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

District: Kamrup, Amingaon Present: Smti. B. Kshetry Special Judge, Kamrup, Amingaon Special Sessions (POCSO) case No.86/2018 U/S-8 of the POCSO Act, 2012. State of Assam -Versus-Haren Kalita s/o- Lt. Jagat Kalita Resident of vill - No.2 Makeli P.S.- Boko Dist- Kamrup (R) -----Accused Appearance: Mr. A.K. Baruah. Ld. Addl. Public Prosecutor -----for the State Mr. Abdur Rahim, Ld. Advocate -----for the accused Date of 22.05.2019, evidence:21.05.2019, 23.05.2019, 09.07.2019.

Date of Argument: 01.08.2019 and 09.08.2019

Date of Judgment: 16.08.2019

<u>JUDGMENT</u>

- 1. The Prosecution case in brief is that—on 28.07.2018, the informant Umesh Das lodged an ejahar alleging that on 27.07.2018 at about 2.30 p.m, the accused— Haren Kalita attempted to commit rape upon his minor daughter aged 10 years in the backyard of the house. But, his attempt was foiled due to the arrival of informant's son—Jaydev at the spot and the accused got caught. Hence, this case.
- 2. On the basis of the said ejahar, Boko P.S Case No. 522/2018 U/S-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-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- 8 of the POCSO Act, 2012, against accused person— Haren Kalita. 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 27.07.2018 at about 2.30 p.m 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. To decide the above sections of law, let us go through the evidences of the witnesses on record alongwith the relevant documents.
- 8. P.W.1, Sri Umesh Das is the informant of this case. He knows the accused person-Haren Kalita, who is his neighbour. Prosecutrix is his daughter. He stated that the incident took place about 10 months ago at 2.30 p.m. Prosecutrix was 10 years at the time of occurrence and studying in class-VI. On the day of occurrence, P.W.1 was not in the house. He had gone to Chhaygaon to attained 'Shraddha'. His wife—Mohini Das had gone to the paddy field. The prosecutrix along with her elder brother, aged 14 years were in the house. Then his son—Jaydev Das rang him and told him that the accused was about to commit some bad act with the prosecutrix in the backyard of their house under the bamboo grooves. He also told P.W.1 that he caught the accused and kept him in the veranda of their house and asked him to come soon. P.W.1 returned home immediately. The accused was not there in the veranda. He had gone to his house. On seeing P.W.1, the accused came to meet him and admitted before him that he was about to commit some bad act with the prosecutrix. P.W.1's wife was also there. On reaching home, P.W.1's son—Jaydev Das told him that when he went to the kitchen to drink water, then he saw the accused catching hold of the

prosecutrix and taking her to the jungle to commit some bad act and he caught the accused. Prosecutrix also told P.W.1 that the accused called her and pulled her by her hand and took her to the backyard of the house. Then, the accused embraced her and he touched her genitals and her breasts and was about to have sexual intercourse with her. Just then, her elder brother came and caught hold the accused. Then, P.W.1 called the village people to his house. Accused admitted before the village people namely, Brajen Das, Pionath Kalita, Niren Nath, Kamal Nath, Subhas Das that he was about to commit some bad act with the prosecutrix in the backyard of the house and had taken her there with him. Village people told P.W.1 that the matter cannot be resolved by them. Next day, P.W.1 lodged the ejahar. Ext. 1 is the ejahar. Ext. 1 (1) is my signature. Police recorded my statement.

In his cross-examination, P.W.1 stated that Ejahar was written by the scribe in the police station as instructed by him. One of his daughter is Baroda. He also stated that they had given a case against the son of the present accused for outraging the modesty of his daughter—Baroda and the case is still pending. He admitted that they do not have good relationship with the accused. He also admitted that he did not see the incident but only heard about it from his son and daughter. P.W.1 also stated that there is no boundary dispute between them and the accused person. He denied that due to previous enmity, he lodged a false case against the accused. He denied that the accused had gone to the grazing field to leave his goats for grazing at the time of occurrence.

9. P.W.2, Smti. Mohini Das is the wife of the informant (P.W.1). She knows the accused person—Haren Kalita, who is their neighbour. Prosecutrix is her daughter. She testified that the incident took place about 10 months ago at 2.30 p.m. Prosecutrix was 10 years old. At the time of occurrence, P.W.1 had gone to Chhaygaon to attain 'Shraddha'. P.W.2 had gone to the paddy field. Only the prosecutrix along with her elder brother—Jadav Das,

aged 14 years were in the house. P.W.2 stated further that her son—Jaydev Das came to the field and called her home. On reaching home, P.W.2 enquired about the incident from prosecutrix. She told her that the accused called her to the backyard of the house to the bamboo plantation. Then, he pulled her by the hand and embraced her. Her son—Joydev told her that he saw the accused embracing the prosecutrix from the kitchen. He ran towards the accused and caught him and kept him in the veranda of their house. But the accused was not there in the veranda when P.W.2 came home. She called the village people and told them about the incident. She also told the incident to her husband (P.W.1). This witness stated that the accused admitted before the village people that he embraced the prosecutrix by taking her to the backyard of their house and he touched and pressed her breasts. The village people told them that the matter cannot be resolved by them in the village level. Next day, her husband lodged the ejahar. Police recorded her statement.

In her cross-examination P.W.2 disclosed that about 10/12 village ladies and men gathered in their house after the incident. Pionath Kalita, Brajen Kalita, Subhas Bayan, Rantu Kalita, Mantu Kalita were there. Her husband was also there at the village gathering. This witness revealed that they had given a case against the son of the present accused for outraging the modesty of their daughter—Baroda and that they do not have good relationship with the accused and his family. She denied the suggestion that the accused had gone to the grazing field to leave his goats for grazing at the time of occurrence and that her husband lodged a false case against him..

10. P.W.3, is the prosecutrix. She testified that the incident took place less than a year ago at about 1.30 p.m. She was 10 years at the time of occurrence and studying in class-VI. On the day of occurrence, her parents were not in the house. Her father had gone to Chhaygaon to attain 'Shraddha'. Her mother (P.W.2) had gone to the paddy field. Only she along

with my elder brother—Jaydev were in the house. P.W.3 stated that at the relevant time, she was boiling milk in the kitchen and her brother—Jaydev Das was sleeping in another room. Then, the accused, whom she addresses as 'Koka' came and enquired her about the bamboo saplings. He called her to the bamboo grooves. She went there with him and showed him. As she was about to return back to the kitchen, the accused caught her by her hand. He embraced her and he touched her breasts. Then, her brother saw the accused from the kitchen when he came to drink water. When her brother came near them, the accused let her free. Then, her brother caught the accused and brought him to the veranda of their house. On being informed by her brother, the wife of the accused and his daughter-in-law came and took him away. Her brother called their mother (P.W.2) from the field and he rang their father (P.W.1) and called him home. Her parents arrived and enquired about the incident from and she narrated them. Village people gathered in their house at night. Accused was also there while P.W.3 was in the kitchen with her mother. Thereafter, her father lodged the ejahar. Police recorded her statement. Police brought her before the Magistrate for recording her statement. Ext. 2 is the statement. Ext. 2 (1 to 3) are her signatures.

In her cross-examination P.W.3 disclosed that she does not remember the date of occurrence. She denied the suggestion that she deposed before the court as tutored by her parents. She disclosed that the accused showered love and affection upon her and he never did any bad act with her before the incident. Her brother on seeing the accused embracing her came with a bamboo stick. She does not know if the accused had gone to the grazing field to leave his goats for grazing at the time of occurrence. P.W.3 further stated that there was a gathering of 5/10 people in the evening hours regarding the incident but she was not present in the gathering.

11. P.W.4, Sri Jaydev Das is the son of the informant and elder brother of the victim/prosecutrix. He testified that the incident took place about a year ago at about 3.00 p.m. Prosecutrix was studying in class-VI at the time of occurrence. At the time of occurrence, he woke up from his sleep and went to the kitchen to drink water. Then, he heard some murmuring sounds in the backyard of the house. His parents were not in the house. He looked outside from the kitchen and saw the accused embracing the prosecutrix (P.W.3) and touching her breasts. P.W.4 took a stick and went near the accused. The accused tried to flee away but P.W.4 caught him and brought him to the house. The accused told him not to tell the incident to anybody and stated he has committed a mistake. P.W.4 made him sit in the veranda and called the wife of the accused. She took him away with him. On enquiry about the incident, prosecutrix told P.W.4 that the accused touched her breasts. P.W.4 went to the paddy field to call her mother and told her the incident. He rang his father and told the incident. His parents arrived and village people gathered in their house at night. Accused was also there. The accused admitted committing the offence upon the prosecutrix. Thereafter, his father lodged the ejahar. Police recorded my statement. Ext. 3 (1) is his signature in the seizure list (Ext.3). Police seized the school certificate of the prosecutrix.

In his cross-examination P.W.4 disclosed that Police recorded his statement in the police station on the date of lodging the ejahar. His father had gone to Chhaygaon on the date of occurrence. He rang his father at around 4/4.30 p.m. and his father reached home at 6.30/7.00 p.m. His mother was in the paddy field. She came home at 4.00 p.m. They called the village people regarding the incident. About 10 persons had come to their house. Pionath Kalita, Brajen Kalita, Subhas Bayan, Rantu Kalita, Mantu Kalita etc. were there. P.W.4 disclosed that they have given a case against Madan Kalita, son of accused and that they do not have good relationship with the accused. He denied the suggestion that due to previous enmity they gave a false case against the accused. He also denied the suggestion that

the accused had gone to the grazing field to leave his goats for grazing at the time of occurrence and that his father lodged a false case against him.

12. P.W.5, Sri Uddhab Das is another son of the informant. He stated that the incident took place last year. At the time of occurrence, he was in Guwahati. Prosecutrix rang him and called him at home. On reaching home the next day, his mother and other family members told him the incident. On enquiry, prosecutrix told him that on the previous day, the accused called her and took her to the backyard of the house to see the bamboo saplings. Then, he caught her hand and touched her breasts. When she tried to shout, then the accused pressed her mouth with his hand. At that time, brother—Jaydev Das (P.W.4) had come to the kitchen to bring water. On hearing some sound in the backyard of the house, he looked outside and saw the accused embracing the prosecutrix. He went near the accused with a stick. Then, as he received a phone call, prosecutrix ran away. P.W.4 also heard that a village meeting had taken place regarding the incident. No decision was taken in the village meeting. Thereafter, his father lodged the ejahar. Police recorded his statement. Ext. 3 (2) is his signature in the seizure list (Ext.3). Police seized the school certificate of the prosecutrix.

In his cross-examination, P.W.5 deposed that the prosecutrix rang him at 4.30 p.m on the date of occurrence. Police recorded his statement in the police station after 2/3 days of the incident. He revealed that they have given a case against Madan Kalita, son of accused and that they do not have good relationship with the accused. He denied the suggestion that due to previous enmity, they gave a false case against the accused. He also denied the suggestion that the accused had gone to the grazing field to leave his goats for grazing at the time of occurrence and that his father lodged a false case against him

13. P.W.6, Sri Subhash Bayan knows the informant and prosecutrix of this case. He also knows the accused person—Haren Kalita. He deposed

that the incident took place about 9/10 months ago. Prosecutrix was 8/9 years old. At the time of occurrence, P.W.6 was in the market. After reaching home, at 9/10 p.m, they gathered in the house of the informant as he was called for a discussion regarding the incident of rape committed by the accused upon the prosecutrix. He stated that about 10/12 persons gathered in the house of the informant. Accused was also there. When they enquired the incident from the accused, he admitted before them that he committed some bad act with the prosecutrix. But, no decision was taken in the said meeting as it was a serious matter. Thereafter, informant lodged the ejahar. Police recorded his statement.

In his cross-examination P.W.6 stated that he heard about the incident at 7.30 p.m. The village people namely, Niren Nath, Narayan Nath, Pionath Kalita, Brajen Das, Rantu kalita etc were present in the meeting. The Secretary of the village is —Rantu Kalita. Prosecutrix was present in the decision which took place in her house and she told them about the incident. She told before them that the accused touched her body and embraced her. P.W.6 stated that informant gave another case against the son of the accused for outraging the modesty of his another daughter so, the relationship between the two families deterioted for some days but again it was normal.

14. P.W.7, S/I Mintu Boro is the Investigating Officer of this case. On 28.07.2018, he was working as i/c at Chamaria P.P under Boko P.S. On that day the informant—Sri Umesh Das lodged an ejahar in Chamaria P.P. he made the G.D. Entry being No. 380 dated 28.07.2018. P.W.7 forwarded the ejahar to O/C, Boko P.S for registering a case. In the meantime, he recorded the statements of the informant, victim and four other witnesses in the police station as the informant was accompanied by the victim and the witnesses also. Thereafter, he apprehended the accused from Boralimara Daspara and brought him to the police station. P.W.7 arrested the accused and forward him to the court. Thereafter O/C, Boko P.S registered a case

bearing Boko P.S Case No.522/2018 U/S- 8 of POCSO Act, 2012 and directed him to investigate the case. Accordingly, he visited the place of occurrence on 28.07.2018 along with the staffs. P.W.7 prepared the sketch map. Ext.4 is the sketch-map and Ext.4 (1) is his signature. P.W.7 sent the victim for medical examination and produced him to the court for recording his statement U/S-164 Cr.P.C. P.W.7 seized the school certificate of the victim and gave it in the zimma of the guardian of the victim. Ext. 3 (3) is his signature in the seizure list (Ext.3). The victim was produced before CWC, Amingaon by Child line. Thereafter, he completed the investigation and on finding sufficient evidence against the accused person—Haren kalita, he submitted the charge-sheet against him U/S- 8 of POCSO Act, 2012. Ext.5 is the charge-sheet and Ext.5 (1) is his signature.

In his cross-examination, P.W.7 disclosed that he arrested the accused after the case was registered. He arrested the accused on 28.07.2018 and then he visited the place of occurrence on that very day. P.W.7 examined all the witnesses in the police station. P.W.7 sent the victim to the court for recording her statement U/S-164 Cr. P.C on 28.07.2018. P.W.7 examined the seizure witness—Udhab Das on 31.07.2018. P.W. 4 did not tell him that the accused was brought to the veranda and made to sit there. P.W.4 also did not tell him that the victim told him that the accused touched her breasts. P.W. 5 did not tell him anything about the incident. He was the seizure witness. He did not examine any witnesses near the place of occurrence as he did not find them. P.W.7 examined one independent witness-Subhash Bayan.

15. 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 declined to adduce evidence. The accused pleaded innocence and stated that he did not do anything with the victim, as alleged. He pleaded that he has been falsely implicated in the case due to previous enmity.

- I have heard the arguments of the Learned Counsels for both the sides and have carefully perused the case record. It is argued by the learned Defence Counsel that there is contradiction in the evidence of the P.Ws regarding time of occurrence. He also argued that independent witness is not eye-witness and all other witnesses are interested witness. He prayed that the accused be acquitted as prosecution failed to prove the case against him. On the other hand, Learned Additional Public Prosecutor has submitted that there is sufficient evidence against the accused and he is required to be convicted.
- 17. Now, coming to the evidence on record, it is found that the ejahar was lodged by the informant (P.W.1) on 27.07.2018. He heard the incident from his son—Joydev Das (P.W.4) and he called for a village meeting in his house. As the matter could not be resolved at village level, so he lodged the FIR on the next day of occurrence.
- 18. In the present case, the prosecutrix stated her age to be around 10 years at the time of incident. So, the victim was below 18 (eighteen) years of age at the time of incident. Therefore, she was a 'child' as per section 2 (d) of POSCO, Act.
- 19. Furthermore, coming to the evidentiary value of child witness, it has been held in **Panchhi Vs State of Uttar Pradesh**, **AIR 1998 SC 2726** that "It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with great circumspection, because a child is susceptible to be swayed by what others tell them and, thus, a child witness is an easy prey tutoring. Here in this instant case, the evidence of prosecutrix is found to be trustworthy and it can be relied upon fully.

- 20. The evidence of the prosecutrix is that on the date of occurrence, the accused, whom she addresses as 'Koka' came and enquired her about the bamboo saplings then, he called her to the bamboo grooves. She went there with him and showed him. As she was about to return back to the kitchen, the accused caught her by her hand. He embraced her and he touched her breasts. The evidence as to embracing the prosecutrix and touching her breasts by the accused has not been challenged by the defence side. There is nothing to disbelieve the evidence of the prosecutrix (P.W.3). Accused has simply denied in his statement U/S-313 Cr. P.C that he did not commit any offence and that he has been falsely implicated in this case.
- 21. Her evidence is supported by her brother (P.W.4), who is an eye witness to the occurrence. The incident took place in the backyard of the house of the informant during day hours and it was witnessed by P.W.4 from the kitchen. P.W.3 corroborated her statement U/S-164 Cr. P.C (Ext.2). P.W.1 and 2 are the parents of the prosecutrix and P.W. 5 is her another brother P.W.6 is the independent witness. The P.Ws—1, 2, 5 and 6 are all hearsay witnesses. Though P.W.3 has been exposed to long cross-examination, her presence at the place of occurrence cannot be doubted. Learned Counsel for the accused argued that all the P.Ws are interested witnesses apart from P.W.6. But, law is well settled that the evidence of the interested witnesses must be subjected to close scrutiny and cannot be discarded simply because it came from interested witnesses.
- 22. In the present case, the prosecutrix has been consistent on the material particulars with regard to the incident. Further, there is full corroboration by her brother i.e P.W.4 together with the reported witnesses, namely, P.W.1, 2, 5 and 6. Evidence of prosecutrix before the court as P.W.3 has also fully corroborated with her statement U/S- 164 Cr. P.C before the Magistrate (Ext.2).
- 23. Though it was argued on behalf of the accused that he has been falsely implicated in the instant case by the father of the prosecutrix due to

enmity with his brother and that the prosecutrix has been tutored by him to deposed falsely against him but the accused failed to discharge the onus of proving that he has been falsely implicated in the case due to enmity or any other reason. It is further argued that there is contradiction in the evidence of the P.Ws regarding time of occurrence.

24. It is settled law that overmuch importance cannot be attached to minor discrepancies in the testimony of witnesses. A witness cannot be expected to posses a photographic memory and to recall the details of an incident. Moreover powers of observation differ from person to person. In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals which varies from person to person. So, discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be given too much importance.

25. 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.

26. Now, it is clear from the evidences on record, that when the prosecutrix went with him to show him the bamboo saplings and was about to return back to the kitchen, the accused caught her by her hand and

embraced her also touched her breasts. This attracts the offence of sexual assault U/S-7 of the POCSO Act which is punishable U/S-8 of the POCSO Act, 2012. Defence side did not adduce any evidence to prove that he had no sexual intent. So, the offence U/S-8 of the POCSO Act is well proved against the accused.

27. In the light of the evidence of the prosecutrix (P.W.3) as well as her parents (P.W.1 and 2) together with evidence of other witnesses (P.W.4, 5 and 6), this Court can presume under Section 29 of the POCSO Act . 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.

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.

- 28. 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—Haren Kalita 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.
- 29. 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.

30. <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 cultivator and has pleaded leniency in awarding the punishment stating that he is 65 years old.

31. 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 – Haren Kalita is sentenced to undergo rigorous imprisonment for 3 (three) years and to pay a fine of Rs. 10,000/- (Rupees ten thousand) only in default to undergo rigorous imprisonment for 6 (six) months, for the offence under section 8 of POCSO Act, which in my opinion , will meet the ends of justice in this case.

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32. The period of detention already undergone by the accused will be

set off from the period of imprisonment.

33. 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.3). The said compensation amount shall be used by the

parents of the prosecutrix for her welfare.

34. The Judgment is delivered in open Court and written on separate

sheets.

35. The case is disposed of on contest.

36. A free copy of the Judgment be furnished to the convict

immediately. A copy of this order and Judgment be sent to the District

Magistrate, Kamrup, Amingaon as per provision of law.

Given under my hand and seal of this Court on this 16thday of

August, 2019.

Special Judge,

Dictated and corrected by me Kamrup, Amingaon

Special Judge,

Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Sri Umesh Das

P.W.2, Smti. Mohini Das

P.W.3, is the prosecutrix

P.W.4, Sri Jaydev Das

P.W.5, Sri Uddhab Das

P.W.6, Sri Subhash Bayan

P.W.7, S/I Mintu Boro

Prosecution Exhibit

Ext. 1 is the ejahar

Ext. 2 is the statement

Ext.3 is the seizure list

Ext.4 is the sketch-map

Ext.5 is the charge-sheet

Special Judge, Kamrup, Amingaon