## IN THE COURT OF ADDL. SESSIONS JUDGE :: KAMRUP :: AMINGAON

District: k	kamrup,	Amingaon
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Present: Smti. B. Kshetry

Addl. Sessions Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.20/2018

U/S-8 of POCSO Act, 2012

State of Assam

-Versus-

Sri Lohit Kumar

s/o-Lt. Sukhuna Kumar

Resident of vill -Srihati

P.S.-Sualkuchi

Dist- Kamrup

-----Accused

### Appearance:

Mr. A.K. Baruah. Addl. Public Prosecutor -----for the State

Md. Jeherul Islam, Advocate ------for the accused

Date of evidence: 27.08.2018, 20.09.2018, 04.10.2018, 12.10.2018

Date of Argument:09.11.2018

Date of Judgment:12.11.2018

#### **JUDGEMENT**

- 1. The Prosecution case in brief is that—on 23.01.2018 at about 7.00p.m while the minor daughter of the informant, aged about 9 years was going towards the house of the informant's brother—Sri Jogesh Kalita, then on the way the accused—Lohit Kumar restrained the her, pressed her mouth by his hand and with a bad intention, he kissed her on her person and touched various parts of her body. And hence, this FIR.
- 2. On the basis of the said ejahar, Sualkuchi P.S Case No. 06/2018 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 committed and this Court after hearing both the parties, framed charges U/S- 8 of the POCSO Act, 2012 against accused—Lohit Kumar. The aforesaid charge 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 as many as seven (7) numbers of witnesses including the informant and victim. Statement of the accused person U/S-313 Cr. P.C is recorded. He has denied committing the offence and declined to adduce evidence.

### 5. **POINT FOR DETERMINATION**

(I) Whether the accused person on 23.01.2011 at about 7.00 p.m at village Srihati under Sualkuchi P.S committed sexual assault on the minor victim girl within the meaning of section 7 of the POCSO Act, 2012 and, thereby, committed an offence punishable U/S-8 of the POCSO Act, 2012 ?

### 6. **DISCUSSION, DECISION AND REASONS THEREOF**

Perused the record. In support of the case, prosecution examined seven (7) witnesses.

- 7. Let us go through the evidences available on record.
- 8. P.W.1, Sri Chabin Kalita is the informant of this instant case. He knows the accused person. Victim is his daughter. The incident took place about 7 months ago (10<sup>th</sup>Magh of Assamese Calendar) at 7.00 p.m. He was not at home. He had gone for work. At 7/7.45 p.m, when he returned back home, then his daughter was lying on his bed and crying. His wife told him that the accused touched the body of their daughter. Thereafter, P.W.1 enquired about the incident from the victim. She told him that after watching T.V in the house of her 'Borma'—Khiroda Kalita as she was about to come home on being called by her mother, then the accused forcibly caught hold of her hand, pressed her mouth with his hand and lifted her. He took her out to the barren space lying between two houses i.e. their house and the house of 'Borma'. Victim also told P.W.1 that the accused touched her breast and her vagina and scratched them with his hand. Accused warned her not to disclose the incident to anybody. Victim was crying in pain due to bruishes on her breast. Pw-1 went to enquire the incident from the accused. But, accused denied committing the incident. Thereafter, P.W.1 lodged the FIR. Ext.1 is the ejahar. Ext.1 (1) is her signature. Police took the victim for medical examination and also brought her before the Magistrate for recording her statement.
- 9. In his cross-examination, P.W.1 stated that there are houses near his house. He further stated that the incident took place in the winter season and people cover themselves in the warm clothing. He does not remember what dress the prosecutrix was wearing at the time of occurrence. He denied the suggestion of giving a false case against accused due to past enmity.
- 10. P.W.2, is the victim and the daughter of the informant. She knew the accused person. She stated that the incident took place about several months ago at around 8 p.m. She had gone to watch T.V in the house of her 'Borma' (Aunt)—Khiroda Kalita, who stays nearby. After watching T.V, while she was coming home, the accused forcibly caught hold of her hand. The accused was hiding in the empty space between her

house and the house of her 'Borma'. The accused then pressed her mouth with his hand, so she could not shout. Thereafter, he touched her breast with his hand and scratched them and put kisses on her cheeks. He also gave a bite on her vagina and then let her go. The accused gave her gems and chocolates at the time of incident. This witness stated that she received injuries on her breast and vagina. There were scratches on her private parts. She came home and told the incident to her mother. Thereafter, her father arrived from work and she told him also. Her parents went to the house of the accused and asked him about the incident. P.W.2 was taken for medical examination and she was brought before the Magistrate for recording her statement. Ext. 2 is her statement U/S-164 Cr. P.C. Ext. 2 (1&2) is her signatures.

- 11. In her cross-examination, P.W.2 has stated that incident took place in the winter season and she was wearing woolen clothes. She also stated that accused took her to a shop and gave her chocolates.
- 12. P.W.3, Niroda Kalita is the wife of the informant and the mother of the prosecutrix. She stated that the incident took place in the month of January, 2018 (10<sup>th</sup>Magh in Assamese calendar). Victim was 9 years old at the time of incident. On the relevant day, at around 7 p.m, victim had gone to the house of her 'Borma' to watch T.V. P.W.3 was cooking food in her house. Then, the victim returned home weeping and told her that the accused was hiding and he caught hold of her as she was coming home. The accused closed her mouth with his hand, touched her breast and vagina and also scratched her private parts. After that, he took her to the chowk and offered her chocolates and went away. P.W.3 further stated that on coming to know about the incident, she went to the house of the accused and charged him. But the accused denied the bad act with the victim girl. On her husband's return, she told him about the incident and he lodged the FIR. Police recorded her statement.
- 13. In her cross-examination, P.W.3 has deposed that that incident took place in the winter season and victim was wearing woolen clothes.
- 14. P.W.4, Smti. Khiroda Kalita is the 'Borma' (Aunt) of the victim girl. Her house is located near victim's house. She knows the accused person. She stated that the incident took place on 23.01.2018 at about 7.00 p.m. Victim was 9 years old at the time of incident. On the relevant day, in the evening time, victim came to her house to watch

- T.V. Accused also came to her house to watch T.V. Then, the electricity current went off and the accused and victim left her house. She went to the kitchen for burning the lamps. At about 9 p.m on hearing 'hullah' in the house of the victim, P.W.4 came out of the house and she heard from the victim's mother (P.W.3) that while the victim came out from her house after watching T.V, the accused caught hold of her and he bit her on her cheeks. He also opened her panty and kissed on her vagina. Thereafter, victim's father lodged the FIR. Police recorded her statement.
- 15. P.W.5, Sri Gauranga Kalita has stated that informant is his Uncle and victim is his sister. He knows the accused person. The incident took place at about 7/7.30 p.m. At the time of incident, the victim was studying in class-III. On the night of occurrence P.W.5 was studying at his home. Then, he heard some 'hullah' outside. On coming out from the house he heard from the victim's mother (P.W.3) that the accused kissed the cheeks of the victim and also bit on her private parts. P.W.5 saw the victim was crying, on asking her, she told him that the accused was hiding and he caught hold of her. Then the accused pressed her mouth with his hand and put kisses on her cheeks. Victim also told P.W.5 that the accused touched and bit on her private parts.
- 16. In her cross-examination, P.W.5 has deposed that that incident took place in winter season and victim was wearing woolen clothes.
- P.W.6, Sri Suren Kalita. He stated that informant is his younger brother and victim is his niece. He knows the accused person. He stated that the incident took place 23.01.2018 at about 7/7.30 p.m. Victim was 9 years old at the time of incident. P.W.6 was at home. He saw victim came to the house crying. He stays near the house of the victim. He heard the victim weeping and telling her mother that while she was coming from the house of her 'Borma' after watching T.V, the accused was hiding and he suddenly caught hold of her and pressed her mouth. He kissed her checks and private parts. Accused even asked the victim not to tell anyone about the incident. Thereafter, the village people came to know about the incident and the victim's father lodged the incident.
- 18. In her cross-examination, P.W.6 has deposed that that incident took place in winter season. The houses of other people is located near their house.

- 19. P.W.7, S/I, TarunTalukdar, is the I/O, who has investigated the case. In his deposition, he has stated that on 23.01.2018, he was at Sualkuchi P.S as S/I. On that day, O/C, Sualkuchi P.S received an ejahar lodged by one, Sri Sabin Kalita. Accordingly, a case was registered by O/C and he directed P.W.7 to investigate the case. Accordingly, Pw-7 visited the place of occurrence and recorded the statement of the witnesses. He also prepared the sketch map. The accused was brought to the P.S. After interrogation, the accused was arrested and produced before the Court. Pw-7 sent the victim for medical examination and produced the victim before the Magistrate for recording her statement U/S-164 Cr. P.C. After completion of investigation and on finding sufficient materials against the accused, P.W.7 submitted charge sheet against the accused- Lohit Kumar U/S-8 of the POCSO Act, 2012. Ext.3 is the sketch-map and Ext. 3(1) is his signature, Ext.4 is the charge-sheet and Ext. 4 (1) his signature.
- 20. In his cross-examination P.W.7 deposed that the P.W.1 did not state before him that—"she (victim) was about to come home after watching T.V as her mother called her then the accused caught hold of her and took her to the barren space lying between two houses and that he had gone to the house of the accused to enquired the incident and he denied the same". P.W.2 did not state before him that—"the accused bit on her (victim's) vagina and that she received injuries on her breast and vagina". P.W.3 did not state before him that—"the victim told her that the accused touches her vagina".And P.W.4 did not state before him that—"Niroda Kalita (P.W.3) told her that the accused opened the panty of the victim and kissed on her vagina and bit on her cheeks."And P.W.5 did not state before him that—"he heard about the incident from the victim and her mother that the accused bit on her private parts." And P.W.6 did not state before him that—"he heard the victim telling her mother that the accused kissed her private parts."
- 21. I have heard the arguments of both the sides. Perused the evidences on record.
- 22. Learned Counsel for the accused further argued that the accused has been falsely implicated in this case and there are contradictions in the material points. He had only given chocolates to the victim as she wanted to have it. Further submission of the Learned Defence Counsel is that there is contradiction in the evidences of the P.Ws

regarding the time of occurrence. He argued that no incident as alleged had taken place as the victim refused to do medical examination.

- 23. Learned Additional Public Prosecutor submitted that there are bound to be some discrepancies between the narration of different witnesses when they speak on details about the incident but overmuch importance cannot be attached to minor discrepancies. Therefore, discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be given much importance.
- 24. In this case , charge was framed u/s 8 of POCSO Act . Now , question comes, whether the offence committed by the accused falls u/s 8 of POCSO Act or any other offence . Now, **Sexual Assault** is defined **U/S 7 of POCSO Act** as "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." **Section 8 of POCSO Act** prescribes the punishment for the offence u/s 7 of the Act.
- 25. It is in the evidence of the victim girl (Pw-2) that while she was returning back home after watching T.V from the house of her 'Borma' (Aunt) at around 8 pm, then the accused ,who was hiding in the open space between both the houses, forcibly caught hold of her in her hand . She alleged that the accused pressed her mouth with his hand .He then touched her breast with his hand and kissed on her cheeks. She further alleged that the accused also gave a bite on her vagina. Thereafter, he offered her chocolates. Victim complained that she received injuries on her breast and vagina and there were scratches on her private parts. She told the incident to her mother ( Pw-3) and also to her father (Pw-1). Her evidence is corroborated by her mother (P.W.3 who stated that victim returned home weeping and told her that the accused was hiding and he caught hold of her as she was coming home from the house of her 'Barma'. Pw-3 was told further that the accused closed the mouth of the victim, then he touched her breasts and vagina and scratched her private parts . After that , he offered her chocolates and went away. Pw-3 stated that on her husband's return, she told him about the incident. According to pw-1, father of the victim when he returned home in the evening, he found the victim was lying on the bed and crying. On enquiry, victim told him that the accused forcibly caught hold of her hand, pressed her mouth, touched her breast and her vagina. Accused scratched her private parts. Pw-1 stated that victim

was crying in pain due to bruishes on her breast. Pw-4 , pw-5 and pw-6 have corroborated the evidence of the victim. Again, according to pw-4, who is the 'Borma' of the victim, on the day of occurrence in the evening time, victim and the accused had come to her house to watch T.V. After the electricity current went off they left and pw-4 went to the kitchen to lit the lamps. This witness stated that she heard from the victim's mother that while the victim was returning from her house after watching TV, then the accused caught hold of her and bit her on her cheeks. He also opened her panty and kissed her on her vagina. Another witness, Pw-5 made it clear that Pw-3 told him that the accused kissed the victim on her cheeks and bite on her private parts. This witness found the victim crying and she told him that the accused was hiding and he caught hold of her , then pressed her mouth with his hand and put kisses on her cheeks . Victim also told him that the accused touched and bite on her private parts.It has come out from the evidence of Pw-6, who is the close neighbour and uncle of the victim that at the relevant time, he saw the victim coming home and she was crying. He heard the victim telling her mother (Pw-3) that the accused caught hold of her, pressed her mouth , kissed her on the cheeks and private parts . It is well established from the record of this case that at the time of commission of the offence, the victim was a minor girl, aged about 9 years. This fact was not only stated by the victim and her parents but also by other witnesses.

- 26. From the scanning of evidences of the victim, her parents and other witnesses, it is well proved that on the day of occurrence, accused Lohit Kumar with sexual intent touched the vagina and breast of the victim which involves physical contact without penetration and had committed the offence of sexual assault. Therefore, it is found that victim was sexually assaulted by the accused person and she had attained 9 years of age at the time of occurrence. This attracts Section 7 of the of the POCSO Act, 2012.
- 27. **Section 29 of the POCSO Act** which deals with presumption as to certain offences reads as "Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and section 9 of this Act, the Special Court shall presume ,that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

- 28. As per section 29 and 30 of the POCSO Act, it is presumed that the accused has committed the offence of sexual assault on the minor victim as he has failed to discharge his burden against presumption.
- 29. In the result, prosecution has succeeded in proving the offence u/s 8 of the POCSO Act against the accused- Lohit Kumar beyond all reasonable doubt. He is held quilty and is ,hereby, convicted for the offence punishable u/s 8 of POCSO Act, 2012.
- 30. Considering the fact that the crime of sexual assaultation has been committed on a minor child, I am not inclined to apply the provision of Probation of Offenders Act , 1958.
- 31. The convict is heard on the quantum of punishment to be imposed upon him, as required u/s 235 of the Crpc. The convict has pleaded innocent, He stated that he is a daily wage labour and has to look after his family members, who are dependent upon him. Heard both the Learned Counsel for the accused as well as the Additional Public Prosecutor in this regard.
- 32. Now , turning to the question of sentence , it is settled law that while deciding the quantum of punishment , it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances . The aggravating circumstances relate to the crime and the mitigating circumstances relate to the criminal. Now, in this instant case , so far as the aggravating circumstances are concerned , a minor girl was sexually assaulted and it has caused her mental trauma. While the mitigating circumstances is that the accused is aged 57 years old and he has claimed to be falsely implicated in the offence.
- 33. Considering the facts and circumstances of the case, the nature of the offence committed on the minor girl and the age of the accused , the severity of the mental and physical harm suffered by the victim , he deserves some punishment . It is pertiment to be mention that Section 8 of the POCSO Act ,2012 prescribes for a minimum punishment for a term of three years with fine . To meet the ends of justice , this court has no option but to impose the punishment of 3 (three) years to the accused.

- 34. Accordingly , accused- Lohit Kumar is convicted and sentenced for offence punishable u/s 8 of the POCSO Act, 2012 to suffer rigorous imprisonment for 3 (three) years and also to pay a fine of Rs 2000/- (two thousand) in default, rigorous imprisonment for 3 (three) months.
- 35. The period of detention which had been undergone by the accused in the custody be set off. Fine amount , if realized, shall be given to the victim.
- 36. Furnish a free copy of this judgment to the convict.
- 37. Also transmit copy of this judgment to this District Magistrate, Kamrup, Amingaon.
- 38. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 12<sup>th</sup> day of November, 2018.

Special Judge, Kamrup, Amingaon

# **APPENDIX**

## **Prosecution Witness:**

P.W.1, Sri Chabin Kalita

P.W.2, Victim (prosecutrix)

P.W.3, Niroda Kalita

P.W.4, Smti. Khiroda Kalita

P.W.5, Sri Gauranga Kalita

P.W.6, Sri Suren Kalita

P.W.7, S/I, TarunTalukdar,

# **Prosecution Exhibit**

Ext.1 is the ejahar.

Ext.2 is the statement of the Prosecutrix made before the Court U/S—164 Cr. P.C.

Ext.3 is the sketch-map

Ext.4 is the charge-sheet

Special Judge, Kamrup, Amingaon