# IN THE COURT OF ADDL. SESSIONS JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Addl. Sessions Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.17/2015

U/S-10 of POCSO Act, 2012

State of Assam

-Versus-

Sunil Mazumdar

s/o-Late Bhupen Mazumdar

resident of vill -Rampur

P.S.Palashbari

Dist- Kamrup

-----Accused

Appearance:

Mr. A.K. Baruah. Addl. Public Prosecutor

-----for the State

Sri Debajit Kalita and Smti. Barnali Kalita, Advocates

-----for the accused

Date of evidence: 22.06.2016, 22.07.2016, 14.12.2016, 06.03.2017,

17.05.2017, 27.03.2018, 04.08.2018 and 09.08.2018

Date of Argument:21.08.2018

Date of Judgment:30.08.2018

#### **JUDGEMENT**

- 1. The Prosecution case in brief is that—on 08.04.2013 at about 10.30 p.m while the minor daughter of the informant—Sri Ranjit Kalita, was returning home from Dadhi Mathan Akhra held at Rampur Sanatan Mandir along with her friend aged about 11 years (d/o- Sri Nayan Kalita), then on the way to home, the accused—Sri Sunil Mazumdar committed sexual assault upon them. But somehow they managed to escape from the hands of the accused. And hence, this FIR.
- 2. On the basis of the said ejahar, Palashbari P.S Case No. 103/2013 U/S-376 (2f)/511 IPC was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S-376 (2f)/511 IPC.
- 3. The case was duly committed and this Court after hearing both the parties, framed charges U/S- 10 of the POCSO Act, 2012 against accused—Sunil Mazumdar. The aforesaid charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined as many as eight (8) numbers of witnesses including the informant, the victim girls, Magistrate and the I/O. Defence side also examined four (4) witnesses.

### 5. **POINT FOR DETERMINATION**

(I) Whether the accused person on 08.04.2013 at 10.30 p.m at village Rampur under Palashbari P.S committed aggravated sexual assault on the minor victim girls and thereby committed an offence punishable U/S 10 of the POCSO Act, 2012?

#### 6. **DISCUSSION, DECISION AND REASONS THEREOF**

Perused the record. Prosecution examined 8 (eight) witnesses. Let us go through the evidences available on record.

- 7. P.W.1, Sri Ranjit Kalita, the informant of this case has stated in his evidence that the incident took place on 08.04.2013 at about 10.30 p.m at village Rampur Talukdarpara. On that day in the village Namghar, Akhora of Dadhimothan was going on and his daughter (the Prosecutrix no.1) and another girl of his neighbourhood (Prosecutrix no.2) were participating in that Akhora and after the Akhora they had taken the dinner there. After dinner, the accused offered and insisted them two or three times to drop them at their homes. Accordingly, they agreed and started for home with the accused. But on the way to home, the accused held the hands of both Prosecutrix and upon reaching a dark place on the way near another temple, located at Tiniali chowk, the accused inserted his hands inside the blouse of the Prosecutrix no.2 and also tore away her blouse. Both the Prosecutrix resisted such acts and somehow the Prosecutrix No.2 removed his hands and ran away. Then, Prosecutrix no.1 whose hands were also held tightly by the accused, she removed her hands by pinching him and ran away another side. After going a little distance, when both the Prosecutrix met each other, then one boy from their village namely, Dilip Kalita saw them and he left them at their homes. This witness stated that his daughter (Prosecutrix No.1) informed him about the incident. Thereupon he went to the house of Sri Nayan Kalita (P.W.4) to discuss the incident. He also revealed that Prosecutrix No.1 was born in the year 2002 and at the time of incident, she was reading in class-VI and Prosecutrix No.2 was reading in class-VII. Thereafter, P.W.1 lodged the ejahar. Ext.1 is the ejahar. Ext.1 (1) is the signature of the informant.
- 8. In his cross-examination, P.W.1 has stated that he has not seen the incident as he was at home at the time of the incident. P.W.1 has further stated that he knows the accused person, who belongs to his village. P.W1 also stated that the accused regularly takes alcohol but he did not know as to whether on the day of the incident the accused had taken alcohol or not.

- 9. P.W.2, the Prosecutrix No.1 has stated in her evidence that she knows the accused as he is from her village. She stated that on 08.04.2013 at about 10 p.m, she along with another girl (Prosecutrix No.2) had gone to Rampur Sanatan Mandir for rehearsal of Dadhimanthan. Then, at the end of rehearsal the accused insisted to drop them at home and subsequently, the accused came to drop them home. But, on the way when they reached near a closed shop, the accused inserted his hand inside the blouse of Prosecutrix No.2. Thereafter, her friend (Prosecutrix No.2) forcefully removed his hand and she ran away. After that, the accused also grabbed her hands but she also removed his hands and ran away in another direction. The PW.2, (Prosecutrix No.1) has stated that at the time of the incident, the street lights of the road were on and since the shop was closed that particular area was somewhat dark. When she saw that the accused was talking to another person named Anil, then taking advantage of the conversation of the accused with the said person, her friend (Prosecutrix No.2) came running towards her and they again meet each other and started going home and on the way they met a co-villager named— Dilip and they requested him to drop them home. Thereafter, Dilip dropped them in their houses. After reaching home, this witness narrated about the incident to her parents and her friend, (Prosecutrix No.2) also narrated about the incident to her mother. And subsequently, after discussing, both of the Parents of Prosecutrix No.1 and Prosecutrix No.2 lodged the instant case against the accused. P.W.2, (Prosecutrix No.1) has stated that Police examined her with regard to the incident and also recorded her statement and on 19.04.2013 she was taken by police to the Court for recording her statement. Ext.3 is the said statement made before the Court U/S—164 Cr. P.C and Ext.3 (1) and Ext. 3 (2) are her signatures. She also stated that at the time of incident she was studying in class VI and her age was 10 years.
- 10. In her cross-examination, she deposed that there was arrangement for food at the venue and after the rehearsal, they have taken roti and the accused had also taken some food. She stated that the accused is a habitual consumer of liquor but on the day of the occurrence, she did not get any impression of his having taken alcohol.
- 11. P.W.3, the Prosecutrix No.2 has stated in her evidence that she knows the informant and the accused as they hail from same village. She stated that on 08.04.2013 at about 10.30 p.m, she along with her friend (Prosecutrix No.1) had gone

to Rampur Sanatan Mandir for rehearsal regarding Dadhimanthan. Then, at the end of rehearsal she along with her friend (Prosecutrix No.1) and some other people had taken food and after taking food, the accused insisted to drop them at home and subsequently the accused came to drop them home. P.W.3 further stated that initially, the accused was coming behind them but after coming a little distance, he (the accused) came near them and held the hands of both of them. Accordingly, the accused was walking in the middle by holding the hands of Prosecutrix No.1 and Prosecutrix No.2 and they were walking on both the sides. But on the way, after coming a little distance, when they reached near a closed shop, the accused inserted his hand inside the blouse of Prosecutrix No.2. P.W.3, (Prosecutrix No.2) further stated that she was wearing a frock as a blouse and mekhela chador. After that, some scuffle was taken place between the accused and the Prosecutrix No.2 and in that process, her blouse was torn. Thereafter, somehow she managed to remove his hand and then ran away. After that the accused also grabbed the hands of P.W. 2 (Prosecutrix No.1) but she also forcefully removed his hands and ran away in another direction. The P.W.3, (Prosecutrix No.2) has stated that at the time of the incident the street lights of the road were on and since the shop was closed that particular area was somewhat dark. When she saw that the accused was talking to another person named Anil. Then taking advantage of the conversation of the accused with the said person, she came running towards her friend P.W.2 (Prosecutrix No.1) and they again meet each other and started going home and after going a little distance, they met a co-villager named— Dilip and they requested him to drop them home. Thereafter, Dilip dropped them in their houses. After reaching home, this witness narrated about the incident to her mother and her friend, (Prosecutrix No.1) also narrated about the incident to her parents. And subsequently, on the next day after discussing, the father of Prosecutrix No.1 lodged the ejahar against the accused. P.W.3 (Prosecutrix No.2) has stated that Police examined her with regard to the incident and also recorded her statement and on 19.04.2013 she was taken by police to the Court for recording her statement. Ext.4 is the said statement made before the Court U/S—164 Cr. P.C and Ext.4 (1) and Ext. 4 (2) are her signatures. She also stated that at the time of incident she was studying in class VII and her age was 11 years.

12. In her cross-examination, P.W.3 has deposed that the rehearsal for Dadhimanthan ended at about 10.30 p.m and after ending the rehearsal, there was arrangement for food at the venue and they have taken food, but she did not know

whether the accused had taken food or not. She stated that the accused is a habitual consumer of liquor but on the day of the occurrence, she did not know whether the accused had taken alcohol.

- 13. P.W.4, Sri Nayan Kalita has deposed in his evidence that he knows the informant as well as the accused of this instant case. He stated that the occurrence took place on 08.04.2013 and on that day he was not at home. He only knew about the incident from his daughter (Prosecutrix No.2). He stated that at the time of incident, his daughter was aged about 12 years. He further stated that both the girls were left by one—Dilip Kalita in the house of Sri Ranjit Kalita, (the father of the Prosecutrix No.1) and thereafter, Ranjit Kalita dropped his daughter (Prosecutrix No.2) at her home.
- 14. In his cross-examination, P.W.4 has stated that he knew the incident on the basis of what he heard from her daughter, (Prosecutrix No.2). He stated that he did not know if the accused takes alcohol regularly and also stated that he did not know whether on the day of the incident, the accused had taken alcohol or not.
- 15. P.W.5, Sri Dilip Kalita has deposed in his evidence that he know both the accused and the informant. He stated that the incident took place on 08.04.2013 and on that day at about 9.50 pm while he was returning from the house of his 'Jethima', he saw the daughters of Ranjit Kalita and that of Nayan Kalita running. On asking the girls as to what had happened, they did not say anything, thereafter when he lit the torch in the darkness, then he saw one person, whom he did not recognize. Thereafter, the girls requested P.W.5 to drop them home and accordingly, he left them in the house of Ranjit Kalita. He also stated that on the next day, he came to know that the accused had tried to do some bad act upon both the prosecutrix. He also stated that both the Prosecutrix were aged about 11-12 years.
- 16. In his cross-examination, he deposed that he heard about the incident after leaving both the Prosecutrix in the house of Ranjit Kalita. He also stated that he did not see the accused at the place of occurrence.
- 17. P.W.6, Sri Prafulla Kalita has deposed in his evidence that he knows the informant and the accused of this case. He has stated that he heard about the incident on the next day that the accused had committed some bad act upon the informant's

daughter and the daughter of one Nayan Kalita. Further, he stated that both the Prosecutrix are minor girls and on the day of the incident they had gone to do Akhara in connection with Dadhimanthan.

- 18. In his cross-examination, he stated that his knowledge about the incident is based on what he had heard from another.
- 19. P.W.7, Smti. Tripti Ari, is the Judicial Magistrate, who has recorded the statement of the victim girls i.e. Prosecutrix No.1 and Prosecutrix No.2 U/S-164 Cr. P.C. In her deposition, she has stated that she has recorded the statements of said two victim girls U/S-164 Cr. P.C of Palashbari P.S Case No. 103/2013 U/S-376 (2f)/511 IPC on the day itself i.e. on 19.04.2013. Ext. 3 is the statement of the Prosecutrix No.1 and Ext. 3(1), Ext.3 (2) are the signature of the Prosecutrix No.1 and Ext.3 (3) is her signature. Ext.3 (4) is the signature of the WHG Archana Boro who had brought and escorted the victim. Ext.4 is the statement of Prosecutrix No.2. Ext.4 (1) and 4(2) are the signatures of Prosecutrix No.2. Ext.4 (3) is her signature. Ext.4 (4) is the signature of Archana Boro who had brought escorted the victim.
- 20. P.W.8, Sri Dhruba Jyoti Borah, is the I/O of this case, who has investigated the case. In his deposition, he has stated that after receiving the FIR for investigation, he went to the place of occurrence, prepared a sketch map, examined the witnesses and he also examined both the Prosecutrix. He also deposed that the victims i.e Prosecutrix No.1 and Prosecutrix No.2, were produced before the Magistrate on 09.04.2014 for recording their statement U/S-164 Cr. P.C. P.W.8, further stated that after completion of investigation, he submitted charge-sheet against the accused--Sunil Mazumdar U/S-376 (2f)/511 IPC. Ext. 1 is the FIR, Ext. 1(2) is his signature. Ext.2 is the printed form of FIR, Ext.2(2) is the signature of Badrul Islam the then O/C, Palashbari Police Station. Ext.5 is the sketch map. Ext.5(1) is his signature. Ext.6 is the charge-sheet. Ext.6 (1) is his signature.
- 21. At the close of Prosecution evidence, statement of the accused person U/S-313 Cr. P.C has been recorded. He denied committing the offence and expressed his desire to adduce defence evidence.
- 22. D.W.1, Sri Robin Kalita, has deposed in his evidence that he do not have any knowledge about the incident. He further deposed that after police arrested

the accused, he only heard that the accused had gone to drop two minor girls to their house after a function (Akhora) in the village.

- 23. In his cross-examination, D.W.1 had stated that he did not see the incident by himself as he was at home on the day of the incident.
- 24. D.W.2, Sri Sunil Mazumdar (the accused), has deposed in his evidence that on the day of incident i.e. on 18.04.2013 at about 8/9 p.m he had gone to drop the two minor girls as committee had given him the responsibility. D.W.2 stated that he was in drunken condition at the time of incident. He further stated that on the way to home near neighbourhood village of the minor girls, he slipped and fell down on the 'kutcha' road. After that the minor girls went home. On the next day, he came to know that the minor girls had given a case upon him.
- 25. In his cross-examination, D.W.2 had stated that he does not know the house of the victim girls.
- D.W.3, Sri Shiva Prasad Kalita, has deposed in his evidence that on the day of incident i.e on 08.04.2013 a Dadhimanthan Akhora rehearsal was held at Rampur Sanatan Dharma Mandir in the house of Bapu da. Generally, after completing of rehearsal the little kids were to be dropped to their houses and on the day of incident, the accused (Sunil Mazumdar) went to drop the minor daughter of one Nayan Kalita and another girl after receiving the responsibility from him. Thereafter, he heard that some incident had taken place. He heard that the accused slipped and fell down on the road. He had given the responsibility to the accused only because he agreed to drop the two minor girls'. But he does not have the knowledge of taking alcohol by the accused.
- 27. In his cross-examination, D.W.3 had stated that he did not see the incident by himself, he only heard about the incident.
- D.W.4, Sri Manas Kalita, has deposed in his evidence that on the day of incident i.e on 08.04.2013, there was a Dadhimanthan Akhora rehearsal and after the completion of rehearsal, the accused had gone to drop the two minor daughters of Nayan and Ranjit to their homes. He was in a drunken condition. And on the next day of the incident, he came to hear that the accused had slipped and fell upon the two

minor girls' and the boys of a nearby shop dropped him to his house. He does not know the names of the boys who had dropped the accused to his home.

- 29. In his cross-examination, D.W.4 had stated that he did not see the incident by himself but he heard about the incident from others.
- 30. I have perused the evidences on record and have heard the arguments of the Learned Counsels of both the sides. Defence side submitted written argument also.
- 31. Learned Counsel for the accused submitted that the case is entirely false and baseless. And that the prosecutrix No2 is not below the age of 12 years as required u/s 9 (m ) of the POCSO Act, 2012. He further submitted that the prosecutrix no 1 did not implicate the accused person of committing any sexual assault upon her. She has deposed clearly that the accused was only tightly holding her hands and did nothing to her.
- 32. After going through the evidences on record , it is seen that except the victim girls , there are no eye-witnesses to the incident. But , immediately after the incident , the two prosecutrix /victims met pw-5 on the way, who dropped them in their home and on reaching home, they informed their parents , which is corroborated by pw-5 as well as P.Ws. No. 1 and 4 ( guardians of the victims).
- According to prosecutrix no1 , on the night of occurrence, while she and prosecutrix no 2 were returning home from Rampur Sanatan Mandir after rehearsal for Dandhimanthan, the accused insisted on dropping them home . But , on the way near a closed shop where it was dark, the accused inserted his hand inside the blouse of prosecutrix no 2, who removed his hand and ran away. This witness further stated that the accused grabbed her hands also but she also managed to remove his hand and fled away in another direction. Thereafter, they both meet each other and on their way towards home, they met one –Dilip (pw-5) and requested them to drop in their houses. Dw-5 dropped them in their houses . Pw-2 narrated the incident to her parents while pw-3 told her mother.
- 34. Similarly, Prosecutrix No.2 (PW-3) is the minor victim girl. Her evidence is that the accused insisted on dropping her and her friend (pw-2) in their houses on the

night of occurrence. The accused was walking in the middle by holding their hands on both sides. According to this witness, after coming for some distance, when they reached a closed shop, the accused inserted his hand inside her blouse. It is in the evidence of pw-3 that some kind of scuffle had taken place between them and her blouse got torn. But, she could somehow remove his hand and ran away. She has fully supported the evidence of Pw-2 and confirmed that the accused also caught hold of the hand of pw-2 but she managed to run away and after running for some distance both of them meet each other. Then, on the way to their homes, they met pw-5 and requested him to drop them in their houses. And on reaching their houses, pw-2 stated the incident to her parents while pw-3 told her mother. Therefore, P.W.2 and P.W.3 have fully corroborated with each other and have fully supported the allegations made against the accused in the ejahar.

- 35. In the backdrop of the evidences of these two minor witnesses, let us go through the evidences of other prosecution witnesses to find out whether there is any noticeable contradiction or whether the other witnesses have narrated the story as alleged by the prosecutrix no 1 and no2. PW-5 fully supported the versions of pw-2 and PW-3 . His evidence is that on that very night of occurrence while he was returning from the house of his 'Jethima', he saw these witnesses running and they asked him to drop them in their homes . He then left them in the house of pw-1 . And on the next day , pw-5 heard that the accused did some bad acts with them.
- 36. It is in the evidence of pw-4 that he heard about the incident from his daughter (pw-3 ) and his daughter was aged about 12 years at the time of incident . He confirmed that both the victim girls were left by pw-5 in the house of pw-2 and her father ( pw-1 ) dropped his daughter at her home .
- 37. In the case , in hand , the prosecutrix no 2 has been consistent on the material particulars with regard to the incident that on the date of occurrence she was sexually assaulted by the accused person. She also said so, before the Magistrate when her statement was recorded u/s 164 Cr. P.C and before the police when her statement was recorded u/s 161 Crpc and even at the time of deposing before the court. The evidences of the victim girls are cogent and reliable. There cannot be any doubt to disbelieve the evidences of the victims.

- 38. There is no any evidence that the informant or any of the family members of the victims have any quarrel or enmity with the accused or any of the family members of the accused to falsely implicate him in such a shameful act by involving their own minor daughters in the allegation. So, the evidences of the P.Ws are found to be reliable.
- 39. Defence has taken the plea that Procedurix no 2 had attained 12 years on the date of occurrence. It is also argued that section 10 of the POCSO Act, 2012 is not applicable in this instant case.
- 40. Let us go through Section 9 of POCSO Act, 2012 to find out if the present offence attracts the section.

## (9) Aggravated Sexual Assault -

- (a) Whoever, being a police officer, commits sexual assault on a child—
  - (i) Within the limits of the police station or premises where he is appointed; or
  - (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) when the person is known or identified as a police officer; or
- (b) Whoever, being a member of the armed forces or security forces, commits sexual assault on a child—
  - (i) within the limits of the area to which the person is deployed; or
  - (ii) in any areas under the command of the security or armed forces; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) where he is known or identified as a member of the security or armed forces; or
- (c) Whoever being a public servant commits sexual assault on a child; or
- (d) Whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being

- in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or
- (e) Whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or
- (f) Whoever being on the management or staff of an educational institution, commits sexual assault on a child in that institution; or
- (g) Whoever commits gang sexual assault on a child; or
- (h) Whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) Whoever commits sexual assault causing grievous hurt or causing injury to the sexual organs of the child; or
- (j) Whoever commits penetrative sexual assault on a child, which—
  - (i) Physically incapacitates the child or causes the child to become mentally ill or to become mentally unfit to perform regular tasks, temporarily or permanently; or
  - (ii) Inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, mentally ill or mentally unfit to perform regular tasks; or
- (k) Whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or
- (I) Whoever commits sexual assault on the child more than once or repeatedly; or
- (m) Whoever commits sexual assault on a child below twelve years; or
- (n) Whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic

- relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or
- (o) whoever being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or
- (p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) Whoever commits sexual assault on a child knowing the child is pregnant;or
- (r) Whoever commits sexual assault on a child and attempts to murder the child; or
- (s) Whoever commits sexual assault on a child in the course of communal or sectarian violence; or
- (t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force, is said to commit aggravated sexual assault.
- (u) whoever commits sexual assault on a child and who has been previously convict of having committed any offence under this act or any sexual offence punishable under any other law for the time being in force; or
- **10.** Punishment for Aggravated Sexual Assault-- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.
- 41. It is true that in the present case , there is no documents like Birth Certificate or Age Certificate issued by the School Authority available on record to prove that the

prosecutrix no 2 was below 12 years of age on the date of commission of the offence. Evidence of her father ( PW-4) clearly reveals that his daughter had attained 12 years on the date of occurrence. Hence, I find force in the argument of the defence side that at the time of occurrence, the prosecutrix no 2 (pw-3) cannot be considered to be below 12 years in age. Again, it is well proved from the evidences of the P.Ws that there was no sexual assault on prosecutrix no.1. Hence, the case brought against the accused does not come u/s 10 of POCSO Act, 2012. But, there is clear allegation of sexual assault on prosecutrix no 2. This attracts section 8 of POCSO Act, 2012.

- 42. Learned Counsel for the accused drew the attention of the court to section 30 of POCSO Act. As per **Section 30 of POCSO Act**, the culpable mental state of the accused should be presumed .The section reads as follows –:
  - (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.
- 43. Learned Defence Counsel further submitted that most of the P.Ws have deposed that the accused is a habitual alcoholic. He contended that the D.Ws also deposed that the accused is habitual alcoholic and on the night of occurrence , he consumed alcohol and under the influence of alcohol , he did such act. As such , at the time of the alleged incident, there is the absence of the 'culpable mental state' and there was no intention, motive , knowledge of the alleged fact . So the accused is entitled to get the benefit of absence of 'culpable mental state'.
- A4. None of the P.Ws stated that the accused was in drunken state on the night of occurrence. It is in the evidence of pw-1 that the accused regularly takes alcohol but he did not know as to whether on the day of incident, the accused had taken alcohol or not. Victim (P.W-2) made it clear that the accused is the habitual consumer of liquor but on the day of occurrence, she did not get any impression of his having consumed liquor. Even, PW-3 (victim girl) made it clear that she did not know if the accused had

liquor on that day. Pw-4 also stated the same. Coming to the evidence of DW-2 (accused) and DW-4, they narrated a different story. According to them, the accused was in drunken state when he went to drop the two girls at their homes but on the way, he slipped and fell down on the 'kutcha' road. Thereafter, the minor girls went to their homes. But none of the DWs have witnessed the incident. No eye-witness have been examined in support of their evidences. So, the evidence of the Defence side remained unproved. And the accused is not entitled to get the benefit of absence of 'culpable mental state' taken in his defence.

- 45. **Section 29 of the POCSO Act** which deals with presumption as to certain offences reads as "Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and section 9 of this Act, the Special Court shall presume ,that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."
- 46. On an appreciation of the evidences of the PWs , it is found that prosecutrix no.2 was sexually assaulted by the accused person and she had attained 12 years of age at the time of occurrence. Now, **Sexual Assault** is defined **U/S 7 of POCSO Act** as "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."
- 47. **Section 8 of POCSO Act** prescribes the punishment for the offence u/s 7of the Act. In this instant case, the victim (Prosecutrix No.2) alleged that the accused put his hand inside her blouse but she removed his hand and ran away. So, this proves that the accused did the act with sexual intent which involves physical contact without penetration. This comes under section 7 of POCSO Act, punishable u/s 8 of the Act.
- 48. It is held that prosecution succeeded in proving the offence U/S-8 of the POCSO Act, 2012 against the accused person beyond all reasonable doubt. Accordingly, the accused is held guilty and is, hereby, convicted for the offence punishable U/S-8 of POCSO Act.

- 49. Heard the accused-- Sunil Mazumdar, on the question of sentence. He has prayed for leniency in punishment. Accused submitted that he is a daily wage labour and he has look after his family consisting his wife.
- 50. I have heard the Learned Counsel for the accused as well as the Learned Additional Public Prosecutor.
- Now, turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances. The aggravating circumstances relate to the crime and the mitigating circumstances relate the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually assaulted and it has caused to her mind. Now, turning to the mitigating circumstances, the accused is aged 52 years and he has denied the allegations made against him by claiming that he is innocent. He also submitted that he has not been previously convicted.
- 52. Considering the facts and circumstances of the case, the nature of the offence committed on a minor girl and the age of the accused he deserves some punishment. The statute u/s 8 of the POCSO Act prescribes minimum punishment for a term of three years with fine. So, this court has no option but to impose minimum punishment of three years.
- 53. The accused --- Sunil Mazumdar is convicted u/s 8 of POCSO Act and sentenced to suffer rigorous imprisonment for 3 ( three ) years and also to pay a fine of Rs. 2000/- ( rupees two thousand only ) in default, rigorous imprisonment for 1 (one) month. The period, which he was detained in custody, shall be set off from the period of imprisonment, imposed on him.

The Judgment is pronounced in open Court and written on separate sheets.

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A true copy of the Judgment be furnished to the accused person immediately. A copy of this order and Judgment be sent to the District magistrate, kamrup, Amingaon as per provision of law.

Given under my hand and seal of this Court on this 30<sup>th</sup> day of August, 2018.

Special Judge, Kamrup, Amingaon

### **APPENDIX**

## **Prosecution Witness:**

P.W.1 –Sri Ranjit Kalita

P.W.2— Prosecutrix No.1

P.W.3 - Prosecutrix No.2

P.W.4 – Sri Nayan Kalita

P.W.5 – Sri Dilip Kalita

P.W.6 – Sri Prafulla Kalita

P.W.7 – Sri Dhruba Jyoti Borah

P.W.8 - Smti. Tripti Ari,

# **Defence Witness:**

D.W.1— Sri Robin Kalita

D.W.2— Sri Sunil Mazumdar (the accused)

D.W.3— Sri Shiva Prasad Kalita

D.W.4— Sri Manas Kalita

### **Prosecution Exhibit**

Ext.1 is the ejahar.

Ext.2 is the printed form of FIR

Ext.3 is the statement made before the Court U/S—164 Cr. P.C of Prosecutrix No.1

Ext.4 is the statement made before the Court U/S—164 Cr. P.C of Prosecutrix No.2.

Ext.5 is the sketch map

Ext.6 is the charge sheet.

Special Judge,

Kamrup, Amingaon