DISTRICT: KAMRUP (M), GUWAHATI

IN THE COURT OF THE SPECIAL JUDGE, KAMRUP (M) GUWAHATI

PRESENT: - Shri A. Chakravarty, M.A., LL.M., AJS

Sessions Case No. 395 of 2018

Under Section 8 of the POCSO Act

State of Assam ...Complainant

-Versus-

Choto Ali ... Accused

Charge framed on : 11.01.2018

Evidence recorded on : 02.05.2019, 04.07.2019, 16.09.2019

Statements recorded on: 27.11.2019

Arguments heard on : 20.12.2019

Judgment delivered on: 10.01.2019

Advocates who appeared in this case are:

Smt. Deepa Bezbaruah, Ld. Special P.P., for the Prosecution.

Shri P. Choudhury, Ld. Counsel for the accused.

JUDGMENT

This case was registered on 30.08.2018, at Jalukbari Police Station, under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act"), based on a First Information Report (in short "FIR") filed by one Nirmali Sarma against accused Choto Ali.

- The case of the prosecution, in brief, is that on 30.08.2018, at around 02:00 pm, at Sankardev Nagar, Maligaon, while the seven years' old minor daughter of the informant (hereinafter referred to as "the victim girl") was returning home from school, the accused Choto Ali caught her and giving her two rupees, took her in his lap and kissed her. The accused also touched her private parts and threatened her that if she tells about the same to anybody, he will kill her. But, the victim girl told her mother, i.e. the informant, about the incident and the informant lodged the FIR of the incident with the Maligoan police outpost.
- **3.** The Incharge of the Maligaon Police out post entered the FIR in the General Diary Book vide Entry No. 554, dated 30.08.2018 and forwarded the FIR to the Officer Incharge of the Jalukbari Police Station for registering a case. He also directed ASI Ajit Kumar Mali to start investigation.
- **4.** Based on the F.I.R., the Officer-in-charge of the Jalukbari police station registered the Case No. 1173/2018, under Section 8 of the POCSO Act, against the accused Choto Ali and entrusted Sub-Inspector Smt. Nilima Boro to investigate the case. Accordingly, she investigated the case.
- During the course of investigation, the investigating officer visited the place of occurrence and recorded statements of the witnesses. The statement of the victim girl was recorded by the Magistrate under section 164 Cr.P.C. After completion of investigation, the investigating officer submitted charge sheet for an offence under Section 354 IPC, r/w Section 8 of the POCSO Act, against the accused Choto Ali in this court as this Court has been designated as the Special Court for trial of cases under the POCSO Act.
- **6.** During trial, my learned predecessor framed a charge under section 8 of the POCSO Act against the accused Choto Ali. When the contents of the charge were read over and explained to the accused person, he pleaded not guilty and claimed to be tried.
- **7.** The prosecution, in order to prove its case, examined five witnesses. The accused did not examine any witness.

- **8.** In his examination under Section 313 Cr.P.C., the accused has denied the prosecution case and has stated that the allegations levelled against him are false and baseless.
- **9.** The point for determination in this case is:-

Whether on 30.08.2018, at around 02:00 pm, at Sankardev Nagar, Maligaon, under Jalukbari Jalukbari police station, the accused Choto Ali sexually assaulted the victim girl, who at the relevant time was a 7 years' old child and thereby committed an offence punishable under section 8 of the POCSO Act?

If so, what punishment does he deserve?

DECISION AND REASONS THEREOF

- 10. I have carefully examined the evidence on record, gone through the relevant documents on record and after hearing the arguments advanced by the learned counsel for both the sides, give my decision on the above point as follows:-
- The victim girl (PW-2) has stated that on the day of the occurrence, while she was returning home from the school, the accused Choto Ali grabbed her, caressed her breasts and touched her vagina. She then asked him to set her free but, he did not set her free. Somehow, she escaped from the clutches of the accused and went to her home. The accused told her not to tell about the same to her mother. But, she told her mother about the incident.
- 12. In the cross-examination, she has stated that she knows the accused since before the said incident. She has denied the suggestion that she has deposed falsely that the accused caressed her breasts and touched her vagina. She has denied the suggestion that somebody taught her to depose in the manner she has deposed. She has denied suggestion that no such incident as deposed by her has taken place and that she has deposed falsely.
- **13.** PW- 1 Smt. Nirmali Sarma, the informant and the mother of the victim girl has deposed that on 30.08.2018, Thursday, at around 02:00 pm, while the victim girl was returning home from school, the accused Choto Ali

caught her, took her in his lap, kissed her and caressed her breasts. He also touched her vagina. The victim girl then started crying and asked the accused to set her free. The accused asked the victim girl whether she was feeling irritated. Somehow, the victim girl escaped from the hands of the accused and came running towards home and told her about the incident. She then went out and saw that the accused was proceeding through the road. She confronted the accused and questioned him as to why he did so to the victim girl. The accused told her that he did nothing and that the victim girl has lied. She then told the accused that she will call the police. The accused then told her that whatever she want, she may do but, he will kill the victim girl. In the meantime, the police and the public arrived there and took away the accused. Thereafter, she lodged the FIR of the case. Ext. 1 is the FIR and Ext. 1 (1) is her signature therein.

- 14. In the cross-examination, she has stated that she has not written the FIR. The FIR was written by one Mukut Kalita but his name is not mentioned in the FIR as the scribe. She lodged the FIR on the day of the occurrence, at around 08:00/ 09:00 pm. She has not explained the delay in lodging the FIR. The police interrogated her on that day itself. She has not seen the accused sexually assaulting the victim girl. She has denied the suggestion that she did not tell the police that the victim girl came crying to the house and told her that the accused had caught her, took her in his lap, kissed her, caressed her breasts and touched her vagina. She has denied the suggestion that she did not tell the police that she confronted the accused and questioned him as to why he did so to the victim girl, that she told him that she will call the police. The accused told her that she may do whatever she wants but, he will kill the victim girl. The daughter of the elder brother of the accused studies in the school of the victim girl. She has denied the suggestion that no such incident as stated by her has actually taken place and that she has deposed falsely due to old enmity. She has denied the suggestion that she had tutored the victim girl and she has given statement as per her instruction.
- PW-3 Sangita Sarma has deposed that she knows the accused Chotu Ali. He is her neighbour. The victim girl is the daughter of the younger brother of her husband. They reside in the same compound. At the time of occurrence, the victim girl was studying in Class II in the Sankardev Sikhu Niketan School at Shankarnagar. On the day of the occurrence, after the school,

at around 02:00 pm, the victim girl came crying to the house and told her mother that the accused Chotu Ali had given her two rupees, took her in his lap and caressed her breasts. Then the mother of the victim girl went out and saw that the accused Chotu Ali was proceeding through the road. The mother of the victim girl confronted the accused and rebuked him. She also went out and rebuked the accused. Thereafter, the mother of the victim girl went to the house of the accused and told his elder brother about the incident. The elder brother of the accused assaulted him. Thereafter the school teachers and the nearby people came and the mother of the victim girl lodged the FIR with the police.

- 16. In the cross-examination, she has denied the suggestion that the victim girl did not tell them that the accused gave her two rupees, took her in his lap and caressed her breasts. She has denied the suggestion that she did not tell the police that they went to the house of the accused and told his elder brother about the incident and the elder brother of the accused assaulted him. She has denied the suggestion that as she is the aunt of the victim girl, she has falsely implicated the accused.
- 17. PW-4 Shri Ajit Sharma, the father of the victim girl has deposed that the accused Chotu Ali is his neighbor. On the day of the occurrence, while the victim girl was returning home from her school, the accused grabbed her, kissed her and caressed her breasts. The victim girl managed to escape from the clutches of the accused, came to the house and told his wife about the incident. His wife came out and rebuked the accused. Thereafter, his wife filed the FIR with the police.
- **18.** In the cross-examination, he has stated that at the time of occurrence, he was present in his shop at situated at Athgaon. He has denied the suggestion that the victim girl did not tell his wife that the accused grabbed her, kissed her and caressed her breasts. He has denied the suggestion that he has deposed falsely against the accused.
- **19.** PW- 5 Smt. Nilima Boro Bordoloi, the investigating officer of the case has deposed that during the course of investigation, she visited the place of occurrence. The place of occurrence was the public road at Shankardev Nagar, Borsala, under Jalukbari police station. She recorded statements of the

witnesses. She also sent the victim girl to the Gauhati Medical College and Hospital, Guwahati for medical examination, but she refused to undergo medical examination. She sent the victim girl to the court for recording her statement by the Magistrate and her statement was recorded by the Magistrate. She arrested the accused and forwarded him to the court. After completion of investigation, she submitted the Ext. 4 charge-sheet under Section 354 IPC and 8 of the POCSO Act against the accused Chotu Ali. Ext. 4 (1) is her signature therein.

- 20. In the cross-examination, she has stated that PW- 1 Nilima Sharma did not tell her that she questioned the accused and asked him why he had sexually assaulted the victim girl? PW- 1 Nilima Sharma did not tell her that the accused told her that he did nothing and her daughter had lied. PW-1 Nilima Sharma did not tell her that she told the accused that she will inform the police and the accused told her that she may do whatever she wants but, he will kill the victim girl. PW- 2 Sangita Sharma did not tell her that they met the accused and told his elder brother about the incident and his elder brother assaulted him. Except the members of the family of the victim girl, she did not examine any independent person. She has denied the suggestion that she did not investigate the case properly and has submitted a false charge-sheet.
- 21. As can be seen from the testimonies of the prosecution witnesses, the victim girl, her parents and her aunt have fully corroborated the prosecution case. By cross-examining them, the accused has failed to bring out anything based on which it can be said that they were not telling the truth. Except the mere suggestion, the defence did not adduce any positive evidence to prove that due to previous enmity or for some other reasons, the informant and the prosecution witnesses have deposed falsely against the accused.
- 22. In the case of Manoj Kumar vs. The State Of Uttarakhand, reported in (2019) 5 SCC 667, the Hon'ble Supreme Court has held as follows:-
- "11. In the absence of any existing enmity between the accused and the witnesses there exists no ground to question the veracity of the witnesses or to raise a ground of false implication..."

- 23. In view of the above, in the instant case, the testimonies of the prosecution witnesses must be accepted to be true and it must be held that on 30.08.2018, at around 02:00 pm, at Sankardev Nagar, Maligaon, under Jalukbari Jalukbari police station, the accused Choto Ali sexually assaulted the victim girl, who at the relevant time was a child under 12 years of age and thereby, committed an offence punishable under Section 10 of the POCSO Act.
- 24. In order to attract any offence under the provisions of the POCSO Act, it should be proved by the prosecution that on the date of the commission of the crime, the victim was a child. The term "child" has been defined in Section 2(d) of the POCSO Act, which states that child means any person below the age of 18 years. Thus, for the purpose of any offence under the POCSO Act, on the date of commission of the alleged crime, the age of the victim child should be proved to be below 18 years.
- 25. In the instant case, as can be seen from the discussion made above, on the day of commission of the alleged offence, the victim girl was a 7 years' old child. The accused did not even challenge the victim girl and the prosecution witnesses in the cross-examination that on the day of the occurrence, the victim girl was not a 7 years' old child. Therefore, the accused must be held guilty of committing the offence punishable under Section 10 of the POCSO Act.
- Regarding Presumption of guilt, Section 29 of the POSCO Act is relevant, which reads as follows:-
- **Section 29:** Presumption as to certain offences. 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.
- **27.** Regarding culpable mental state of the accused, Section 30 of the POSCO Act is relevant, which reads as follows:
- **28.** "30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence

of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

- (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".
- 29. In the instant case, the presumption of guilt under Section 29 of the POSCO Act must be applied as all the necessary facts regarding commission of the offence under the POSCO Act have been proved by the prosecution. The said presumption also has not been rebutted by the accused by adducing any evidence and the evidence on record does not prove his innocence. Further, the accused also did not rebut the presumption under Section 30 of the POCSO Act that he did not have culpable mental state while sexually assaulting the victim girl, by adducing any evidence and the evidence on record does not prove his innocence. Therefore, it must be held that the accused Choto Ali had culpable mental state while sexually assaulting the victim girl, who at the relevant time, was a 7 years' old child and thereby committed an offence punishable under Section 10 of the POCSO Act.
- **30.** The crime against children has been increasing day by day and to deal with such crimes, the Parliament has to enact a special statute like the POCSO Act and the object and reasons of enacting the POCSO Act is to protect the children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Court for trial of such offences and for matters connected therewith or incidental thereto.
- In the case of **State of A.P. v. Bodem Sundara Rao,** reported in (1995) 6 SCC 230: AIR 1996 SC 530, dealing with a case of reduction of sentence from 10 years R.I. to 4 years R.I. by the High Court in the case of rape of a girl aged between 13 and 14 years, the Hon'ble Supreme Court has observed as follows:

"In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our iudicial conscience. The offence was inhumane."

The sentence was accordingly enhanced to 7 years R.I. in the said case.

- **32.** In the instant case, the convict Choto Ali has committed sexual assault on a child below 12 years of age. Hence, I do not think it proper to give the accused the benefit of the ameliorative relief as envisaged under the Probation of the Offenders Act.
- **33.** Heard the convict Choto Ali on the question of sentence. He has pleaded leniency in awarding the punishment.
- 34. In the instant case, my learned predecessor has framed the charge under Section 8 of the POCSO Act though, the charge should have been framed under Section 10 of the POCSO Act as according to Section 9 (m) of the POCSO Act, if sexual assault is committed on a child below 12 years of age, the same becomes aggravated sexual assault as defined in the said Section and not mere sexual assault as define under Section 7 of the POCSO Act and in the instant case, on the date of commission of the alleged offence, the victim girl was a seven years old child. According to Section 9 (m) of the POCSO Act, whoever commits sexual assault on a child below 12 years; he is said to commit aggravated sexual assault. The punishment for sexual assault as per Section 8 of the POCSO Act shall not be less than three years, which may extent to five years and fine whereas, the punishment for aggravated sexual assault shall not be less than five years but, which may extent to seven years and fine. In the instant case, in my considered opinion, if the accused is sentenced to undergo the maximum punishment prescribed under section 8 of the POCSO Act i.e., imprisonment for five years, the same will serve the ends of justice and also

amounts to compliance of Section 10 of the POCSO Act as the accused has committed aggravated sexual assault. Therefore, there is not necessity of altering the charge at this stage as that will delay the disposal of the case which is a two years old case and according to Section 35 (2) of the POCSO Act, the trial of such case, as far as possible, is required to be completed within a period of one year from the date of taking cognizance of the case and in the instant case, the cognizance was taken on 06.12.2018.

- **35.** In the result, from the facts and circumstances of the case and above discussion, I hold that the prosecution has succeeded in bringing home the charge under Section 8 of the POCSO Act against the accused Choto Ali beyond all reasonable doubt. Hence, I hold the accused Choto Ali guilty of committing an offence under Section 8 of the POCSO Act and convict him under the said section of law.
- **36.** In the case of **CHANDER SINGH Vs. STATE**, reported in (2016) 2 Crimes 792, in a case under Section 8 of the POCSO Act, the Hon'ble Delhi High Court has held as follows:--

"20. Consequently, the conviction of Chander Singh is altered to one for offence defined under Section 7 and punishable under Section 8 of POCSO Act. The punishment for sexual assault prescribed under Section 8 is imprisonment for not less than 3 years which may extend up to 5 years and to pay fine as well. The conduct of Chander Singh in sexually assaulting a deaf and dumb girl who was not in a position to protect herself fully warrants maximum punishment. Consequently, the order on sentence of Chander Singh is altered and modified. Chander Singh is directed to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 10,000/- in default whereof to undergo simple imprisonment for a period of 1 month."

The convict Choto Ali has stated that he is a first offender and is the sole bread earner of his family and hence, has prayed for punishing him leniently. But, as the convict Choto Ali has sexually assaulted a child below 12 years of age, I do not think it proper to punish him leniently. Deterrent punishment is his just deserts. The point is decided accordingly.

Sessions Case No. 395 of 2018

ORDER

- **38.** Considering the entire facts and circumstances of the case, I sentence the convict Choto Ali to undergo rigorous imprisonment for five years and to pay a fine of Rs. 10,000/- (Rupees ten thousands) only, in default to undergo rigorous imprisonment for three months, for committing offence under Section 8 of POCSO Act, which in my considered opinion, will serve the ends of justice in this case. The period of detention already undergone by the convict during investigation and trial shall be set off from the sentence of imprisonment. The bail bond of the convict sands cancelled. Issue Jail warrant.
- **39.** Furnish a copy of the judgment to the convict Choto Ali free of cost, immediately.
- **40.** Signed, sealed and delivered in the open Court on this the 10th day of January, 2020 in Guwahati.

(Shri A. Chaakravarty)
Special Judge, Kamrup (M), Guwahati

Dictated by me

(Shri A. Chakravarty)
Special Judge, Kamrup (M), Guwahati

APPENDIX

(A) Prosecution Witnesses:

- 1. PW-1 Smt. Nirmali Sarma
- 2. PW-2 Smt. Krishti Sarma
- 3. PW-3 Smt. Sangita Sarma
- 4. PW-4 Shri Ajit Sharma
- 5. PW-5 Smt. Nilima Boro Bordoloi

(B) Prosecution Exhibits:

- 1. Ext. 1 : FIR
- 2. Ext. 2: Printed form of FIR.
- 3. Ext. 3: Statement of the victim.
- 4. Ext. 4 : Charge sheet

(Shri A. Chaakravarty) Special Judge, Kamrup (M), Guwahati