HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 39/2018

UNDER SECTIONS: 354-B IPC

READ WITH SECTION 10 OF THE POCSO ACT.

VS.
NADU RAY

PRESENT:- DIPAK THAKURIA, B.A., LL.M., AJS
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
A. LATIF, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 05-06-2018, 03-07-2018, 07-09-2018, 29-10-2018, 12-11-2018, 02-01-2019, 22-02-2019.

DATE OF ARGUMENT:- 26-03-2019. **DATE OF JUDGMENT:-** 09-04-2019.

JUDGEMENT

1. Accused Nadu Ray stands trial for the offences punishable under section 354-B IPC read with section 10 of the POCSO Act for allegedly disrobing and also causing aggravated sexual assault to a minor girl on 18-04-2018 at village Sonakhuli Pt. II under Golokganj police station.

- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 24-04-2018 one Redwanul Haque, an Assistant Sub-Inspector of Police of Halakura police check post lodged a written ejahar before the Officer-in-charge of Golokganj police station stating that on 18-04-2018 at about 1/2 p.m. accused Nadu Ray at village Sonakhuli Pt. II dragged a 9 year old girl to a maize field, removed her clothes and attempted to fulfill his lust.
- **3.** After receiving the ejahar a case as Golokganj P. S. Case No. 353/2018 under section 354-B of IPC read with section 8 of the POCSO Act was registered.
- 4. The investigating officer arrested the accused, produced him before the Court and the Court remanded him to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C. Also recorded the statement of the victim girl under section 164 Cr. P. C. By completing the investigation, I. O. has submitted charge sheet against the accused person to prosecute him under sections 354-B IPC read with section 8/10 of POCSO Act.
- **5.** Cognizance of the case was taken in charge sheeted sections. Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under sections 354-B IPC read with section 10 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **6.** The prosecution examined eleven witnesses including investigating officer and closed the evidence.
- **7.** Judicial Magistrate Sangita Haloi who recorded the statement of the victim girl was examined as Court witness.
- **8.** After completion of the prosecution evidence, the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.

9. Heard learned counsels appearing for the parties and perused the evidence on record.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 18-04-2018 at about 1 p.m. to 2 p.m. at village Sonakhuli Pt. II under Golokganj police station used criminal force to the victim with the intention of disrobing her and thereby accused is liable to be punished under section 354-B IPC?

Whether the accused on the same day time and place sexually assaulted to the victim who is a minor girl of just 9 year old and thereby accused is liable to be punished under section 10 of the POCSO Act?

DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

- 10.In order to establish the charges framed against the accused, the prosecution has examined eleven witnesses. Among them P. W. 1 is the victim girl. P. W. 2 and P. W. 3 are the parents of the victim girl, P. W. 4 Redwanul Haque is the complainant, P. W. 5 is the uncle of the victim girl, P. W. 6 Bina Ray, P. W. 7 Sashi Bala Ray, P. W. 9 Illiash Rahman are independent witnesses, P. W. 10 Dr. Rinku Ahmed is the medical officer, P. W. 8 Geeta Sarkar is the police officer and P. W. 11 Hirakjyoti Saikia is the investigating officer.
- **11.**C. W. 1 Sangita Haloi is the Judicial Magistrate 1st Class, Dhubri who recorded the statement of the victim girl under section 164 Cr. P. C.
- **12.**The prosecution has exhibited the statement of the victim recorded under section 164 Cr. P. C as Ext. 1, Extract copy of G. D. Entry No. 493 dated 23-04-2018 as Ext. 2, Ejahar as Ext. 3, Medical report as Ext. 4, seizure list as Ext. 5, sketch map of place of occurrence as Ext. 6 and charge sheet as Ext. 7. Birth certificate of the victim is exhibited as M. Ext. 1.
- **13.** The defence examined none. Plea of the defence is total denial of the case.

- **14.** Learned Special Public Prosecutor B. Basumatary has submitted that the prosecution examined all together 11 witnesses to establish the charges framed against the accused. The main witness for the prosecution is the minor girl who is just 9 year old. She has depicted entire story and her deposition has been corroborated by her parents and other independent witnesses. After the incident, the statement of the victim girl was recorded by Judicial Magistrate whom the Court examined as Court witness. The statement of the victim girl given before Judicial Magistrate and the deposition given by her in the Court are consistent. There is nothing to disbelieve the prosecution witnesses. The prosecution is able to establish the charges framed against the accused beyond all reasonable doubt. So, has prayed to hold the accused guilty under framed charges and impose adequate punishment to him.
- 15. On the other hand learned counsel appearing for the defence A. Latif has submitted that the accused is an old man and it is not believable that the accused had misbehaved the young girl. In this case, the prosecution has failed to examine any of the eye witness. The fate of the prosecution case depends only upon the deposition of the victim girl. The deposition of the victim girl cannot be relied as she described two stories in two occasions. While the Magistrate recorded her statement she described another story and in the Court she described a different one. Besides it, the family members did not file the ejahar. The police officer who recorded the statement of the victim girl was an Assistant Sub-Inspector of Police. As per section 24 of the POCSO Act an Assistant Sub-Inspector of Police is not authorized to record the statement of the victim. The lady police officer did nothing. Besides it the case does not fall under the category of sexual assault as defined under sections 7 and 9 of the POCSO Act. The evidences led by the prosecution are not sufficient to constitute the charges framed against the accused. The prosecution has failed to establish the charges against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.
- **16.**Before we proceed, let us reproduce the material parts of the witnesses examined by the prosecution during trial.
 - **16.1** P. W. 1 is the victim girl. She is just 9 year old. Before recording her deposition some questions were put to her to test her maturity. She was found matured to understand the questions put to her. She has deposed that she knows the accused who is her neighbor. One day, she was returning home from the house of her paternal aunt (Pehi). On the road, she met the accused who dragged her to a nearby field and removed her panty. After the

- incident, she was produced in the court. Her statement was recorded in the court. Ext-1 is her statement and Ext-1(1) and 1(2) are her signatures.
- 16.2 In cross-examination she has stated that the incident took place on Wednesday. She was wearing full pant. The colour of the pant was blue. The house of the accused is near to her house. The accused was tethering a cow near the road. No one present in the spot at the time of incident. She denied the suggestion of the defence that the accused did not drag her to a field and also not removed her panty. She has also denied the suggestion of the defence that she gave her statement in the court as taught her by the police.
- **16.3** P. W. 2 is the father of the victim girl. He has deposed that accused is his neighbor and the age of his daughter was just 9 year. About two months back, one day, his wife told him that his daughter went to the house of his sister. While his daughter returned home she met the accused on road who dragged her to the nearby field and removed her panty. His daughter told the incident to his wife.
- 16.4 In cross-examination he has deposed that after two days of the incident, he came to his house from his work place. He was working in a tea stall at Halakura which is just 3 kms away from his house. After two days of the incident, one Dilip Roy told him about the incident. He had not filed any ejahar at police station. The houses of Bablu, Jogesh and Tarani Roy are situated near the place of occurrence. The I.O. had not seized the panty of his daughter.
- P. W. 3 is the mother of the victim girl. She has also deposed that the accused is her neighbor and her daughter was just 9 year old. About three months back, one day, her daughter went to the house of her sister in law. At that time, she was not at her residence. After reaching her house, she had not seen her daughter; so, she searched her. She called her daughter. Hearing her sound, her daughter came from nearby maize field. She saw the accused was running away from the field. On being asked, her daughter told her that the accused dragged her to the nearby field and removed her panty. After three days, her husband returned home from his work place and then she told him about the incident.
- **16.6** In cross-examination she has deposed that there are three houses near the place of occurrence. She has denied the suggestion of the defence that before I.O. she did not disclose that she saw the accused was running away

from the field and also not disclosed that she told the incident to her husband. She had not filed any case. After one week of the incident, police registered the case. She has denied the suggestion of the defence that just to harass the accused and as per advice of villagers, she deposed falsely.

- P. W. 4 Redwanul Hague is the complainant who on 23-04-2018 was working 16.7 as Halakura Police Check Post under Golokganj police station. He has deposed that on that day SI Hirakiyoti Saikia was working as In-charge of the Check Post. On that day, at around 02:19 pm I/C, Halakura Police Check Post received a Whatsapp message from O/C, Golokganj PS whereby it was informed that at village Gorerhat one Nadu Ray dragged a 9 year old girl to a maize cultivation and attempted to commit rape on her. The matter was not informed to police station, but the villagers conveyed a village bichar. After receiving the Whatsapp message I/C, Halakura PCP opened Halakura PCP G.D.E no. 493 dated 23-04-2018 and moved to Sonakhuli Pt-II. He was also with him. They found a village bichar was going on in the courtyard of a person. He could not say the name of the person in whose courtyard the village bichar was going on. They found the victim girl and the accused in the village bichar. On being asked, the persons present in the village bichar informed them that regarding the incident they were discussing the matter and tried to settle the matter amicably. As the matter was serious; so, they took the accused and victim girl to the Police Check Post. He recorded the statement of the victim girl and sent her to hospital for medical examination. Next day, he filed a written ejahar before O/C, Golokganj PS. During investigation, it was known that the incident took place at village Sonakhuli Pt-II not at village Gorerhat as informed by O/C, Golokganj PS in his Whatsapp message. He has exhibited the extract copy of G.D.E no. 493 dated 23-04-2018 as Ext-2. Ext-2(1) is the signature of I/C, Hirakiyoti Saikia which he is acquainted with. Ext-3 is the ejahar and ext-3(1) is his signature.
- 16.8 In cross-examination he has stated that the incident took place on 18-04-2018. After receiving the information they visited to village Sonakhuli Pt-II. They did not visit village Gorerhat. At village Sonakhuli Pt-II they found about 25 persons who were present in the village bichar. He could not say who presided over the bichar. In the meeting, Mahesh Ray and Mohan Ray were present. In the ejahar, he had not written that on 23-04-2018 the accused and victim were brought to Halakura PCP. The Investigating Officer did not

record his statement u/s 161 Cr.P.C. The case was not investigated by him. I/C, Hirakjyoti Saikia sent the victim to the court for recording her statement u/s 164 Cr.P.C. He has denied the suggestion of the defence that the accused and the victim were not brought to Halakura PCP and he had not visited the place of occurrence. He has also denied the suggestion of the defence that Ext-3 is a manufactured document.

- P. W. 5 is the uncle of the victim girl. He has deposed that about seven months back, one day, his sister-in-law who is the mother of the victim told him that the accused dragged her daughter to a nearby maize field and removed her panty. Thereafter, he asked about the incident to the victim girl who told him that the accused dragged her to the maize field and removed her panty. After the incident, the relatives sat together to discuss the matter and then police arrived and had taken away the accused.
- 16.10 In cross-examination he has deposed that the place of incident is situated just 150 yards away from the house of the victim. Victim and her mother told him about the incident in his residence. Next day of the incident the relatives sat together in the field of Hari Temple to discuss the matter. On that day police came and had taken away the accused. He does not know how police came to know about the incident. He has denied the suggestion of the defence that his sister-in-law and the victim did not tell him that the accused dragged the victim to the maize field and removed her panty.
- **16.11** P. W. 6 Bina Ray and P. W. 7 Sashi Bala Ray are independent witnesses. They have deposed that mother of the victim told them that the accused dragged her daughter to a nearby maize field. In cross-examination they have denied the suggestion of the defence that the mother of the victim did not tell them that the accused dragged her daughter to the maize field.
- **16.12** P. W. 8 Geeta Sarkar who was working as SI of Police at Dhubri police station. She knows nothing subject matter of the case.
- **16.13** P. W. 9 Illias Rahman is an independent witness. He has deposed that in the month of March or April 2018, one evening, one person of village Gorerhat (he forget his name) over telephone informed him that one Ladu Ray attempted to commit rape on a 9 year old girl and the girl was recovered by villagers and the villagers instead of informing the matter to police started a village bichar. At that time, he had no number of police station in his mobile phone. So, he gave a facebook status in his facebook account informing the

matter.

- **16.14** In cross-examination he has deposed that he cannot say the mobile number of the boy who informed the matter to him and also forgot the date. He has denied the suggestion of the defence that he received no information.
- **16.15** P. W. 10 Dr. Rinku Ahmed is the medical officer who examined the victim on 24-04-2018 at Dhubri Civil Hospital. The victim girl, on being asked told her that on 18-04-2018 while she was returning from the house of her maternal aunt then one Nadu Ray pulled her and try to sexually assault her. Her mother rescued her. She found no evidence of recent sexual intercourse/assault on the victim at the time of examination. She has exhibited her report as Ext. 4 and her signature thereon as Ext. 4 (1).
- **16.16** P. W. 11 Hirakiyoti Saikia is the investigating officer. He has deposed that on 23-04-2018, he was working at Halakura Police Check Post under Golokganj P.S. as In-charge. On that day he received a message from O/C, Golokganj P.S. through Whatsapp. After receiving the Whatsapp message he came to know that one Laddu Ray attempted to commit rape on a 9 year girl at village Gorerhat and the girl was recovered by villagers. The incident was not informed by anyone to the police station and the villagers were conveyed a village bichar. So, he opened GD Entry no. 493 dated 23-04-2018 and proceeded to the place of occurrence. After receiving the spot, he found that a village bichar was going on in a field in front of a Club at village Sonakhuli Pt-II. He found 4 to 5 persons in the field. The accused was also there. He found the parents of the victim girl. Then he visited the house of the victim girl and asked her what had happened. Then the girl told him that Thakuba indicating the accused dragged her to the field and removed her panty. Thereafter, the accused was apprehended by them. Help of Women Police had taken. He inspected the place of occurrence. The place of occurrence was at Sonakhuli Pt-II not at village Gorerhat as he received information at Whatsapp message. He prepared sketch map of place of occurrence. He seized the birth certificate of the victim girl. He sent the victim girl to Halakura CHC for examination and thereafter she was again forwarded to Dhubri Civil Hospital. The victim was sent to the court for recording her statement. He did not collect the report from Halakura CHC. After arresting the accused he was forwarded to the court. Statements of the witnesses were recorded by him. After collection medical report from Dhubri Civil

- Hospital, he had submitted charge sheet against the accused u/s 354-B IPC, r/w section 10 of POCSO Act. Ext-2 is the Extract copy of GD Entry no. 493 dated 23-04-2018 and ext-2(2) is his signature. Ext-5 is the Seizure list and ext-5(1) is his signature. Ext-6 is the sketch map and ext-6(1) is his signature. Ext-7 is the charge sheet and ext-7(1) is his signature. M.Ext-1 is the birth certificate of victim girl.
- 16.17 In cross-examination he has deposed that in Whatsapp message the date of incident had not been mentioned. In presence of parents, he asked the victim girl about the incident. On 24-04-2018, the statement of the victim girl was recorded by Judicial Magistrate. He has denied the suggestion of the defence that he told the victim girl what to say before the Magistrate. There was no formal bichar against the accused at Sonakhuli Part-II. He did not record the statement of the persons found in the village bichar. The panty of the victim girl was not seized by him. He has denied the suggestion of the defence that the accused was not involved with the incident and he did not investigate the case properly.
- **16.18** C. W. 1 Sangita Haloi is the Judicial Magistrate 1st Class, Dhubri who recorded the statement of the victim girl under section 164 Cr. P. C. She has deposed that on 24-04-2018 the victim was produced before her for recording her statement under section 164 Cr. P. C. in connection with Golokganj P. S. Case No. 353/2018. The victim was identified by WHG Charu Bala Ray. The victim was a girl of tender age; so, to determine whether she was able to depose or not she put some questions to her and after satisfaction she recorded the statement of the victim girl without administering oath. The victim told her that one Friday, in the afternoon, she went to the house of her maternal aunt and on the way of returning home, one Thakur (she forgot his actual name) dragged her from the road to a nearby maize field, gagged her mouth, removed her pant and touched her shoulder. The person then removed his cloths and showed his private part to her and then she run away and told the incident to her mother. After recording the statement the same was read over to her. The signatures of the girl were taken by Bench Assistant in her presence. Ext-1 is the statement of the victim recorded by her. Ext-1(3), 1(4) and 1(5) are her signatures.
- **16.19** In cross-examination she has deposed that before recording the statement, she enquired from the girl whether she was tutored by her parents or not.

The girl replied her in negative. She did not mention the same in the statement. She had not enquired from the girl whether police tutored her or not. She has denied the suggestion of the defence that she had not recorded her statement as per section 164 Cr.P.C.

- 17.On perusal the evidence on case record it appears that Officer-in-charge of Golokganj police station received a facebook status regarding the incident and he immediately informed the matter to in-charge of Halakura police check post through Whatsapp message. In-charge of Halakura check post opened G. D. Entry No. 493 dated 23-04-2018 (Ext. 2) and moved to the place of occurrence. The prosecution examined Illias Rahman (P. W. 9), the person who posted the information in his facebook account who has stated that one villager of Gorehat over telephone informed him that one Ladu Ray attempted to commit rape on a 9 year old girl and the girl was recovered. The villagers instead of informing the matter to police started village bichar. Though P. W. 9 mentioned the name of village as Gorehat; but police came to know that actually the incident took place at village Sonakhuli Pt. II. From the oral testimony of Illias Rahman (P. W. 9) and the contents of Ext. 2 it appears that the alleged incident took place at village Sonakhuli Pt. II under Golokganj police station.
- **18.**After receiving the information police of Halakura Check post started action. The incharge of Halakura Check post Hirakjyoti Saikia (P. W. 11) and ASI Redwanul Haque (P. W. 4) found the victim girl and the accused at village Sonakhuli Pt. II. P. W. 4 has deposed that in the courtyard of a person at village Sonakhuli Pt. II a bichar was going on where he found the accused and the victim. On being asked the persons present there informed about the incident and also apprised them that they were trying to settle the dispute amicably. As the matter was serious; so, the accused and the victim were brought to police check post. The investigating officer (P. W. 11) has also deposed that a village bichar was going on in a field in front of a club where he found the accused and the victim.
- **19.**Here, regarding the place of holding the bichar there found a contradictory statement between two police officers. According to P. W. 4 the bichar was held in a courtyard of a villager and as per P. W. 11 the bichar was held in a field in front of a club. P. W. 5 in his cross-examination has deposed that the bichar was held in the field of Hari Temple. The place where the bichar was held is not a big issue; but it is clear that the villagers were

discussing the matter and in that bichar the accused and the victim were present which confirms the facebook status posted by Illias Rahman (P. W. 9). The minor discrepancy regarding the place of holding the bichar does not shake the basic version of the prosecution case and because of this minor discrepancy the accused will not prejudice anyway as the so-called village bichar will not decide the fate of the case.

- **20.**The contents of the Ext. 2, extract copy of GDE No. 493 dated 23-04-2018 show that one old man attempted to commit rape on a minor girl of just 9 year by dragging her to nearby maize field. P. W. 4 who visited the concern village for investigation found that the information received by Halakura police check post was correct and he filed the ejahar which the prosecution has exhibited and marked as Ext. 3.
- **21.**In this case the victim girl is the most important witness for the prosecution. The prosecution examined her as P. W. 1. As per prosecution, the victim girl was just 9 year old. To substantiate the same the investigating office produced the birth certificate of the victim girl which he exhibited and marked as M. Ext. 1. As per birth certificate, the date of the birth of the victim girl was 18-03-2008. The alleged incident took place on 18-04-2018. Arithmetical calculation shows that on the day of the alleged incident she was 10 years 1 month old. The defence does not challenge the genuineness of the M. Ext. 1. So, there is no iota of doubt that the victim girl was a child as defined under section 2 (d) of the POCSO Act.
- 22. As stated earlier the victim girl is the vital witness for the prosecution. The victim being a child is most vulnerable witness. The evidence of child witness has to be subjected to closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the questions put to her and she is capable to giving reasonable answers. A child witness by reason of his/her tender age, is pliable witness. The child can be tutored easily either by threat, coercion or inducement. During the investigation the investigating officer produced the victim girl before medical officer for medical examination and in the Court for recording her statement. The prosecution examined the medical officer Dr. Rinku Ahmed as P. W. 10. The medical officer before examining her took the history from the girl who told her that on 18-04-2018 while she was returning from the house of her maternal aunt then one Nadu Ray pulled her and try to sexually assault her; but her mother rescued her. Though the medical officer did not find any evidence of recent sexual intercourse or assault on her; but her deposition is important as the victim girl disclosed the incident to her. The medical officer exhibited her report

- as Ext. 4 which she proves by authenticating her signature thereon. The defence does not challenge the report of the medical officer. In the report (Ext. 4) the medical officer jotted down whatever the victim girl told her.
- **23.**From the evidence of Judicial Magistrate Sangita Haloi (C. W. 1) it appears that the victim girl was produced before her on 24-04-2018. Before recording the statement of the victim girl under section 164 Cr. P. C., learned Judicial Magistrate tested her maturity of understanding by putting some questions to her and the victim girl replied satisfactorily and learned Magistrate after being satisfied record her statement under section 164 Cr. P. C. (Ext. 1).
- **24.** During trial while the deposition of the victim girl was recorded this Court also tested her maturity by putting some questions to her and after analyzing her reply this Court was satisfied that the girl was matured enough to understand the questions put by the Court and thereafter her deposition was recorded.
- 25. Now let us scrutinize the evidence of the victim girl (P. W. 1). She has deposed that accused is her neighbor. One day while she was retuning from the house of her aunt, on road, she met the accused who dragged her to nearby field and removed her panty. After the incident she was produced in the Court where her statement was recorded. (Ext. 1). The defence cross-examined the victim girl where she stated that the day of the incident was Wednesday. On that day she was wearing full pant. The colour of the pant was blue. The house of the accused is near to her house. The accused was tethering a cow near the road. No one was present on the spot. She denied the suggestion of the defence that the accused did not drag her to the nearby field and also not removed her pant. She has denied another suggestion of the defence that she gave her statement as taught by the police.
- **26.** The oral testimony of the victim girl is found consistent as she disclosed the same story before the medical officer and the Judicial Magistrate. Another important witness for the prosecution is the mother of the victim girl whom the prosecution examined as P. W. 3. Her deposition shows that on the day of the incident and at the relevant time she was not at her residence. After reaching her house she did not see her daughter and she started to search her. She called her daughter. Hearing her sound, her daughter came from nearby maize field. She saw that the accused was running away from the field. On being asked her daughter told her that the accused dragged her to nearby field and

removed her panty. The defence categorically cross-examined her but failed to discard her evidence. From the evidence of P. W. 5 it transpires that after the incident the mother of the victim girl disclosed the incident to him. The father (P. W. 2) of the victim girl was not at his residence at the time of incident. Hearing the incident he came to his house and from the mouth of his wife he heard about the incident. The defence during cross-examination to the investigating officer (P. W. 11) put a suggestion that he told the victim girl what to say before the Magistrate which he denied. But the defence has failed to disclose as to why the investigating officer taught the victim girl to implicate the accused.

- **27.**The accused is the neighbor of the victim girl. The defence has failed to show any enmity between the accused and the family of the victim girl. So, there found nothing to falsely implicate the accused.
- 28. Evidence of the child witness ca be relied upon if the Court comes to the conclusion that the child is not tutored and her evidence has a ring of truth. In this case the victim girl initially disclosed the incident to her mother, thereafter to the medical officer and the Judicial Magistrate and ultimately deposed in the Court during trial. This Court carefully examined her and the Judicial Magistrate (C. W. 1) also carefully examined her at the time of recording her statement under section 164 Cr. P. C. After scanning the evidence on record of the victim girl, her mother, the medical officer and the Judicial Magistrate it is found that the victim girl's evidence is true.
- **29.** During argument learned defence counsel raised a question that as per section 24 of the POCSO Act only Sub-Inspector of Police can record her statement under section 161 Cr. P. C. But in this case one Asstt. Sub-Inspector of Police recorded her statement. So, it was a clear violation of law.
- **30.**On perusal the case record it transpires that after getting the information police from Halakura Check post moved to the spot, found a village bichar was going on where the accused and the victim girl were also there. To know the facts the police asked about the incident to the victim girl which was natural. Till then no case was registered against anyone. Even formal ejahar was also not filed. Under such circumstances it cannot be treated that the investigating agency violated the mandatory provision of law. After filing formal ejahar (Ext. 3) by Asstt. Sub-Inspector of Police Redwanul Haque (P. W. 4) the case was registered and P. W. 11 Hirakjyoti Saikia took the responsibility of investigating

the case. The investigating officer in clear terms has deposed that he visited the house of the victim and asked her what had happened. Help of woman police was taken. The evidence of investigating officer is clear which shows no violation of mandatory provision of law.

- **31.**The investigating officer submitted charge sheet (Ext. 7) under section 354-B IPC read with section 8/10 of the POCSO Act. Charge against the accused was framed under section 354-B IPC and section 10 of the POCSO Act.
- **32.** Section 354-B IPC deals with the offence of assault or use of criminal force to woman with intent to disrobe her. For the purpose of this section, the act of disrobing contemplates either the intention of disrobing or compelling her to be naked. Therefore when a person has the intention of either disrobing a woman or compelling her to be naked, and in pursuance to this intention, if that person either himself uses assault or criminal force, or abets the use of assault or criminal force, he becomes liable for punishment under this section. It is irrelevant whether the accused was successful in either disrobing the woman or compelling the woman to be naked. Merely required action on the part of accused in either use or abetting the use of assault or criminal force will be sufficient for the purpose of mischief defined in this section. From the evidence of the victim girl it transpires that at the time of the incident she was alone. The accused was tethering a cow nearby road. The accused dragged her to the nearby maize field and removed her pant. From the evidence of mother of the victim girl it reveals that when she searched her daughter and called her shouting her name, then her daughter came from the field and she noticed that the accused was running away from the field. The act of the accused that he dragged a 9/10 year old girl to nearby maize field and removed her pant shows his criminal intention and without any hesitation it can be concluded that the accused committed the offence of disrobing to the victim girl as defined under section 354-B IPC.
- **33.** Another charge against the accused is that on the day of the incident he committed sexual assault to the victim girl. The charge against the accused has been framed under section 10 of the POCSO Act which deals with the punishment of aggravated sexual assault. Sexual assault defines under section 7 of the POCSO Act. As per section "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." Under section 9 (m) of the POCSO Act whoever commits sexual assault on a child below twelve years is said to commit aggravated sexual assault. It is established that the age of the victim girl is just 10 years.

- **34.** Now let us scrutinize whether the accused committed sexual assault to the victim girl as defined under section 7 of the POCSO Act or not. The victim girl during trial deposed that the accused dragged her to nearby field and removed her panty. The victim girl was medically examined and also recorded her statement in the Court. The prosecution exhibited the statement of the victim girl recorded by Judicial Magistrate under section 164 Cr. P. C as Ext. 1. The statement of the victim girl has been proved by the Judicial Magistrate (C. W. 1). The defence does not challenge the statement of the victim girl i.e. the Ext. 1. The only plea of the defence is that the victim girl gave her statement as police taught her which the defence has failed to establish. The victim girl in the Court does not disclose that the accused touched her vagina, breast or anus and also not make her to touch his penis or anus. On perusal the statement of the victim girl recorded by the Judicial Magistrate (Ext. 1) it appears that the accused dragged her to maize field, gagged her mouth, removed her pant and kept his hand on her shoulder. Thereafter he removed his wearing gamocha and showed his private part. After scanning the oral testimony of the victim girl and her statement recorded under section 164 Cr. P. C. it appears that the prosecution has failed to establish that the accused committed sexual assault to the victim girl as defined under section 7 of the POCSO Act. But from the evidence on record it transpires that the accused by dragging the victim girl to maize field removed her pant, also removed his wearing gamocha and showed his private part to her. The act of the accused attracts the offence defines under section 11 of the POCSO Act as the accused exhibited his part of the body to the victim. And hence the accused committed an offence of sexual harassment as defined under section 11 of the POCSO Act punishable under section 12 of the POCSO Act.
- **35.**In view of the above discussion and observation it is concluded that the prosecution is able to establish the requirements of the penal provisions under sections 354-B IPC and section 11 of the POCSO Act punishable under section 12 of the POCSO Act.
- **36.**Though the charge under section 12 of POCSO Act has not been framed; but the prosecution is able to establish the charge against the accused under said section. There is no bar in holding the accused is guilty under section 12 of POCSO Act instead of

- section 10 of POCSO Act vide provision of section 222 (2) Cr. P. C.
- **37.**Hence, it is held that the prosecution is able to establish the charges against the accused under section 354-B IPC and section 12 of the POCSO Act beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **38.**The accused/convict is the neighbor of the victim. He is around 70 years old and the victim girl is just like his granddaughter. The act of the accused gave her mental shock. It is the high time to protect the children from such person. Considering the nature of the case and its mode of execution I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **39.**Heard accused/convict on quantum of sentence.
- **40.** Also heard learned counsels appearing for the parties.
- **41.**Accused/convict has stated that this was his first offence. He has prayed to excuse him as it was his first offence and he will not repeat such type of offence in future.
- **42.**Learned counsel for the prosecution has submitted that the accused/convict should be given adequate punishment so that it becomes an example for the wrongdoer.
- **43.**On the other hand learned counsel for the defence has submitted that the accused is an old man aged about 70 years. Already he is in judicial custody and got enough punishment. The prosecution has failed to show any criminal antecedent of the accused; so, has prayed to deal with him leniently considering his young age.
- **44.** Prescribed punishment under section 354-B IPC is imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine for the first conviction.
- **45.**Prescribed punishment under section 12 of the POCSO Act is imprisonment of either description for a term which may extend to three years and shall also be liable to fine.
- **46.**The accused/convict is an old man about 70 years old and it was his first offence. Considering his age it is decided to impose following punishment.

ORDER

- **47.**The prosecution is able to establish the charges against the accused Nadu Ray under section 354-B IPC and section 12 of POCSO Act beyond all reasonable doubts and accordingly he is found guilty and convicted under said sections.
- **48.**The accused/convict is sentenced to undergo rigorous imprisonment for 4 (four) years and also pay fine of Rs. 5,000/ (rupees five thousand) in default rigorous imprisonment for 2 (two) months under section 354-B IPC.
- **49.** The accused/convict is further sentenced to go rigorous imprisonment for 2 (two) years and also pay fine of Rs. 3,000/ (rupees three thousand) in default rigorous imprisonment for 1 (one) month under section 12 of POCSO Act.
- **50.**Both the sentences will run concurrently.
- **51.** Fine amount, if realized, shall be given to the victim as compensation.
- **52.** The period underwent during investigation and trial shall be set off as per law.
- **53.**Return the seized birth certificate to the father of the victim girl after expiry of appeal period.
- **54.** Furnish a free certified copy of the judgment and order to the accused/convict as per provision of law forthwith.
- **55.**Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

- **56.** The victim girl who was just 10 year old at the time of incident faced such a situation which cannot be explained and I am of the view that the victim girl is entitled to get compensation under section 357-A Cr. P. C.
- **57.**So, District Legal Services Authority, Dhubri is asked to determine appropriate amount of compensation to the victim girl as per victim compensation scheme and pay the same as early as possible.

- **58.**The bench assistant is directed to provide the name of the victim girl, her parents' name and address to the Secretary DLSA, Dhubri in a sealed envelope so that DLSA, Dhubri can communicate with the victim or her legal guardian.
- **59.**Send a copy of this judgment and order to the Secretary DLSA, Dhubri for information and necessary action.
- **60.** Given under my hand and seal of this Court this the 09th day of April 2019.

(D. Thakuria)
Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 39/2018 UNDER SECTIONS: 354-B IPC READ WITH SECTIOM 10 OF THE POCSO ACT.

STATE OF ASSAM VS. NADU RAY

<u>APPENDIX</u>

A. Prosecution exhibits: Ext. 1 Statement of the victim girl. Ext. 2 : Extract copy of G. D. Entry. Ext. 3 : Ejahar. Ext. 4 Medical report. Ext. 5 Seizure list. Ext. 6 Sketch map of place of occurrence. Ext. 7 : Charge sheet. M. Ext. 1 : Birth certificate f the victim.

B. Defence Exhibits: Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Victim,

P. W.2: Father of the victim,

P. W.3: Mother of the victim,

P. W.4: Redwanul Haque,

P. W.5: Uncle of the victim,

P. W.6: Bina Ray,

P. W.7: Sashi Bala Ray,

P. W.8: Geeta Sarkar,

P. W.9: Illias Rahman,

P. W.10: Dr. Rinku Ahmed &

P. W.11: Hirakjyoti Saikia.

E. Defence Witness: Nil.

F. Court Witness:

C. W. 1: Sangita Haloi.

(D. Thakuria)

Special Judge, Dhubri.