

GAHC010069892023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./120/2023

MD. SAMED ALI
S/O ABDUL MATLEB,
R/O RUPKURIA JUGLONI GAON,
P.O.- TEZPUR,
P.S.- TEZPUR,
DIST.- SONITPUR (ASSAM), PIN- 784001.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY P.P., ASSAM.

2:RAJEN RABHA
S/O LET NOKUL RABHA
R/O RUPKURIA JUGLONI GAON
P.O. AND P.S.- TEZPUR
DIST.- SONITPUR (ASSAM)
PIN- 784001

Advocate for the petitioner	: Mr. R. Baruah;
Advocate for the respondents	: Mr. B. Sarma, for respondent No.1; Ms. P. Das, for respondent No.2.
Date of hearing	: 08.02.2024
Date of judgment	: 10.04.2024

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT & ORDER (CAV)

Heard Mr. R. Baruah, learned counsel for the appellant and Mr. B. Sarma, learned Addl. Public Prosecutor for the State respondent No. 1. Also heard Ms. P. Das, learned Amicus Curiae for the respondent No. 2.

2. In this appeal, under Section 374(2) of the Cr.P.C., the appellant, namely, Md. Samed Ali has put to challenge the correctness or otherwise of the judgment and order dated 14.03.2023, passed by the learned Special Judge (POCSO), Sonitpur at Tezpur, in Special (POCSO) Case No. 6/2021.

3. It is to be noted here that vide impugned judgment and order dated 14.03.2023, the learned Court below has convicted the appellant under Section 354 IPC, read with Section 8 of the POCSO Act and sentenced him to suffer rigorous imprisonment for one year and also to pay a fine of Rs. 5,000/- with default stipulation under Section 354 of the IPC and also sentenced him to suffer rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- with default stipulation, under Section 8 of the POCSO Act.

4. The background facts leading to filing of the present appeal are briefly stated as under:

“On 08.01.2021, at about 7:30 p.m. in the evening, the daughter of Rajen Rabha Smt. X (name withheld), aged about 16 years, was cleaning utensils near the well of her house, then appellant Samed Ali came there and enquired her the whereabouts of her father, and then she told him that her father is not present in the house. Then, he embarrassed her and dragged her and also touched her private parts and then, the

victim raised hue and cry and thereafter, the appellant fled away from the place of occurrence and before fleeing away from the place of occurrence, he threatened her not to disclose the said fact to anybody, else threatened to kill her. Then, her father, the informant, returned home and she had reported the matter to him and then the informant on 09.01.2021, lodged one FIR with the Salonibari Police Out Post, upon which the In-charge of Salonibari Police Out Post recorded a G.D. Entry No. 178 dated 09.01.2021 and forwarded the same to the Officer-in-charge of Tezpur Police Station, upon which the Officer-in-charge of Tezpur Police Station registered a case being Tezpur P.S. Case No. 63/2021, under Sections 354A/506 IPC, read with Section 8 of the POCSO Act and endorsed S.I. Dimbeswar Dahal to investigate the same.

The I.O. then visited the place of occurrence and examined the witnesses and prepared sketch map of the place of occurrence and got the victim examined by doctor and also got her statement recorded by the Magistrate and arrested the appellant and forwarded him to the Court and on completion of investigation, the I.O. laid charge-sheet, being charge-sheet No. 36/2021 dated 31.01.2021, against the appellant to stand trial in the Court, under Sections 354A/506 of the IPC, read with Section 8 of the POCSO Act.

The learned Special Judge (POCSO), Sonitpur at Tezpur, on production of the appellant before the Court, complied with the provision of Section 207 of the Cr.P.C. and upon hearing the learned Advocates of both the parties, framed charge against the appellant under Section 354 of the IPC, read with Section 8 of the POCSO Act, and on being read and explained the same to him, he pleaded not guilty and claimed to stand

trial. Thereafter, the learned Court below has examined as many as thirteen witnesses and also examined the appellant under Section 313 of the Cr.P.C. and thereafter, upon hearing the learned Advocates of both the parties, the learned Court below has convicted and sentenced the appellant as aforesaid."

5. Being aggrieved, the appellant has preferred this appeal on the following grounds:

- (i) That, the learned Court below has mechanically passed the judgment and order dated 14.03.2023, without interpreting and analyzing Section 8 of the POCSO Act in the light of the evidence on record.
- (ii) That, the prosecution side has failed to adduce cogent evidence to bring home the charge under Section 354 of the IPC, read with Section 8 of the POCSO Act against the appellant, and that PW1, PW2, PW3, PW4, PW6 and PW7, all are interested witnesses and the learned Court below has erroneously relied upon their evidence and that they are not trustworthy and their evidence fails to inspire confidence, and this aspect has exude consideration of the learned Court below.
- (iii) That, the learned Court below has failed to appreciate the defects in the prosecution case by analyzing the evidence in a dispassionate manner, and therefore, it is contended to set aside the same.

6. Mr. Baruah, learned counsel for the appellant, besides reiterating the aforesaid points, submits that the learned Court below has convicted the appellant under Section 354 IPC, read with Section 8 of the POCSO Act and

sentenced him under both the provisions, which is not permissible in law in view of Section 42 of the POCSO Act. Mr. Baruah also submits that the age of the victim girl has not been proved by the prosecution side and in order to establish a charge under any provision of the POCSO Act, it is incumbent upon the prosecution side to establish that the victim is a 'child' under Section 2(d) of the POCSO Act. Mr. Baruah also submits that the learned Court below has relied upon the evidence of the prosecution witnesses who are related to the informant and the victim and they, being interested in the outcome of the case, reliance cannot be placed on them and on such count, the impugned judgment and order fails to withstand the legal scrutiny. And therefore, it is contended to set aside the same. Mr. Baruah has also referred to a decision of the Hon'ble Supreme Court in the case of **Sunil vs. State of Haryana**, reported in **(2010) 1 SCC 742**, in support of his submission.

7. Whereas, Mr. B. Sarma, learned Addl. Public Prosecutor for the State respondent No. 1, has supported the impugned judgment and order passed by the learned Court below and submits that the same is based on the evidence on record and no cogent ground has been assigned by the appellant to interfere with the same, and therefore, it is contended to uphold the same.

8. On the other hand, Ms. P. Das, learned Amicus Curiae for the respondent No. 2, also subscribes the submission advanced by Mr. B. Sarma, learned Addl. Public Prosecutor and submits that the evidence of the victim is creditworthy and can be accepted and acted upon as nothing tangible could be elicited in the cross-examination and no ground is assigned to disbelieve her version and therefore, it is contended to uphold the impugned judgment and order.

9. Having heard the learned Advocates of both sides, I have gone through the memo of appeal and the grounds mentioned therein and also perused the

impugned judgment and order dated 14.03.2023 and the record of learned Court below, and also gone through the case law referred by Mr. R. Baruah, learned counsel for the appellant.

10. It appears that while the occurrence took place on 08.01.2021 at about 7:30 p.m., the FIR was lodged on 09.01.2021, at about 09:30 a.m. and the case has been registered at about 04:45 p.m. On receipt of the FIR, the In-charge of Salonibari Police Out Post has recorded a G.D. Entry, being G.D. Entry No. 178, dated 09.01.2021, at about 9:30 p.m., which is exhibited by prosecution side as Exhibit P-6, through the I.O. (PW12). As at the relevant point of time the informant was not present in his house and as the offence involves outraging the modesty of a 'child', it cannot be said that there is any considerable delay in lodging the FIR so as to spell the veracity in the prosecution version.

11. The evidence of the I.O. (PW12) reveals that during investigation, he has seized one school certificate of the victim girl on 27.01.2021, on being produced by the father of the victim girl, which he has seized as Exhibit 2 (which has been seized vide seizure list P-3) and thereafter, he has given the same in the custody of the father of the victim girl, vide zimma No. 01/2021 (Exhibit P-4), and thereafter, he went to the school on that day where the victim girl pursued her studies and met the Headmaster of Pub Rupkuria L.P. School and then, the Headmaster confirmed that the victim girl studied in the school for the session 2011 to 2014.

12. A careful perusal of the Exhibit 2 indicates that the same was issued by the Headmaster of Pub Rupkuria L.P. School, Rupkuria, Sonitpur on 10.10.2015, which indicates that the date of birth of the victim girl, according to the admission register is 06.10.2004. It is also categorically stated in the FIR (Exhibit 1) by the informant Rajen Rabha, the father of the victim girl that at the

relevant point of time, the age of the victim girl was 16 years. In his evidence also, he categorically stated that the age of his daughter was 16 years at the relevant point of time.

13. The victim girl also categorically stated in her evidence that her age was 16 years at the relevant time of occurrence. She had categorically stated that her date of birth is 06.10.2004, and the said date is not disputed by the appellant side. Thus, the evidence of the victim girl (PW2) and the FIR (Exhibit-1) and the School Certificate (Exhibit 2), goes a long way to show that at the relevant point of time, the victim had not attained the age of 18 years and her date of birth is 06.10.2004 and as such, she was a 'child' as defined in Section 2(d) of the POCSO Act and the prosecution side has succeeded in establishing the same beyond reasonable doubt.

14. The evidence of the victim girl also reveals that at the relevant point of time i.e. on 08.01.2021, at about 7:30 p.m., she was alone in her house and her father was at his work and that the appellant came to her and asked whether she was alone and then she replied in positive and then the appellant caught hold both of her hands and dragged her by her neck and took her to the backside of the toilet and told her that he loves her and she then resisted and the appellant then let her loose and went away. She then went to the house of the appellant and reported the matter to his mother, but his mother did not believe her accusation. She also tried to contact her father, but could not succeed and later on, her father lodged the FIR with the police station. It is elicited in her cross-examination that except holding her neck and hands, the appellant did not touch any part of her body.

15. PW1, who is the father of the victim and the informant of the case, also lends support to the version of the victim. Of course, this witness has not seen

the occurrence. But, he came to know about the same from PW2 the victim girl, who had reported to him that the appellant came to her house and forcefully dragged her towards backside of the toilet. But, when she shouted, the neighbors came and the appellant ran away. He denied having adduced false evidence in his cross-examination, but he stated that he has testified whatever his daughter reported to him.

16. PW-3 - Hemanta Mech, PW-4 Hari Prashad Bakti, PW-5 Amit Kumar Rabha, PW-6- Shri Diganta Rabha, PW-7 Shri Haren Mech, PW-8 -Md. Sahabuddin, PW-9- Shri Keteng Boro and PW-10-Md. Ahmad Ali are not the eye witnesses of the occurrence. PW3 came to know about the occurrence from the informant who asked him to accompany him to the police station and then, he told him that one boy, namely, Ali had hugged his daughter from behind. PW-4 is not aware of the occurrence. PW-5 had testified that the informant reported him that on the previous night, the appellant caught hold of his daughter, and then his daughter raised hulla and he also accompanied him to the police station. PW-6 testified that on the day of occurrence, he heard hulla of the crowd and then he went out of his house and heard from the people that the appellant had caught hold of the victim girl for which she had shouted. This witness, however, admitted in his cross-examination that the victim girl is his distantly related sister.

17. PW-7 was the VDP Secretary of Juglonigaon and on the day of occurrence, at about 6 p.m., he received a phone call from the informant that the appellant had entered into his house and caught hold of his daughter. He then reported the matter to the police and also informed another member of the VDP, namely, Sahabuddin about the incident. PW8 testified that he received a phone call from Haren Mech, who informed him that an incident had occurred in the house of

the informant and he then came to the place of occurrence and found the family members of the appellant as well as the informant. But, the appellant told him that he has falsely been framed with an allegation by the informant and his family members and when asked, the victim girl told that the appellant uttered some obscene words against her.

18. PW-9 and PW-10 are witnesses of seizure, in presence of whom the I.O. had seized one School Certificate of the victim, vide seizure list, Exhibit P-3, and took their signatures as witness. PW-11 is Dr. Jerina Nazrin, who examined the victim girl on 09.01.2021 at Kanaklata Civil Hospital and upon examination, she found no external injury and submitted her report (Exhibit P-5). PW-12 is the I.O. of the case, who has carried out the investigation and submitted charge-sheet. His evidence reveals that during investigation, he visited the place of occurrence, examined the witnesses and drew a Sketch Map (Exhibit P-7) and he also got the victim examined at Kanaklata Civil Hospital and he recorded one G.D. Entry with Salonibari Police Out Post, bearing No. 178 dated 09.01.2021 (Exhibit P-6) and also got the statement of the victim girl recorded in the Court under Section 164 of the Cr.P.C. and he seized the school certificate of the victim girl (Exhibit 2), vide seizure list (Exhibit P-3), and on completion of investigation, he submitted charge-sheet (Exhibit P-8) against the appellant to stand trial in Court under Sections 354A/506 IPC, read with Section 8 of the POCSO Act. PW-13 is the Bench Assistant of the Court of learned Chief Judicial Magistrate, Sonitpur, and he confirmed the statement of the victim girl (Exhibit P-9) recorded by Smt. T.D. Hazarika, Judicial Magistrate 1st Class, Tezpur, Sonitpur.

19. Thus, from the evidence discussed above, it becomes apparent that except the victim, there is no eyewitness to the occurrence. The evidence of the victim

reveals that at the relevant point of time, while she was alone in her house, the appellant came and enquired the presence of her father and while she replied that her father was absent, then the appellant caught hold of her hands and neck and dragged her towards the backside of the toilet which is situated behind her house and he stated that he loves her, and while she resisted then the appellate let her loose and fled away.

20. Now, the question is whether the aforesaid act of the appellant amounts to an offence under Section 354 of the IPC, read with Section 8 of the POCSO Act or not.

21. The learned Court below in paragraph No. 28 of the impugned judgment and order, had held that the prosecution side has succeeded in establishing use of force to the victim girl by the appellant and thereby, he intended to outrage her modesty. The learned Court below also observed that what constitutes outraging a female modesty is defined nowhere and the essence of woman's modesty is her sex and the culpable intention of the appellant is the crux of the matter and the reaction of the woman is very relevant, but if absent is not always decisive and as the victim, immediately after the occurrence, reported the matter to the mother of the appellant, the said conduct of the victim girl is very much relevant and the intention is not the sole criteria of the offence under Section 354 of the IPC, which can be committed by a person assaulting or using criminal force to any woman, which indicates that the prosecution side has been able to establish the guilt of the appellant in committing the offence under Section 354 of the IPC, beyond reasonable doubt.

22. The reason, so assigned by the learned Court below, in arriving at such a finding, appears to be not so unreasonable.

23. It is not in dispute that having arrived in the house of the victim, the appellant enquired about the presence of the father of the victim and while she stated that her father was not present, then the appellant caught hold of her hands and neck and dragged her towards the backside of the toilet of her house, where he stated that he loves her. Thus, the culpable intention of the appellant can be derived from his conduct of enquiring the presence of her father and dragging her by holding her hands and neck towards the backside of the toilet and he did so without her consent. Further, it appears that immediately after the occurrence, the victim girl has reported the matter to the mother of the appellant, who of course disbelieved her version and then, she reported the matter to her father when he arrived home.

24. Thus, from the aforementioned facts and circumstances, it is clearly established that the ingredients of offence under Section 354 of the IPC is made out here in this case and as such, the learned Court below has rightly arrived at finding the guilt of the appellant under Section 354 of the IPC.

25. The learned Court below, however, has not discussed the ingredients of the offence under Section 8 of the POCSO Act and the learned Court below has observed that the foundational fact of the case has clearly made out through reliable and credible evidence and the appellant failed to rebut the same and as such, the presumption under Sections 29 and 30 of the POCSO Act is available against the appellant. The learned Court below has also placed reliance upon a decision of this Court in the case of **Bhupen Kalita vs. State of Assam**, CRL. Appeal (J) 87/2017. There is no doubt that once the prosecution side has been able to discharge its burden of establishing the foundational facts constituting the offences against the accused in course of trial which would satisfy a prudent man that such a thing had indeed occurred at the instance of the accused, the

presumption under Section 29 of the POCSO Act is available.

26. Section 7 of the POCSO Act deals with sexual assault which read as under:

“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.”

27. In the case in hand, admittedly, the appellant has not touched the private parts of the victim girl. But, having caught hold of her hands and neck and dragging her behind the toilet of her house, and stating to her that he loves her, indicates that the said act involved physical contact and in the given facts and circumstances, existence of culpable mental state has to be presumed in view of section 30 of the POCSO Act. And it appears that the appellant had made no attempt to rebut the same though he has the right to rebut the same.

28. Thus, all the ingredients of the offence under Section 8 of the POCSO Act, and also under section 354 IPC, appears to be established here in this case and as such the prosecution side has succeeded in discharging its burden of establishing the charges under said sections, beyond all reasonable doubt. Moreover, the presumption under Section 29 of the POCSO Act is also available here in this case and the appellant had failed to rebut the same.

29. It also appears that the learned Court below having convicted the appellant under both provisions of law had sentenced him under both the count. Now, what left to be seen is whether sentence of the appellant under both the count is warranted here in this case or not.

30. In this context, reference may be made to Section 42 of the POCSO Act,

which provides for alternate punishment, wherein it is stated that where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, (376A, 376AB, 376B, 376C, 376D, 376DA, 376DB), (376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

31. Thus, a careful perusal of Section 42 of the POCSO Act indicates that sentence under both the counts is not warranted. A person may not be punished twice for the same set of actions of conduct or omission that collectively form an offence covered by two separate articles of law. Despite the fact that law allows for a trial on an alternative charge for both offences, the punishment can only be given for one of them, the one that is more serious.

32. In arriving at such a finding, this court gain sustenance from a decision of Hon'ble Supreme Court in **Independent Thought vs. Union of India**, reported in **AIR 2017 SC 4904**, wherein it has been held that section 42 of the POCSO Act makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. It has further been observed that same is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. It is also observed that the legislature knowingly introduced section 42 of POCSO Act to protect the interest of the child. As the objects and the reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with

a view to ensure that the children of tender age are not abused during their childhood and youth. Therefore, considering section 42 of the POCSO Act where an act or omission constitute an offence punishable under POCSO Act as well as under Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the IPC as provides for punishment which is greater in degree. Therefore, on a fair reading of section 42 of the Act while imposing punishment for the act or omission which constitutes an offence under the POCSO Act as well as under IPC, it is the duty caste upon the trial Court/Court to award suitable punishment either under the POCSO Act or under IPC, however, which is greater in degree.

33. Now, adverting to the case in hand I find that the learned court below had convicted and sentenced the appellant under Section 354 IPC and sentenced him to suffer rigorous imprisonment for **one year** and also to pay a **fine of Rs. 5,000/-** with default stipulation and also convicted and sentenced him to suffer rigorous imprisonment for **five years** and to **pay a fine of Rs. 5,000/-** with default stipulation under Section 8 of the POCSO Act. The learned court below, by virtue of section 42 of the POCSO Act, ought to have imposed suitable punishment either under the POCSO Act or under IPC, however, which is greater in degree.

34. The punishment prescribed under Section 354 IPC is simple imprisonment of either description for a term which shall not be less than **one year** but which may extend to **five years** and shall also liable to fine. And the punishment prescribed under Section 8 of the POCSO Act is imprisonment of either description for a term which shall not be less than **three years**, but which may extend to **five years** and shall also liable to fine.

35. Apparently, the punishment prescribed under section 8 of the POCSO Act which is greater in degree, in as much as here minimum punishment prescribed is, it shall not be less than three years, whereas, the minimum punishment prescribed under section 354 IPC is, it shall not be less than one year. That being so, the learned court below ought to have imposed punishment under section 8 of the POCSO Act, which is greater in degree, in view of section 42 of the POCSO Act.

36. Thus, having tested the judgment of the learned court below, in the light of the above discussion and finding, it cannot be said that the sentence so awarded by the learned court below withstands the legal scrutiny. Accordingly, the sentence, so imposed by the learned court below upon the appellant, under section 354 IPC, stands set aside and quashed.

37. It also appears that having convicted the appellant under section 8 of the POCSO Act the learned court below had sentenced him to suffer rigorous imprisonment for 5 years and also to pay a fine of Rs. 5,000/- with default stipulation. The learned counsel for the appellant submits that 5 years is the maximum punishment prescribed under section 8 of the POCSO Act and that is in higher side. And that the appellant is behind the bar for about one year. And on such count the learned counsel for the appellant submits that some amount of leniency may be shown to the appellant.

38. There appears to be substance in the submission of learned counsel for the appellant. There is no doubt that given the object sought to be achieved by the legislature in enacting the stringent provisions, no leniency is warranted for the perpetrator of such a crime. Even then imposing of the maximum punishment prescribed under section 8 of the Act, appears to be in higher side and given the magnitude of the offence and the antecedent of the appellant, this court is of the

view that maximum sentence provided in the section is not warranted herein this case.

39. And having considered the aggravating as well as the mitigating circumstances, this court is of the view that end of justice will be sub-served if the period of five years is modified to **three years**. Accordingly, the sentence, so imposed by the learned court below, stands modified to the extent indicated above. However, the sentence of fine of **Rs. 5,000/- with default stipulation**, under Section 8 of the POCSO Act, is not interfered with.

40. In the result, I find no merit in this appeal and accordingly, the same stands dismissed. However, the sentence under section 8 of the POCSO stands modified to the extent indicated above. And the sentence under section 354 IPC stands set aside. The parties have to bear their own costs. The Registry shall send down the record of the learned court below, with a copy of this judgment and order, forth with.

41. Send back the LCR forthwith.

JUDGE

Comparing Assistant