

**(2025) 12 GAU CK 0023**

**Gauhati HC**

**Case No:** Crl.A. Of 215 Of 2021

Sowkat Ali

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

---

**Date of Decision:** Dec. 11, 2025

**Acts Referred:**

- Indian Penal Code, 1860- Section 354, 376(2), 506
- Protection of Children from Sexual Offences Act, 2012- Section 6, 9, 18

**Hon'ble Judges:** Sanjeev Kumar Sharma, J

**Bench:** Single Bench

**Advocate:** A Ahmed, A Dey, R.J Baruah

**Final Decision:** Allowed

---

**Judgement**

Sanjeev Kumar Sharma, J

1. Heard Mr. A Ahmed, learned counsel for the appellant. Also heard Mr. R.J Baruah, learned Addl. Public Prosecutor for the State of Assam as well as Mr. A Dey, learned

counsel for the informant/respondent No. 2.

2. This appeal u/s 389 of the Cr.P.C, 1973 is directed against the Judgment and Order dated 30.11.2021 passed by learned Special Judge (POCSO), Kokrajhar, Assam in Special Case No. 30/2018 convicting the accused/appellant u/s 6 of POCSO Act and sentencing him to undergo R.I for 10 years and also to pay a fine of Rs. 10,000/- i/d imprisonment for 1 year.

3. The case of the prosecution is that xxx, the paternal uncle of the victim, lodged an FIR alleging that on 18.06.2018, at about 3 PM, when the members of the house were away, accused Sowkat Ali gagged the mouth of victim and committed rape on her. After the incident the victim informed the matter to her grand-mother. On receipt of the FIR, a case under Section 376(2)(i)/506 IPC, r/w Section 6 of POCSO Act was registered and after completion of the investigation, a charge sheet was laid

against the accused Sowkat Ali for commission of offence U/S 376(2)(i)/506 IPC, r/w Section 6 of POCSO Act. The accused person was summoned and on his appearance, copies of the relevant documents were furnished to him. The case was transferred to Court of learned Special Judge (POCSO), Kokrajhar, Assam for disposal. Upon hearing both sides, charge under Section-6 of POCSO Act was framed against the accused Sowkat Ali to which he pleaded not guilty and claimed trial. In the course of trial, prosecution examined 11 (eleven) witnesses. At the closure of prosecution evidence, the accused person was examined U/S 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

4. Pw-1 is the mother of victim. She deposed that at about 3 PM her mother-in-law came to her house and told that Sowkat Ali had committed rape on her daughter, the victim. Pw1 also deposed that her daughter told her that accused took her to his bedroom, forcibly opened her pant and entered his penis into her vagina. In cross examination, PW1 was suggested that in her statement u/s 161 of Cr.P.C, she had not stated that her daughter told her that the accused took her to his bed room, forcibly opened her pant and entered his penis into her vagina. Pw 1 denied the suggestion.

5. Pw-2, xxx, the victim, aged about 9 years, deposed that accused is her paternal uncle and the incident took place 3 days after Eid. She deposed that while she was playing, accused called her and when she went to his house he took her inside his room, gagged her mouth with his hand, threw her on his bed, opened her churidar and thereafter he tried to enter his penis into her vagina. Pw2 has also deposed that accused repeated the act of entering his penis for 2-3 times. Pw2 has also deposed that at that time the mother of accused came and thereafter the accused left her. Pw 2 has deposed that she reported the matter to her grand-mother. In cross examination, defence suggested that Pw2 had not stated about rape in her statement u/s 161 of CrPC which Pw2 denied.

6. Pw-3 is the paternal uncle of the victim and the informant. He deposed that he heard of the incident from her mother and the victim. He has deposed that he lodged the FIR, Exhibit-2. In cross examination, Pw3 denied that a false case has been lodged against the accused because of previous family dispute.

7. Pw-4 is the mother of informant. She deposed that the victim came from the house of accused and reported that accused committed rape on her. In cross examination, Pw4 deposed that when the victim was reporting the matter to her she was alone in the house.

8. Pw5 is the father of victim and he deposed that he came to know about the rape of her daughter by accused, from her mother. In cross examination, Pw5 denied the suggestion that he has deposed falsely.

9. Pw-6 and Pw7 deposed that they have heard about the incident.

10. Pw-8 Dr. Sushma Brahma has deposed that on examination of the victim she found the following:

The age of the girl is between 7 years to 9 years but not above 10 years. She might not have been exposed to sexual intercourse. Injury mark on the inner side of both thighs which is simple in nature.

11. Pw-9 deposed that he is the cousin of informant. He also deposed that he came to know from the informant that accused committed rape on the victim.

12. Pw-10 Zakir Hussain deposed that he was asked by the informant to come to his house and later he came to know that the accused committed rape on the victim.

13. Pw-11 Sri Pankaj Kr. Ray, the Investigating Officer, deposed that on 18.06.2018 he was posted as Officer-in charge of Kazigaon Police Station. On that day, he had taken up for investigation the FIR lodged by Pw-1. On receipt of the FIR, a case u/s 376(2) (i) / 506 IPC, r/w Section 6 of POCSO Act was registered. In the course of investigation, he visited the place of occurrence and recorded the statements of the witnesses and the victim. He had taken steps for causing the medical examination of the victim and also for recording of her statement U/S 164 of CrPC. The accused Sowkat Ali was arrested and forwarded to Court. The wearing apparel of the victim was seized vide Exhibit-3 seizure list. Having found sufficient materials against the accused, he submitted charge sheet against him for commission of offence u/s 376(2) (i) and 506 IPC, R/W Section 6 of POCSO Ac. Exhibit-5 is the charge sheet and Exhibit-5(1) is his signature. In cross examination, Pw11 has deposed that he visited the place of occurrence on 18.6.2018 at 8 p.m but he had not recorded the statement of the witnesses. On 19.06.2018, he had visited the place of occurrence and recorded the statement of witnesses. He had not recorded the statement of Sabur Ali and Safura Khatun U/S 161 Cr.P.C. The seized wearing apparel of the victim were not sent for FSL examination. With respect to omissions in the evidence of prosecution witnesses, pw 11 deposed as follows:

i. That Pw-1 xxx stated before him that she came to know about the incident from her mother-in-law. Pw1 did not state before him that the victim informed her that accused pulled her hands and took her to his bed room and forcibly opened her pant and entered his penis into her vagina and committed rape on her and when she shouted the mother of accused Sowkat came and saw the incident.

ii. Further, Pw-2 xxx did not specifically state before him that accused tried to enter his penis into her vagina. Pw-2, the victim did not state before him that accused repeated to enter his penis for 2-3 times into her vagina. Pw-2 the victim did not state before him that accused held her mouth tightly as she tried to shout for which she also sustain injury on her lip.

iii. Further Pw-3 did not state before him that accused had torn the clothes of the victim.

iv. Pw-4 stated before him that her grand-mother reported that her paternal uncle has committed "bad act" on the victim.

v. Pw-5 stated before him that accused committed 'bad act' on his daughter.

vi. Pw-6 did not state before him that he came to know about the incident from his wife Salima.

14. A bare perusal of the evidence of the victim who was examined as Pw-2 would go to show that she has clearly stated that the accused/appellant had repeatedly tried to penetrate her and upon the arrival of the mother of the accused and upon being chided by her, the accused left.

15. During the cross-examination of Pw-2, it is interesting to note that the Pw-2/victim had asserted that she had stated before the police whatever she had stated in her examination-in-chief and it appears from the record that the suggestion that she did not state so before the I/O was not put to her in the usual manner, the answer to which would start with the phrase it is not a fact. Be that as it may, even taking the same to be a suggestion which was denied by the Pw-2 and taking into account the fact that the I/O had confirmed the omission to some extent, it would be noticed that according to the I/O, he had recorded the statement of the victim one day after the incident and on the very same day, the statement of the victim was also recorded u/s 164 Cr.P.C before the Ld. Magistrate wherein she explained the entire episode in detail and as rightly held by the learned Trial Court, the evidence of the Pw-2 before the Court is fully corroborated by her statement before the Ld. Magistrate. Therefore, the alleged aforesaid omission before the I/O does not appear to be of much consequence.

16. Thus situated, it appears that the evidence of the victim alone is sufficient to bring home the guilt of the accused in the absence of any rebuttal evidence discrediting such testimony. The rebuttal evidence through DW-1 and DW-2 has rightly been rejected by the learned Trial Court for the reason that the evidence of DW-1 was in the nature of alibi and there was no suggestion to the prosecution witnesses that the accused was elsewhere at the time of occurrence and further that DW-2, being the mother of the accused, is a highly interested witness and was likely to be supportive of the plea of the accused and furthermore, the DW-2 did not support the plea of alibi taken by the DW-1. Hence, the defence evidence is of no consequence.

17. Following the decision of this Court in Bhupen Kalita V. State of Assam CrI.A(J) No.87/2017, wherein it was held that the prosecution has to prove the foundational facts of the offence charged against the accused, not based on the standard of proof beyond reasonable doubt but on the basis of preponderance of probability, the learned Trial Court has held that the prosecution has been successful in establishing the foundational facts and accordingly, raised the presumption u/s 29 of the POCSO Act against the accused/appellant. But, as can be seen, the defence

could not introduce any credible rebuttal evidence to offset the presumption u/s 29 of the POCSO Act. Even otherwise, there is nothing to doubt the testimony of the PW-2/victim who is a 9 year old girl and who therefore, appears to be a credible witness. Moreover, her testimony has been supported by the other prosecution witnesses particularly PW-4, the mother of the informant who deposed that the victim came from the house of the accused and told her that the accused committed rape upon her.

18. Mr. Ahmed, learned counsel for the appellant, though did not lay much stress on merits, submitted that in the instant case, Section 6 of the POCSO Act would not be attracted. Rather Section 18 of the Act would be the more appropriate provision. Alternatively, it is submitted that the act of the accused/appellant would come under the purview of Section 354 of IPC and Section 9(m) of the POCSO Act.

19. For the purpose of ready reference, Section 7 (sexual assault) and Section 9(m) (aggravated sexual assault) of the POCSO Act are reproduced hereinunder :

7. Sexual assault. 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.

9(m) whoever commits sexual assault on a child below twelve years; or is said to commit aggravated sexual assault.

20. Further, Section 3 of the POCSO Act defines penetrative sexual assault as follows :

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

21. Section 18 of the POCSO Act reads as follows :

18. Punishment for attempt to commit an offence. Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine

or with both.

22. Section 354 IPC reads as follows :

354. Assault or criminal force to woman with intent to outrage her modesty.

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with 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 be liable to fine.

23. The question that now arises for determination is whether the Act of the accused, as described by the victim, taken at its face value would constitute an offence of penetrative sexual assault/rape or an attempt to commit such offence or would the said act be covered under the definition of sexual assault or by Section 354 IPC.

24. As per definition of penetrative sexual assault, penetration to any extent is sufficient to constitute penetrative sexual assault/rape. In other words, penetration to the slightest extent is sufficient. In the present case, the medical evidence does not indicate any injury to the vagina or uretra of the victim and the M.O also opined that she might not have been exposed to sexual intercourse. The victim has stated that the accused appellant tried to insert his penis into her vagina two to three times. Therefore, what she deposed was that the appellant tried to penetrate her vagina. But, from her deposition it does not emerge as reasonable certainty that penetration to some extent had taken place. That part is left to deduction and in view of the fact that the appellant was interrupted by the entrance of his mother while he was in the process of committing rape/ penetrative sexual assault upon the victim and coupled with the fact that the medical evidence does not indicate any injury to the vagina of the victim or exposure to intercourse, this Court is unable to hold that penetration at least to some extent took place but that the attempt at penetration was made but did not succeed.

25. It is a settled principal of law that even when two views are possible, the one favoring the accused is to be adopted. Considering all the aforesaid aspects, the finding of this Court is that the act of the accused must be regarded as an attempt to commit penetrative sexual assault/rape. When the act of the accused is covered either by the definition of penetrative sexual assault/rape, or the attempt to do so, there is no scope for bringing the said act within the purview of sexual assault as defined u/s 7 of the Act or of Section 354 IPC.

26. In view of the above discussion, the impugned judgment and sentence is modified by altering the conviction from one u/s 6 of the POCSO Act to one u/s 18 of the POCSO Act and the sentence of 10 years rigorous imprisonment is reduced to a sentence of 5 years rigorous imprisonment along with a fine of Rs. Rs. 10,000/-. Period of detention already undergone be set of.

27. The appeal stands partly allowed as above.