#### THE COURT OF THE SPECIAL JUDGE, SONITPUR AT TEZPUR

**SPL(POCSO) CASE NO.** :- <u>73 of 2018</u>

(Under Section 457 of the IPC read with section 18 of POCSO Act, arising out of G.R. Case No 3152 of 2018)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur, Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Md. Amir Ali,

Son of Ajgar Ali

Resident of Kamarchuburi Police Station – Thelamara Dist :- Sonitpur, Assam.

Date of framing Charge :- 07/09/2018

Date of evidence :- 20/09/2018, 05/10/2018

31/10/2018 & 14/12/2018

Date of examination of :-

accused u/s 313 Cr.P.C.

- 14/12/2018

Date of evidence of DW :- 17/12/2018

Date of Argument :- 18/12/2018

Date of Judgment :- 18/12/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor.

Counsel for Accused :- Mr. A.K. Paul, Advocate.

#### **JUDGMENT**

- **1.** In this case accused Md. Amir Ali is put for trial for allegation of charge under Section 457 of the IPC read with section 18 of POCSO Act.
- 2. The various facts leading to this case according to FIR in brief is that on or about 11.30 p.m. of 11-08-2018 the accused trespassed into the house of the informant by breaking the "Ekora/jute stick" wall, gagged informant's minor daughter, attempted to commit sexual assault. On hearing raising alarm of victim all the family members gathered and caught the accused red handed but he fled away somehow. Hence, this prosecution case. The ejahar was filed by informant Md. Kalum Ali before the O/C of Thelamara PS on 12-08-2018.
- On receipt the ejahar, the O/C of Thelamara P.S. registered the case, vide Thelamara PS Case No. 148/18, under Section 457 of IPC read with section 8 of POCSO Act. After completion of usual investigation, the O/C Thelamara Police station sent up the case for trial against the accused Md. Amir Ali under Section 457 of IPC read with section 8 of POCSO Act.
- **4.** On being appeared the accused person before this Court after hearing both parties, framed charge under section 457 of IPC read with section 18 of POCSO Act against the accused Md. Amir Ali. Particulars of the charge are read over and explained to which he pleads not guilty and claimed to be tried.
- 5. To substantiate the case prosecution examined as many as 9 (nine) numbers of witnesses. Accused pleads total denial while his statement was recorded u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him where he denied the evidence and declined to give defence evidence.
- I have also heard arguments put forwarded by the learned counsel for both parties.

### 7. The point for decision in this case is that :

(i) Whether the accused on or about 11.30 p.m. of 11-08-2018 at Komarchuburi under Thelamara Police station, committed lurking house trespass by night by entering into the house of complainant after the house of Sunset and before the hour of Sunrise, inroder to commit and attempted to commit any offence punishable under the POCSO Act or to cause such an offence to be committed, and in such

attempt, does any acts towards the commission of the offence on Miss X (14 years of age) and thereby committed an offence punishable under section 457 of the IPC read with section 18 of POCSO Act?

#### Reasons, Decisions and reason for decision

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- 9. **PW-1** Kalu Ali, the complainant of this case, stated that the incident took place more than one month ago, at night at about 11.30 p.m. The victim Miss X is her daughter who is aged about 14 years at the time of incident. When his daughter was sleeping, the accused entered into their house and dragged his daughter holding her legs. Then his daughter raised alarm and on hearing he rushed to her room and on being seen the accused he caught the accused red handed but the accused fled away forcefully by breaking the wall of the house. Next morning at about 10 a.m., he has filed the ejahar. The ejahar was written by a scribe as per his instruction where he put thumb impression. Police came and saw the broken wall of the house. Police recorded his statement and the statement of his victim daughter were also recorded by police in their house. Thereafter, police sent his daughter to the doctor for medical examination. Police also sent his victim daughter to the learned Magistrate for recording her statement. He has submitted a photo copy of birth certificate of his victim daughter to police. The date of birth of his daughter was 12-04-2004 according to that birth certificate.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to the accused entered into their house, dragged his daughter by holding her legs, when she raised alarm he along with other family members went to the room and he caught the accused red handed thereafter accused forcefully fled away by breaking the "Ekora" wall of their house has remained unchallenged.

**10. PW-2** Miss X who is the victim of this case, stated that she knows the accused Amir Ali. The incident took place one and half months ago. At night at about 11.30 p.m., the accused came to their house and trespassed in to her room by breaking the "Ekora" wall and entered into her room. During that time, she was sleeping with her 8 years old younger sister Rabina Khatun. At first

accused dragged her leg and gagged her mouth. Then she raised alarm. On hearing her alarm her parents arrived there. Her uncle (Jethu) Gajibur Rahman and Kamaluddin, Rezek etc were arrived at their house. But her younger sister was still in slept. Then the accused fled away and in the next day her father filed the case before the police station. On being instituted the case, police recorded her statement and also sent her to the learned Magistrate to record her statement u/s 164 Cr.P.C. Ext. 1 is the said statement u/s 164 Cr.P.c. and Ext. 1(1) is her signature. In earlier accused proposed her to love but she refused.

Though she has been exposed to long cross-examination except giving many suggestions the evidence as to at the relevant time accused criminally trespassed into her room, while she was sleeping with her 8 years old younger sister, then accused dragged her leg, gagged her mouth, when she raised alarm, on hearing her hulla her parents and uncle (Jethu) Gajibur Rahman, Kamaluddin, Rezek etc were arrived at their house, but her younger sister was in sleeping, then accused fled away from her house has remained unchallenged.

11. PW-3 Ramisa Khatoon, mother of the victim stated that the age of her victim daughter was 14 years at the time of incident. The incident took place at night at about 8.30 p.m more than one month ago. Accused entered into their house by breaking the wall. The accused gagged the mouth of her victim daughter who was sleeping at the relevant time. When she raised hulla she awoke and called her husband. When her husband caught the hand of the accused, then the accused wanted to sit in their bed but he fled away. Thereafter, neighbouring people gathered there. In the next day, her husband filed the case.

Though she has been exposed to long cross-examination the evidence as to at the relevant time accused entered into their house by breaking the Ekora wall, gagged the mouth of her victim daughter who was sleeping at the relevant time, while her daughter raised hulla she awoke and called her husband and her husband caught the hand of the accused, then the accused wanted to sit in their bed but he fled away has remained same.

**12. PW- 4** Kamaluddin, neighbor of the complainant, stated that the incident took place more than one month ago, at night, at about 11.30 p.m. in the house of complainant. At the relevant time there was heavy raining and he was at home. Gajibur Rahman and the mother of the victim namely, Ramisa Khatoon

went to his house and informed him that the accused entered in to the house of Ramisa by breaking the wall of the house and grabbed the mouth of victim when she was sleeping. Then he along with other villagers arrived at the house of Ramisa Khatoon and saw the broken wall of the house. He informed police. Next day morning, father of the victim filed ejahar before the police station.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to at the relevant time he was at home, Gajibur Rahman and the mother of the victim namely, Ramisa Khatoon went to his house and informed him that the accused entered in to the house of Ramisa by breaking the wall of the house and grabbed the mouth of victim when she was sleeping has remained unchallenged.

13. PW 5 Gajibur Rahman, uncle of the victim, stated before the court that the incident took place more than one month ago at about 11.30 p.m. at night. At the relevant time he was at home. On hearing hulla of victim and Ramisa he rushed to the house of Ramisa and saw that Kalum tried to catch hold the accused but he failed. Amir fled away. On enquiry the matter to victim, she told that the accused caught hold her legs and when she woke the accused gagged her mouth. Neighbouring people gathered there and then he informed police over phone.

He was duly cross-examined but the evidence as to at the relevant time on hearing hulla in the house of Ramisa he rushed to her house and saw Kalum tried to catch hold the accused but he failed and then accused fled away, while making enquiry, the victim told him that the accused hold her legs and when she was awoke the accused gagged her mouth has remained unshaken.

**14. PW 6** Md. Torab Ali stated that the incident took place two and half months ago, at night at about 11.30 p.m. At the relevant time they were watching TV in their uncle's house. The victim is aged about 14 years. On hearing hulla in the house of complainant Kalam Ali he rushed to his house. There, he saw many people gathered there. Kalum Ali stated that accused trespassed into his house, and when attempt to commit bad acts by dragging his daughter then Kalum Ali attempt to hold him but accused pushed him down and fled away by breaking open the bamboo wall. Thereafter, Kalum Ali filed FIR against the accused.

Though he has been exposed to cross-examination, the evidence as to at the relevant time they were watching TV in their uncle's house, on hearing hulla in the house of complainant Kalam Ali he rushed to his house, he saw many people gathered there, complainant stated that accused trespassed into his house, and when attempt to commit bad acts by dragging his daughter then Kalum Ali attempt to hold him but accused pushed him down and fled away by breaking open the bamboo wall has remained unchallenged.

**15. PW 7** Md. Rezek Ali stated that the incident took place two and half months ago, at night at about 11.30 p.m. On being called by Kalum Ali he rushed to his house and saw one of the wall of the house was broken. There he came to know from Kalum Ali that accused trespassed into the house of Kalum Ali, attempted to commit bad acts by dragging his daughter then Kalum Ali attempted to hold him but accused pushed him down and fled away by breaking open the bamboo wall. Thereafter, Kalum Ali filed FIR against the accused. At the relevant time victim was about 15 years. On enquiry, victim stated to him that while she was slept, accused entered into her room, gagged her mouth, dragged her hands and attempted to commit misdeed. When she raised alarm, her father attempted to caught hold the accused but the accused fled away by breaking the bamboo wall of the house. Thereafter, many people gathered there and called the accused but he did not go there and fled away. So, complainant filed this case against the accused.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to at the relevant time while he was called by Kalum Ali he rushed to his house and there he came to know from Kalum Ali that accused trespassed into the house of Kalum Ali, attempted to commit bad acts by dragging his daughter then Kalum Ali attempted to hold him but accused pushed him down and fled away by breaking open the bamboo wall, on enquiry, victim stated to him that while she was slept, accused entered into her room, gagged her mouth, dragged her hands and attempted to commit misdeed has remained unchallenged.

**16. PW 8,** Miss Sparsita Garg, Judicial Magistrate, 1<sup>st</sup> class, Tezpur stated that on 13-08-2018 she was posted as Judicial Magistrate, 1<sup>st</sup> class, Sonitpur, Tezpur and on that day in reference to Special POCSO Case No. 73/18 u/s 357 of IPC read with section 8 of POCSO Act, a fourteen years minor girl namely Miss X,

D/O Kalum Ali of village Kamarchuburi, Thelamara under Thelamara PS was produced before her for recording her statement. The said witness was escorted and identified by WHG Hemi Patangia. She recorded the statement of said witness in her court Chamber. At the time of recording her statement other than her and victim none was there. The witness made statement voluntarily. After recording her statement, she read over the contents of the statement and on acceptance she put signature thereon. Ext 1 is the statement of said witness and Ext. 1(3) is her signature. Ext. 2 is the order dated 13-08-2018 and Ext. 2 (1) is her signature.

- **17.** PW 9, the Investigating Officer, Sri Arun Gogoi, stated before this court that on 12-08-2018 he was posted as ASI of police at Thelamara Police station. On that day, at 10 a.m. complainant Kalum Ali lodged an ejahar before the police station. Accordingly, O/C registered a case being Thelamara PS Case No. 148 /2018 u/s 457 of the IPC r/w section 8 of POCSO Act and entrusted him for investigation of the case. Accordingly, he visited the place of occurrence, drew the sketch map of the place of occurrence and recorded the statement of witnesses. Ext. 3 is the sketch map where in Ext. 3(1) is his signature. He also arrested the accused and forwarded him to the court. He sent the victim to the court for recording her statement u/s 164 Cr.P.C. Ext. 4 is the FIR wherein Ext. 4(1) is the signature of the then O/C Susil Kr. Bhuyan which he knew. At the relevant time the age of the victim was about 14 years. During the time of investigation, the complainant gave the original copy of birth certificate of the victim which he has kept one photocopy of the said certificate and the original was returned to the complainant. As per the said certificate the date of birth of the victim is 12-04-2004. On completion of usual investigation, he has filed the chargesheet against the accused finding sufficient materials u/s 457 of IPC read with section 8 of POCSO Act. Ext. 5 is the chargesheet and Ext. 5(1) is his signature.
- **18.** These much is the evidence of prosecution.
- **19.** Defence plea is total denial while his statement was recorded u/s 313 Cr.P.C. He admitted that he has entered into the house of the complainant at the invitation of the wife of the complainant as because his mobile hand set is required by the wife of the complainant to call somebody.

To buttress the defence accused adduced evidence through himself and his mother.

**DW 1** stated that on the day of incident, at about 9.30 p.m., mother of the victim called him to her house to make a call from his mobile hand set as there is no mobile in the house of victim. His house is adjacent to the house of the victim. When he went to the house of the victim, the mother of the victim opened the door and he asked to give the number which she wanted to call but she did not provide the same. Then father of the victim hold his hand, asked him that he will entangle him with some offence. Then mother of the victim went to his house and complaint to his mother alleging that he torn her clothes. During that time, he was hold by father of the victim. They did not allow him to come out. Then victim was sent to the house of Gajibur to call him. Gajibur came with a bamboo stick to assault him. Then he fled away by breaking the bamboo wall of the house of the complainant.

In cross- examination by Prosecution he admitted that he did not stay with his parents as he lived in a separate room. At the time of calling him by the mother of the victim he was watching TV alone. His parents were in sleeping. The mother of the victim initially called his mother who was in sleeping. Though mother of the victim asked his mother to take the mobile hand set but she did not took the mobile to their house. Complainant is their adjacent neighbor. They had a visiting terms.

Similarly, DW 2, Ahatjan Bibi, the mother of the accused, stated that the wife of Kalum, Ramesa Khatoon asked her to call her son Amir Ali to her house to make a call from his mobile phone to her parents' house. Then she sent her son with his mobile to the house of Kalum. Thereafter, she came to know from her son Amir that by that time Kalum Ali was sleeping and his wife was searching the phone number and suddenly Kalum Ali awoke finding her son inside his room caught hold of her son. Thereafter, Ramesa came to her house and informed her that her son Amir committed some misdeed to her and therefore, she called her to her house. By that time Gajibur and Kalum also tried to assault her son inside their house, then her son came out by breaking the bamboo wall of the house. At that time there was raining. When the rain stopped, some other people gathered there. In the gathering Kalum Ali and his wife reported that some misdeed commit by her son with Romesa.

In cross-examination, she admitted that she has not appeared in summons. Ramesa came to their house at night to wake her up. During that time all the family members were in sleeping. Amir Ali was also in sleeping. She called him. Prior to the incident, they had no enmity with the complainant.

- 20. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, there is only one eye witness i.e. the victim. Secondly, accused entered at the relevant time into the house of the complainant at the invitation of complainant's wife as his mobile hand set is required by the wife of the complainant to call somebody. Thirdly, the complainant has falsely implicated the accused into the allegation of sexual assault to the victim. Fourthly, there are many contradictions among the statement of witnesses particularly, the statement of Kamaluddin, some of which are confirmed through the I.O.
- 21. On the other hand, learned Special Public Prosecutor has submitted that the prosecution has ably proved the case against the accused beyond any reasonable doubt. Firstly, there is a clear unambiguous statement on the oath of the victim. Secondly, there is a clear evidence that on hearing hulla victim's father, uncle and neighbor reached at the place of occurrence where the accused was caught red handed by the father of the victim though he was fled away somehow. Therefore, accused's presence in the house of the complainant at dead night of 11.30 p.m. cannot be ruled out. Thirdly, statement of victim is corroborated with her statement made before the I.O. u/s 161 Cr.P.C. and also the statement made before the learned Magistrate u/s 164 Cr.P.C. Under such circumstances, the accused is required to be convicted under the charged section.
- **22.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **23.** On close scrutiny of the record as well as the statement of the victim, it appears that to substantiate the case prosecution examined as many as 9 numbers of witnesses. Out of 9 numbers of witnesses two PWs i.e. PW 8 and PW 9 are official witnesses. They are the learned Magistrate who recorded the statement of the victim u/s 164 Cr.P.C. and the Investigating Officer. So, there remained 7 numbers of unofficial witnesses. Among the seven numbers of

unofficial witnesses, PW 1 and 2 are father and mother of the victim respectively. PW 5 is the uncle of the victim. PW 4, PW 6 and PW 7 are independent witnesses. It is a fact that there is no any eye witness other than the victim.

Let me discussed the evidence of the complainant first. PW1, is the father of the victim who deposed that at the relevant time his victim daughter was sleeping, the accused entered into their house and dragged his daughter by holding her legs, then his daughter raised alarm and on hearing hulla he rushed to her room and on being seen the accused he caught the accused red handed but the accused fled away forcefully by breaking the wall of the house. Next morning at about 10 a.m., he has filed the ejahar which was written in his instruction by one scribe. Thereafter, police came and investigated the case. He clearly stated the photo copy of the birth certificate of his victim daughter shows that the date of birth of his daughter was on 12-04-2004. PW 3, mother of the victim supported the evidence of the complainant. She stated that the incident took place at night where accused entered into their house by breaking the wall (made of Ekora), the accused gagged the mouth of her victim daughter who was sleeping at the relevant time, when victim raised alarm she awoke and called her husband, when her husband caught red handed of the accused, accused wanted to sit in their bed but he fled away. Their statements are supported by PW 5, the nephew of the victim who also stated that at the relevant time on hearing hulla of the victim and her mother, he rushed to the house of the complainant and so Kalum (PW 1) tried to catch hold of the accused but he failed then accused fled away. On enquiry to victim, she told him that accused hold the legs of the victim when she woke up the accused gagged her mouth. One of the most independent witness PW 4 who belongs to the same locality of the complainant, stated that at the relevant time there was a heavy raining and he was at home. Gajibur Rahman and the mother of the victim namely, Ramisa Khatoon went to his house and informed him that the accused entered in to the house of Ramisa by breaking the bamboo wall of the house and grabbed the mouth of victim when she was sleeping. Then he along with other villagers arrived at the house of Ramisa Khatoon and saw the broken Ekora wall of the house. Similarly, other independent witnesses, PW 6 and PW 7 also supported the evidence of pW 1 complainant. They stated that on hearing hulla in the house of the complainant they rushed to the house of the complainant where they noticed many people

gathered there. Complainant stated that accused trespassed into his house and when he attempted to commit bad act by dragging his daughter, Kalum Ali attempted to hold him but accused pushed him down and fled away by breaking open the bamboo wall.

Though PW 4, PW 5, PW 6 and PW 7 are not eye witnesses to the occurrence but all the aforesaid witnesses clearly stated that on hearing hulla in the house of the complainant, they went to the house of the complainant and there they came to know that accused trespassed into the house of the complainant, at first accused dragged the victim's leg and then gagged her mouth, when she raised alarm her uncle Gajibur, and Kamaluddin, Rezek etc were arrived at their house.

As stated herein above, the victim PW 2 is the only eye witness to the occurrence. Though PW 1 did not see the accused dragged the legs of the victim and gagged her mouth but on raising alarm of victim and his wife he woke up and caught red handed the accused inside his house, however, accused forcefully fled away. The victim stated that at the relevant time accused trespassed into their house by breaking the Ekora wall and entered into her room. During that time she was sleeping with her 8 years old younger sister. At first accused dragged her leg and gagged her mouth, then she raised alarm. On hearing her alarm, her parents arrived there. Her uncle (Jethu) Gajibur Rahman and Kamaluddin, Rezek etc were arrived at their house, but her younger sister was still in slept. Then the accused fled away from their house.

25. The law is well settled that in a case of sexual offence, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifted. In practice, a conviction for rapesexual offence almost entirely depend on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. It is not necessary that there should be independent corroboration of every material circumstance in the scene that the independent evidence in the case, apart from the testimony of the victim, should in itself be sufficient to sustain conviction. All that required is that there must be some additional evidence rendering it probable that the story of the victim is true and that is reasonably safe to act upon.

- It appears from the record that the statement of the victim made before the court is corroborated with the statement made u/s 161 Cr.P.C before the I.O. and also with the statement u/s 164 Cr.P.C. made before the learned Magistrate. It has already stated that though all the aforesaid witnesses were duly cross-examined by the defence but the defence has failed to shake the evidence of the aforesaid witnesses. Besides, there is no any evidence that complainant has any enmity with the accused or with any of the family members of the accused to implicate the accused falsely. Under such circumstances, the statement of the victim is found convincing, reliable and trustworthy.
- 27. Learned counsel for the accused submitted that according to the statement of the accused recorded u/s 313 Cr.P.C. accused went to the house of the victim because the mother of the victim asked him to come to their house with mobile hand set so that she rang to her grand mother's house and therefore, the accused went there. Other than mere a simple suggestion made to the complainant the accused failed to cross-examine or make any suggestion neither to victim nor to the mother of the victim. To substantiate the alibi accused adduced evidence himself as DW 1 and also adduced evidence through his mother who is DW 2. It appears that a feeble attempt made by the accused to change the story of lurking house trespass but it has not succeeded. Firstly, the accused as DW 1 stated, about the fact of 9.30 p.m. but according to the prosecution story, the incident took place at about 11.30 p.m. Secondly, DW 2, the mother of the accused appeared before this court not on summons. Besides, DW 2 being the mother of the accused (DW1) never wanted conviction of her own son. Lastly, the evidence of DWs is not corroborated with each other, because DW 1 himself stated that at the relevant time he was watching T.V. On the other hand, DW 2 stated that at the relevant time she and her son were in sleep in bed. The evidence of accused and his mother cannot overcome the reliable, trustworthy and convincing evidence of victim (PW 2), her father PW1, her mother PW 3 and the independent witnesses PW 4, PW 6 and PW 7 and the relative witness PW 5. It is noteworthy to mention that the evidence of the complainant clearly showed that when he woke up on hearing hulla of his daughter (victim) and his wife he found the accused inside his house and caught the accused red handed but he forcefully fled away by breaking the Ekora wall.

The evidence of complainant clearly showed that the accused was not there with the consent or at the invitation or pleasure of complainant's wife.

- **28.** Here in this case, the accused is found concealing himself in the dead night in another men's house and on the failure of the accused to justify his presence there, the presumption could be drawn that he made entry with intent to commit some offence.
- **29.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **30.** Under Section 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
  - "29. Presumption as to certain offences where a person is prosecuted for committing or abetting or attempting to commit any offence U/s.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. "
- **31.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the acused where culpable mental state is required on the part of the accused. Section 30 of POCSO Act reads as under:
  - "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 that 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 purpose 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 probabilities. "

- **32.** Similarly whenever any law prescribes that the court shall presume the existence of culpable mandatory state or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. Certainly, it does not discharge the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume". Thus, as per Section 29, if a person is prosecuted for committing or abating or attempting to commit any offence U/s.3,5,7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abated or attempted to commit the said offence as the case may be unless the contrary is proved. However, in the present case, the accused has completely failed in discharging his burden even by preponderance of probabilities much less beyond reasonable doubt.
- **33.** In the instant case as stated above, the statement of the victim is reliable, trust-worthy and convincing. Her statement was supported by her father, mother and other independent witnesses, i.e. PW 4, 6 and 7 and the relative witness PW 5.
- **34.** In view of the aforesaid reasons and discussions, I am bound to hold that accused commits lurking house trespass by night into the house of the complainant with attempt to commit any sexual assault on the victim. It appears that the prosecution has failed to prove the charge u/s 457 of the IPC but able to prove the charge u/s 456 of the IPC read with section 18 of POCSO Act.
- **35.** In the result, I convict accused Amir Ali u/s 456 of the IPC and U/s.18 of the POCSO Act.
- **36.** Heard the accused on the point of sentence where he praying for leniency stating that he is only 22 years old boy doing labour at Guwahati. He has been in custody for long time earlier.
- **37.** I have also heard the Ld. counsel for the accused and Ld. P.P.
- **38.** 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 aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is

not only to the body but also to the mind not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 22 years old at the time of incident. Therefore, there is a chance of reformation. It is not brought to the notice of the court that before this incident the accused has committed any other offence. The statute U/s.18 of the POCSO Act provides punishment for any description of the offence for term which may extend to one half of the imprisonment for life or, as the case may be, one half of the longest term of imprisonment provided for that offence or with fine or with both.

#### O R D E R

**39.** I convict accused Md. Amir Ali for the offence u/s 456 of the IPC and sentence him to undergo Rigorous Imprisonment for 24 (twenty-four) days and a fine of Rs. 1,000/- (Rupees one thousand only) in default Rigorous Imprisonment for 1 (one) month and for the offence u/s 18 of POCSO Act sentence him to pay a fine of Rs.20,000.00 (Rupees Twenty thousand) only, in default of payment of fine, he shall under-go Rigorous Imprisonment for 6 (six) months. The fine, if realized, be given to the victim as way of compensation.

The period, in which he detained in custody, shall be set off from the period of imprisonment, imposed on him.

- **40.** Let a copy of this judgment be furnished to the accused free of cost.
- **41.** A copy of this judgment be also forwarded to the District Magistrate, Sonitpur, Tezpur as per provision of Sec.365 of Cr.P.C.
- **42.** Given under my hand and seal of this court on 18<sup>th</sup> day of December, 2018.

(Ashok Kumar Borah)
SPECIAL JUDGE,
SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah)
SPECIAL JUDGE,
SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

# **APPENDIX**

#### **Prosecution Witness**

1. Prosecution Witness No.1 :-Kalu Ali, complainant, Prosecution Witness No.2 2. Victim 3. Prosecution Witness No.3 Ramisa Khatoon, 4. **Prosecution Witness No.4** Kamaluddin Prosecution Witness No.5 Gajibur Rahman 5. **Prosecution Witness No.6** Md. Torab Ali 6. 7. Prosecution Witness No.7 Md. Rezek Ali

8. Prosecution Witness No.8 :- Miss Sparsita Garg, J.M.
9. Prosecution Witness No.9 :- Sri Arun Gogoi, I.O.

## **EXHIBITS.**

Exhibit 1 :- statement of victim u/s 164 Cr.P.C.

Ext. 1(1) : - Signature of the victim. Exhibit 2 :- Order dated 13-08-2018 Exhibit 2(1) :- Signature of Judl. Magistrate

Exhibit 3 :- Sketch map

Exhibit 4 :- FIR

Exhibit 5 :- Chargesheet. Exhibit 3(1),4(1)&5(1):- Signature of the I.O.

> (Ashok Kumar Borah) SPECIAL JUDGE SONITPUR: TEZPUR