

**IN THE COURT OF SPECIAL JUDGE(POCSO) ::NALBARI****Present : Farhana Sultana**

Special Judge,Nalbari.

**Date of Judgment : 14-09-2022****SPL. (P) CASE NO. : 09/2020**

*U/S Sec. 342/363/354A(I)/354B/376AB/511 Indian Penal Code read with section 10/18 of Protection of Children from Sexual Offences Act, 2012.*

**Complainant : State of Assam**Represented by : Sri K.K Sarma, Ld. Special  
Public Prosecutor**Accused : Mahimuddin Ahmed @  
Sokumuda,**

S/O- Lt Mafir Ali

Vill : Hamlakur,

P.S- Mukalmua

Dist- Nalbari, Assam.

Represented by : Taizuddin Ahmed, Advocate.

Date of offence : 20-02-2020

Date of FIR : 24-02-2020

Date of Charge Sheet : 29-02-2020

Date of Framing of Charge : 10-02-2021  
Date of Commencement of Evidence: 08-10-2021  
Date on which judgment reserved :  
Date of Judgment : 14-09-2022  
Date of the Sentencing Order, if any : ---

### Accused Details :

<b>Rank of accused</b>	<b>1</b>	<b>Name of Accused</b>	<b>Mahimuddin Ahmed @ Sokumuda</b>	<b>Date of Arrest</b>	<b>25/02/2020</b>	<b>Date of Release on</b>	<b>07/04/2020</b>	<b>Offences charged with</b>	<b>U/S 342/ 363/ 354A(I)/ 354B/ 376AB/ 511 rw Sec 8 of POCSO Act</b>	<b>Whether Acquitted or Convicted</b>	<b>Acquitted</b>	<b>Sentenced imposed</b>	<b>Nil</b>	<b>Period of detention undergone during trial for purpose of</b>	<b>42 days</b>
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## J U D G M E N T

1. Prosecution case, as has been revealed, from the ejahar, is that, on 24.02.2020, the Informant Ajijur Rahman lodged an ejahar, in the Mukalmuwa P.S, alleging inter alia that, on 20.02.2020, his 10 year old daughter came out to the road at

around 2 pm, when the accused who is a nearby shop keeper called her to his shop, caught hold of her removed her pant and tried to rape her. As she suffered pain, she shouted for help. Her voice was heard by one Akhtar Hussain, who went to the shop and saw the tin door locked from inside. As he banged on the door, the accused hid the victim under the bed and opened the door. Taking chance, the victim ran out of the shop. But, out of shame and fear she did not disclose the incident to anybody. Later on inquiry the victim told her mother about the incident and her mother informed the victim and Informant lodged the ejahar.

2. On receipt of the ejahar, O.C Mukalmuwa P.S, registered the same as Mukalmuwa P.S, case no. 67/20, u/s 376 (A)(B) of IPC read with section 4 of POCSO Act. O.C, Mukalmuwa P.S, then assigned S.I, Habibur Rahman to investigate into the matter.

3. Taking up the investigation of the case, the I.O, S.I, Habibur Rahman, recorded the statement of the Informant and victim, sent the victim for medical examination, but, the victim and her family members refused Medical Examination. Then the I.O, got her statement u/s 164 Cr.P.C recorded. He had also, visited the place of occurrence, prepared a rough sketch map of the place of occurrence, seized the school certificate of the victim, from the Informant and gave it in his custody. On completion of the investigation the I.O, submitted the charge sheet against the accused Mahimuddin Ahmed, u/s 376 A B of IPC read with section 4 of POCSO Act.

4. The accused Mahimuddin Ahmed, was arrested and produced before the Court and the Court was pleased to send him to Judicial Custody. The charge sheet was laid before the Special Judge, Nalbari, and upon taking cognizance, the proceeding of the case started. The accused was furnished with the copies of relevant documents and both the Ld. Special P.P and the Ld. Defense Counsel were heard pertaining to framing of charge. After due consideration, prima facie materials were found against the accused, U/S, 342/ 363/ 354 A(i)/ 354 B/ 376 AB/ 511 IPC read with section 10/18 of POCSO Act and hence a formal charge was framed against the accused Mahimuddin Ahmed, u/s 342/ 363/ 354A(I)/ 354B/ 376AB/ 511 read with sec 10/18 of POCSO Act and the same on being read over and explained the accused pleaded not guilty and claimed to be tried.

5. During trial Prosecution had examined altogether seven witnesses, including the MO and the IO. On completion of Prosecution evidence, the accused was examined u/s 313 of Cr.P.C, wherein he has denied all the evidences adduced against him. He also, declined to adduced defense evidence. I have heard arguments advanced by the Ld. Special P.P and Ld. Defense Counsel.

## **6. POINTS FOR DETERMINATION:**

7.(i) *Whether the accused Mahimuddin Ahmed kidnapped the victim, from her lawful guardian when she was standing on the road on 20-02-2020 at around 2 pm ?*

(ii) *Whether on the same day and at same time you took the victim inside your shop and wrongfully confined her?*

(iii) *Whether penetrative sexual assault on the victim, under the age of eighteen years, by gagging her mouth, on 07.04.2019, at around 7 pm, in Bonpura Village ?*

(iv) *Whether the accused Ajijur Rahman, on the same day and at same time, attempted to commit rape on the victim who is under 12 years of age?*

(v) *Whether the accused on the same day and same time made physical contacts and advances involving unwelcome and explicit sexual overtures towards the victim?*

(vi) *Whether the accused on the same date and time committed assaulted the victim and outraged her modesty by disrobing her?*

(vii) *Whether the accused, on the same day and time and at the same place attempted to commit aggravated sexual assault on the victim?*

## **7. DISCUSSION, DECISION AND REASONS THEREOF:**

8. The Informant of this case Ajijur Rahman was examined by Prosecution as PW-1. PW-1, in his evidence has stated that, the victim is his daughter. She was about nine years at the time of the occurrence. The incident happened on 20-02-2020

at around 2 pm, when his daughter went to the road, the accused called her to his shop and locked the door from inside. Thereafter, the accused removed her pant and tried to rape her. The victim shouted for help, hearing which his wife Sahera, mother, Pholmati and two other persons went to the shop and banged the door. The accused opened the door and the victim came out of the shop. After returning home the victim told him, her mother and others about the incident. So, he lodged the ejahar in Police Station. He has identified the ejahar as Ext-1.

9. In his cross examination, PW-1, stated that he did not see the occurrence taking place and heard from his daughter two days after the incident. He also, stated admitted that in Ext-1, he has mentioned that his victim daughter reported the matter to them after two days and then he went to the Police station. Admittedly, the ejahar was not written by him but, by a co villager. However, PW-1, could not remember the date.

9. The victim was examined as PW-2. Her ability to depose in the court was determined by my predecessor by putting some random questions and as per answers, it was opined that the victim was able to understand the questions put to her and give rational answers to them. The victim deposed in the court that, the incident happened in the afternoon. When she was standing on the road, the accused called her to his shop, and when she went there, the accused pushed her into the bed and started to remove her pant. Thereafter, he touched her body part from which she urinates. She immediately started shouting hearing which villagers came there and started banging on the door. Her

mother and grandmother also, went there and banged on the door. The accused hid her under the bed and opened the door. As the door opened she ran out of the shop.

10. She reported her mother and grandmother about the incident and later he father when he came home.

11. Victim's mother, PW-4, Sahera Begum, deposed in the court that on the relevant day at around 2 pm, her daughter was watching fishing nearby. The accused called her victim daughter to his shop As soon as her daughter went into the shop, the accused locked the door from inside. She also, said that her daughter started crying. So, they rushed to the shop and two other boys also, went there. The accused opened the door and she saw her daughter inside. She came running to her. She asked her what happened and the victim told her that the accused tried to rape her. PW-4, then asked the accused what he did to the victim. The accused told her that he did not do anything and that they should not lodge any case against him and he will pay whatever money they asked for.

12. PW-4, revealed that after two days they went to the Police station and her husband lodged the case. She further stated that her daughter told her that after locking her daughter inside the accused put her on the bed and put his penis into her private parts.

13. Her cross examination reflected that, she did not see the occurrence herself. Her daughter reported about the incident two days after it happened. This witness admitted the suggestion given by the Ld. defense Counsel that she did not

state before the I.O, that, the accused put penis into her private parts. She has also, admitted that her daughter often goes to the shop to play and on that day too she might have gone there to play. She did not inform any nearby person about the incident on that day.

14. Though this witness has stated that her victim daughter was medically examined by doctor and her wearing clothes were seized by Police, it is seen from the evidence of the Medical Officer, that the victim and her guardians refused to go through medical examination and nothing was seized by the Investigating Officer at the time of investigation.

15. The two independent witnesses examined by the Prosecution PW-5, Nurul Haque and PW-6 Pohar Ali, stated before the Court that they do not know anything about the incident.

16. Ld. Defense Counsel has argued that, from the evidence of the Informant, victim and PW-4 it has come to record that, two villagers also, went to the shop of the accused on hearing alarm raised by the victim. There names have been stated by PW-4 to be Sanababa and Dhan Ali, but, neither of the said two persons were examined by the I.O, during investigation nor they have been cited as witnesses in the charge sheet. This is a vital lacuna, which creates doubt in the Prosecution case.

17. Ld. Defense Counsel has also, argued that, the ejahar was lodged after two days of the occurrence, but there is admittedly no explanation about the delay. So, the delay in lodging the ejahar also, affects the Prosecution case, adversely.



18. Moreover, Ld. Defense Counsel has also, argued that the witnesses are not consistent regarding the time of knowledge of the victim's mother about the incident. Victim stated that, when she shouted from inside the shop, her mother and grandmother came. Again she stated that hearing her voice villagers came to spot and when her mother asked she narrated the incident to her mother and also, to her grandmother. In Ext-2, statement of the victim recorded u/s 164 of Cr.P.C, the victim stated that, when she shouted for help only Akhtar and Dhan came there. She did not state that her mother or grandmother reached the place of occurrence at that time. She also, stated in Ext-2, that both Akhtar and Dhan reported the matter to her mother in the evening.

19. Mother of the victim PW-3, stated that, her daughter reported her two days after the incident took place. Grandmother of the victim has also, to been cited in this case. He has further argued that, admittedly there were other many people near the place of occurrence in the Mosque as well near the fishing pond, but, the I.O, did not examine any such person in support of the case.

20. Further PW-3 admitted in her cross examination that, she did not state to the I.O, that the accused put his penis into the private parts of the victim. She has also, admittedly, did not inform any nearby villagers about the incident that day. Ld. Defense Counsel has argued that the aforesaid circumstances create doubt in the veracity of the witnesses and it will not be safe to rely on the said witnesses for conviction of the accused.

21. He has also submitted that the victim was a child of about eleven or twelve years. It is very easy to manipulate a child of this age. She may have perceived the facts wrongly and may have swayed away by her parents. It has also, come to record from the evidence of the mother of the victim that she often goes to the shop of the accused to play hide and seek and on the relevant day also, she might have gone there to play. This evidence shows that victim's mother, herself was not sure about the occurrence. Hence it is clear that evidence of the witnesses are not reliable enough to base conviction of the accused.

22. It is a settled legal principle that conviction can be sustained on the basis of evidence of a solitary witness or prosecutrix. But, the witness must be of In the Supreme Court's decision of Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21, it was held that the "sterling witness" should be of a very high quality and calibre whose version should be unassailable. The Court considering the version of such witness should be in a positing to accept it for its face value without any hesitation. To test the quality of such witness, what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross examination of any length and howsoever

strenuous it may be, and under no circumstance should be roomed for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it.

23. According to the decision of the aforesaid case, the witness should be consistent right from the beginning to the end point. But, in this case, only the statement of the victim has been recorded u/s 161 of the Cr.P.C. Statement u/s 164 of Cr.P.C, is of utmost importance, since, it is the first statement given under oath and is the basis of determining the credibility of the witness by contradiction. There are some vital inconsistencies in the statement of the victim Ext-2 and her evidence given in Court. Moreover, since the victim is a child no oath was administered to her, at the recording evidence. So, it cannot be accepted without any grain of salt. Therefore, in view of the aforesaid facts and circumstances, I am of considered opinion that, the veracity of the victim is doubtful and it cannot be held that Prosecution has been able to establish the foundational facts of the case.

24. It is pertinent to mention here that, the trial under the POCSO Act is unique in the sense that, this Act has been armed with the reverse presumptions as depicted u/s 29 and 30 of the Act.

25. Section 29 of POCSO Act says that, **where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to**

**commit the offence, as the case may be unless the contrary is proved.** It has been already decided in a number of adjudications by the Hon'ble Supreme Court and various High Courts that before the presumption in law under [Section 29](#) of the Act comes into operation against an accused, the prosecution must be able to prove the existence of certain foundational facts in course of the trial which would satisfy a prudent man that such a thing had indeed occurred at the instance of the accused.

26. In the case of **Bhupen Kalita vs State of Assam, reported in 2020 (3) GLT, 403**, it has been held by the Hon'ble Gauhati High Court that, burden of the Prosecution to establish the foundational facts has been somewhat lessened than beyond all reasonable doubt, but, it has to be of preponderance of probability. The Court must be able to believe that such an incident may have happened. In the backdrop of the discussion made above, I am of considered opinion that, the Prosecution has not been able to establish the foundational facts of the case against the accused. Hence, the presumption u/s 29 of the POCSO Act cannot be resorted to. Accordingly, the Prosecution is held to have failed to prove the guilt of the accused Mahimuddin Ahmed, u/s 342/ 363/ 354A(i)/ 354B/ 376 AB/ 511 read with sec 10 / 18 of POCSO Act 2012 and as such he deserves to be acquitted.

27. As per the compensation scheme for women victims/survivors of sexual assault/other crimes, 2018, the factors which are to be considered are-gravity of offence and mental or

physical harm or injury suffered by the victim, expenditure incurred on the medical treatment of the victim, either physical or mental, including counselling, travelling, funeral, loss of educational opportunity, loss of employment, whether the incident was a single isolated one, whether the victim became pregnant or contracted any sexually transmitted disease or HIV, etc., any disability suffered by the victim and the financial condition of the family of the victim, among others. Now, in this case, the incident was a single isolated one. The financial status of the Informant's family is acceptable. There is nothing in the record to show that the victim lost the opportunity of education or employment. Question of pregnancy or contracting sexually transmitted disease or HIV does not arise in this case. Hence, in the facts and circumstances of the case, I am of opinion that there is no necessity for payment of compensation in this case.

### O R D E R

28. From the discussion made above, it is seen that the prosecution has failed to prove the offence u/s 342/ 363/ 354A(i)/ 354B/ 376AB/ 511 of IPC read with sec 10/18 of POCSO Act against the accused. Hence, **accused Mahimuddin Ahmed is found not guilty and is acquitted from the charge of offence u/s 342/ 363/ 354A(i)/ 354B/ 376AB/ 511 of IPC read with sec 10/18 POCSO Act, 2012 on benefit of doubt.**

29. The accused person is set free at his liberty forthwith.

30. Bail bond furnished by the accused shall stand canceled after period of 6 months.

31. The seized articles if any be disposed of as per law in due course of time.

32. Given under my hand and seal of this court on this the 14<sup>th</sup> day of September /2022.

**Farhana Sultana)**

Special Judge

Nalbari

Dictated & corrected by me

Special Judge

Nalbari

**APPENDIX**

**LIST OF PROSECUTION/ DEFENCE/ COURT WITNESSES**

**(A) Prosecution:**

<b><u>SI Rank</u></b>	<b><u>Name</u></b>	<b><u>Nature of Evidence</u></b>
i)	PW 1 : Ajijur Rahman	Informant
ii)	PW 2 : Sajina Begum	Victim
iii)	PW 3 : Dr Dipti Choudhury	M/O
iv)	PW 4 : Mrs Sahera Begum	Independent
v)	PW 5 : Nurul Haque	Independent
vi)	PW 6 : Pohar Ali	Independent
vii)	PW 7 : SI Habibur Rahman	I/O
(B)	<b><u>Defence :</u></b>	None
(C)	<b><u>Court :</u></b>	None

**LIST OF PROSECUTION/ DEFENCE/ COURT EXHIBITS**

**Prosecution Exhibits :**

<b><u>Sl.</u></b>	<b><u>Exhibit No</u></b>	<b><u>Description</u></b>
i)	Ext 1	: Ejahar
ii)	Ext 1(1)	: Signature of PW 1,
iii)	Ext 2	: Statement of victim u/s 164 CrPC
iv)	Ext 2(1) to 2(6)	: Signatures of the PW 2,
v)	Ext 3	: Medical Report
vi)	Ext 3(1)	: Signature of PW 3,
vii)	Ext P 4	: Sketch map
viii)	Ext P 4(1)	: Signature of PW 7
viii)	Ext P 5	: Seizure list
ix)	Ext P 5(1)	: Signature of PW 7

- x) Ext P 6 : Charge Sheet  
xi) Ext P 6(1) : Signature of PW 7

- (B) **Defence Exhibits** : None  
(C) **Court Exhibits** : None.  
(D) **Material Exhibits** : None

( **Farhana Sultana** )

Special Judge

Nalbari