

GAHC010146872024



2026:GAU-AS:1051-DB

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

Case No. : Crl.A./259/2024

RANJAN DEKA
S/O LATE BIPIN DEKA, R/O DOLONGDIA, P.S.- GARESWAR, DIST.- BAKSA
(BTAD).

VERSUS

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

2:DIPAK BARMAN
S/O DHARMESWAR BARMAN
R/O BORAGAON
GANDHIPARA
P.S.- GARCHUK
DIST.- KAMRUP METRO
ASSAM

Advocate for the appellant : Mr. B.M. Deka, Advocate.

Advocate for the respondent : Ms. A. Begum, Addl. P.P., Assam.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

Date on which judgment is reserved : 05.01.2026

Date of pronouncement of judgment : 30.01.2026

Whether the pronouncement is of the : No

operative part of the judgment ?

Whether the full judgment has been : Yes
pronounced?

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. B.M. Deka, learned counsel for the appellant. Also heard Ms. A. Begum, learned Addl. P.P., Assam. No one appears for the respondent No.2, though office note dated 18.03.2025 states that service report has been received from the O/c of the Garchuk Police Station, West Guwahati, to the effect that notice had been duly served on the respondent no.2.
2. This criminal appeal has been filed under Section 374(2) of the Cr.P.C. against the impugned judgment and order dated 04.12.2023 (which has been incorrectly mentioned as 04.11.2023), passed by the Court of the learned Addl. Sessions Judge-cum-Special Judge(POCSO), Kamrup(M) in Sessions Case No.300/2017, by which the appellant had been convicted under Section 4 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for 25 years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for 3 months, for raping a 7 year old girl.
3. The learned counsel for the appellant submits that the evidence of the victim (PW-2) does not state that the appellant's private parts had been inserted/penetrated the private parts of the victim. Further, there was no evidence given by the victim that the appellant had manipulated any part of the

body of the victim to cause penetration into the private parts of the victim. As such, when there was no evidence given by the victim which could attract the provisions of Section 3 of the POCSO Act, 2012, the learned Trial Court could not have convicted the appellant for penetrative sexual assault under Section 4 of the POCSO Act. He submits that the evidence recorded by the learned Trial Court could have, at best, resulted in the conviction of the appellant under Section 10 of the POCSO Act, 2012, inasmuch as, the victim had testified to the effect that the appellant lay on top of the victim. He submits that there was no evidence to show that the appellant and the victim were naked at that time. As the appellant had apparently raised an alarm, the appellant had fled from the place of occurrence.

4. Ms. A. Begum, learned Addl. P.P., on the other hand, submits that though the victim (PW-2) has not specifically testified in Court that the appellant's private parts had penetrated the private parts of the victim, the medical evidence of PW-12 showed that there was redness present in the hymen, besides redness and tenderness being present around the vaginal opening.

5. The learned Addl. P.P submits that though the victim in her testimony does not say that there was penetration or that the appellant or the victim were naked, the victim in her statements given under Section 161 and 164 Cr.P.C had stated that the private parts of the appellant had penetrated the private parts of the victim. As such, the above clearly proved that there had been penetration of the private parts of the victim by the appellant's private parts. The learned Addl. P.P also submits that the evidence of PW-3, who is the mother of the victim, is

to the effect that the victim had told her (PW-3) that the appellant had opened the panty of the victim and thereafter touched her private parts with his penis. As such, all the above proved that there was penetration of the private parts of the victim by the private parts of the appellant. There being no infirmity with the decision of the learned Trial Court in convicting the appellant under Section 4 of the POCSO Act, the decision of the learned Trial Court should not be interfered with.

6. We have heard the learned counsels for the parties.

7. The prosecution case in brief is that an FIR dated 03.03.2015 was submitted by PW-1, who is the father of the victim, to the O/C of Garchuk Police Station, stating that around noon on 01.03.2015, while the victim was playing near the gateway of their house, the appellant, a tenant residing in the house of his neighbour, Montu Sen, lured the victim away by showing her chips and sweets. He then took her to his rented house and forcibly committed bad act on her. On the victim informing her mother and their neighbours about the pain she was experiencing in her private parts, they learnt about the incident. Pursuant to the FIR dated 03.03.2015, Garchuk P.S. Case No.89/2015 under Section 376(i) IPC read with Section 4 of the POCSO Act was registered on 03.03.2015. After investigation of the case, the Investigating Officer (PW-14) submitted a charge-sheet, on finding a prima facie case under Section 4 of the POCSO Act against the appellant.

8. The learned Trial Court thereafter framed charge under Section 4 of the POCSO Act, 2012 against the appellant, without specifying the

particular/applicable sub-section of Section 4 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried. Section 4 of the POCSO Act, 2012 states as follows :-

"4. Punishment for penetrative sexual assault.(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

9. The learned Trial Court thereafter examined 14 prosecution witnesses. The appellant was also examined under Section 313 Cr.P.C, in which he denied the evidence adduced against him, besides stating that he did not want to adduce any evidence. The learned Trial Court thereafter, vide the impugned judgment dated 04.12.2023, came to a finding that the appellant was guilty of having committed an offence under Section 4 of the POCSO Act, 2012 and convicted him accordingly. The learned Trial Court came to a finding that the medical examination report and the fact that the evidence of the victim was to the effect that the appellant had lain over the victim, and though the memory of the occurrence may not be intact added with question of shyness of the victim girl, all attract the provision of section 4 of the POCSO Act.

10. However, in the evidence adduced by the victim, there is no mention of the appellant's penis touching or penetrating or being inserted into the private parts of the victim. There is also nothing stated in the testimony of the victim to the effect that the appellant had kissed the victim's cheeks, lips or her private parts.

11. The evidence adduced by PW-2 in the learned Trial Court, is as follows :-

"The occurrence took place about three years ago. I was a student of Class-III. It took place in the day time. My mother and my parents went to our price hotel in the morning. They used to go there every day in the morning and they used to come back some times at 5 P.M. and some times at 6 P.M. I know the accused person. On the day of occurrence, I was alone in the house and was playing with my friend Sangita Rajbongshi. Her father's name is Bipul Rajbongshi. The accused person was residing in a rented house near our house and did not know his good name. But he was being called in the neighbourhood as Bharti He is present today in the court and sitting in the chair. While I was playing with my friends, the accused person came there and called me to his house. He told me that he would give me chocolate. Accordingly I went to his rented house. After taking me to his room, the accused person took me to his bed and thereafter got over me. I asked him not to do that, but he did not hear me. I could not remember what had happened thereafter. (The witness started to weep). I raised alarm and then the accused person fled away immediately. I also came out from the room. There is a Public Health Sub-Center. I rushed there and Informed a lady in said Sub-Center. The lady asked me about the Incident and I reported her about the incident. Then she examined me and thereafter informed my mother to come to the house. Getting the Information, my mother immediately came and took me to Garchuk P.S. The lady of the Public Health Sub-Center also accompanied us to the Police Station. I forgot what happened thereafter. After the incident, I developed illness. I suddenly fell down and became unconscious. I am under regular treatment. Every week I have to take medicine.

XXX

One lady asked me about the incident at the police station. The accused person used to offer me chocolate. Previously also I took chocolate from him. He used to like me as sister. I never entered into his room before. I do not know whether the accused person takes meal at the hotel of my father. I do not know whether he has got any debt towards my father. It is not a fact that no such incident had taken place, as deposed by me. It is also not a fact that the accused person did not call me to his room on the pretext of giving me chocolate. It is also not a fact that he did not get over my body. It is not a fact that I did not state at the Police Station all the facts as stated by me today before the court. It is not a fact that the illness, as reported by me today, is from my childhood. It is not a fact that I am deposing before this court on being tutored by my parents. It is not a fact that my father filed the case against the accused falsely. It is not a fact that I have no illness of unconscious and falling down. It is not a fact that I received injury on my private part while playing with my friends."

12. On the other hand, the statement of the victim under Section 161 Cr.P.C which had been recorded on 03.03.2015, is to the effect that the appellant had removed her panty and thereafter, he pressed his penis into her private parts and touched it. The appellant further kissed her cheeks, lips and vagina. However, it is settled law that statements made under Section 161 Cr.P.C are not admissible in evidence.

13. In her statement under Section 164 Cr.P.C, the victim had stated that the appellant had removed her panty, kissed her and pressed her, besides touching her chest and thereafter he inserted his penis into her vagina. She experienced pain and it hurt her while urinating for a few days.

14. Though the statements of the victim under Section 161 Cr.P.C. and 164 Cr.P.C specifically states that there was penetration of her private parts by the penis of the appellant, no such statement had been made during her testimony before the learned Trial Court. Further, as stated earlier, there is no evidence

given by the victim in her testimony before the Court that the appellant had kissed her cheeks, lips and vagina.

15. The evidence of the mother of the victim (PW-3), is to the effect that she was told by the victim that the appellant had opened the panty of the victim and touched the victim's private parts with his penis. Here too, there is nothing to show that there was any penetration of the victim's private parts by the private parts of the appellant, though it can be speculated that there was penetration. However, speculation is not tantamount to proof. In our view, the touching of the victim's private parts by the appellant's private parts, without penetration, cannot attract the provisions of Section 3 of the POCSO Act, 2012, which states 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."

16. Though there was manipulation on the body of the victim, due to the appellant lying on the top of the body of the victim, there is no evidence to prove that there was any intention to cause penetration into the vagina, urethra, anus or any part of the body of the victim. Though it may be assumed that their private parts were exposed at the relevant point of time, assumption or suspicion cannot take the place of proof, as it is settled law that the guilt of an accused has to be proved beyond any reasonable doubt. The evidence of the victim does not show that the appellant or the victim were in an undressed state at the time the appellant lay over the victim on his bed. Though the medical evidence is the effect that there was redness around the private parts of the victim, redness alone cannot be proof, for coming to a finding that there was any penetration of the victim's private parts. The redness could be due to rubbing also. Further, we have to keep in mind the fact that while the incident occurred on 01.03.2015, the medical examination was done on 04.03.2015.

17. In the case of ***R. Shaji Vs. State of Kerala***, reported in ***(2013) 14 SCC 266***, the Supreme Court has held that statements under Section 164 Cr.P.C can only be used for corroborating or contradicting the testimony of a witnesses. In the above case of ***R. Shaji (supra)***, the Supreme Court had also held that a statement under Section 161 Cr.P.C is not admissible in evidence and can only be used for contradicting the testimony of a witness.

18. The facts of this case, on the other hand, goes to show that while a picture of penetrative sexual assault had been made out in the victim's

statements under Sections 161 and 164 Cr.P.C, her testimony before the learned Trial Court does not, in any manner, attract Section 3 of the POCSO Act, i.e, a case of penetrative sexual assault has not been made out in her testimony.

19. The extract of the medical examination report dated 04/03/2015 of the victim, pertaining to the redness on her private parts and opinion of the Doctor, besides the cross-examination, is reproduced below as follows:-

"17. Genital Examination-

(A) Genital organs- Healthy, well developed.

(B) Vulva- Labia majora and labia minora well appeared on abducting the thighs.

(C) Hymen- Circular with redness present.

(D) Vagina- Healthy.

(E) Cervix-Not visible.

(F) Uterus- Not palpable per abdomen.

(G) Evidence of venereal disease- Not detected at time of examination.

(H) Vaginal swabs collected from- Around the vaginal opening.

18. Injury on the body- Redness and tenderness is present around the vaginal opening.

26. Opinion: on the basis of physical examination and laboratory investigations done on victim girl. I am of the opinion that :

1. Her age is above 6 years and below 8 years.

2. There is no evidence of recent sexual intercourse on her person however, there is redness and tenderness around the vaginal opening which has been described in page 2 column 17 C and column 18.

3. Marks of injury on her person have been described in page 2 column and 17 C and column 18.

P. exhibit 3 is my medical examination report and P. exhibit 3(1) is my signature.

Xxxx Cross examination xxxxxxxx

The incident took place on 01.03.2015 and the victim girl was examined on 04.03.2015.

It is not a fact that the injuries mentioned in point no. 17 are sustained due to falling of her on any substance.

The injuries that are mentioned in point No. 17 are due to attempted sexual act."

20. Though the Doctor has opined that the redness on the hymen was due to an attempted sexual act, we have to bear in mind that the Doctor's opinion is only advisory in nature. It may be accepted by a Court. However, on considering the testimony of the victim in the learned Trial Court, we cannot say that the opinion of the Doctor proved that penetration had occurred.

21. The failure on the part of the learned Trial Court to specify the precise sub-section of Section 4 of the POCSO Act, while framing charge against the appellant, would not invalidate a conviction unless the error or omission in the charge actually misled the accused and led to a failure of justice. In the present case, though the learned Trial Court failed to specify the precise charge framed against the appellant, the evidence recorded by the learned Trial Court would go to show that Section 4 of the POCSO Act is not attracted.

22. For the reasons stated above the impugned judgment and order dated

04.12.2023 is not sustainable and is accordingly set aside.

23. The other question that has to be decided is with regard to whether the appellant can be said to have committed the offence under Section 9(m) of the POCSO Act, 2012, which states that sexual assault on a child below 12 years would amount to aggravated sexual assault, thereby being liable for conviction under Section 10 of the POCSO Act, 2012.

24. Section 7 and 9(m) of the POCSO Act, 2012 states as follows:-

"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. Aggravated sexual assault.—

.....

.....

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

25. The evidence of PW-2(victim) is to the effect that while playing with her friends, the appellant had called her to his place, stating that he would give her chocolate. On going to his house, the appellant took her to his room and put her on the bed and thereafter got on top of her. The victim asked him not to do that, but he did not listen. The victim could not remember what had happened thereafter (the witness started weeping). When the victim raised an alarm, the appellant fled away and the victim came out from the room.

Thereafter, the victim rushed to the Public Health Sub-Center. The lady in the Public Health Sub-Center asked her about the incident and she reported the incident to her. The lady then examined the victim and informed the victim's mother to come to the house. On getting the information, the victim's mother immediately came and took the victim to Garchuk P.S. The lady of the Public Health Sub-Center also accompanied them to the police station. After the incident, the victim developed illness and suddenly fell down and became unconscious. She was under regular treatment and every week she had to take medicine.

26. There is a gap in the evidence of PW-2, inasmuch as, she had rushed out from the room/place of occurrence to the Public Health Sub-Center, wherein she told a lady therein about the incident. On being examined by the lady of the Public Health Sub-Center, her mother was informed. Thereafter, the mother arrived and they went to the Garchuk Police Station. The evidence of the victim suggest that the incident and the reporting of the incident to the Police, happened on the same day. However, the chain of events suggest otherwise. The incident occurred on 01.03.2015 and the FIR being filed on 03.03.2015, there appear to be holes in the chain of events which has not been explained, inasmuch as, there is a gap between the happening of the incident and the filing of the FIR. PW-1 in his evidence had also stated as follows:-

"The occurrence took place in 2014/2015. On the date of occurrence, I myself and my wife were in our Hotel situated at Paschim Boragaon. My daughter Sushmita Barman was alone in the house. At about 1:00pm one Bihari boy, who was residing near our house as tenant, came to my Hotel in his cycle and told me that something had happened to my daughter and asked me to go to the house immediately. He saw my daughter crying at our doorstep. Then immediately we closed the hotel and rushed

to our house. A medical sub-center is there near our house and the nurses working there called my wife at the sub-center. They reported my wife everything and asked her to go to the Police Station. Then my wife told me to rush to the Police Station. I along with my wife went to Gorchuk PS. We took our daughter with us. At the Police Station I lodged FIR against Ranjan Deka. My wife told me what she had heard at the medical center and I wrote the FIR in my own handwriting. Ext. 1 is my FIR and Ext. 1(1) is my signature with my address and phone number. Ext. 2 is the printed copy of the FIR and Ext. 2(1) is my signature. My daughter told me that the accused person offered her chocolate and thereafter committed rape on her. After filing of the case Police took her to GMCH and she was examined by the doctor. Her statement was also recorded in the court. After 3/4 days of the occurrence, once she suddenly fell down on the floor and received head injury. I arranged for her treatment, but till now, she gets unconscious time to time. Her treatment is going on. I have a monthly income of about Rs.15000/-(net). I spent about Rs.1,30,000/- for the treatment of my daughter till date and she requires medicine worth Rs.750 per week. I did not get any compensation either the legal service authority or from anyone.

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I narrated the incident in my FIR, on being stated by my wife. I personally did not ask my daughter, as my wife asked her. The accused person never visits my Hotel. He also does not go to my house. I have no connection with him. It is not a fact that I developed enmity with the accused person for non payment of his bills after having meal in my Hotel. It is not a fact that my daughter had problem since before the incident. It is not a fact that as I had previous enmity with the accused, implicated him falsely in this case. I went to the Police Station about 3:30/4:00pm. Police took her to the GMCH on the next day. It is not a fact that no such occurrence, as reported by me had taken place with my daughter, I do not know whether at the medical sub-center, any entry was given by the nurses. One Ashakarmi accompanied us to the Police

Station. It is not a fact that I did not visit the medical sub center, nor any Ashakarmi accompanied me. It is not a fact that the present illness of my daughter has no relationship with the alleged incident. It is not a fact that the case has been lodged by me falsely."

27. In his cross-examination, PW-1 had denied the suggestion that he had developed enmity with the appellant for nonpayment of his bills after having meals in his hotel.

28. The evidence of PW-3 is as follows :-

"We have a price hotel at Artfed, Boragaon. Victim Susmita is our daughter. We used to go out in the morning to our price hotel, leaving our daughter in the house. She also used to go to school. The incident took place about four years ago. On the day of occurrence also, I myself and my husband went to our price hotel. My daughter was in the house. Around 2.00 P.M. 2.30 P.M., one person of Bihari community went to my price hotel and told me that something had happened in our house and my daughter was crying. He asked me to rush to the house immediately. There were seven customers in my price hotel and I was giving meal to them. But hearing the person of the Bihari community, I rushed to my house. I found my daughter in the Medical Sub-Center. The nurse was present at the Sub-Center and she told me that she had checked my daughter and had seen her private part and found redness there. She told me that this was a case of police and asked me to go to the police station. Then I went to the police station. The nurse also accompanied me. My daughter was also with me. The nurse reported the incident to police. Police immediately came to our house, but did not find the accused person. He had already fled away. Police took her to Medial College for her examination. I forgot whether on the same day or on the next day, she was taken to the Medical College. Police also brought my daughter to the court for recording her statement. In the court also, one lady Magistrate recorded the statement of my daughter. I did not ask my daughter on that day, but at night I asked her about the incident and then she told me that the accused person opened the panty and thereafter touched his penis to her private part. My daughter also told me that it was washed by cloth On the next day also one lady police officer

asked my daughter whether there was anything after the occurrence at her private part and she told that there was wet substance and it was removed with a cloth. The police officer took the cloth with her.

After the incident, my daughter has become permanently ill. Often she fell down and got unconscious. Sometimes when she remains alone, she starts to cry. Treatment of my daughter is going on from then.

X X X

Police asked me about the incident. I could not remember the time, when I was asked by police. It is not a fact that the accused person used to take meal in our price hotel. I do not know him. I do not know the name of the person from the Bihari community, who had informed me first. He used to take rice in my price hotel. I met my daughter at Sub-Center first after the incident. I do not know who took her to the Sub-Center. On the night of occurrence itself, I asked her about the incident. It is not a fact that my daughter told me that the accused person opened the panty and thereafter touched his penis to her private part. I could not remember whether I stated the same before police. It is not a fact that I deposed falsely before the court that my daughter reported me that the accused person opened her panty and thereafter touched his penis to her private part. It is not a fact that no such incident had taken place, as deposed by me. It is not a fact that my daughter received injury at her private part while playing with her friends."

29. We are of the view that as there was a time gap of more than 3½ years between the date of the incident, filing of the FIR and the recording of the evidence of PW-1, minor discrepancies can arise at the time of adducing evidence. The same can be ignored, as per the law laid down by the Hon'ble Supreme Court, as they do not go to the root of the matter. We are of the view that the minor contradictions with regard to the actual date of filing of the FIR and the actual sequence of events in this case do not take away the fact that the appellant had committed aggravated sexual assault on the victim. This is

due to the fact that the victim in her evidence had clearly stated that the appellant had laid himself on top of her. This action on the part of the appellant, in our view, amounts to doing an act with sexual intent without penetration in terms of Section 7 of the POCSO Act, 2012.

30. Thus, while we are of the view that Section 3 of the POCSO Act, 2012 is not attracted to the facts of this case; the appellant has committed the offence of sexual assault on the victim, who was 7 years old. Accordingly, in terms of Section 9(m) of the POCSO Act, the appellant is liable to be convicted and sentenced under Section 10 of the POCSO Act. The charge under Section 4 of the POCSO Act is accordingly altered to Section 10 of the POCSO Act as per Section 216 Cr.P.C.

31. Section 216 and 217 of the Cr.P.C states as follows:

"216. Court may alter charge. - (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be

proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered.- *Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-*

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material."

32. Keeping in view Section 216(3) Cr.PC., we are of the view that the alteration of the charge from Section 4 of the POCSO Act, 2012 to Section 10 does not cause any prejudice to the accused in his defence or the prosecution in the conduct of the case, as the said Section 10 is a less serious charge than Section 4. However, Section 217 of the Cr.P.C. provides that whenever a charge is altered or added to by the court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon any witness with regard to alteration or addition of the charge or call any further witness whom the court may think to be material. In the case of **Madhusudan & Ors. Vs. The State of Madhya Pradesh** in **Criminal Appeal No. 1509/2010**, the Supreme Court has held that a court may alter or add any charge before judgment is pronounced but when charges are altered, opportunity must be given under Section 217 of the Cr.P.C, both to the prosecution and the defence to re-call or re-examine witnesses in references to such altered charges more importantly, in case, charges are altered by the court and reasons for the same are recorded.

33. On asking the learned counsel for the appellant and the learned Additional Public Prosecutor as to whether they would like to recall or re-examine witnesses in reference to the alteration of charge to Section 10 of the POCSO Act, 2012, they submit that they do not want to recall or re-examine any witness, whose evidence has been adduced during trial.

34. In view of the reasons stated above, we convict the appellant for having committed aggravated sexual assault on the victim under Section 9(m) of the POCSO Act.

35. On hearing the question of sentence to be awarded to the appellant, keeping in view that the minimum sentence under Section 10 is 5 years, up-to a maximum of 7 years, the learned counsel for the appellant submits that the appellant's wife is living alone as their only son has abandoned them. He accordingly prays that only the minimum sentence should be awarded to the appellant. On the other hand, learned Addl. PP prays that the maximum sentence should be awarded to the appellant.

36. On considering the submissions of the learned counsels for the parties, we are of the view that justice would be served, if the appellant is sentenced to undergo Rigorous Imprisonment for 6 years. We accordingly sentence the appellant to undergo Rigorous Imprisonment for 6 (six) years with fine of Rs. 10,000/-, in default, Simple Imprisonment for 3 (three) months.

37. The impugned conviction and sentence imposed upon the appellant, vide the impugned judgment & order dated 04.12.2023 passed in Sessions Case No.

300/2017 by the learned Addl. Sessions Judge-cum-Special Judge (POCSO), Kamrup (M), is hereby modified to the extent indicated above.

38. The appeal is accordingly disposed of.

39. Send back the LCR.

JUDGE

JUDGE

Anupam
Chutia

Digitally signed
by Anupam
Chutia
Date: 2026.01.30
14:44:02 +08'00'

Comparing Assistant