the statements of the other witnesses in the spot. P.W.7 prepared the sketch map. The accused-Mamammad Ali @ Syed Moinuddin Ali was handed over by the public before Sualkuchi P.S on 22.06.2016. He was arrested and produced him before the court. P.W.7 recorded the statement of the victim and produced her before the court for recording her statement U/S-164 Cr.P.C. P.W.7 seized the HSLC Admit Card of the victim and give in the zimma of the informant. Ext.3 (3) is his signature in the seizure list (Ext.3). Thereafter, P.W.7 completed the investigation. On finding sufficient evidence against the accused person, P.W.7 submitted the charge-sheet against him U/S-354 of IPC R/W section 8 of the POCSO Act, 2012. Ext.4 is the sketchmap and Ext.4 (1) is his signature. Ext.5 is the charge-sheet and Ext.5 (1) is

his signature. Material Ext. 'A' is the Original Admit Card of the victim seized vide Ext.3, which is seen by him today in the court.

In his cross-examination, P.W.7 disclosed that the accused was arrested as per Arrest Memo at 7.00 p.m on 22.06.2016. P.W.7 did not mention in the case diary regarding the time at which the accused was handed over by the public at Sualkuchi P.S. P.W.7 visited the place of occurrence on the same day at 3.00 p.m. P.W.7 did not find any tools/instruments used by the accused in the spot. P.W.7 did not examine the neighbouring people indicated in the sketch-map (Ext.4). P.W. 1 did not tell before him that her mother was in the kitchen preparing tea and her father was outside in the courtyard. She also did not tell before him that as she woke from sleep and shouted. P.W.2 did not tell him that prosecutrix was 16 years old at the time of occurrence and that the accused uttered obscene words at her. P.W.3 did not tell him that prosecutrix was 16 years old at the time of occurrence and she saw the accused standing near the prosecutrix. P.W.4 did not tell him that he saw the accused standing near the prosecutrix and that he heard the incident from his sister.

- 14. At the close of prosecution evidence, statement of the accused person U/S-313 Cr. P.C has been recorded. He denied committing the offence and adduced evidence of two D.Ws.
- 15. DW1 Anima Begum is the wife of the accused. She deposed that accused is carpenter by profession. At the time of incident, accused was working in the house of the informant Dhananjay Das but the payment for the work done was not made to him. Accused went three days to the house of the informant asking for his due money. She stated that on 26.06.2016 at 4 p.m. The accused went to the house of the informant to bring the money which was due by the informant. But instead of giving the money the accused was assaulted by the informant and his family members and confined inside the house. On hearing this DW1 went to the house of the

informant along with one NaJimmudin , Labour Stroke helper of the accused. The accused was found there and handed over to the police . DW1 was assaulted and her cloths was torn by the informant's wife . Thereafter, DW1 has lodged an ejahar in Sualkuchi P.S. after three days of the incident and at present the case is pending in the court. Exibit A is the certified copy of the F.I.R. and Exhibit A(1) is her signature.

- 16. DW2 Najimuddin @ Najim Ali stated the he works as a helper of the accused as a carpenter. About three years ago he and the accused were engaged by the informant to do some wooden works . But the informant did not make any payment to them. One evening when the accused went to ask the payment from the informant he was assaulted by the informant. On hearing this , DW2 along with DW1 went to inquire the incident. But they were assaulted by the informant and hid family members and a case was given against the accused by the informant.
- 17. I have carefully perused the evidences on record and have heard the arguments of the Learned Counsels for both the sides. Learned Counsel for the accused submitted that the accused has been falsely implicated in the case and there are major contradiction in the evidences of the pws. He further argued that except pw-5 , all the witnesses are related witness. On the other hand, Learned Additional Public Prosecutor submitted that the prosecution side has fully proved the case against the accused beyond any shadow of doubt.
- 18. Admitted fact is that the prosecutrix is a minor. She stated in her evidence before the court that she was 16 years old at the time of occurance. Perused Material Ext. 'A', which is the HSLC Admit Card of the prosecutrix, wherein her date of birth is mentioned as 31.12.2000. The alleged incident took place on 22.06.2016 at 12 noon . Defence side did not dispute her age. So , at the time of incident, prosecutrix was a child U/S-2 (d) of the POCSO Act.

- 19. Coming to the evidence of the prosecutrix (pw-1), she has stated that on the relevant date at 12 noon, while she was sleeping in the bed inside her house, her mother (pw-3) was in the kitchen preparing tea and father (pw-2) was in the courtyard. Her evidence discloses that on the day of occurrence, accused who is a carpenter was working in their house. She has alleged that while she was asleep, the accused came and pressed her breast. As she woke up and shouted the accused fled away. And she told the incident to her parents. There is full corroboration in her evidence before the court and her statement before the Magistrate u/s 164 Crpc (Ext-1). Furthermore, evidence of pw-1 is fully supported by her parents (pw-2 &3). Their version is also that on the date of occurance, accused had come to their house for doing the work of fitting the door of the house and then, at 12 noon , while pw-3 was in the kitchen and pw-2 was sent outside the house by the accused , then prosecutrix was sleeping inside the room. On hearing her shouts , pw-2 and pw-3 went near the prosecutrix and they found the accused near her . It is in their evidences that as they came near the prosecutrix, the accused fled away. Pw-4 also supported them. Pws -2,3 & 4 made it clear that they heard from the prosecutrix that the accused touched her breast while she was sleeping, Then, she woke up and shouted. Now, pw-2 and pw-3 are the parents of the prosecutrix and pw-4 is her brother. So, they are related witnesses.
- 20. It is settled principle that the evidence of interested witness needs to be scrutinised with outmost care . It can only be relied upon if the evidence has a ring of truth to it , is cogent , credible and trustworthy. In this instant case, alleged incident took place inside the house of the prosecutrix and only her family members were present in the house at the time of incident.
- 21. It is also well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement.

- 22. The Hon'ble Supreme Court in the case of Vijendra Singh vs State of U.P. reported in (2017) 11SCC 129 has held as under:
 - " 31. In this regard reference to a passage from Hari Obula Reddy v. State of A.P. would be fruitful. In the said case , a three -Judge Bench has ruled that : (SCC pp.683-84, para 13) "[it cannot] be laid down as an invariable rule that interested evidence can form the basis of conviction never unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If , on such scrutiny , the interested testimony is found to be intrinsically reliable or inherently probable, it may, be itself, be sufficient, in the circumstances of the particular case , to base a conviction thereon." It is worthy to note that there is a distinction between a witness, who is related and an interested witness. A relative is a natural witness. The Court in Kartik Malhar v . State of Bihar has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason."
- 23. Here, in this instant case the witnesses have fully corroborated with each other and they are found to be reliable and trustworthy. Their evidences inspire confidence.

- 24. Defence evidence is that the accused is a carpenter and he did some wooden work in the house of the informant but the payment was due to him and on the evening of the date of occurrence, accused went to the house of the informant for bringing the money due to him. But, the informant did not give him the money, instead, the informant and his son assaulted him and confined him inside the house. When the wife of the accused heard this, she went to the house of the informant, she too was assaulted and the accused was handed over to the police by the informant. Defence witness no 1 is the wife of the accused. Then, after 3 (three) days of the incident, Dw-1 lodged the ejahar against the informant (pw-2) and his son(pw-4).
- 25. On the other hand, it is in the evidence of the pws that the informant lodged the FIR against the accused on the very day of the incident. Perusal of the FIR reveals that the incident took place on 22.6.16 and the FIR was lodged on the same day. So, the FIR was lodged immediately and there was no delay in lodging the FIR by the informant.
- 26. According to the Dws , the accused was assaulted by the informant and his son on the evening of the date of occurrence when he went to the house of the informant to get his payment. But, evidence of Dw-1 reveals that she gave the FIR after 3 days of the alleged incident of assaultation. So , it is clear that the FIR given by the accused is an after thought and it has been lodged by giving false allegations against the informant and his son in order to save her husband (accused).
- 27. Section 29 of the POCSO Act provides that a Special Court shall presume that the accused had committed the offence of sexual assault unless contrary is proved. Evidence on record clearly pointed that accused embraced and touched the breasts of the prosecutrix with sexual intent and the evidence of the prosecutrix is unimpeached and believable. So, as per

Section 30 of POCSO Act , the culpable mental state of the accused should be presumed.

- 28. Section 30 of POCSO Act which deals with Presumption of culpable mental state reads as follows –:
 - (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.
- 29. In this instant case, it is well proved from the evidence on record that the accused committed the offence U/S-7 of the POCSO Act, which is punishable U/S-8 of the POCSO Act. As regards the offence U/S-354 of IPC, there is no allegation of assaultation or use of criminal force by the accused person upon the prosecutrix with intent to outrage her modesty. So, Section 354 of IPC is not attracted in this case.
- 30. In the result, it is held that the prosecution has succeeded in bringing home the charge U/S 8 of the POCSO Act against accused—Mohammad Ali @ Syed Moinuddin Ali beyond all reasonable doubt. Hence, he is held guilty of committing the offence punishable under section 8 of the POCSO Act and is convicted under the said section of law.

31. Considering the facts and circumstances of the case and the nature of the offence committed by the accused, he is not entitled to get the benefit of Probation of Offender Act or under section 360 Cr.p.c.

32. <u>SENTENCE</u>

Heard the accused on the question of sentence. Also heard the Learned Defence Counsel as well as the learned Addl. Public Prosecutor. Accused has stated that he has not committed the offence and he has no earlier criminal antecedent. He submitted that he is a carpenter by profession and has a family to look after. He has pleaded leniency in awarding the punishment stating that he is 31 years old.

- 33. Considering the entire facts and circumstances of the case, the nature of the offence and the mental injury suffered by the child victim, the accused Mohammad Ali @ Syed Moinuddin Ali is sentenced to undergo rigorous imprisonment for 3 (three) years and to pay a fine of Rs. 8,000/- (Rupees eight thousand) only in default to undergo simple imprisonment for 3 (three) months, for the offence under section 8 of POCSO Act, which in my opinion , will meet the ends of justice in this case.
- 34. The period of detention already undergone by the accused will be set off from the period of imprisonment.
- 35. Now, coming to the aspect of compensation to the prosecutrix, who is a minor girl. She has suffered mental agony due to the act of the accused. And she needs to be provided with restorative and compensatory justice. So, the Learned Secretary, District Legal Service Authority, Kamrup, Amingaon is directed to assess and grant adequate compensation to the

prosecutrix (P.W.1). The said compensation amount shall be used by the parents of the prosecutrix for her welfare.

36. Issue Jail Warrant.

37. A free copy of the judgment be furnished to the accused person.

38. The Judgment is prepared in separate sheets and kept in the case record

39. Send a copy of this judgment to the Learned Secretary, District Legal Services Authority, Kamrup, Amingaon for determination of the quantum of compensation under Victim Compensation Scheme as provided under section 357 A Cr. P.C.

40. Send a copy of the judgment to the Learned District Magistrate, Kamrup, Amingaon under the provision of Section 365 Crpc.

Judgment is pronounced and delivered in open court under the hand and seal of this court on this 21^{ST} day of December, 2019.

Special Judge, Kamrup, Amingaon

Dictated and corrected by me

Special Judge,

Kamrup, Amingaon

APPENDIX

Prosecution Witness:

PW1 is the victim

PW2 Sri Dhananjay Das

PW3, Smt. Manju Das

P.W.4, Sri Srimanta Das

P.W.5, Smti. Sontara Das

P.W.6, Sri Samir Das

P.W.7, S/I Amar Ghosh

Prosecution Exhibit

Exhibit 1 is the statement

Exhibit 2 is the F.I.R

Exhibit 3 is the seizure list

Exhibit 4 is the sketch-map

Exhibit 5 is the charge-sheet

Defence Witness:

DW1 Anima Begum

DW2 Najimuddin @ Najim Ali

Special Judge, Kamrup, Amingaon