DISTRICT: DHUBRI

IN THE COURT OF THE SPECIAL JUDGE, DHUBRI

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

Special Case No. 31 of 2016

<u>Under Sections 323/34 IPC and 8 of the POCSO Act, r/w Section 34 IPC</u> <u>Corresponding to G.R. Case No. 3910/2016</u>

State of AssamComplainant

Versus

1. Shri Alom Sheikh

2. Shri Atinur Sheikh ... Accused

Charge framed on : 01-03-2017

Evidence recorded on : 20-04-2017, 06-06-2017 and 17-08-2017

Statement recorded on : 25-09-2017 Arguments heard on : 27-10-2017

Judgment delivered on : 10-11-2017

Advocates who appeared in this case are:

Shri Maniruz Zaman, Special P.P. for the Prosecution

Shri Giasuddin Ahmed, Advocate, for the Defence

<u>JUDGMENT</u>

- 1. This case was registered on 17-09-2016, at Gauripur Police Station, under Sections 341/342/323/34 of the Indian Penal Code, 1860 (in short "the IPC"), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short "the POCSO Act"), based on a First Information Report (in short "the FIR") filed by one Sona Kanta Ray against accused Alom Sheikh and Atinur Sheikh.
- 2. The case of the prosecution, as stated in the FIR is that on 16-09-2016, at around 01:00 p.m., on the PWD road at village Dumordoh, Part-IV, under Gauripur Police Station, plying a bicycle and accompanied by her friend (hereinafter referred to as "the victim girl"), aged about 12 years, while the minor daughter of the informant (hereinafter referred also as "the victim girl"), aged about 14 years, was proceeding from the house of the informant towards Kurirpar, near the house of Prafulla Ray, the accused Alom Sheikh and Atinur Rahman waylaid them and pushed them down from the bicycle, as a result of which, they sustained injuries on their body. They then raised a hue and cry, at which, the nearby people came forward and seeing them, the accused fled away. Therefore, the informant filed the FIR of the instant case with the Balajan Police Out-post on 16-09-2016.
- **3.** The In-charge of the Balajan Police Out-post entered the FIR in the General Diary Book of the Outpost vide Entry No.237, dated 16-09-2016 and forwarded the FIR to the Golakganj Police Station for registration of a case. He also started investigation in anticipation.
- **4.** Based on the FIR, the Officer In-charge of the Gauripur Police Station registered the case No.929/2016 for commission of offences punishable under Sections 341/342/323/34 IPC, read with Section 4 of the POCSO Act against the accused Alom Sheikh and Atinur Rahman.
- **5.** During the course of investigation, the victim girls were medically examined and their statements were recorded by the Magistrate under Section 164 Cr.P.C. Statements of several witnesses were also recorded and after completion of investigation, a charge sheet was filed for offences punishable under Sections

341/342/323/34 IPC, read with Section 4 of the POCSO Act against the accused Alom Sheikh and Atinur Rahman in this Court as the offences under the POCSO Act are tirable by the Special Court and this Court has been designated as the Special Court to try offences under the POCSO Act. Hence, this case.

- **6.** During trial, charges under Sections 323/34 IPC and Section 8 of the POCSO Act, read with Section 34 IPC were framed against the accused Alom Sheikh and Atinur Rahman. When the contents of the charges were read over and explained to the accused, they pleaded not guilty and claimed to be tried.
- **7.** The prosecution, in order to prove its case, examined eight witnesses. The accused did not examine any witness.
- **8.** In their examination under Section 313 Cr.P.C., the accused have denied the prosecution case and have stated that the allegations levelled against then are false and baseless.
- **9.** The point for determination in this case is:-

Whether on 16-09-2016, at around 01:00 p.m., on the PWD road at village Dumordoh, Part-IV, under Gauripur Police Station, the accused Alom Sheikh and Atinur Rahman voluntarily caused hurts to the victim girls, who on the day of the alleged occurrence, were child under 18 years of age and also sexually assaulted them?

If so, what punishment do they 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 counsels for both the sides, give my decision on the above point as follows:-

- **11.** The P.W.-2, one of the victim girls, has deposed that plying a bicycle along with her friend, (the other victim girl), while they were proceeding towards the house of the other victim girl situated at village Dumordoha, coming from behind in a motorcycle the accused pushed them down and thereafter, pulled them and caressed their breasts. When they raised hue and cry, the nearby people came forward and seeing them, the accused fled away from the place of occurrence.
- **12.** In the cross-examination, she has stated that she did not see which of the accused was driving the motorcycle. She also could not say which of the accused pushed them down. Her friend was plying the bicycle and she was sitting in the rear seat. Their bicycle also fell down and was damaged. She did not notice any other motorcycle on the road at that time. There were three persons in the motorcycle in which the accused were travelling. Leaving the two accused at the place of occurrence, the other person fled away with the motorcycle. The road was a PWD road. There were houses on both the sides of the road. She has denied the suggestion that the accused did not push them down and also did not caress their breasts.
- **13.** The P.W.-3, the other victim girl, has also deposed that on 16-09-2016, at around 01:00 PM, plying a bicycle with her friend victim girl, while they were proceeding towards her house, on the way, the accused pushed them down from behind as a result of which, they fell down on the road. Thereafter, the accused pulled them and caressed their breasts. When they raised hue and cry, the nearby people came forward and seeing them, the accused fled away from the place of occurrence.
- **14.** In the cross-examination she has stated that she did not see how the accused came. She also did not see any motorcycle. A passerby lifted them up. She has denied the suggestion that the accused did not push them down and also did not caress their breasts.
- **15.** P.W.-4 Anita Bala Ray has deposed that on the day of the alleged occurrence, at around 01:00 PM, hearing a hue and cry in front of her house, she went out and saw that the accused were pulling the victim girls.

- **16.** In the cross-examination, she has stated that at the time of the occurrence, she was working at the Domordah CHC. She knew the victim girls since before the occurrence. The incident occurred in front of her house. There are other houses near her house. At the time of the incident, they were taking lunch. Hearing a sound, she went to the place of occurrence. The incident occurred on the main road. Many people, including the Member of the Gaon Panchayat, namely Hamidur Rahman, arrived at the place of occurrence. The victim girls were lying on the road and they lifted them. The bicycle was lying near the victim girls. She did not see any motorcycle there. She has denied the suggestion that at the time of the occurrence, she was not present in her house.
- **17.** P.W.-5 Prafulla Chandra Ray has deposed that on the day of the occurrence, while he was taking lunch, hearing a hue and cry near his house, he went out and saw that the accused were pulling the victim girls and seeing him, the accused fled away.
- **18.** In the cross-examination, he has stated that he saw the victim girls standing on the road and their bicycle lying on the road. His wife also accompanied him to the place of occurrence. He has denied the suggestion that the accused did not pull the victim girls. He has denied the suggestion that while plying the bicycle, the victim girls met with an accident. He has also denied the suggestion that due to previous enmity, he has deposed falsely against the accused persons. But, the accused did not prove by adducing any positive evidence what previous enmity the PW-4 had with them.
- **19.** P.W.-6 Binod Chandra Ray has deposed that on the day of the occurrence, he was present in his house. Suddenly, he heard a sound of falling bicycle. He then went out and saw that the victim girls were crying. When he asked them what the matter was, they told him that the accused had pushed and shoved them.
- **20.** In the cross-examination, he has denied the suggestion that he did not tell the police that he saw the victim girls crying and when he asked them as to why they were crying, they told him that the accused pushed and shoved them. He has also denied the suggestion that due to religious dispute and as the accused

belonged to different religion, he has deposed falsely against the accused. But, the accused did not adduce any positive evidence to prove that the PW-6 had religious dispute with them.

- **21.** P.W.-1, Dr. Mithun Paul, who had treated the victim girls, has deposed that on 16-09-2016, he had examined the victim girls and found swelling and tenderness on the right ankle joint and on the right thumb of one of the victim girl and found abrasion on the left knee joint, abrasion on the medial side of left elbow and swelling on the right side of the upper lip of the other victim girl. Ext.1 is the injury report prepared by him and Ext.1 (1) is his signature therein. Thus, the PW.1 has proved that the victim girls had sustained some injuries on the day of the occurrence.
- **22.** In the cross-examination, he has stated that all the injuries were superficial. He has not mentioned the colour of the swelling area of the lip. He has further stated that all the injuries may be caused by dashing against any hard substance or due to falling. He has further stated that the injuries may also be self-inflicted.
- 23. P.W.-8 Pranjal Hatiboruah has deposed that on 16-09-2016, he was posted at the In-charge of the Balajan Police Out-post, under Gauripur Police Station. On that day, the informant Sona Kanta Ray, son of Late Lakhi Kanta Ray, verbally informed him that plying a bicycle, while his daughter (one of the victim girls) and her friend (the other the victim girl) were proceeding towards village Kurirpar, at village- Dumardaha, Part-IV, the accused Alom Sheikh and Atinur Sheikh waylaid them, pushed them down on the ground, caught hold of them and tried to took them to the nearby bamboo bush. When they shouted for help, the villagers arrived there and rescued them. He entered the information in the General Diary Book of the police out-post vide entry No.237, dated 16-09-2016. Ext. 2 is the said G.D. Entry No.237, dated 16-09-2016 and Ext-2 (1) is his signature therein. Thereafter, he sent both the victim girls to the Gauripur CHC for medical examination and went to the place of occurrence and prepared a site plan. Ext-3 is the said site plan and Ext-3 (1) is his signature therein. He also recorded the statements of the witnesses at the place of occurrence. Thereafter, he returned to the out-post. At the outpost, the informant Sona Kanta Ray lodged the Ext-4 FIR

of the case. Ext-4 (1) his signature therein and Ext-4 (2) is the signature of the Officer In-charge of the Gauripur Police Station. Thereafter, he recorded the statements of the informant and the victim girls. He sent the FIR to the Gauripur Police Station for registration of a case and based on the FIR, the Officer Incharge of the Gauripur Police Station registered a case and entrusted him to investigate the case. Thereafter, he collected the injury report of the victim girls. He also arrested the accused persons and forwarded them to the Court. After completion of investigation, he submitted charge sheet for offences under Sections 341, 342, 323, 34 IPC, r/w Section 4 of the POCSO Act against the accused persons. Ext-5 is the said charge sheet and Ext-5 (1) is his signature therein.

- **24.** By cross-examining the PW-8, the defence has failed to bring out anything based on which it can be said that he was not telling the truth or has deposed falsely.
- **25.** P.W. 7 Jagadish Chandra Ray is not a material witness of the case.
- **26.** It can be seen from the above discussion that on 16-09-2016, at around 01:00 p.m., on the PWD road at village Dumordoh, Part-IV, under Gauripur Police Station, the accused Alom Sheikh and Atinur Rahman pushed down the victim girls from their bicycle as a result of which, they fell down on the road and sustained the injuries as deposed by the P.W.-1. Further, as the victim girls have deposed that thereafter, the accused pulled them and caressed their breasts. it must be held that the accused voluntarily caused hurts to the victim girls and also sexually assaulted them who, on the day of the alleged occurrence, were child of 14 and 12 years old.
- **27.** For the purpose of this case, we may first firstly refer to Section 7 of the POCSO Act, which reads as follows:-
- "7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breasts 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". (Emphasis added).

- **28.** The scope of the provision of Section 7 crystal clear. Hence, the Section requires no further elucidation. Section 8 is the penal provision for Section 7.
- 29. 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, the age of the victim should be proved to be below 18 years as on the date of commission of the alleged crime. In the instant case, it can be seen from the above discussion that the victim girls, who on the day of the alleged occurrence were child under 18 years of age, withstood gruelling cross-examination by an experienced advocate of the Dhubri Bar, namely Shri Giasuddin Ahmed. The accused did not even challenge the victim girls in the cross-examination that on the day of the alleged occurrence, they were not child under 18 years of age. Therefore, the accused Alom Sheikh and Atinur Rahman must be held guilty of committing the offences punishable under Sections 323/34 IPC and Section 8 of the POCSO Act, read with Section 34 IPC. As both the accused actually committed the alleged offences, they can be held guilty of committing the alleged offences even without the aid of Section 34 IPC.
- **30.** Regarding the culpable mental state of the accused, we may refer to the Section 30 of the POSCO Act, which reads as follows:
- **"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".
- **31.** In the instant case, as the accused Alom Sheikh and Atinur Rahman pushed down the victim girls from their bicycle as a result of which, they fell down on the

road and sustained injuries and as thereafter, the accused pulled them and caressed their breasts, it must be held that the accused voluntarily caused hurts to the victim girls and also sexually assaulted them who, on the day of the alleged occurrence, were children of 14 and 12 years old, therefore, their culpable mental state has to be presumed. Further, the accused did not rebut the said presumption. Therefore, I hold that the accused had culpable mental state while pushing down the victim girls from their bicycle and thereafter, pulling them and caressing their breasts. Apart from the same, the presumption of guilt under Section 29 of the POSCO Act also needs to be applied as all the necessary facts regarding commission of the offence under the POSCO Act have been proved. The said presumption also has not been rebutted by the accused persons.

- **32.** Failing to shake the prosecution case, the learned counsel for the accused vehemently argued that as the FIR was not filed immediately after the alleged occurrence, the prosecution case is liable to be rejected in its entirety for the delay in lodging the FIR.
- **33.** I do not agree with this contention of the learned counsel for the accused. It can be seen from the above discussion that immediately after the occurrence; the father of one of the victim girls went to the Balajan Police Out-post and verbally informed the Balajan police about the occurrence. The Balajan Police also entered the said verbal information in the General Diary Book of the Out-post vide entry No.237, dated 16-09-2016, at 04:45 p.m, which reads as follows:

"Shri Sona Kanta Ray, son of Late Lakhi Kanta Ray, resident of Dhorarghat, Part-I, P.S. Gauripur, District-Dhubri, Assam verbally informed that today, at around 01-00 p.m., plying a bicycle along with her friend, aged about 12 years, while his daughter, aged about 14 years, was proceeding from his house towards Kurirpar, at Dumardaha, Part-IV, Alom Sheikh, son of Monir Uddin Sheikh, resident of Dhorarghat, Part-I, P.S. Gauripur and Atinur Sheikh, son of Moksed Ali Sheikh, resident of Dumardaha, Part-IV, P.S. Gauripur, District-Dhubri, Assam, on the PWD road at Dumardaha, Part-IV, near the house of Prafulla Ray, pushed and shoved them. The girls were sent for medical examination to the Gauripur PHC and waited to do the needful after receiving the FIR."

- **34.** Therefore, immediately after the occurrence; the father of the one of the victim girls went to the Balajan Police Out-post and verbally informed the Balajan police about the occurrence. As the incident occurred at village Domordaha, Part-IV, having learnt about the same, the informant went to the place of occurrence and took the victim girls to the Balajan Police Out Post and informed the Balajan police about the matter, that must have taken the time intervening time between the occurrence and making of the G.D. Entry.
- **35.** Further, as can be seen from the above discussion, the contents of the G.D. Entry No.237, dated 16-09-2016 and the FIR are same. Therefore, even if the G.D. Entry No.237, dated 16-09-2016 is held to be the FIR, then also the same will not adversely affect the merits of the prosecution case. In view of the above, I am of the opinion that there was no delay in the lodging of the FIR and if at all there was some delay, in the facts and circumstances of the case, the same was natural.
- **36.** The learned counsel for the accused further argued that as the P.W.-1 has deposed that he found swelling and tenderness on the right ankle joint and on the right thumb and found abrasion on the left knee joint, abrasion on the medial side of left elbow on one of the victim girl and swelling on the right side of the upper lip of the other victim girl but, as the victim girls did not specifically depose that they sustained the said injuries at the hands of the accused, it cannot be held that the victim girls sustained the said injuries at the hands of the accused. I do not agree with this contention of the learned counsel for the accused as the victim girls were child of 14 and 12 years and they have categorically stated that when the accused pushed them, they fell down from the bicycle and sustained injuries. Therefore, though they did not specifically depose about the injuries sustained by them, it cannot be held that they did not sustain the said injuries at the hands of the accused. Therefore, the accused must be held guilty of voluntary causing hurts to them.
- **37.** The leaned counsel for the accused further argued that as there was another accused and after committing the alleged offences, the said accused fled away with the motorcycle, the accused Alom Sheikh and Atinur Rahman cannot be

held guilty of the committing alleged offences. I do not agree with this contention of the learned counsel for the accused as for not charge sheeting the said accused, it cannot be held that the accused Alom Sheikh and Atinur Rahman are not guilty of committing the alleged offences.

- **38.** 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 charges under Sections 323/34 IPC and Section 8 of the POCSO Act, read with Section 34 IPC, against the accused Alom Sheikh and Atinur Rahman beyond all reasonable. Hence, I hold the accused Alom Sheikh and Atinur Rahman guilty of committing the offences punishable under Sections 323/34 IPC and Section 8 of the POCSO Act, read with Section 34 IPC and convict them under the said Sections of law. The point is decided in the affirmative, accordingly.
- **39.** The minimum sentence prescribed under Section 8 of the POCSO Act is Rigorous Imprisonment for three years which cannot be modified or altered. Therefore, the Probation of Offenders Act is not applicable to the instant case. As such, the accused are not entitled to get the benefit of the ameliorative relief as envisaged under the said Act.
- **40.** Heard the convicts on the question of sentence. They have pleaded leniency in awarding the punishment on the grounds that they are first offenders and are youths.
- **41.** 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 judicial conscience. The offence was inhumane." The sentence was accordingly enhanced to 7 years R.I. in the said case.

- **42.** 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."
- **43.** In the case in our hand, the convicts have sexually assaulted two minor girls in broad daylight, on a public road. Therefore, they have scant regards to the civilized norms and no woman will be safe from them. Therefore, I do not think it proper to punish the convicts leniently as the age of the accused can hardly be a relevant consideration while imposing adequate and appropriate punishment. Hence, I deem it proper to award the maximum punishment prescribed under the law to them.

ORDER

44. Considering the entire facts and circumstances of the case, I sentence the convict Alom Sheikh and Atinur Rahman to undergo rigorous imprisonment for three months and to pay a fine of Rs. 1,000/- (Rupees one thousand) only, each

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in default to undergo rigorous imprisonment for fifteen days each, for committing

the offence under Sections 323, read with 34 IPC and to undergo rigorous

imprisonment for five years each and to pay a fine of Rs. 10,000/- (Rupees ten

thousand) only, each in default to undergo rigorous imprisonment for six months

each, for committing the offence under Section 8 of the POCSO Act, read with

Section 34 IPC, which, in my opinion, will meet the ends of justice in this case.

Both the sentences shall run concurrently as the both the offences have arisen

from one transaction. The period of detention already undergone during

investigation and trial shall be set off from the sentence of imprisonment. The

bail bonds of the accused stand cancelled. Issue Jail warrants.

45. Furnish copy of the judgment to the convicts free of cost, immediately.

46. Signed, sealed and delivered in the open Court on this the 10th day of

November, 2017, at Dhubri.

(A.Chakravarty)

Special Judge, Dhubri

Dictated & corrected by me

(A.Chakravarty)

Special judge, Dhubri

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APPENDIX

1. PROSECUTION WITNESSES:

P.W 1	Dr. Mithun Paul
P.W2	Jonali Ray
P.W3	Sangita Ray
P.W4	Anitabala Ray
P.W5	Prafulla Ch. Ray
P.W6	Binod Ch. Roy
P.W7	Jagadish Ch. Ray
P.W8	S.I. Pranjal Hatiboruah

2. PROSECUTION EXHIBITS:

Exhibit-1	Injury Report
Exhibit-2	Extract copy of G.D. Entry.
Exhibit-3	Site Plan
Exhibit-4	FIR
Exhibit-5	Charge Sheet.

(A.Chakravarty)

Special Judge, Dhubri