



GAHC010127332021

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THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Crl. Appeal No. 140 of 2021

SRIMAN DEV SARMA

S/O- LATE GURU DUTTA DEV SARMA,

R/O- BORGAON, MOUZA- NAMATI,

UNDER TIHU P.S.,

DIST.- NALBARI, ASSAM

.....Appellant

VERSUS

THE STATE OF ASSAM AND ANR.

REP. BY THE P.P., ASSAM

2:HEMEN DAS

S/O- LANKESWAR DAS

R/O- BORGAON

UNDER TIHU POLICE STATION

MOUZA- NAMATI, ASSAM.

.....Respondents

Advocates for the appellant : Mr R Singha

Mr J Borah.

Advocate for the respondent : Mr B Sarma, Addl. PP.

BEFORE

HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Hearing : 08.05.2023

Date of Judgment : 21.06.2023



JUDGEMENT AND ORDER (CAV)

Heard Mr R Singha, learned counsel appearing on behalf of the appellant. Also heard Mr B Sarma, learned Additional Public Prosecutor appearing on behalf of the State of Assam.

2. Feeling aggrieved and dissatisfied with the Judgment and Order dated 30.03.2021, passed by the learned Special Judge, (POCSO) Nalbari, in Special (POCSO) Case No. 32/18, by which the accused appellant has been convicted under Section 448 IPC & Section 10 of Protection of Children from Sexual Offences Act, 2012,(hereinafter, in brevity, referred to as "the POCSO Act"), the accused has preferred this appeal. The appellant was sentenced to undergo Rigorous Imprisonment for 7 (seven) years and to pay a fine of 25,000/- (Rupees Twenty Five Thousand) only, and in default to undergo Simple Imprisonment for 5 (five) months for the offence under Section 10 of the POCSO Act, and the accused appellant was also sentenced to undergo Simple Imprisonment for a term of 1 (one) year and to pay a fine of Rs. 1000/- (Rupees One thousand), and in default of payment of fine to undergo Simple Imprisonment for 5 (five) days for the offence under Section 448 IPC. Both the sentences were directed to run concurrently.

3. The case of the prosecution is that Hemen Das, who is the father of the victim lodged an FIR before the Officer-In-Charge, Tihu Police Station, stating inter alia that the accused is his adjacent neighbour. On 22.07.2018, at about 11:00 am, in absence of any person in his house, the accused entered into his house. At that time, his minor daughter aged about 11 years was writing something inside the room. Suddenly, the accused embraced her and kissed her on her cheeks and also touched her private parts. It is also alleged that the accused also tried to commit rape on her. When his daughter raised alarm, the accused fled



away from the scene.

4. On receipt of the FIR, a case was registered vide Tihu PS Case No. 129/2018, under Sections 448/376/511 IPC, read with Section 10 of the POCSO Act, 2012, against the accused appellant and investigation was initiated.

5. During investigation, the Investigating Officer visited the place of occurrence, recorded the statements of the witnesses. The victim was also sent to the Court for recording her statement under Section 164 CrPC by the Magistrate. She was also medically examined. After completion of investigation, charge sheet was submitted against the accused appellant under Sections 448/376/511 IPC, read with Section 10 of the POCSO Act.

6. During trial, on appearance of the accused appellant, charge was framed under Sections 448/376(2)(i)/511 IPC, read with Section 10 of the POCSO Act, which was read over and explained to the accused/ appellant, to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused/ appellant, the prosecution examined 8 (eight) witnesses and exhibited ten documents. On the other hand, the accused appellant adduced three witnesses in support of his defence. After completion of the trial, the statement of the accused appellant was recorded under Section 313 CrPC, wherein he denied the evidence of the witnesses made against him and pleaded his innocence. After hearing the arguments of the learned counsel for the parties, the trial Court had delivered the Judgment convicting the accused as aforesaid. Hence, this appeal.

8. It was urged by the learned counsel for the appellant that in the facts and circumstances of the case, the trial Court has committed a grave error in convicting the accused appellant under Section 10 of the POCSO Act, as the appellant could not have been



convicted only on the basis of the sole testimony of the victim. Even considering the prosecution case, as it is, at the best, the case would fall under sexual assault, punishable under Section 8 of the POCSO Act.

9. It is also submitted by the learned counsel for the appellant that there are lots of contradictions in the statements of the witnesses. The learned trial Court while convicting the accused/ appellant relied on the sole testimony of the victim. However, the learned trial Court has completely overlooked the fact that in her examination in chief, she has stated that on an earlier occasion while the victim was on her way to shop, the accused had touched her breasts, about which she had informed his mother but her mother told her that as the accused appellant does not have daughter hence, he touched her breasts. The fact was never corroborated by PW-3, who happened to be the mother of the victim. As such, the Judgment and Order dated 30.03.2021, is liable to be set aside.

10. It is also the submission of the learned counsel for the appellant that the learned trial Court has opined in the judgment that the DW-2 has stated in his evidence that the accused was with him at the time of incident. It was also opined that PW-6 also stated that the appellant was at his house and as such, it cannot be possible on his part to be present in two places. However, the appellant did not place any supportive documents. The trial Court did not give any opinion to disbelieve the testimony of DW-2 and as such, the impugned Judgment and Order dated 30.03.2021, is bad in law and liable to be set aside.

11. On the other hand, learned Additional Public Prosecutor appearing on behalf of the State, while opposing the present appeal has vehemently submitted that in the present case, the prosecution has proved the case on the basis of the evidence of the victim and the other



witnesses beyond reasonable doubt. It is further submitted that the accused in the present case was a neighbour of the victim girl and he misused his position as a neighbour and he has committed aggravated sexual assault on the minor girl. Under the facts and circumstances of the case, it is prayed to dismiss the appeal.

12. Having heard the learned counsel for both the parties on either side and having perused the materials on record, it is seen that the point arising for consideration is= whether the prosecution has established the guilt of the accused/ appellant under Section 10 of the POCSO Act!

13. Before I deal with the evidence in the case and also the submission of the learned counsel for the parties, it is necessary to mention that there is no dispute in this case, as to the age of the victim girl. Similarly, there is also no dispute to the fact that the accused is the adjacent neighbour of the victim, who has access to the victim girl.

14. I shall now deal with the evidence in the case. As usual in similar cases, the only evidence in the case as regards the sexual assault, is the evidence tendered by the victim girl, who was examined as PW-1. She deposed in her evidence that during last summer vacation of her school, one day, when she went to the grocery shop of her village, the accused asked her where she was going, to that, she answered to the accused that she was going to her village grocery shop and at that time, the accused touched her breasts. After touching her breasts, the accused petitioner left the place and thereafter, she went to the shop and from there she returned home and disclosed the incident to her mother. Her mother told her that as the accused did not have daughter, so he touched her breast.

15. PW-1 also stated that on the next day, in between 11:00 am to 12:00 pm, the accused



came to their house, and at that time, she was watching TV, accused asked her where her mother had gone and then he touched her breasts and left the house. Thereafter, accused again came on next day and on that day also she was watching TV and was writing poem. Accused asked her where her mother was, and when she told that her mother visited neighbour's house and she went inside the bedroom and the accused followed her and pushed her and pulled down her on the bed, kissed her on the cheeks, touched her breasts. When she raised alarm, the accused ran away. After 10 minutes of the last incident, when her mother came home, she was found crying and when she asked her what had happened, then she disclosed the whole incident to her mother. Her mother informed her father about the incident and her father lodged the FIR. Her statement was recorded by Police and thereafter, she was produced before the Magistrate. Accordingly, her statement was recorded vide Exhibit-1.

16. In her cross-examination, PW-1 replied that on the date of incident, she was present alone at her house. She shouted when accused hold her and pulled her down and touched her breasts . After 10 minutes her mother came home but none came immediately when she raised alarm. She had narrated the entire incident to her mother.

17. PW-2 is the informant, who is the father of the victim girl. From his deposition, it reveals that on the date of incident, he was not present at home. When he was coming from Bhutan and reached Kenduguri, he received phone call of his wife Pranita, and she told him over phone that the accused/ appellant entered into their house, hold his daughter, kissed her and touched her breasts and pulled her down on the bed. When he came back home, he took his daughter to the Police Station and lodged the FIR vide Exhibit-2.



18. PW-3 was the mother of the victim who was also not present at the time of incident. According to PW-3, on the date of incident, she herself along with the accused were taking a cup of tea in the house of one of her neighbour. At that time, the accused asked about her daughter and she told him that her daughter was watching TV and writing something. Thereafter, the accused came to her house. When she reached home, she saw her daughter was crying. On being asked, her daughter disclosed that the accused touched her breasts, kissed her and pulled her down on the bed. Thereafter, she narrated the incident to one of her neighbour and told her husband about the incident. PW-3 also stated that about 10 days back from the date of incident, when her daughter went to nearby shop, accused stopped her near the Shiv Mandir and he touched her breasts. Her daughter had disclosed the incident to her.

19. From the evidence of PW-2 and PW-3, it appears that the accused is their adjacent neighbour.

20. PW-4 is the Medical Officer, who examined the victim girl. The Medical Officer took the history of the incident from the victim, wherein she stated before the Medical Officer that a person known to her touched her breasts at around 3:00 PM on 22.07.2018. According to PW-4, the radiological evidence shows that the victim was above 10 years and below 13 years of age, on the date of examination.

21. PW-5 is the neighbour of the informant. She deposed in her evidence that on the date of incident, she was planting paddy in her own land, near the house of one Barun Talukdar. At that time, wife of the informant, Hemen Das told her that accused entered into the house of Hemen Das and touched the breasts of informant's daughter.



22. PW-6 is Rina Talukdar. From her deposition, it reveals that on the date of incident, she along with mother of the victim, Pranita and accused were taking cup of tea in her house. After taking cup of tea, the accused left her house. Thereafter, Pranita also left her house to cook food. After some time, Pranita again came back to her house and told her that accused went to her house and sexually assaulted her daughter by touching her breasts.

23. PW-7 is also another neighbour of both the victim and the accused. According to her, the incident took place on 22.07.2018 during daytime. She stated that there is a long pending boundary dispute between the accused and the informant. She also knew that the accused was beaten by the family members of the informant.

24. In her cross-examination, PW-7 replied that wife of the accused lodged a case for assaulting her husband by the informant, which is pending at Tihu Court. On 22.07.2018, Pabitra Rajbongshi was working as labour in the house of the accused. She did not know any incident with regard to the daughter of the informant.

25. PW-8 is the Investigating Officer. She deposed in her evidence that on 22.07.2018, she was working as DSP (Probation) and posted as Officer-In-Charge of Tihu Police Station. On that day, on receipt of the ejahar from one Hemen Das, she registered a case vide Tihu PS Case No. 129 of 2018, under Sections 448/376/511 IPC, read with Section 10 of the POCSO Act and started investigation. The informant Hemen Das was accompanied by his wife and victim, i.e., his daughter to the Police Station. She recorded the statement of the informant, his wife and the victim girl. She visited the place of occurrence, which is the house of the informant, situated at Village Borganon under Tihu Police Station and drew sketch map of the place of occurrence, vide Exhibit-6. She also recorded the statements of other witnesses. The



victim girl was sent for medical examination and produced before the Magistrate for recording her statement under Section 164 CrPC. She seized one birth certificate of the victim girl, on being produced by her mother, vide Exhibit-3, Seizure List. The accused was arrested. After completion of investigation, charge sheet was submitted against the accused under Sections 448/376/511 IPC, read with Section 10 of the POCSO Act, vide Ext-7.

26. The defence took the plea of *alibi* that the accused appellant was not present on that day in his house. In support of the fact, the defence adduced 3 (three) witnesses. DW-1 is the wife of the accused appellant. She stated in her evidence that on the date of incident, her husband was working with a labour, namely, Pabitra Rajbongshi in their compound and after having meal, her husband left for Barama to sell biscuits and at that time, Hemen Das assaulted her husband and snatched away Rs. 10,000/-, from him and gave false allegation of committing rape on his daughter. On the next day, she lodged one FIR against Hemen Das for assaulting her husband and snatching away the money, which is pending in Tihu Court.

27. In his cross-examination, DW-1 replied that there is no case pending regarding the boundary dispute between her husband and the informant. She lodged the FIR against Hemen Das after filing of case by Hemen Das against her husband.

28. DW-2 is Pabitra Rajbongshi. From his deposition, it reveals that on 22.07.2017, the incident took place. On that day, he had gone to the house of the accused to work as daily labour. The accused was working with him. Around 2'o clock, the accused went to collect money payable to him in connection with some business. Near Namghar, the accused was beaten by Hemen Das. Hearing hue and cry, he rushed to the place and saw the incident. Thereafter, accused returned home.



29. In his cross-examination, DW-2 replied that at about 12'o'clock, Hemen Das left him and went for lunch. He did not know where the victim was at the time of incident.

30. DW-3 is the accused appellant, Deba Sharma. He deposed in his evidence that he was working in his property, along with his helper, Pabitra Rajbongshi. There was a boundary dispute between him and the informant for a long time. At about 12:30 pm, he was on his way and near a Mandir, Hemen Das accosted him and physically assaulted him. His wife lodged an FIR against the informant Hemen Das, regarding the said incident. An absolutely false case has been lodged against him. He has no contact with the victim at any point of time. Their boundary dispute has not yet been settled.

31. Though the wife of the accused appellant, i.e., DW-1 stated that on the date of incident after having meal at about 04:00 pm, her husband left for Barama, to sell biscuits, but on the way Hemen Das assaulted him and snatched away Rs. 10,000 from him. But the accused did not utter a single word that the informant Hemen Das snatched away Rs. 10,000/- from him, rather on the date of incident, according to DW-3, i.e., the accused, at about 12:30 pm, when he was on his way Hemen Das accosted him and physically assaulted him. DW-2 stated that around 2'o clock, the accused went to collect money in connection with his business. Near the namghar, the accused was beaten by Hemen Das and having heard the hue and cry, he went to the spot.

32. From the evidence DW-1, DW-2 and DW-3, it appears that there was a time gap of around 2 hours in each of the statements given by DW1, DW-2 and DW-3. So, plea of alibi is not proved. Though the defence plea is that there is a long standing boundary dispute between the parties, this false case has been instituted, but according to the wife of the

appellant (DW-1), no case is pending between the parties regarding boundary dispute. They did not file any case against the informant regarding boundary dispute. So, probability of false implication is also not proved in the case.

33. In cases concerning offences under the POCSO Act, the sheet anchor of the arguments made on behalf of the State is the presumption that operates against the accused under Section 29 of the POCSO Act. It is contended in cases pertaining to the POCSO Act, as contended in the present case by the learned Additional Public Prosecutor on behalf of the respondent State that the Court has to presume that the accused has committed the offence for which he is charged under the said Act, unless the contrary is proved. On this basis, it is submitted on behalf of the respondent State that in the present case, it was for the appellant to have proved to the contrary and that the burden was entirely on him, which he had failed to discharge and that therefore, the conviction and sentence imposed by the trial Court could not be disturbed. 34. In this backdrop, it is first necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused could rebut such presumption. Section 29 of the POCSO Act reads as follows:-

"29. Presumption as to certain offences -

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."

35. A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading



to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.

36. The manner in which a presumption would operate against an accused has been analysed and deliberated upon by Courts because such a presumption is also provided for in various statutes, including the [Prevention of Corruption Act, 1988](#). In the case of ***Babu .vs. State of Kerala; (2010) 9 SCC 189***, while examining as to in what manner presumption under a statute would operate against the accused, the Hon'ble Supreme Court has held as follows:-

"(IV) Burden of Proof and Doctrine of Innocence

27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the

offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like [Negotiable Instruments Act, 1881](#); [Prevention of Corruption Act, 1988](#); and [Terrorist and Disruptive Activities \(Prevention\) Act, 1987](#), provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."

37. In the case of **Sachin Baliram Kakde .vs. State of Maharashtra, 2016 ALL MR (Cri) 4049**, the Hon'ble Supreme Court in the context of presumption under Section 29 of the POCSO Act, after quoting the said provision, has held as follows:-

"18. Thus, when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that the said person has committed the said offence unless the contrary is proved.

19. The presumption, however, cannot be said to be irrebuttable. In-fact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof.



The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved”

38. In a recent judgment, again in the context of presumption under Section 29 of the POCSO Act, in the case of **Amol Dudhram Barsagade .vs. State of Maharashtra; 2018 0 Supreme (Bom) 2023**, Hon'ble Supreme Court has held as follows:-

"5. The learned Additional Public Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim 12.10.2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."

39. In this context after quoting and referring to presumption under Section 29 of the POCSO Act, the Calcutta High Court in the case of **Sahid Hossain Biswas vs. State of West**

Bengal; 2017 SCC OnLine Cal 5023, has held as follows:-

"23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove the contrary, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see [Sait Tarajee Khimchand vs. Yelamarti Satyam](#), (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary."

40. Being a child witness of tender age and the sole direct witness in support of the prosecution case, the evidence of the said PW2 has to be evaluated with great care and circumspection. In this context, the Hon'ble Supreme Court in the case of [Radhey Shyam vs. State of Rajasthan](#); reported in **2014 2 Supreme 363**, has held as follows:-

"12. In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned

counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles."

41. It has been further held in the case of **Lallu Manjhi and another .vs. State of Jharkhand; (2003) 2 Supreme Court Cases 401** by the Hon'ble Supreme Court as follows:-

"10. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable,

(ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."

42. Applying the aforesaid principles pertaining to appreciation of evidence of witnesses,



particularly a child witness, it will have to be first examined as to under which category would the testimony of PW-1 (victim) fall in the present case. If the testimony is found to be wholly reliable, there would be no necessity of corroboration and if it was found to be wholly unreliable, it would have to be discarded. But, if it was found neither wholly reliable nor wholly unreliable, it would definitely require corroboration. A close scrutiny of the evidence of PW-1 shows that it was alleged by the victim that prior to the incident, i.e., on 22.07.2018, the accused touched the breast of the victim, while she was going to the shop and subsequently, on the next day, when the accused came to the house of the victim, she was alone and watching TV and accused touched her breasts and left the place. On the date of incident, accused pushed her and pulled down her on the bed, kissed on her cheeks and touched her breasts. The victim disclosed about the incident to her mother, which was supported by the mother of the victim also. It also appears that the victim was consistent in her statement before the Investigating Officer and when her statement was recorded by the Magistrate under Section 164 CrPC. The other witnesses, i.e., PW-5 and PW-7, are the neighbours of the informant and the accused, who also supported the fact that the mother of the victim informed them about the incident immediately after the occurrence.

43. The accused was convicted under Section 10 of POCSO Act, which deals with punishment for aggravated sexual assault. Aggravated sexual assault describes in Section 9 of POCSO Act and the present case deals with Section 9 (I) which says whoever commits sexual assault on the child more than once or repeatedly, is said to commit aggravated sexual assault. The sexual assault describes in Section 7 of POCSO Act, which reads as follows:-

“7. 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.”

44. Learned counsel for the appellant submits that the accused appellant was convicted under Section 10 of POCSO Act and he was sentenced to undergo Rigorous Imprisonment for 7 years which is the maximum punishment prescribed under Section 10 of the POCSO Act. Under the facts and circumstances of the case the punishment be reduced to 5 years.

45. Section 10 of POCSO Act says that –

“10. Punishment for aggravated sexual assault. Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

46. Regarding quantum of sentence, learned counsel for the appellant has contended that the convict is having family consisting of his wife and children and he is the sole earning member of his family. It is further submitted that he has been detained in custody since the date of the Judgment, i.e., for last two years and is a first offender. It is also submitted that the offence under Section 10 of the POCSO act carries maximum imprisonment for seven years with fine and since the convict is a first time offender, a lenient view be taken by imposing minimum sentence to 5 (five) years.

47. Learned Additional Public Prosecutor has opposed the contention of the learned counsel for the appellant on the ground that the convict has been found guilty of heinous offence under Section 10 of the POCSO Act, which carries minimum sentence of five years and, therefore, having regard to the gravity of the offence and to the fact that offences against girl



child are on the rise in the society, no leniency should be showed to the convict.

48. I have considered the submissions on the point of sentence.

49. The mitigating circumstances in favour of the convict is that he is the first time offender.

50. The aggravating circumstance against the convict is that he had sexually assaulted the girl child aged about 11 years by touching her breasts repeatedly. The other circumstance is that number of cases of girl child abuse are on rise in the society.

51. On balancing the mitigating and aggravating circumstances, it is apparent that aggravating circumstances far outweighs the mitigating circumstances.

52. The offence under Section 10 of the POCSO Act carries maximum sentence of seven years imprisonment and fine. Therefore, interest of justice will be met if convict is sentenced to minimum punishment of 5 (five) years. Fine imposed by the learned trial Court will remain as same.

53. In the result, appeal is partly allowed to the extent as aforesaid.

54. Accordingly, the Criminal Appeal stands disposed of.

55. Send down the LCR.

JUDGE

Comparing Assistant