# **IN THE COURT OF SPECIAL JUDGE:: KAMRUP:: AMINGAON**

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.59/2018

U/S- 4 of the POCSO Act, 2012

State of Assam

-Versus-

Sri Bhabesh Das

s/o-Sri Jatin Das

Resident of vill –Kulhati (Da- Boritol)

P.S.-Hajo

Dist.-Kamrup

-----Accused

Appearance:

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

-----for the State

Sri K. Nath , Ld. Advocate

-----for the accused

Date of evidence: 13.03.2019, 18.02.2019, 26.04.2019,

02.05.2019, 07.06.2019, 24.07.2019, 27.08.2019

Date of Argument: 30.08.2019, 13.09.2019, 17.10.2019

Date of Judgment: 30.10.2019

#### **JUDGMENT**

- 1. The Prosecution case in brief is that—: On 27.01.2018, complainant—Smti. Kanika Das lodged an ejahar alleging that on 26.01.2018 at about 8.00 p.m, accused —Bhabesh Das came to her house to sit by the fire place and he took the minor daughter of the complainant on his lap. Thereafter, he committed sexual assault upon her minor daughter by inserting his finger into her vagina. Hence, this case.
- 2. On the basis of the said ejahar, Hajo P.S Case No. 58/2018 U/S- 4 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S- 4 of the POCSO Act, 2012.
- 3. The case was duly forwarded and this court after hearing both the parties, framed charge U/S- 4 of the POCSO Act, 2012 against accused—Bhabesh Das. 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 nine (9) numbers of witnesses including the informant, the victim girl, M/O and I/O.

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

(I) Whether the accused person on or about 26.01.2018 at about 8.00p.m, at village Kulhati under Hajo P.S committed penetrative sexual assault upon the minor daughter of the informant, and thereby committed an offence punishable U/S 4 of the POCSO Act, 2012?

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

- 6. In this instant case, the accused is charged U/S-4 of POCSO Act. Let us go through the evidences on record to find out if the prosecution has succeeded to prove the case.
- 7. P.W.1, Smti. Bajra Das. She has deposed in her evidence that she know the Informant and the accused of this case. Prosecutrix is her granddaughter. P.W.1 stated that the incident took place about 1 year 2 months ago. Prosecutrix was 9 years old at the time of occurrence. It was winter season and P.W.1 was sitting by the fire place in herVaranda. Prosecutrix was studying inside the house. Then, the accused came and sat near her. Just then, the prosecutrix came from inside and sat near her. The accused called the prosecutrixand took her on his lap. Prosecutrix cried out and then her father—Ratul Das took her away from the lap of the accused. Her mother also came out and the prosecutrix told the mother that the accused inserted his finger inside her vagina. P.W.1 heard the prosecutrix telling her mother about the incident. They saw her bleeding from her vagina and blood stains in her panty. P.W.1 chased the accused person from their house. P.W.1 stated further that she went to the house of the accused person and told his guardians about the incident. Prosecutrix was immediately taken to the Hajo PHC by her parents. Next day, she was taken to GMCH. Thereafter, the informant lodged the ejahar. Police did not record her statement.

In her cross-examination, P.W.1 stated that informant is her daughter and informant stays with her family in her house. She denied the suggestion of defence side that she deposed as tutored by her son-in-law. This witness disclosed that accused was engaged as daily wage labour in their house on the date of occurrence and he was given payment of Rs.250/- by her son-in-law. But she does not know if any payment was due to the accused. P.W.1 also denied the suggestion of the defence side that there was quarrel between

Ratul Das (prosecutrix's father) and the accused over payment of money at the time of occurrence and that Ratul Das refused to give him the money and he assaulted the accused person. P.W.1 also denied the suggestion of the defence side that on hearing about the quarrel between her father and the accused, prosecutrix came running outside the house and resisted her father. But he pushed her for coming there, as a result of which, prosecutrix fell down and got hurt on her person. P.W.1 revealed that she lit the fire with coconut shells and sal woods. She denied that prosecutrix fell over the sal wood and got hurt. P.W.1 also denied the fact that there was no electricity in the house at the time of occurrence. She disclosed that she did not see the incident.

8. P.W.2, Smti. Joni Das has deposed that she knows the informant and the accused of this case. They are herneighbours. She also knows the prosecutrix. The incident took place about 1 year 2 months ago. Prosecutrix was 9 years old at the time of occurrence. P.W.2 was in her maternal home near the place of occurrence. She heard prosecutrix crying and came to her house. She saw a crowd there. As P.W.2 entered inside the house, she found prosecutrix crying and she was bleeding from her vagina. P.W.1 revealed that the informant (P.W.1) told her that accused inserted his finger inside her vagina and he was chased from the house by the grandmother of the prosecutrix. Prosecutrix was immediately taken to the Hajo PHC by her parents. Thereafter, informant lodged the ejahar. Police recorded her statement.

In her cross-examination, P.W.2 disclosed that informant stays with her family in her maternal home and on the date of occurrence, accused was working in their home as daily wage labour. She does not know if there is any dispute between prosecutrix's father and the accused over money matter. P.W.2 disclosed that she did not see the incident and she does not know if there was any quarrel between Ratul Das (prosecutrix's father) and the accused over payment of money at the time of occurrence and that Ratul Das

refused to give him the money and he assaulted the accused person. P.W.2 also didnot know if on hearing the quarrel between her father and the accused, prosecutrix came running inside her house and resisted her father but he pushed her away for coming there, as a result of which prosecutrix fell down and got hurt on her person. P.W.2 does not know if prosecutrix fell over the sal wood and got hurt. This witness denied the defence suggestion that she deposed falsely against the accused person as tutored by the parents of the prosecutrix.

9. P.W.3, Smti. Kanika Das is the informant of this case and prosecutrix is her daughter. She stated that the incident took place on 26.01.2018 at 8.00 p.m. Prosecutrix was 9 years old at that time and she was studying in class-IV. She testified that at the relevant time she was cooking in the kitchen while prosecutirx was sitting alone by the fire place out in the courtyard to warm herself. Then, the accused came and sat near the prosecutrix. After few minutes, P.W.3 heard the prosecutrix crying loudly. She came out from the kitchen and brought the prosecutrix inside the house and put her on the bed. P.W.3 further stated that her sister-in-law—Joni Das also came and prosecutrix told that the accused inserted his finger inside the vagina. P.W.3 found the prosecutrix bleeding from the vagina and he brought the prosecutrix to Hajo PHC. Next day, P.W.3 lodged the ejahar. Ext.1 is the ejahar. Ext.1 (1) is her signature. P.W.3 disclosed that her husband was inside the house at the time of incident. Police sent the prosecutrix for her medical examination to GMCH and before the Magistrate for recording her statement.

In her cross-examination, P.W.3 disclosed that the ejahar was not written by her as she is an illiterate person. The ejahar was written by scribe at Hajo P.S. as per her instruction and it was read over to her but the same has not been written therein. P.W.3 disclosed that accused is a daily wage labour and he was engaged by her husband on the date of occurrence to do some labour works outside the house in the courtyard. P.W.3 was sitting in a bed inside my house at the time of incident. She heard about the incident

from the mouth of the prosecutrix. Prosecutrix was not given any medical treatment in Hajo PHC on the date of occurrence. Next day of the incident, prosecutrix was taken to the GMCH by police for her medical examination. This witness disclosed that prosecutrix addresses the accused as 'mama' (Uncle). P.W.3 denied the defence suggestion that the accused got Rs.100/only for the labour work done by him and he was called in the evening by her husband to receive the remaining payment and when the accused came to receive the remaining money, her husband refused to give him the money. But the accused insisted on giving him the money, so her husband slapped him and when the prosecutrix heard the incident, she came running out but her husband stopped her and he pushed her away, whereby she fell down over the bundle of firewood lying outside and got injured in her private parts. P.W.3 denied that she gave a false case against the accused to harass him for personal gain and to humiliate and defame her in the society.

10. P.W.4 is the prosecutrix. Shestated that informant of this case is her mother. She know the accused person—Bhabesh Das and addresses him as 'Mama' (Uncle). The incident took place on 26.01.2018 at about 8.00 p.m. At the relevant time, she was sitting alone by the fire place outside the house in the veranda. Her parents were inside the house. Her mother (P.W.3) was inside the kitchen. Then, the accused came and sat near her. He took her in his lap and he inserted his finger inside her vagina. P.W.4 cried loudly. Accused was sitting there. Her mother came and took her inside the house and put her in the bed. On enquiry, P.W.4 told her mother that the accused took her in his lap and he inserted his finger inside my vagina. P.W.4 had pain in her vagina. Her parents took herto the doctor at Hajo. But the doctor did not give her any medical treatment. Thereafter, they came to police station to give the ejahar but as it was late night, so police did not register the case. Next morning they came to the police station and lodged the ejahar. Police took her to GMCH for her medical treatment. Next day again P.W.4 was produced before the court by police for recording her statement. Ext. 2 is the statement U/S-164 Cr. P.C. Ext. 2 (1 and 2) are her signatures. Police also recorded her statement.

In her cross-examination, P.W.4 disclosed that on the date of occurrence, the accused worked in their house as daily wage labour. She was studying in class-V at the time of occurrence. Shereads during evening hours. But, on the relevant night she was sitting alone in the veranda of her house near the fireplace by the courtyard. Her grandmother and younger brother were not with her. Their lights were on. P.W.4 disclosed that she heard that her father made some payments to the accused but she does not know for what he made the payments. P.W.1 denied the defence suggestion that she did not state before the police and Magistrate that she was sitting alone by the fireplace in her veranda on the relevant night. This witness disclosed that she was sitting in a wooden stool by the fireplace. There was only one stool. The fire was lit with wooden pieces and kept over iron vessel. P.W.4 denied the defence suggestion that there was a quarrel between her father and the accused on the relevant day regarding payment of wages to him and that the accused was called in the evening by her father to receive some payment and when the accused came to receive the money, her father refused to give him the money. Instead he slapped the accused and when she heard the incident, she came running outside but her father stopped me and he pushed her away, whereby she fell down over the bundle of firewood lying outside and got injured in my private parts.

11. P.W.5 Sri Ratul Kalita is the father of the prosecutrix (P.W.4). He has deposed in his evidence that informant is his wife. He knows the accused—Bhabesh Das, who is hisneighbour. This witness stated that the incident took place on 26.01.2018 at about 7.30 p.m. Prosecutrix was 9 years old at the time of occurrence. On the day of occurrence, accused was engaged as a daily work labour to work in his house. It was winter season and his family members except him were sitting by the fire place in the veranda while he was cooking inside the kitchen. P.W.5 heard the cries of the

prosecutrix. He came outside and saw the accused taking her in his arms. At that time, prosecutry was alone with the accused. His wife, who was working inside the house also came out on hearing her cries. P.W.5 stated that he freed the prosecutrix from the arms of the accused and lifted her. In the mean time, the accused fled away. On enquiry, the prosecutrix did not tell him anything butshe kept crying. Then, his wife took the prosecutrix inside the house. On hearing hue and cry of his wife, neighbouring people arrived. One Joni Das also came. His wife and said Joni Das told him that they heard from the mouth of the prosecutrix that the accused inserted his finger inside her vagina. Prosecutrix was immediately taken to the Hajo PHC by them. Doctor advised them to inform the police first before giving treatment as it was a police case. They could not lodge the ejahar on that night as it was very late. But a police man accompanied them again to the Hajo PHC and then the doctor gave some ointments to the prosecutrix. Next day, theejaharwas lodged in Hajo P.S. Prosecutrixwas taken to GMCH and brought before the court for recording her statement. Police recorded his statement.

In his cross-examination P.W.5 disclosed that Prosecutrix was alone at the time of occurrence. Later says, her grandmother was sitting by her side near the fireplace at the time of occurrence. P.W.5 and his wife were inside the house at the relevant time. P.W.5 denied that he deposed falsely due to enmity with the accused. He admitted that accused was engaged as daily wage labour in their house on the date of occurrence. But he denied the defence suggestion that the accused was not given full payment by him and that the accused was called in the evening time by him to receive the remaining payment. And when the accused came to receive the remaining money, he refused to give him the money and slapped him. When prosecutrix heard the incident, she came running outside but he stopped him and he pushed her aside, whereby she fell down over the bundle of firewood lying outside and got injured in her private parts.

- 12. P.W.6, Smti Anju Das is declared hostile by the prosecution. P.W.7, Smti. Bidyabati Das heard that accused—Bhabesh Das did some bad act with the prosecutrix.
- 13. P.W.8, M/O, Dr. Oli Goswami has deposed in her evidence that on 28.01.2018 I was working as a PG on duty, Department of Forensic Medicine at GMCH. On that day, at around 12.55 p.m I examined one, Miss Daisy Kalita, female, 9 years of age brought in reference to Hajo P.S case No. 58/18 U/S-4 of the POCSO Act. She was accompanied and identified by HG, GirijaMahanta. The victim's mother alleged that on 26.01.2018 the accused—Bhabesh Das had committed sexual assault upon her minor daughter by inserting his finger into her vagina.

On the physical examination of the victim found---

Her height—122 cm, weight—20 kg, chest girth—60 cm, abdominal girth—66 cm. Scalp hair-31 cm, black in colour, well distributed. Axillary hair, Pubic hair— not present. Her breast—childlike. Menarche—not yet attained.

### On genital examination:-

Genital organs—well Developed, vulva—labia majora is healthy minute scratch abrasion seen over labia minora, Hymen –incomplete tears seen at 6 o' clock positions, Vagina—Reddened and tender. Minute scratch abrasion seen with oozing of blood, Cervix—healthy, Uterus—healthy, not palpable per abdominally, evidence of venereal disease –not detected clinically, Vaginal swabs collected from—around the entroitus and around the hymen.Injury on the body—not detected at the time of examination, her mental condition at the time of examination—anxious and shy, behavior—Co-operative and Intelligence and Memory—average, gait—Normal.

#### Laboratory investigation:-

Vaginal smears does not show any presence of spermatozoa or gonococcus.

<u>Opinion:</u> On the basis of physical examination, radiological and laboratory investigations done, P.W.8 opined that:-

- 1. Her age is above 7 (seven) years and below 11 (eleven) years of age.
- 2. Evidence of recent penetration present in her private parts.
- Recent injury marks present in her private parts which is caused by a finger like object.

Ext. 3 is the medical report. Ext. 3 (1 to 2) are her signatures. Ext. 4 is the forwarding letter of the I/O.

In her cross-examination P.W.8 deposed that she did not obtain the consent of the victim at the time of examination as she was 9 years old. However, she obtained the consent of the mother at the time of examination of the victim. P.W.8 does not remember if the victim was examined prior to her examination and she has not mentioned the same in her report. The case history has been obtained from the mother of the victim. The scratch abrasion of the victim is caused by finger nail or any pointed substance. The victim was sent for ossification test to ascertain her age but the same was not done. The age of the victim has been mentioned in her report as per her dental examination done by her.

14. P.W.9, S/I, Bhanita Das, is the I/O of this case, who has investigated the case. In his deposition, he has stated that on 27.01.2018, she was working as Attached Officer at Hajo P.S. On that day, the informant—Smti. Kanika Das lodged an ejahar in Hajo P.S. Thereafter, O/C, Hajo P.S registered a case at around 8.15 p.m bearing Hajo P.S Case No.58/2018 U/S-4 of POCSO Act, 2012 and directed her to investigate the case. Accordingly, she took up the investigation. On 28.01.2018, she recorded the statements of the informant, victim and one Ratul Kalita in the police station and sent the victim to GMCH with a woman constable and guardian. P.W.9 also sent the victim to the court for recording her statement U/S-164 Cr.P.C. P.W.9 visited the place

of occurrence along with the staffs. She prepared the sketch map and recorded the statements of other witnesses. The accused—Bhabesh Das could not be found as he fled away. Then, on 23.03.2018, the accused surrendered in the Hajo police station. He was arrested and forwarded to the Court. Thereafter, P.W.9 collected the medical report and completed the investigation. On finding sufficient evidence against the accused person, P.W.9 submitted the charge-sheet against him U/S-4 of POCSO Act. Ext.5 is the sketch-map and Ext.5 (1) is my signature. Ext.6 is the charge-sheet and Ext.6 (1) is her signature.

In his cross-examination, P.W.9 disclosed that the incident took place on 26.01.2018 at 8.00 p.m. But the ejahar was lodged on the next day. Police were informed regarding the incident on 26.01.2018 itself and on medical requisition, the victim was sent to Hajo PHC for medical examination. P.W.9 did not collect the medical report from Hajo PHC. P.W.3 did not tell P.W.9 that P.W.4 (prosecutrix) was sitting near the fire alone at the time of occurrence. P.W.9 sent the prosecutrix for her medical examination after 1 ½ day of the incident. P.W.4 did not state before him that on the relevant night, she was sitting alone in the veranda of her house near the fireplace and that her grandmother and younger brother were not with her. P.W.4 stated before P.W.9 that she along with her grandmother and younger brother were sitting by the fireplace. She also stated before P.W.9 that after the incident, her father slapped the accused and he went away. P.W.5 did not state before him that he freed the prosecutrix from the arms of the accused.

- 15. At the close of prosecution evidence, statement of the accused person U/S-313 Cr. P.C is recorded. He has denied committing the offence and declined to adduce evidence.
- 16. Heard the arguments learned Counsels for both the sides. Learned Counsel for the accused argued that there are major contradictions in the evidences of the P.Ws and that the accused has been falsely implicated in

this case due to enmity. His further submission is that all the witnesses are interested witnesses. He vehemently contended that evidence of P.W.4 (prosecutrix) is very much contradictory with P.W.1. Even the evidence of P.Ws. 3 and 5 are contradictory. Therefore, their evidences are not at all credible and trustworthy. Learned Defence Counsel further contended that no reliance can be placed on the evidence of the prosecution on the basis of such huge contradictory and inconsistent evidence. He placed reliance on the case of **Priyanath Das Vs State of Assam** in Criminal Appeal No. 114 of 2016 dated 16.02.2015, **Prahlad Vs State of Rajasthan** in Criminal Appeal Nos. 1794-1796 of 2017 dated 14.11.2018 of Hon'ble Supreme Court and **State of Maharashtra Vs Krushna s/o- Ramrao Ridde in** Criminal Confirmation Case No. 3 of 2016 with Criminal Appeal No. 527 of 2016 with Criminal Appeal No. 507 of 2016, dated 14.08.2017.

- 17. Learned Addl. Public Prosecutor has argued that the P.Ws have supported each other and the prosecution has well proved the case against the accused. He submitted that minor contradiction, here and there has not affected the sub-stratum of the prosecution story.
- 18. Now, the question comes : Whether on the evidence adduced by the victim, the accused can be convicted ?
- 19. Coming to the evidences on record, evidence of victim (P.W.4) reveals that she was sitting alone by the fire-place outside the house in the varanda while her parents were inside. She alleged that the accused came and sat near her . He took her on his lap and inserted his finger inside her vagina. She had pain in her vagina . She told the incident to her mother (pw-3). Again P.W.3 stated that she was working in the kitchen while P.W.5 stated that he was in the kitchen and his wife (P.W.3) was working in the house. It is in the evidence of pw-1 that she was sitting by the fire-place, then the prosecutrix (pw-4) came and sat near her . According to pw-1, the accused came there and he took the prosecutrix on his lap. She cried out and

told the incident to her mother. Pw-1 saw the prosecutrix bleeding from her vagina.

- 20. In this instant case, P.w-1, 3, & 4 have confirmed that the accused came to their house on the night of occurrence. All the P.Ws have made it clear that the accused sat by the fire place in the veranda of the informant and he took the prosecutrx on his lap. The witnesses have alleged that the accused inserted his finger into the vagina of the prosecutrix and she started bleeding from her vagina. It is quite clear that P.W. 3 & 5 (parents of the prosecutrix) was inside the house at the time of occurrence. And P.W.1 did not see the incident. It has come out from the evidences on record that pw-4 (prosecutrix) cried out and she narrated the incident to her mother (pw-3). Evidence of P.W.4 is fully supported by her mother (P.W.3),It is in the evidence of pw-2, who is the independent witness that she came out of house on hearing the shouts of the prosecutrix. She , too, stated that prosecutrix narrated the incident to her mother (P.W.3) and she saw the prosecutrix bleeding from her vagina.
- In **State of H.P vs Raghubir Singh**, **(1993) 2 SCC 622**, it has been held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of substance which mitigate against her veracity.
- 22. Upon going through the evidences of P.Ws, no doubt, I find some contradictions. But, these are minor contradictions which are bound to appear when ignorant and illiterate persons are giving evidence. Memory, sometimes, plays false even in case of trained and educated persons. And evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident maybe witnessed by another though both were present at the scene of occurrence.

According to the Hon'ble Supreme Court, overmuch importance cannot be attached to minor discrepancies in the testimony of witnesses for the following reasons:—

- 1. A witness cannot be expected to possess a photographic memory and to recall the details of an incident.
- A witness is ordinarily overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore, cannot be expected to be attended to absorbs the details.
- 3. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on the person's mind , whereas it might go unnoticed on part of another.
- 4. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.

Therefore "discrepancies which do not go to the root of the matter and shake the basic version of the witness" cannot be given too much importance.

23. It is evident that the prosecutrix is very much consistent and confident in her statements before the Magistrate under Section 164 Crpc as well as in her deposition in the court. She has been subjected to cross-examination by defence but defence failed to discredit her in material particulars. She has categorically alleged in her evidence before the court that the accused came while she was sitting by the fire place outside the house, he took her on his lap and inserted his finger inside her vagina. As a result, there

was bleeding from her vagina. In her statement before the Magistrate under Section 164 Crpc, she reiterated the same fact baring few omission which is bound to occur in a criminal case , more so, when the victim being a minor of years . Her deposition cannot be looked in the perspective of the evidence of an adult person. Her evidence inspires confidence because defence failed to bring any such circumstances to show any grudge or enmity with the accused. The evidence of the prosecutrix is found to be credible and trustworthy.

- 24. Now, coming to the evidence of the Medical Officer (pw- 8), she examined the prosecutrix on 28.01.2018. She gave the opinion that on the basis of physical examination, radiological and laboratory investigation, the age of the prosecutrix is above 7 (seven) years and below 11 (eleven) years. Pw-8 also found evidence of recent penetration present in her private parts. She further opined that recent injury marks present in her private parts, which is caused by a finger –like object. In her cross-examination, pw-8 made it clear that the scratch abrasion of the victim is caused by finger nail or any other pointed substance. Therefore, from the evidence of the M.O (PW-8), it is fully confirmed that the accused inserted his finger inside the vagina of the prosecutrix on the date of occurrence.
- 25. The oral testimony as regards the age of the prosecutrix stands corroborated by medical evidence. As per Section 2 (d) of the POCSO Act , the prosecutrix is found to be below 18 years of age at the time of the incident. So, the prosecutrix is a 'child' under the POCSO Act.
- 26. It is the admitted position of law that information regarding commission of an offence is required to be brought to the notice of the authority concerned, without inordinate delay. In this instant case, it is found that the alleged incident took place on the night of 26.01.2018 and the ejahar was lodged on 27.01.2018. Time of occurrence is mentioned as 8.00pm. It has come out from the evidence on record, that on that very night, they went to the police station and informed the police but it was late night, so the

ejahar was not lodged. Therefore, there is no delay in lodging the ejahar as it was lodged immediately after the occurrence. No question of after thought arises in the case.

- 27. Defence plea is that on the relevant evening there was a quarrel between P.W.5 (prosecutrix's father) and the accused over payment of money at the time of occurrence and that P.W.5 refused to give money to the accused and assaulted him and that on hearing the quarrel between her father (P.W.5) and the accused, prosecutrix came running outside the house and resisted her father but he pushed her for coming there, as a result of which, prosecutrix fell over the woods and got hurt on her person. But no defence evidence has led in support of this plea, so the same remained unproved.
- 28. In this instant case, the accused is charged U/S-4 of the POCSO Act. To bring the charge under section 4 of the POCSO Act, prosecution must prove the ingredients mentioned in Section 3 of the POCSO Act.

### **Section 3 of the POCSO Act** deals with penetrative sexual assault.

- **3. Penetrative sexual assault**—A person is said to commit "penetrative sexual assault" if—
  - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
  - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
  - (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus

- or any part of the body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4 of the POCSO Act deals with punishment for penetrative sexual assault.

- 29. From the facts and circumstances of this instant case, it can be safely concluded that the testimony of the prosecutrix (P.W.4) is found to be reliable, trustworthy and inspires confidence. Therefore, it is well proved that accused Bhabesh Das has committed the offence of penetrative sexual assault on the victim girl u/s 3 of the POCSO Act, which is an offence punishable u/s 4 of the POCSO Act.
- 30. Regarding the culpable mental state of the accused , we may refer to Section 30 of the 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.

- 31. In this instant case, it comes out that the accused took the prosecutrix on her lap when she was sitting near the fireplace outside the house at night and committed penetrative sexual assault on her by inserting his finger in her vagina and caused her vaginal bleeding. The accused did not rebut the said presumption by adducing any defence evidence. Therefore, it must be presumed that accused had culpable mental state in committing the alleged offence and he committed the offence of penetrative sexual assault on the victim (pw-4). That apart, the presumption of guilt under section 29 of the POCSO Act also needs to be applied as all the necessary facts regarding commission of the offence under the POCSO Act have been proved.
- 32. In the result, from the facts and circumstances of the case and above discussion, it is held that the prosecution has succeeded in bringing home the charge under section 4 of POCSO Act against accused Bhabesh Das beyond all reasonable doubt. Hence, he is held guilty of committing the offence punishable under section 4 of POCSO Act and is convicted under the said section of law.
- 33. The minimum sentence prescribed under Section 4 of the POCSO Act is rigorous imprisonment for seven years which cannot be modified or altered. Therefore, keeping in view the nature of the offence, the Probation of Offenders Act is not applicable to this instant case.
- 34. Heard the accused on the question of sentence. Also heard the Learned Defence Counsel as well as the Addl. Public Prosecutor. Accused has stated that he has not committed the offence and he has no earlier criminal antecedent. He submitted that he works as a labourer and has parents to look after. He has pleaded leniency in awarding the punishment.

- 35. In this instant case, the commission of penetrative sexual assault on the prosecutrix by the accused is well proved. The accused, being the neighbour, this act of the accused has caused mental trauma as well as physical harm to the prosecutrix, who was minor child at the time of occurrence.
- 36. Considering the entire facts and circumstances of the case ,the grave nature of the offence and the mental and physical injury suffered by the child, the accused –Bhabesh Das is sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of Rs 10,000/- (Rupees ten thousand) only in default to undergo rigorous imprisonment for 1 (one) year , for the offence under section 4 of POCSO Act., which in my opinion, will meet the ends of justice in this case.
- 37. The period of detention already undergone by the accused will be set off from the sentence of imprisonment.
- 38. His bail –bond stands cancelled .
- 39. Issue Jail Warrant.
- 40. Now, coming to the aspect of compensation to the victim, who is a minor girl. She needs to be provided with restorative and compensatory justice. So, the Learned Secretary, District Legal Service Authority, Kamrup, Amingaon is directed to assess and grant adequate compensation to the prosecutrix (P.W.4). The said compensation amount shall be used by the parents of the prosecutrix for her welfare and rehabilitation.
- 41. The Judgment is delivered in open Court and written on separate sheets.

- 42. A free copy of the Judgment be furnished to the convict immediately. A copy of this order and Judgment be sent to the District Magistrate, Kamrup, Amingaon as per provision of law.
- 43. Given under the hand and seal of this Court on the  $30^{\text{th}}$  day of October, 2019.

Special Judge, Kamrup, Amingaon

Dictated and corrected by me

Special Judge, Kamrup, Amingaon

## **APPENDIX**

## **Prosecution Witness:**

P.W.1, Smti. Bajra Das

P.W.2, Smti. Joni Das

P.W.3, Smti. Kanika Das

P.W.4 is the prosecutrix

P.W.5 Sri Ratul Kalita

P.W.6, Smti Anju Das

P.W.7, Smti. Bidyabati Das

P.W.8, M/O, Dr. Oli Goswami

P.W.9, S/I, Bhanita Das

## **Prosecution Exhibit**

Ext.1 is the ejahar

Ext. 2 is the statement U/S-164 Cr. P.C.

Ext. 3 is the medical report

Ext. 4 is the forwarding letter of the I/O

Ext.5 is the sketch-map

Ext.6 is the charge-sheet

Special Judge, Kamrup, Amingaon