

GAHC010190242020



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

**Case No. : CRL.A(J)/95/2020**

PAPU DAS  
JORHAT, ASSAM.

VERSUS

THE STATE OF ASSAM  
REP. BY PP, ASSAM.

2:SMTI MUNU GOGOI  
D/O SRI PRONOB GOGOI  
R/O TEOK TELIA GAON  
P.S-TEOK  
DISTRICT- JORHAT

Advocate for the appellant : Mr. D.K. Nath (Amicus Curie)

Advocate for the respondents : Mr. R.J. Baruah, (Addl. P.P.)  
for respondent No.1;  
Mr. P. Saikia, (Legal Aid Counsel)  
for respondent No.2.

Date of hearing : **01.04.2024**

Date of judgment : **13.05.2024**

**BEFORE  
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

**JUDGMENT & ORDER (CAV)**

Heard Mr. D.K. Nath, learned counsel for the appellant and Mr. R.J. Baruah, learned Addl. Public Prosecutor for the State respondent No. 1. Also heard Mr. P. Saikia, learned Legal Aid counsel for the respondent No. 2.

**2.** This appeal is preferred from the Central Jail, Jorhat, by the appellant, namely, Shri Papu Das, who stood convicted vide the impugned judgment and order dated 07.03.2020, passed by the learned Special Judge (POCSO), Jorhat, in Special Case No. 47/2018, under Section 354 of the IPC, read with Section 8 of the POCSO Act and sentenced him to suffer rigorous imprisonment for three years and a fine of Rs. 5,000/- with default stipulation under Section 354 of the IPC and also sentenced to suffer rigorous imprisonment for five years and also to pay a fine of Rs. 10,000/-, with default stipulation, under Section 8 of the POCSO Act.

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

“On 29.05.2018, at about 2 p.m. in the afternoon, the daughter of Smt. Munu Gogoi, namely, Smt. X (name withheld), of Teok Telia Gaon, went to the shop of Shri Papu Das to purchase some toffee and then, said Papu Das committed rape upon her. On receipt of an FIR to this effect from Smt. Munu Gogoi on 29.05.2018, the Officer-in-Charge of Teok P.S. had registered a case, being Teok P.S. Case No. 218/2018, under Section 4 of the POCSO Act and endorsed S.I Tayyebur Rahman to investigate the same.

The I.O. then visited the place of occurrence, drew a sketch map of the place of occurrence, examined the witnesses and thereafter, got the victim examined by Doctor and collected the report and got her statement recorded in the Court and also arrested the accused and forwarded him to the Court. Then on completion of investigation and having found a prima facie case made out, against the appellant, the I.O. laid charge-sheet, being charge-sheet No. 229/2018, dated 31.08.2018, under Sections 376(A)(B)/75 of the IPC, read with Section 4 of the POCSO Act, to stand trial in the Court under said Sections of law.

The appellant was accordingly produced before the learned Court below and thereafter, the learned trial court, complying with the provision of Section 207 of the Cr.P.C. and upon hearing the learned Advocates of both the parties, had framed charge against the appellant under Section 376 of the IPC, read with Section 4 of the POCSO Act, and on being read and explained over the particulars of the offences to the appellant, he pleaded not guilty and claimed to be tried. Thereafter, the prosecution side had examined as many as ten witnesses, including the M.O. and the I.O. Thereafter, closing the prosecution evidence, the learned trial Court had examined the appellant under Section 313 of the Cr.P.C. and thereafter, hearing arguments of learned Advocates of both the parties, the learned trial Court had found the offences under Section 354 of the IPC, read with Section 8 of the POCSO Act, well established against the appellant and convicted him under the said Sections of law and sentenced him accordingly."

**4.** Being aggrieved, the appellant has preferred this appeal from the Central Jail, Jorhat, challenging the correctness and otherwise of the said judgment and

order of conviction and sentence.

**5.** It is to be noted here that the appeal is being preferred from Central Jail, Jorhat, and this Court, vide order dated 22.02.2024, was pleased to engage Mr. D.K. Nath, learned Advocate as Amicus Curiae for the appellant and Mr. P. Saikia, learned Advocate as legal aid counsel for the respondent No.2 as the respondent No.2 did not turn up inspite of receipt of notice.

**6.** Mr. D.K. Nath, learned Amicus Curiae has submitted that except the victim girl, there is no eye-witness to the occurrence and that her evidence is not of sterling quality so as to act upon the same without corroboration and that the medical evidence has also not supported her version. Further, Mr. Nath submits that the learned Court below had convicted the appellant under Section 354 IPC, read with Section 8 of the POCSO Act and sentenced him under both the counts, which is not at all permissible in view of Section 42 of the POCSO Act. Mr. Nath, further submits that the prosecution side had failed to establish the charges against the appellant under Section 354 of the IPC, read with Section 8 of the POCSO Act, beyond all reasonable doubt, and therefore, contended to allow this appeal.

**7.** On the other hand, Mr. R.J. Baruah, learned Addl. Public Prosecutor, has supported the impugned judgment and order of conviction. Mr. Baruah, submits that the learned trial court had rightly convicted the appellant under Section 354 of the IPC read with Section 8 of the POCSO Act, and that there is no merit in this appeal and therefore, Mr. Baruah has contended to dismiss the appeal.

**8.** Mr. P. Saikia, learned Legal Aid Counsel for the respondent No. 2, subscribed the submission, so advanced by Mr. R.J. Baruah, learned Addl. Public Prosecutor. Besides, Mr. Saikia submits that though there is no independent

witness to the occurrence, yet, there is no ground to believe the evidence of the victim, whose evidence is sufficient to establish the charges under which the appellant stood convicted and that her mother - P.W. 1, is the eye witness to the occurrence, whose evidence lends unstinting support to the version of the victim. Therefore, Mr. Saikia has contended to uphold the impugned judgment and order.

**9.** Having heard the submission of learned Advocates of both sides, I have carefully gone through the appeal and the documents placed on record and also perused the record of the learned Court below, carefully.

**10.** In order to establish a charge under any penal provision of POCSO Act, it is the duty of the prosecution side to establish that the victim is a 'child' as defined in Section 2(d) of the POCSO Act. It is to be noted here that Section 2(d) of the POCSO Act defines 'child' is a person who has not completed 18 years.

**11.** Notably, Section 34(2) of the POCSO Act provides that - If any question arises in any proceeding before the Special Court, whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. As indicated in sub section (1) of Section 34 of the POSCO Act, the age of the victim could be determined by following the procedure contemplated in Section 94 of the Juvenile Justice Act, 2015.

**12.** In the case of **Jarnail Singh vs. State of Haryana, reported in (2013) 7 SCC 263**, Hon'ble Supreme Court, while dealing with the issue of determination of age of a minor, has held that one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children)

Rules, 2007. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a 'child' who is a victim of crime for, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.

**13.** Again in the case of **State of MP v. Anoop Singh reported in 2015 7 SCC 773**, it has been held by Hon'ble Supreme Court that Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 is applicable to determination of age of rape victim.

**14.** It is to be noted here that Rule 12(3) (b) of the 2007 Rules, which reads as:

“12. Procedure to be followed in determination of age.—

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) And only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

**15.** Whereas, Section 94 of Juvenile Justice Act, 2015 provides for presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age."

2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

**16.** Admittedly, in the case in hand, the I.O. had not seized any of the documents mentioned in Sub-section 2(i) and (ii) of Section 94 of the Juvenile Justice Act, 2015. Of course, he got the victim examined by Doctor and collected the report. And as such, the Court has to rely upon the medical evidence to arrive at a finding in respect of the age of the victim girl. The prosecution side had examined Dr. Ritu Saikia as P.W.3 and exhibited the Medical Report as Exhibit-3. The same indicates as under:-

**Hairs:-** Auxiliary- Absent;

Pubic - Absent;

**Breast:-** Not developed;

**Dental Examination:-** Total teeth- 20

**Genital Examination:-**

**Genital Organs, perineum and valve:-** No evidence of injury detected

**Hymen –** Ammula hymen present;

**Vagina-** No evidence of injury detected;

**Cervix & Uterus –** Not palpable, clinically;

**Evidence of venereal diseases:** - Not detected;

**Vaginal smear:-** Not collected

**Wearing garments:-** Evidence of struggle – not detected;

**Evidence of stain-** Not detected;

**Injury on body:-** No evidence of injury detected at the time of examination;

**Mental Condition at the time of examination:-** Within normal limit;

**Intelligence and memory:-** within normal limit;

**Co-operation and behavior :-**Within normal limit;

**Gait:-** Normal;

**Radiological Report:-** Requisition for radiological examination was given to the I.O. but till date no report for the radiological examination has been received by the FSM department of JMCH, Jorhat;

**Opinion:-**

- (i) Approximate age cannot be counted due to non-availability of radiological report. However, as per dental and physical examination, her age is above four years and below six

years;

(ii) (ii) No evidence of any physical injury detected on her person;

(iii) No evidence of recent sexual intercourse detected;

**17.** Thus, the evidence and the Medical Report submitted by her indicates that the age of the victim girl is above 4 years and below 6 years, as per dental and physical examination. However, the radiological report of the victim girl was not produced before her at the time of furnishing the report. In the case of **Vijay v. State of M.P.** reported in **(2010) 8 SCC 191**, Hon'ble Supreme Court has held that the issue of non-production of radiological report, the IO is the only competent person to throw light on the issue of the non-production of the report of the radiological test and if no question is put to the IO during his examination before the trial court, no adverse inference can be drawn always against the prosecution in as much as prosecutrix has no control over the prosecuting agency.

**18.** While dealing with the issue of determination of age of the victim in the case of **Vijay** (supra), Hon'ble Supreme Court has held as under:-

***“Determination of age***

**27. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (dental age), height, weight, general appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers, etc. However, for determining the controversy involved in the present case, only a few of them are relevant.**

***Teeth (dental age)***

**28. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth:**

|                              |                     |
|------------------------------|---------------------|
| Central incisors             | — 6th to 8th year   |
| Lateral incisors             | — 7th to 9th year   |
| Canines                      | — 11th to 12th year |
| Second molars                | — 12th to 14th year |
| Third molars or wisdom teeth | — 17th to 25th year |

In total, there are 32 teeth on full eruption of permanent teeth.

***Secondary sex characters***

**29. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages:**

- (a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;**
- (b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;**
- (c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs.**

**30. The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:**

- (i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.**
- (ii) More elevation and enlargement of breast and areola, but their contours are not separate.**
- (iii) Areola and papilla project over the level of the breast.**
- (iv) Adult stage — only the papilla projects and the areola merges with the general contour of the breast.**

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**34. The trial court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW 3), who had examined the prosecutrix on 7-12-1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast had developed a little; the armpit hair was in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at the relevant time, the prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW 3) makes it clear that the prosecutrix Asha @ Gopi had**

**very little developed breast and the growth of her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age."**

**19.** In the case in hand, as P.W.3 had found the Auxiliary and Pubic hairs of the victim girl absent and her breast not developed and found her teeth only 20 in number, which clearly indicates that the victim had not attained the age of 18 years at the material time of occurrence. Notably, the finding of the Doctor (P.W.3) is not disputed by the appellant side. And the evidence of P.W.1, who is the informant and mother of the victim, also indicates that the age of the victim at the material time of occurrence, was 4 years. That being so, no fault can be found with the finding, so arrived at by the learned Court below in respect of the age of the victim that she is a 'child' within the meaning of Section 2(d) of the POCSO Act.

**20.** The prosecution side has examined the victim girl as P.W.2. Her evidence reveals that she was studying in Class 'Ka' at Aniruddha Niketan. On the day of occurrence, after coming back from the school, she had lunch and then went to the shop of the appellant to purchase toffee, who is her neighbor, and then the appellant removed his pant and also removed her pant and thereafter, he had laid her on the ground and got on top of her person. Thereafter, her mother came inside the shop and then the appellant had fled away. Then, her mother pulled the appellant from that place and then her mother slapped her and took her back to home and thereafter to the police station. Thereafter, police got her examined by Doctor and also got her statement recorded by a Lady Magistrate. Her evidence also reveals that she knows the appellant and on earlier occasion also, she went to the shop of the appellant who used to sell vegetables in his shop. Notably, the victim was not been cross-examined by the appellant side.

**21.** Her evidence finds support from her statement under section 164 Cr.P.C.,

Exhibit 2, which indicates that the appellant laid her on the ground and also he got atop her person and thereafter, he got penis touched over her private part. P.W.10, Smti. Jinti Panging is the Judicial Magistrate, who had recorded the statement of the victim girl under Section 164 of the Cr.P.C. who also confirmed the statement (Exhibit 2) recorded by her. P.W.1, the mother as well as informant of the case and she also confirmed the Exhibit-2, recorded by Magistrate in the court.

**22.** P.W.1- Smti. Munu Gogoi is the mother of the victim. Her evidence reveals that the occurrence took place at around 2 p.m. on one day in the month of May, 2018. On that day, after coming back from the school, her daughter had taken her lunch and then went to the shop of the appellant's mother, to purchase toffee and since did not return for a long time, she went to the shop of the appellant's mother and did not find his mother there. Then, she went inside the shop and saw her daughter lying on the floor and the accused on her top with his pant unzipped. Then she pulled him away by holding his shirt and recovered her daughter and she also found the pant of her daughter unzipped. Thereafter, she took her daughter to the house of the landlady Keshati Das and reported the matter. Then she came to Teok P.S. and lodged the FIR (Exhibit 1). And at the time of occurrence, her daughter was 4 years old and then police got her daughter examined by a Doctor and also got her statement recorded in the Court and Exhibit 2 is the said statement of her daughter. The appellant side cross-examined her at length, but nothing tangible could be elicited to cast a doubt about the veracity of her version, except that police did not collect the vest and pant worn by the daughter at the time of occurrence. Thus, the evidence of the victim finds corroboration from the evidence of the informant -P.W.1.

**23.** It is, however, fact that the medical evidence has not supported her version. Dr. Ritu Saikia (P.W.3) who had examined the victim, found no evidence of physical injury on her person; and the evidence of recent sexual intercourse was also not detected. But, on this count alone the evidence of the P.W.1 and 2 cannot be disbelieved. In arriving at such a decision I am supported by following two decision of Hon'ble Supreme Court in **Gurcharan Singh v. State of Haryana** reported in **(1972) 2 SCC 749**, wherein it has been held as under:-

**“The absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape.”**

**24.** Again in the case of **Devinder Singh v. State of H.P. reported in (2003) 11 SCC 488**, Hon'ble Supreme Court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that the prosecutrix was used to sexual intercourse. Thereafter, Hon'ble Supreme Court has held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

**25.** P.W.4, Smti. Aruna Hazarika is the landlady of the informant. Her evidence reveals that around 3:30 p.m. on the day of occurrence, the informant came to her and reported that when her daughter went to the shop of the accused, then the accused laid her on the ground and tried to do something on her and at that

time, Keshati Hazarika, Akani Hazarika and others were present, and when she asked the victim then the victim told her that the accused laid her on the ground. Her evidence also reveals that Papu Das used to sell vegetables in his shop and adjacent to the same there is also a pan shop. Thereafter, the prosecution side declared this witness hostile and cross-examined her and she denied having stated before the police that Papu Das laid the victim under the *chang* and sexually harassed her by getting on her top.

**26.** P.W.5- Smti. Keshati Hazarika and her evidence reveals that on the day of occurrence, while she arrived at her home, then the informant reported her that her daughter has been raped. Nothing tangible could be elicited in cross-examination of this witness to discredit her.

**27.** P.W.6 is Smti. Akani Lahan and her evidence reveals that about 5/6 months back, while she was at her home, then the informant came and told her that she had sent her daughter to the shop of the mother of the accused and then the accused caught hold of her inside the shop. And at that time, Keshati Hazarika, Aruna Hazarika were present with her. Her evidence also reveals that prior to that incident also, Papu Das had harassed her own daughter namely Smti. Y. (name withheld). Thereafter, the prosecution side had declared this witness hostile and brought on record the statement given by her before the police. She denied having stated before the police that while she and some women were sitting in the courtyard of her house with other tenants, Munu Gogoi and her daughter came in tears and told her that Papu Das had laid her daughter on the floor and when he was committing bad act on her daughter by getting on her top and she then pushed him aside and brought her daughter from there and that her daughter would have died if she had not been there, and then Papu kept his pant unzipped and thereafter, he had gone under the

*chang* of the shop, and that about 7/8 years back when her daughter was 6 years old and was collecting water from the pond situated behind her house, Papu Das called her on the pretext of giving a packet of chips and committed bad act on her by taking her inside his room.

**28.** P.W.7 is Smti. Kanmai Das and she is the mother of the informant. Her evidence reveals that on the day of occurrence, at about 2:30 p.m., she saw the informant and her daughter with tears and when asked, the informant told her that when her daughter went to buy toffee in the shop of Papu Das, then he laid her on the ground, inside the shop and thereafter, the informant went to the police station taking along her daughter, and the informant told her that the accused had tried to commit bad act on her daughter by removing his pant and then, her daughter brought her therefrom. In her cross-examination, she denied having adduced false evidence in favour of her daughter.

**29.** P.W.8 is Md. Muktar Ahmed, who testified that he is not aware of the incident. Thereafter, the prosecution side declared him hostile and brought on record the statement given by him before the police and he denied having stated before the police that Munu Gogoi told him that when her daughter Smt. X went to the shop of Papu Das in front of his house, then she saw him committing bad act on her daughter by taking her daughter inside the shop.

**30.** P.W.9 is Syed. Tayyebur Rahman, the I.O. of this case. He confirmed that witness Aruna Hazarika, (P.W.4) stated before him that "Papu Das laid the victim under the *chang* and sexually harassed her by getting on her top." He also confirmed that witness Akani Lahan (P.W.6) stated before him that "When she and some women were sitting in the courtyard of her house with other tenants, Munu Gogoi and her daughter came in tears and told her that Papu Das had laid her daughter on the floor and when he was committing bad act on her daughter

by getting on top of her, she pushed him aside and brought her daughter from there and that her daughter would have died if she had not been there, and then Papu kept his pant unzipped and that thereafter, he had gone under the '*chang*' of the shop, and that about 7/8 years back when her daughter was 6 years old and was collecting water from the pond situated behind her house, Papu Das called her on the pretext of giving a packet of chips and committed bad act on her by taking her inside his room." He also confirmed that witness Muktar Ahmed (P.W.8) had stated before him that "Witness Munu Gogoi told him that when her daughter Smt. X went to the shop of Papu Das in front of his house, then she saw him committing bad act on her daughter by taking her daughter inside the shop."

**31.** What transpired from the evidence discussed herein above is that there was no material to show that the accused had committed penetrative sexual assault upon the victim. Neither the victim nor the informant had whispered any word to that effect. The medical evidence also never indicated the same. Though the victim had stated in her statement under section 164 Cr.P.C. that the accused/appellant having got on top of her person got his penis touched over her private part, yet, she remained silent in her evidence before the court. It is to be noted here that her statement under section 164 Cr.P.C. cannot be taken as evidence.

**32.** But, it becomes apparent that at the relevant time, while the victim went to the shop of the appellant, the appellant had removed his pant and also the pant of the victim and he laid her on the ground and he got on top of her person. And while doing so, he touched the victim and applied force to her. Thus, the evidence of P.W.1, the informant as well as mother of the victim and who is the only eye witness to the occurrence and also the evidence of the victim, goes a

long way to establish beyond all reasonable doubt that the appellant had subjected the victim to 'sexual assault' as defined in section 7 of the POCSO Act and also outraged her modesty as defined in section 354 IPC, by laying the victim on the ground of his shop and getting on top of her person after unzipping his chain of his pant and removing the pant of the victim. And probative value of their evidence could not be demolished in their cross-examination.

**33.** The other prosecution witnesses also supported the prosecution version. It is a fact that they are not the eye witness to the occurrence. Their evidences are albeit hearsay. But, they heard it from the P.W.2 who is the eye witnesses to the occurrence. No doubt P.W.4, 6 and 8 were declared hostile. But, discarding their evidence also it can be arrived at a conclusion, on the basis of evidence of the victim and informant alone, that the prosecution side has been succeeded in bringing home the offence under section 354 IPC and the offence under section 7 of the POCSO Act beyond all reasonable doubt. And as such, the learned Court below has rightly arrived at finding the guilt of the appellant under the said sections of law.

**34.** It is to be noted here that 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.”**

**35.** In the case in hand, the appellant, having laid the victim on the ground and getting on top her person, after unzipping the chain of his pant and removing the pant of the victim he made physical contact with the victim. 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. He had both knowledge and intention to subject the victim to sexual assault which are writ large from his conduct discussed herein above.

**36.** Since herein this case, the foundational fact of the offence under section 8 of the POCSO is also made out through reliable and credible evidence of P.W.1. In view of above, and also in view of the decision of this Court in **Bhupen Kalita vs. State of Assam**, CRL. Appeal (J) 87/2017, the presumption, under section 29 of the POCSO Act is applicable in all its plenitude and amplitude to the facts and circumstances herein this case. And the appellant had failed to rebut the presumption available under sections 29 and 30 of the POCSO Act, by adducing any evidence or on the basis of the evidence available on the record.

**37.** 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.

**38.** It also appears that the learned Court below, having convicted the appellant under both the 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.

**39.** 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.

**40.** 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.

**41.** 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 cast upon the trial Court/Court to award suitable punishment either under the POCSO Act or under IPC, however, which is greater in degree.

**42.** Now, adverting to the case in hand, I find that the learned court below had convicted the appellant under Section 354 IPC and sentenced him to suffer rigorous imprisonment for three years and a fine of Rs. 5,000/- with default stipulation also having convicted him under section 8 of the POCSO Act sentenced him to suffer rigorous imprisonment for five years and a fine of Rs. 10,000/- with default stipulation. But, 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.

**43.** The punishment prescribed under Section 354 IPC is 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.

**44.** 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.

**45.** 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.

**46.** 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. 10,000/- with default stipulation.

**47.** And having considered the aggravating as well as the mitigating circumstances, this court is of the view that no leniency is warranted herein this case.

**48.** In the result, I find no merit in this appeal and accordingly, the same stands dismissed. However, 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, forthwith.

**49.** Before parting with the record, this court would like to acknowledge the invaluable services rendered by Mr. D.K. Nath, the learned Amicus Curie and of Mr. P. Saikia, the learned legal Aid Counsel in disposing of this appeal. The Registry shall pay them remunerations as per their entitlement.

**JUDGE**

**Comparing Assistant**