IN THE COURT OF SPECIAL JUDGE (FTC), SONITPUR AT TEZPUR

SPL(POCSO) CASE NO. :- <u>52 of 2017</u>

(Under Section 323/341 of IPC, r/w Sec. 8 of Protection of Children From Sexual Offence (POCSO) Act, Arising out of GR Case No 3287 of 2017)

Present :- R. Baruah

Special Judge, Sonitpur, Tezpur.

Prosecutor :- State of Assam

-Vs-

Accused :- Sri Rajesh Narah @ Sanju,

S/o Sri Ameswar Narah, Resident of No.2 Miripothat,

PS – Chariduar, Dist- Sonitpur, Assam

Date of framing charge :- 20-09-2017.

Date of Recording Evidence :- 12-03-2018,05-05-2018, 05-01-2017,

02-02-2019,05-08-2017, 25-06-2019 &

05-08-2019.

Date of examination of accused

u/s 313 of Cr. P.C :- 28-02-2019.

Date of Argument :- 03-12-2019.

Date of Judgment :- **17-12-2019**.

Counsel of the Prosecution :- Mr A Baruah & Mrs J Baruah,

Learned Addl. Public Prosecutors,

Tezpur.

Counsel for Accused :- S E Alom, Ld. Sr. Advocate and

A Bhuyan & LJ Saikia, Ld. Advocates.

JUDGMENT

1. In this case accused Sri Rajesh Narah @ Sanju is put for trial for the allegation of charge under Section 323/341 of IPC, r/w Sect.8 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act').

- 2. The prosecution case in brief is that on 24-08-2017 informant Smti Bijuli Orang lodged an FIR before the Chariduar Police Station stating inter alia that on the same day i.e. on 24-08-2017 at around 4.00 PM while her daughter (aged about 13 years) went to the nearby shop for purchasing some articles, accused restrained her and touched her buttock and also harassed her by touching her other private parts. As her daughter raise alarm, her sister-in-law(Borma of her daughter) informed her about the incident and they went to the place for of rescue her daughter, then the accused assaulted her sister-in-law on her head by means of a dao causing injuries on her head. It is also mentioned in the FIR that during the scuffle, the accused also sustained injuries.
- 3. On receipt of the ejahar, O/C, Chariduar Police Station registered the case vide Chariduar PS 190/17 under Section 341/354/326 of IPC. Police, after completion of investigation, submitted charge sheet against the accused Rajesh Narah under Section 341/323 of IPC, r/w Section 8 of POCSO Act for trial.
- 4. On appearance of the accused and after hearing the learned Advocate for both the sides, charge under Section 341/323 of IPC, r/w Section 8 of POCSO Act framed against the accused. The above charges are read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. To substantiate the case, prosecution has examined as many as 8(eight) nos. of witnesses including the victim namely 1. Smti Bijuli Orang (PW1), 2. Smti Moina Orang (PW2), 3. "X"(victim) (PW3)(name changed in the judgment), 4. Dr Hemanta Mech (PW4), 5. Sri Bir Singh Orang (PW5), 6.Smti Rameswari Orang (PW6), 7.Sri Raju Munda (PW7) & 8.SI Dwijomoni Sarma (PW8), IO.
- 6. Accused is examined under section 313 Cr.P.C. The defence plea is of total denial. The defence examined two witnesses namely 1.Sri Ratul Chintey (DW1) and 2.Sri Bablu Narah (DW2).
- 7. I have carefully gone through the record of the case and heard the learned Counsel for both the sides.

The Ld. Addl. P.P submitted that the witnesses has corroborated each other regarding the nature of offence committed by the accused. It is proved that the victim is a minor at the time of occurrence. The defence could not demolish the evidence adduced by the victim and other witnesses. Though the witnesses are relatives, it should be kept in mind that immediately after the incident the victim informed her relatives. It is natural that the witnesses will be relatives. The DWs cannot be believed because, they are friends of the accused. Submission made for conviction of the accused under the charges.

On the other hand, the Ld. Sr. Advocate for the defense submits that from the evidence it will appear that accused filed a case earlier to the present informant, which is numbered as 189/17. The informant of the present case and others came to the house of the accused and assaulted the accused. When the father of the accused went to file a case, they filed a concocted case. The allegation under POCSO Act is false. Under 161 of CR.P.C statement there are no allegation under the POCSO Act. The court is to take into consideration the total evidence. Bijuli Orang is mother of the victim. She said that first Moina is informed. PW1 is hearsay evidence. That was a bazar day. The informant and relatives are the aggressor. Then the concocted case is filed. Quarrel took place in the house of the accused. All the witness are related to each other. No a single villager examined by the prosecution. The vital evidence of molestation not stated before the IO by the PW1. All the facts not stated before the IO by the PW1.

PW1 admitted in her cross examination that it was bazar day. PW2 said that victim did not said anything to her. PW2 said that as they lodge case against them, so they lodged the case. PW3- the victim said that accused was playing carom and during playing carom the body of the accused touched her body and she did not raised objection to the accused. She did not stated about touching her buttock and breast to the IO. She has not described the incident like her mother. Nearby people witness the incident, as per the victim, but not examined by the prosecution.

The PW4 if the doctor. He has not examined the PW3 on police requisition. PW4 said that the injuries may be caused by falling on any substance. Examined after four days. PW5 Hearsay witness. PW6 do not know anything. PW7 is hostile.

PW8 is the IO. IO said that the accused was the injured. The injury of the accused has to be explained by the prosecution. Non explanation of injury of accused

is fatal to the prosecution. IO confirmed in details which are not stated before him by the witnesses. The person present during playing carom is examined as DW1. The DW1 has nullify the stand of the prosecution's stands. Now it is clear that the DW1 saw the incident. Nothing so serious took place. It is the family members of victim who trespassed in to house of the accused.

The Ld. Advocates for the accused has referred to the judgments reported in (1996) to GLR 79, (2003) 1 SCC (Cri) page 1052 and (2010) 4 GLR 567 in connection with contradictions in the statement of witnesses. Wherein it is mentioned that serious omissions amounts to contradictions.

Regarding evidence by relative the Ld. Advocates for the accused has referred to the judgment reported in (2010) 4 GLR 445.

In connection with injuries sustained by the accused and for which no explanations is given by the prosecution then accused is entitled to get benefit of doubt. (2016) Cr.L.J. 3154 (SC), 2008 (3) GLT 245 cited. The Ld. Advocates for the accused also referred to the judgments reported in (1996) 2 GLR 291 and 2019 Cr.L.J. 388 (SC) discussing preponderance of probability.

The judgment reported in (2010) 2 GLR 1, so cited by the defense, mention that when there are two views, one which is favorable to the accused must be considered.

Regarding hearsay evidences the Ld. Advocates for the accused has referred to the judgment reported in 2011 Cr.L.J. 1844 (Gauhati).

Regarding defence witness stands in the same footing as prosecution witness, the Ld. Advocates for the accused has referred to the judgments reported in (2003) 3 GLT 468 and (2010) 3 SCC (Cri.) 330.

I have gone through the judgments referred by the Ld. Senior Counsel for the accused.

- 8. The point for decision in this case is that
 - (1) Whether the accused on 24-08-2017 at about 4.00 PM at No.2 Miri Pathar under Chariduar Police Station, voluntarily caused hurt on the hands and back of the informant and head of the aunty of the victim?
 - (2) Whether the accused on the same date time and place mentioned above, wrongfully restrained the victim on the road?

(3) Whether the accused, on the same date time and place mentioned above, committed sexual assault on Miss "X" aged about 13 years minor girl?

Reasons, Decisions and reason for decision:

- 9. Before appreciating the evidences adduced by the parties, I deem it fit to reflect the summaries of evidence of the witnesses.
- 10. **PW1**, the informant stated in her examination in-chief as follows – "I know accused Sanju Narah who is absent today. The incident took place in the month of Aug, 2018 at about 4 PM. Victim "X" is my daughter. Her age is 13 years at the time of incident. At the relevant time, I sent my victim daughter to a shop nearby. While, my daughter went to shop, the accused grabs buttock of my victim daughter. While my daughter looked to the accused by turning her head, accused grabs her breast. When my daughter questioned accused why he grabs her breast then, accused slap her. Again she asked accused that her parents have brought up her in very well manner, why he slap her. Then accused again touched her breast. The accused all together grabs her breast for three times. Initially, my daughter informed the matter to her anuti (borma i.e. Moina Orang). My daughter again called me and informed about the incident. On being come to know about the incident, I went to the house of accused to asked about the incident. While I asked him why he did such act to my minor daughter, then accused fell her down on a bamboo fencing and also assaulted him. During that time, Moina Orang told accused why he assaulted a woman like me having child. Then, accused assaulted Moina Orang by means of a dao caused her injury on her head. As a result, she had to take treatment by stitching her forehead. Then, I lodged the ejahar before Chariduar PS where I put my thumb impression. The ejahar was written by a scribe according to my dictation. Thereafter, OC, Chariduar PS registered the case. After registering the case, police visited my house, examined my victim daughter medically. At present my victim daughter is a student of Class-IX."

In her cross-examination the PW1 stated as follows –

"I sent my girl to bring some articles from the shop of Ratul Sinte. That Ratul Sinte's shop is still there. The occurrence with my daughter took place in front of the shop of said Ratul Sinte. We are not there at the time of occurrence. My daughter did not bring anything from the shop. Near the shop of Ratul Sinte, there are other shops. I have made statement today on the basis of information given by my victim daughter. After hearing the incident, I along with other family members went to the house of the accused to enquire the matter. For the occurrence, which a quarrel took place in the house of accused, they have also filed a case against us. Bir Singh Orang is my elder brother (borjona) of my husband and Kartik Orang is also my elder brother (borjona) of my husband. Moina Orang is my sister-in-law. Accused has filed a case against them. Police took my statement in this case.

It is not a fact that I did not state before police that "While my daughter looked to the accused by turning her head, accused grabs her breast. When my daughter questioned accused why he grabs her breast then, accused slap her. Again she asked accused that her parents have brought up her in very well manner, whey he slap her. Then accused again touched her breast, the accused all together grabs her breast for three times".

It is not a fact that I did not state before police that accused touched my daughter's breast for thrice while she was going to the shop. It is not a fact that my daughter never stated that accused touch her breast. It is not a fact that "when I went to the house of accused to enquire about the matter and while I asked him why he did such act to my minor daughter, then accused fell her down on a bamboo fencing and also assaulted him, during that time, Moina Orang told accused why he assaulted a woman like me having child, then, accused assaulted Moina Orang by means of a dao caused her injury on her head".

It is not a fact that there was no any incident took place as I have stated above. It is not a fact that at the relevant time, accused along with Ratul Sinte had playing carom near the side of the shop of Ratul Sinte.

Accused's family are known to me for long time.

It is not a fact that while accused was playing and my daughter going through the side of the accused, suddenly while accused go back, then his body touches the body of my daughter, then an exchange of words took place and then my daughter came to my and told us about the incident and then we in a group went to the house of accused and attacked the accused in his house, and then father of the accused went to police and informed the matter.

It is a fact that I have injured Sanju Narah by means of a dao and then his father informed the matter to the police for which a case was registered vide Chariduar PS Case No 189/17.

It is not a fact that on being came to know that they have filed a case then I have filed this instant case against the accused person afterwards. It is not a fact that I have made a concocted story involving my daughter. On the day of incident is a market day. It is not a fact that our family members took alcohol on that bazaar day and they were in drunken condition and went to the house of accused and assaulted him. It is not a fact that on the day of incident, accused did not grab my daughter's buttock or breast nor slap her. It is not a fact that to save from the case filed by the father of accused against us, I have lodged this false case against the accused. It is not a fact that I have sustained any injury neither Moina Orang sustained injury as I have stated today."

11. **PW2** said in her examination in-chief as follows –

"I know accused Sanju Narah who is absent today. The complainant is my sister-in-law. The incident took place in the last year.

"X", the victim daughter of complainant went to shop to bring fair price rice. At that time, she was a minor girl. During that time, accused assaulted X's buttock and breast. When she (victim) reported us about the incident, then, I along with the complainant went to the house of accused to inquire about the incident. During that time accused assaulted complainant, fell her down by a bamboo fencing. To rescue complainant, I went there, then accused assaulted me fell me down. I become senseless. As a result of assault, I have sustained injury on my forehead."

During cross-examination PW2 stated as follows -

"I have not seen the incident as alleged took place with "X". When "X" reported us about the incident by crying, then, family member including me went to the house of accused to inquire about the matter, then the exchange of "marpit" took place in between both parties. I do not know who had assaulted whom. Even I do not by which weapon I was assaulted. "X" has not reported anything to me about the incident. As her mother called me, so, I went with her to the house of accused. There was a scuffle between the parties and thereafter what happened I do not know. Then, father of accused Sanju went to the police station and to lodged a case

against us. Thereafter, we also sent to the police station. As they lodged a case against us, so, we also lodged this case.

It is not a fact that Bijuly and myself not sustained any injury in the incident. On that day there was market day. Usually, in the market day all male members used to consume liquor. It is not a fact that I have deposed according to dictation of complainant."

12. PW3- the victim of this case stated in her examination in chief as follows; "I know accused Sanju Narah who is absent today. He is our neighbour. The incident took place on 24-08-2017 at about 4 PM. At the relevant time I went to shop situated near the house of accused. Then accused grabs me on my buttock. When I asked him why he did so, then he grabs on my breast. Then, when I asked him why he grabs my breast, then he slap me. Then, I reported the incident to my mother. Then, my mother along with my Borma and Kartik and Bir Singh went to the house of accused to enquire about the matter. While my mother asked accused why he did so, then accused assaulted my mother. I myself seen accused while assaulting my mother. While my borma (Moina Orang) asked accused why he assaulted such a woman having child, then he also assaulted my Borma upon her head with a dao. As a result, she sustained injury on her forehead. Accused also fell down my mother on a bamboo fencing and assaulted her. Then, my mother filed a case against the accused.

Thereafter, police took me for medical examination along with my mother and Borma. During investigation, my mother has submitted Photostat copy of my birth certificate (under objection as the copy of said birth certificate was not supplied to accused)."

During cross examination by defence PW3 stated as follows -

"I went to the shop of Ratul Sinte for bring some fair price items. During that time accused along with others were playing carom on the side of the shop. At that time, I went to the shop by their side. During that time shop was opened and other customers were in the shop. During that time when accused was playing carom when accused got somewhat back, then his hand touch my buttock. I did not raise any objection to the accused.

It is not a fact that I have not stated before police that "accused grabs

me on my buttock, when I asked him why he did so, then he grabs on my breast, then, when I asked him why he grabs my breast, then he slap me".

It is not a fact that I did not state above fact before police and for the first time today, I have narrated the case before the Court. It is not a fact that nothing happened as narrated by me in the Court today, actually, while they were playing, and when I went nearby themselves, accused's body somehow touch me and when I said something to him thereafter exchange of words between us, I went back to my home reported exaggerating to my family members, then, my mother, elder mother and other male members of my family went to the house of the accused, quarreled him and assaulted him causing serious injury on his head.

It is not a fact that I have suppressed the actual genesis of the case and giving false statement in the Court today.

I go to the shop regularly for bringing household item. There are no other shops in the side of the said shop and there are houses of other people. Nearby people have seen the incident which took place with me. I do not know the name of those persons. Those people are still in the village near the shop.

It is not a fact that my mother has filed the case as the accused persons have also filed a case against our family members.

It is not a fact that there is no occurrence took place as narrated by me today.

It is not a fact that accused did not touch my buttock or my breast on the day of occurrence. It is not a fact that later on by exaggerated and concocted the actual fact my mother has filed this false case against the accused.

I have not given any birth certificate to police."

13. PW4 the MO said in his examination in-chief as follows –

"On 24-08-2017 I was posted as In charge Dy Superintendent Chariduar CHC and on that day at about 8.50 PM, I examined Moina Orang, 25 years, female W/O Birsing Orang of village No.2 Miri Pathar, PS Chariduar, vide Emergency Hospital Registration No. 1725 - 1727, on being escorted and identified by WPC Dimpi Hazarika. On examination, I found the following:

Lacerated wound over right side of forehead about 6 cm in length.

I have also examined "X", 13 years, female, of village No.2 Miri Pathar, PS

Chariduar, found the following:

Tenderness seen over chest.

I have also examined Bijuli Orang, 25 years, female, W/O Sukun Orang of village NO.2 Miri Pathar, PS Chariduar, found the following:

Minor lacerated wound over left ring finger dorsal aspect.

All injuries are simple caused by blunt weapon.

Ext.1 is the medical report and Ext.1(1) is my signature."

During cross-examination by defence, the PW4 stated as follows -

"There is no case number in my report, Ext.1. I have not seen the police requisition in this case.

The injuries which I have mentioned may be caused by falling on any hard substance. Ext.1 is copied from the original medico legal Register of the hospital. I have not brought the original medico legal Register to the court. My report is dated 28-08-2017.

It is not a fact that my report, Ext.1 do not belongs to this case."

14. PW5 said in his examination in-chief as follows –

"I know the informant. I know the accused. Victim is my niece. The incident took place about 18 months ago at around 4.00 PM. At that time I was at my house. At that time, the daughter of informant went to the shop. Then the accused touch the buttock of the victim and also touch her body. She cried. My wife, informant and others hearing the cry went towards the girl. Hearing commotion I went to the spot and found my wife in injured condition. The people said that accused gave dao blow on the forehead of my wife. I noticed the cut injury and she was lying unconscious state. We brought the injured to the police station and then to the hospital. She received three stitches on her injury. My wife told me that accused gave dao blow."

During cross-examination PW5 said as follows -

"I do not know what occurrence took place while "X" went to the shop and after coming back to her home. The occurrence took place in the house of accused Rajesh Narah. I went to the house of accused. The relatives of Rajesh Narah were present. I do not know what happened in the house of accused as at that time I was in my house in stitching fishing net. After the occurrence I went to the place of occurrence. I do not know actually who assaulted whom.

Regarding the fact of touching the body of my niece by the accused, I heard from my co-villagers, but, I do not remember who told me this fact.

It is not a fact that nothing of that sort happened to my niece nor anybody told me about the said fact to me.

It is a fact that I did not state before police that when I asked my wife, she told me that Rajesh assaulted her with a dao on her forehead.

Police found my wife in unconscious state and I did not tell police in my statement that my wife was in unconscious state.

It is not a fact that accused never stab my wife on her forehead and she never received such kind of injury.

It is not a fact that without any reason, we the family members went to the house of accused Rajesh and assaulted him and his family members as a result, accused sustained injury. It is not a fact that to save ourselves from the same we have concocted this false case against the accused.

Accused also filed a case for the same incident in their house and the same is pending.

It is not a fact that no person told me anything about the incident which I am narrated today in the court.

It is not a fact that as we belong to same family and to save ourselves I am deposing falsely today.

I am also an accused in the case filed by the present accused. My brother Kartik, Sukur and his wife Bijuli are also the accused in the said case. That was the bazaar day."

15. PW6 stated in her examination in-chief as follows –

"On the day of incident, at around 4.30 PM, while returning from my work, I heard a commotion. I noticed wife of Bir Singh lying in an unconscious state on the road. I brought her to the house, gave her water. As my children are crying I went to my home."

Duirng cross-examination PW6 said that – "I do not know anything about the incident. I do not know what happened and who assaulted Moina."

16. PW7 stated in his examination in-chief as follows –

"I know the accused. I do not know the informant and victim. On the day of

occurrence in the evening when I came back from my work I my friends enquired from me whether I am aware regarding the quarrel took place in my village to which I replied that I do not know.

(At this stage, the witness is declared hostile by the prosecution)

During cross by prosecution he stated as follows -

"It is not a fact that I did not state before police that " today on 24/8/2017 at around 4.00PM Smti "X" aged 13 years went to the shop to purchase articles then another co-villager Ranjot Narah @ Sanju wrongfully restrained her on the road, put hand on her buttock, also push and pulled the girl and made obscene gestures and also tried to outrage her modesty. Hue and cry took place, then aunt Smti Moina Orang came forward to rescue but she was injured and the mother of the victim was assaulted. I was present at the place of occurrence at the time of occurrence."

It is not a fact that I have deposed falsely today for the sake accused."

During cross by defence PW7 stated as follows –

"I do not know anything about the incident. I did not state to police as narrated to me by learned Addl. PP in my above statement. Today I have not state anything falsely. Accused is not my relative. I have not stated anything falsely today."

17. PW8 the IO stated in his examination in-chief as follows –

"I know the accused. I know the informant. On 24-08-2017 I was posted at Chariduar PS as 2nd Officer. On that that Smti Bijuli Orang, w/o Sukur Orang of village No.2 Miripother under Chariduar PS lodged FIR against the accused stating that accused wrongfully restrained and misbehaved her daughter and when the complainant went forward to stop, the accused assaulted her and another and as a result they got grievous injury. The OC, registered the FIR and endorsed the case to me for investigation. During investigation I visited the place of occurrence, recorded the statement of witnesses, I forwarded the victims for examination by doctor and collected the medical report. I prepared the sketch map of the place of occurrence, arrested the accused and forwarded him to the Court. After completion of investigation, finding material against the accused, I submitted charge sheet against the accused Rajesh Narah @ Sanju under Section 8 of POCSO Act, r/w Section 341/323 of IPC. Ext.2 is the sketch map of the place of occurrence and Ext.2(1) is my signature. Ext.3 is the charge sheet and Ext.3(1) is my signature.

I have recorded the statement of witness Raju Munda (PW7). The said witness stated before me that "today on 24/8/2017 at around 4.00PM Smti "X" aged 13 years went to the shop to purchase articles then another co-villager Ranjot Narah @ Sanju wrongfully restrained her on the road, put hand on her buttock, also push and pulled the girl and made obscene gestures and also tried to outrage her modesty. Hue and cry took place, then aunt Smti Moina Orang came forward to rescue but she was injured and the mother of the victim was assaulted. I was present at the place of occurrence at the time of occurrence."

In cross-examination PW8 stated as follows –

"I received the FIR on 24-08-2017 at 10 PM. The victim stated before me that the said occurrence took place while she was going to the grocery shop. I have not drawn any sketch map of the place of occurrence i.e. grocery shop and nearby area. I have not visited the grocery shop. As per Ext.2 the place of occurrence is near the house of Ameswar Narah.

Ext.A is the forwarding report of accused Rajesh Narah @ Sanju. Ext. A(1) is my signature. In Ext.A I wrote that the accused was injured and he should be treated by jail doctor. Ext.A (2) is my noting in Ext.A. There was a cross case filed by the accused persons against the complainant party. In that case, the injury report of accused Rajesh Narah is submitted. The cross case was investigated by another police officer. PW1 Bijuli Orang did not state before me that "While my daughter looked to the accused by turning her head, accused grabs her breast. When my daughter questioned accused why he grabs her breast then, accused slap her. Again she asked accused that her parents have brought up her in very well manner, whey he slap her. Then accused again touched her breast, the accused all together grabs her breast for three times".

The said witness also not stated before me that "when I went to the house of accused to enquire about the matter and while I asked him why he did such act to my minor daughter, then accused fell her down on a bamboo fencing and also assaulted him, during that time, Moina Orang told accused why he assaulted a woman like me having child, then, accused assaulted Moina Orang by means of a dao caused her injury on her head".

PW3 "X" did not state before me that "accused grabs me on my buttock, when I asked him why he did so, then he grabs on my breast, then, when I asked

him why he grabs my breast, then he slap me".

It is not a fact that PW7 Raju Munda did not state before me as I stated in my examination-in-chief.

It is not a fact that without any material I have submitted charge sheet against the accused."

18. DW1 stated in his examination in-chief as follows –

"Today I have appeared in the Court after receiving summons. I have a grocery shop in front of my house at No.2 Miripothar. I know the accused. He is my co-villagers. The incident took place on 24-08-2017 at around 4.00 PM. On that day, myself and accused were playing carom near my shop and Bablu Narah was also there. Then one girl namely "X" came to my shop for purchasing some articles. I went inside the shop to give the articles and then, while accused was striking the striker of carom, he moved backward and his person slightly hit the girl. The girl rebuked the accused saying that whether he has not seen her. Accused replied and thereafter an altercation took place between the girl and the accused. After giving the articles, asked the girl to leave. Later on, at around 5.30 PM family members of the girl came to the house of accused and assaulted the accused. They also assaulted the accused with 'balam' (spear like weapon to catch fish). As a result, accused received injuries on his face and head. Thereafter, both parties, filed cases against each other."

During cross by prosecution DW1 stated as follows –

"Accused is my friend. We call the accused by the name Sanju. My house and shop is not attached to each other. My shop is near the road and my house is about 20 feet away from the shop. The length of my house will be about 30 feet which stretches backward. Nearby my shop is the house of Ameswar Narah. Accused often come to my shop to play carom. Today, I have come to the court with the accused.

It is not a fact that accused paid my fare for coming to the court and also gave me money. When I entered into the shop, the incident occurred.

It is not a fact that when I went inside the shop, the incident occurred behind my back. It is not a fact that as the incident occurred behind my back I am not aware about the incident. It is not a fact that as I was inside the shop for taking the articles (as I stated in my examination in-chief), it was not possible/convenient

for me to notice the incident, which took place in front of my shop or near the shop.

After entering into my shop altercation took place between the girl and accused.

It is not a fact that I have not witness what happened between the accused and the girl and as the accused is my friend, I have deposed falsely before the Court concealing the real fact to save the accused."

19. DW2 stated in his examination in-chief as follows –

"The incident took place about two years back i.e. on 24-08-2017. We were playing carom board in front of the shop of Ratul Sinte. Myself, Ratul and accused were playing at around 4.00 PM. At that time "X" came to the shop of Ratul from backside of accused for purchasing some articles. While accused was striking the striker of carom, he moved backward and his person slightly hit the girl. The girl rebuked the accused. The accused replied and thereafter an altercation took place between the girl and the accused. We pacified the girl and explained that while playing unintentionally the person of accused dashed against her. We asked Ratul to give the girl what she wants. The girl left the place after taking the articles. Later on, we heard chaos in the house of accused. The family members of the girl came to the house of accused and assaulted the accused and others."

During cross by prosecution, DW2 stated as follows –

"Accused Sanju is my friend and co-villagers. We used to play carom everyday whenever we get time. At the time occurrences, when the girl came and incident occurred all three of us were playing.

It is not a fact that at the time of incident Ratul Sinte was inside the shop to bring the articles for sale. It is not a fact that I was not actually present at the place of occurrence and was not playing carom as I said today, when the victim came and incident took place. It is not a fact that I did not notice the incident as I was not present at the place of occurrence on 24-08-2017. It is not a fact that today I have deposed falsely regarding the incident as narrated in my examination in-chief.

After hearing chaos we went to the house of accused. My house is about 500 meter away from the shop of accused. It is not a fact that I came to the house of accused after hearing hulla from my house. Ratul Sinte is also a friend of mine. It is not a fact that as accused is my friend, hence, today I have deposing falsely to save him."

20. The charge under section 7 of the Protection of Children From Sexual Offences Act , 2012 provide the definition of 'sexual assault' as follows;

"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."

21. I would like to place the observation made by the Hon'ble Gauhati High Court in **Gautam Das and anr vs State of Tripura** (reported in **2011 (2) GLT 266)**;

"(15) What follows from the above discussion is that the counsel for the prosecution or the defence, as the case may be, for the purpose of contradicting a witness with his previous statement, is required to bring that portion of the statement, which is sought to be contradicted, to the notice of the witness, inviting his response to such previous statement. If he admits his previous statement, no further proof is necessary, if he does not admit, the practice, generally followed, is to admit it subject to proof thereof by the Investigating Officer. If the Investigating Officer, relying on the case diary, asserts that the witness, in question, did make the statement (which is contradictory to the statement made in the Court on oath), the court shall, then, mark the same as an exhibit. Similarly, if an omission, on the part of a prosecution witness, is sought to be proved, then, the defence or the prosecution, as the case may be, may suggest to the concerned witness that he did not make, at the time of giving statement before the Investigating Officer, any such statement, which he has made in the Court. Such suggestion, if denied by the witness concerned, is to be proved by asking the Investigating Officer, during his examination, as a witness to the effect as to whether the witness concerned had made such a statement before him or not. If the Investigating Officer relying on the case diary, answers in the negative, then, the statement made by the witness, on oath, in the Court, can be treated as omission."

22. In **Tapan Bhowmik and Ors. VS-- State of Tripura**. (reported in **2002**(3) GLT 306). the Hon'ble Gauhati High Court observed as follows;

[&]quot; (7) It is settled proposition of law that the testimony of a witness recorded in his

examination-in-chief and cross examination together constitute the oral evidence. The testimony of the oral evidence of a witness recorded during trial in resilience of his earlier statement recorded under 161 Cr. P. C. and the testimony of a witness during trial contradicting his earlier statement recorded under 161 Cr. P. C. cannot be equated with the deposition of a witness recorded during trial which are not available rather missing in his 161 statement recorded during investigation. The former two circumstances should be termed to be a contradiction within the meaning of section 145 of the Evidence Act while the third contingency simply renders the trustworthiness of such witness to be weaker but cannot altogether be discarded. Before putting reliance upon such statements some sort of acceptable corroboration must be there."

- 23. In the present case the FIR discloses two occurrence which took place within one hour. The first incident is regarding misbehaving the daughter of informant by the accused and the other is when the informant with family members went to the house of accused to question the accused as to why he misbehaved the victim earlier. In the FIR form it is mentioned that the occurrence took place on 24/8/2017 at 4.00PM and the information received at 5.30PM. The distance between the place of occurrence and the Police Station is 15 kilometer.
- 24. Here I would like to discuss the first incident which took place between the accused and the victim (PW3). The defence during cross examination of the victim has suggested to her that while she was going to the shop by the side of accused the hand of accused touched her buttock to which she did not objected. This suggestion on the part of defence towards the victim confirm that prior to the incident which took place in the house premise of accused, another incident took place earlier near the shop where the victim went for purchasing some article.
- 25. The victim denied during cross examination that an altercation took place between her and the accused and thereafter she exaggerated the facts to her family members. The victim is a thirteen years old girl. She has admitted that in front of the shop of Ratul Chinte the occurrence took place. If there is any intention on the part of the victim to exaggerate the happenings and create a concocted story she would never admit presence of other persons at the time of occurrence. At the age of

thirteen a child can very well judge as to what is meant by misbehavior concerning his/her body. The victim has clearly mentioned as to what the accused did to her and in presence of others.

The argument of the defence that the victim in cross examination admitted that she did not raise objection on touching her buttock by the accused and the IO confirmed that the victim did not state about touching her buttock, breasts and slapping proves only implication of the accused falsely, cannot be accepted for more than one reasons. The victim (PW3) immediately after the incident of touching her private parts informed the relatives. The PW1 and PW3 corroborated to the facts. The defence itself suggested to the PW3 that arguments took place. Then question arise, why the victim would argue with the accused if she has not faced with some sort of offence committed towards her. Further the defence has not followed the process for proving the contradiction in the statement of the PW3 made before the court and before the investigating officer.

26. Another factor is to be noted in the present case is the time taken for reporting the matter to the police. Generally, when there is delay in reporting the matter to the police, it is to be considered whether certain facts are added or facts are embellished/ colored before reporting the matter. From the chronology of events of the present case, no such intention could be noticed. The incident occurred at 4.00PM, thereafter the family members went to the house of the accused to guestion regarding the incident and thereafter the police is informed. The distance between the police station and the place of occurrence is 15 kilometers. It is unlikely, that a girl of 13 years would conspire with her mother during the journey time to the police station to implicate the accused in a false case of sexual assault. It should be noted that PW1 and PW2 went to the house of the accused just after coming to know about the incident of misbehaving the victim is quite spontaneous. The PW2 has not tried to colour the facts. The PW2 said that when family members went to the house of the accused to enquire, a marpit took place between both sides. PW2 said that she do not know who assaulted her. The evidences of the PW1 and PW2 cannot be discarded as because they are relatives of the victim. Their presence is natural. The minor girl would naturally report matters to her mother and relatives.

27. It should be remembered that when the incident took place, the PW3 was alone. The other prosecution witnesses were not with her. The PW3, a girl of 13 years (a school going girl) was subjected to physical assault. The accused first touched her buttock and then her breasts. The parts of the body where the accused put his hands are private parts of a person. Repeated touching of any of these parts of a girl by a grown up man can be termed as touching the parts with sexual intent.

Further, the evidence on record does not impress upon the court to presume otherwise, including mental state of the accused.

- 28. The defence has examined the DW1 and DW2 as witnesses to the incident which took place between the accused and the victim. It is proved that the DW1 and DW2 are the friends of the accused and they regularly meet to play in the shop. Hence, the evidence of DW1 and DW2 cannot be accepted.
- 29. Regarding the offence of wrongful restrain and voluntarily causing hurt to the PW1, PW2 and PW3. It is to be noticed that the PW2 in her cross examination said she do not know who committed the injury and by what means. The PW2 said that her family members went to the house of the accused to enquire and then a marpit took place between both sides. The PW2 has not corroborated regarding the use of weapon by the accused as mentioned by PW1 and PW3.
- 30. The judgments so cited by the defence are not applicable in the present case, particularly for the defence.
- 31. In view of the above, the accused is convicted under section 8 of the POCSO Act. However, the accused is not found guilty for the offence under 341/323 of IPC. Accordingly, accused is acquitted from the charges under Section 341/323 of IPC.
- 32. The Offence is committed against child. Therefore the accused is not considered under the Probation of Offenders Act.
- 33. The accused is heard on sentence under the provision of Section 235(2) of CrPC. He submits that he is innocent.

34. The accused is sentenced to undergo rigorous imprisonment for a period of 3 (three) years and pay fine of Rs. 3000/- (rupees three thousand). In default of payment of fine, accused shall undergo further rigorous imprisonment for a period of 2 (two) months.

35. The period of detention undergone by the accused, if any, be set off from the period of imprisonment.

36. It is seen that no recommendation is made in the record for giving compensation to the victim. Hence, it is hereby recommended to give appropriate compensation to the victim by the District Legal Service Authority, Sonitpur, Tezpur.

37. Free copy of judgment be furnished to the convict.

38. Another copy of judgment be sent to the learned District Magistrate, Sonitpur, Tezpur as per provision of Section 365 of CrPC and to the Learned Secretary, District Legal Service Authority, Sonitpur, Tezpur.

Given under my Hand and Seal of this Court on this the **17**th day of **December, 2019**.

(R Baruah) Special Judge Sonitpur,Tezpur.

Dictated and corrected by me.

(R Baruah) Special Judge, Sonitpur, Tezpur

Dictation taken and transcribed by me:

Smt. Pori Das, Steno.

ANNEXURE

Witnesses examined by the prosecution:

- 1.PW1 Smti Bijuli Orang,
- 2.PW2 Smti Moina Orang,
- 3.PW3 Miss "X"(victim),
- 4.PW4 Dr Hemanta Mech,
- 5.PW5 Sri Bir Singh Orang,
- 6.PW6 Smti Rameswari Orang,
- 7.PW7 Sri Raju Munda &
- 8.PW8 SI Dwijomoni Sarma (IO).

Witnesses examined by the Defence:

- 1. DW1 Sri Ratul Chintey &
- 2. DW2 Sri Bablu Narah.

<u>Documents exhibited by the prosecution:</u>

- 1. Ext. 1: Medical report,
- 2. Ext. 2: Sketch map,
- 3. Ext. 3: Charge sheet,

<u>Documents exhibited by the Defence:</u>

1. Ext. A: Forwarding report of accused Rajesh Narah @ Sanju.

(R Baruah) Special Judge, Sonitpur,Tezpur.