IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE ::::UDALGURI

Present : Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.

Special (POCSO) No. 28/2017 U/S 04 of POCSO Act R/W Section 9/10 of Prohibition of Child Marriage Act.

State of Assam -Vs-

Rohit Boro @ Lada Boro.....Accused.

For the Prosecution : Mr. R. Sarmah, Addl. Public Prosecutor.
For the Accused : Mr. M. C. Narzary, Learned Advocate.

Date of Evidence : 10-08-18: 16-02-19: 18-03-19: 27-05-19.

Date of Arguments: 05-07-2019.

Date of Judgment: 11-07-2019.

JUDGMENT

1. The prosecution case in brief is that on 02-07-17, informant Tanai Boro lodged an FIR with the Officer-in-charge of Tangla P.S. alleging that on 01-07-17, at about 08 O' Clock, in the morning, the accused forcibly took away her 14 (fourteen) years old minor daughter from the road on her way to tuition class. On the basis of the FIR, Tangla PS Case No. 92/17, U/S 365 IPC R/W Section 04 of POCSO Act and Section 9/10 of Prohibition of Child Marriage Act was registered. After completion of investigation police submitted charge-sheet U/S 365 IPC R/W Section 04 of POCSO Act and

Section 9/10 of Prohibition of Child Marriage Act against the accused Rohit Boro @ Lada Boro.

- 2. In consideration of the submission of the learned counsel for both the parties and materials on record and having found sufficient grounds for presuming that the accused person had committed offences under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act, learned Special Judge framed charges there under and the ingredients of charges under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Thereafter, the learned Sessions Judge vide Order dated 25-06-19, transferred the case to this court for disposal.
- 3. The prosecution in order to prove its case examined the following 08(eight) witnesses:

PW1- Mrs. Tanai Boro.

PW2- Victim-A.

PW3- Dr. Ganesh Das.

PW4- Pradip Swargiary.

PW5- Kanika Swargiary.

PW6- Phanidhar Boro.

PW7- Jayanti Boro.

PW8- S.I., Maheswar Sarmah.

- 4. The statement of the accused person had been recorded U/S 313 Cr.P.C. The defence plea was of total denial. Defence had declined to adduce evidence.
- 5. Situated thus, the points for determination in the instant case are set up as follows:-

- (I) Whether the accused person committed penetrative sexual assault on Victim-A?
- (II) Whether the accused person being a male above eighteen years of age contracts marriage with victim-A, a girl aged about 14 years?
- (III) Whether the accused person performs marriage with victim-A, a girl aged about 14 years?

DISCUSSION, DECISION AND REASON FOR DECISION:

- 6. I have heard learned Addl. PP Mr. R. Sarmah for the prosecution and learned defence counsel Mr. M. C. Narzary.
- 7. Learned Addl. P.P. appearing for the State has argued that prosecution has proved the case beyond all reasonable doubt. The victim was a minor on the date of alleged incident. The accused had forcibly solemnized marriage with the minor girl and did intercourse with her and hence, he is liable to be convicted under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act, 2006.
- 8. Learned defence counsel has submitted that the revelation made by the victim girl (PW2), who is the material witness, during her cross-examination would show that the victim was a consenting party to go with the accused. The accused did not use force upon her to go with him. The prosecution has failed to prove the age of the victim girl by adducing birth certificate or school certificate of the victim girl. The medical evidence reveals that on the date of occurrence the approximate age of the victim is about 16-17 years. As the prosecution has failed to adduce the best evidence to prove the age of the victim, therefore, accused is entitled to get the benefit of margin of error of two years in determining the age of the victim on the basis of radiological report.

- 9. Learned defence counsel has further argued that prosecution has miserably failed to prove the alleged marriage between the victim and the accused. Neither the 'Purohit' who had allegedly performed the marriage nor any other person who had witnessed the marriage between the accused and the victim has been examined by the prosecution to prove the solemnization of marriage.
- 10. Before appreciating the arguments put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsels, I would like to discuss the evidences adduced by the prosecution.
- 11. PW1 is Mrs. Tanai Boro, mother of the victim. In her evidence PW1 had deposed that at the time of occurrence the age of her victim daughter was 14 years. On the date of occurrence, her daughter went to attend tuition class. But when she did not return home as usual they made search for her whereabouts but till in the night her whereabouts could not be located and as such on the next day, in the morning, she lodged an FIR with the police. Subsequently she went alongwith the police in search of his daughter and she was eventually found at Bhergaon alongwith the accused on the road, in front of the house of the accused. After recovery her victim daughter informed that on the day of occurrence, the accused forcibly took her in a motor-cycle when she went to attend the tuition class and thereafter she was taken to his residence and solemnized marriage with his daughter against her will and committed sexual intercourse with her against her will and consent. Ext.1 is the FIR lodged by PW1. Ext.1(1) is the signature of PW1. In cross-examination, PW1 had stated that she knew the accused prior to the incident as she used to work in a stone quarry near their home. The accused used to come to their house now and then during that time. Her daughter is a student of Tangla Girls High School. On the day of occurrence her victim daughter did not take her mobile phone alongwith her. Her daughter attended tuition alongwith her classmates and on the day of occurrence when her daughter went to tuition class her other tuition

classmates were not present. She did not know as to whether her daughter used to talk with the accused over mobile phone. She did not know as to whether the accused developed love affairs with her daughter when she used to come to their home. PW1 had denied the suggestion that on the date of occurrence her daughter voluntarily joined hands with the accused due to her love affairs and when she did not return home they lodged the FIR on the ground that accused had kidnapped her forcibly. PW1 had revealed that after the incident, she came to know that his daughter without informing her used to meet the accused after development of love affairs with her. PW1 had stated that when they found their daughter alongwith the accused she was not willing to come with them as because she got married with the accused. She had also stated that the age of her victim daughter mentioned in the FIR merely on suspicion. They had not submitted birth certificate of their daughter to proof her age at the time of incident.

12. PW2 is victim-A. In her evidence PW2 had deposed that on the day of occurrence at around 8 AM she went to attend tuition class. While she was proceeding to tuition class at that time the accused intercepted her and forcibly taken her in a motor-cycle to his house. Thereafter, the family members of the accused managed a marriage between her and the accused in their house in presence of "Puruhit" of a local Siva Mandir. On the next day of the incident her mother alongwith other family members and police came to the house of the accused to bring her back. Then she came alongwith her mother to the police station. After marriage the accused had physical relation with her. Police got her statement recorded U/S 164 Cr.P.C. and also sent her for medical examination. Ext.2 is her statement U/S 164 Cr.P.C.. Ext.2(1) is her signature. In cross-examination, PW2 had stated that she called the accused on the day of occurrence to go with him as she grew love affairs with the accused when he used to visit their house. Prior to this incident also she used to meet the accused now and then without informing her parents. She had frequent telephone talk with the accused before the incident. The accused did not compel her to go with him on the day of occurrence. Rather she on her own accord went with the accused to the house of his parents. The accused solemnized her marriage in the presence of one "Puruhit" as per her consent. She had stated her age on presumption. She had not submitted birth certificate in order to prove her actual age at the time of incident.

- 13. PW3 is Dr. Ganesh Das. In his evidence PW3 had deposed that on 03-07-17, he examined the victim-A at Udalguri civil hospital and on examination he found the following:-
 - (1) Her approximate age is about 16-17 years as by X-ray
 - (2) No injury mark on the body on physical examination.
 - (3) No spermatozoa on vaginal swab found.
 - (4) on above finding it is not a case of rape.
 - Ext. 2 is the medical report. Ext. 2(1) is the signature of PW3.

Cross-examination had been declined by the defence.

14. PW4 is Pradip Swargiary. In his evidence PW4 had deposed that the incident occurred in the year 2017. At the material time one day while he was at his home in Panery, his sister in law informed him at about 4 PM, over phone that her daughter went to tuition class in the noon but she did not return as per usual time. After receipt of the telephone he came to the house of his sister-in-law and made search to locate the whereabouts of her daughter. Till late in the night the daughter of his sister-in-law remained untraceable. On the next morning when the victim could not be traced out he advised them to lodge an FIR with the police. Accordingly, he along with his brother in law came to the police station and his brother-in-law lodged the FIR. In the meantime someone informed the mother of the victim that her daughter was along with the accused at his own house. This information was also conveyed to the police. Accordingly, police recovered the victim while she was on the road along with the accused near the house of accused. He did not ask the victim anything regarding

the incident. In cross-examination, PW4 had stated that he went along with the police to the house of accused in search of the victim. He did not know whether there was any love affair between the accused and victim before the incident.

- 15. PW5 is Kanika Swargiary, elder sister of informant. In his evidence PW4 had deposed that on the date of occurrence the victim, who is the daughter of her sister, went to attend tuition during day time but she did not return home as per usual time. When her sister did not find her then her sister informed them about the incident. On the next day in the morning, she along with her husband went to the house of her sister and came to know that accused solemnized marriage with the daughter of her sister. The family member of the accused informed her sister that the accused married the victim. Later an FIR was lodged with the police regarding the incident and police recovered the victim. The victim did not tell PW5 anything regarding the incident nor did she ask anything about the incident to her. In cross-examination, PW5 had stated that she did not know as to whether accused and the victim had love affair before the incident. She only heard that accused married the victim. It is not known to her as to whether the victim voluntarily went to the house of accused or the accused forcibly took her to his house.
- 16. PW6 is Phanidhar Boro. In his evidence PW6 had deposed that at the material time he came to know from co-villagers that accused took away the victim who belongs to their village. On the next day he along with the mother of victim and some other village people went to the PS and mother of the victim lodged an FIR. Later, the victim and the accused were found together in front of the house of the accused and police rescued the victim and arrested the accused. At that time he was with the police. PW6 had deposed that he did not know as to how the accused had taken the victim to his house. In cross-examination, PW6 had stated that he did not know whether the accused and the victim had love affair prior to the incident.

PW6 came to know after the incident that accused had taken away the victim in a bike. He did not know whether the victim voluntarily went to the accused or she was forcefully taken away by the accused.

- 17. PW7 is Jayanti Boro, aunt of victim. In her evidence PW7 had deposed that on the date of occurrence, the victim went to tuition class but she did not return home in the usual time. Her mother made search for her whereabouts but she could not be traced out. So the mother of the victim over telephone informed her about the incident. On the next day, in the morning, she came to know that victim was recovered along with the accused and they were brought to the police station so she came to the Tangla PS and saw the accused and the victim at the police station. When she saw the victim at the police station she was wearing shendur (vermilion) on her forehead. She told PW7 that her marriage was solemnized with the accused. In cross-examination, PW7 had stated that she did not know as to how the victim went along with the accused. She also did not know as to whether the accused and victim had love affair prior to the incident.
- 18. PW8 is S.I. Maheswar Sarmah. In his evidence PW8 had deposed that on 02-07-17, he was posted as attached officer at Tangla PS. On that day one Tanai Boro lodged an FIR with the OC Tangla PS on the basis of the same the OC Tangla PS registered the Tangla PS case No. 92/17 U/S 365 IPC and entrusted him for investigation of the same. In course of the investigation he came to know that the victim and the accused were at Bhergaon Moholiapara. Accordingly he proceeded to that place and found both the accused and the victim at that place on the road near the house of accused. Both the victim and accused were brought to the Tangla PS and accused was taken into custody and forwarded to the court. The victim was sent for medical examination. He got the statement of the victim recorded U/S 164 CrPC. PW8 recorded the statement of the witnesses U/S 161 CrPC., collected the medical report of the victim and prepared the

sketch map of the place of occurrence. On conclusion of the investigation having found prima-facie case established against the accused PW8 laid the charge sheet against him U/S 365 IPC; R/W Section 4 of POCSO Act and Section 9 of prohibition of child marriage Act. PW8 had deposed that he could not seize the birth certificate of the victim as no original birth certificate was produced before him. Ext. 3 is the sketch map of the place of occurrence wherein Ext. 3(1) is the signature of PW8. Ext. 4 is the charge sheet. Ext. 4(1) is the signature of PW8. In cross-examination, PW8 had stated that he did not collect any evidence as regards solemnization of marriage between the accused and the minor victim to establish the infringement of the provision of child marriage act. In the sketch map Ext. 3 he had only shown wherefrom the accused and victim were recovered. PW8 had denied the suggestion that accused had not married the victim.

- 19. On cumulative assessment of the evidence on record it appears from the evidence of PW2, the victim girl that during cross-examination, she had revealed that she had love affairs with the accused. She used to meet the accused without informing her parents. She has clearly revealed that on the date of occurrence the accused did not compel her to go with him rather she on her own volition went with the accused to his house. Thus, from the evidence of PW2, it appears that the accused did not use force upon the victim girl to take her with him. In this regard, the revelation of the victim girl during cross-examination is sufficient to negate the prosecution version of the case.
- 20. In this case as per the opinion of Doctor (PW3) the age of the victim is about 16-17 years. The victim girl is a student of school but prosecution has failed to produce the school certificate or the birth certificate of the victim to prove her age. The Investigating Officer (PW8) had deposed in his evidence that he could not seize the birth certificate of the victim as the original birth certificate was not produced before him. Thus, it appears that the parents of the victim had withheld a material proof with regard to age

of their daughter for which reasonable doubt arises as to the fact that the victim was a minor girl at the time of incident. PW1 had also revealed in cross-examination that in the FIR she mentioned the age of the victim merely on suspicion.

- 21. It appears that all the prosecution witnesses except PW6 are relatives. The prosecution has failed to prove any independent witness who was present in the alleged marriage solemnized between the accused and the victim. In her evidence victim girl had deposed that the family members of the accused organized the marriage between her and accused in their house in presence of a local purohit of a shiva mandir. But the purohit, who performed the marriage, was not examined by the prosecution to prove the marriage. Though prosecution witnesses had deposed that they had seen vermillion on the forehead of the victim, but in absence of best evidence to prove the marriage, the evidence of seeing of vermillion on the forehead of the victim cannot be the proof of marriage between the accused and the victim. The Investigating Officer (PW8) has also admitted in cross-examination that he did not collect any evidence as regards solemnization of marriage between the accused and the victim.
- 22. Moreover, though PW1 had deposed that after marriage the accused had physical relation with her but the inconsistency of her evidence in her examination-in-chief and cross-examination make this witness not worthy of credence.
- 23. In view of above discussion it appears that the prosecution has failed to establish the charges under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act against the accused person beyond all reasonable doubt.
- 24. Situated thus the points for determination are decided in the negative and against the prosecution.

ORDER

25. In the result, the accused person Rohit Boro @ Lada Boro is found not guilty under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act and acquitted of charges under Section 4 of POCSO Act R/W Section 09/10 of Prohibition of Child Marriage Act and set with liberty forthwith.

26. Bail bond executed by the accused Rohit Boro @ Lada Boro and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.

27. Judgment is signed, delivered and pronounced in the open court today the 11^{th} day of July, 2019.

Dictated and Corrected

(N.Talukdar)
Addl. Sessions Judge
Udalguri

(N.Talukdar)
Addl. Sessions Judge
Udalguri

IN THE COURT OF ADDL. SESSIONS JUDGE:::::::UDALGURI.

Special (POCSO) 28/2017 APPENDIX

(A) Prosecution Exhibits:

Ext.-1: FIR.

Ext.-2: Statement of the victim-A U/S 164 Cr.P.C.

Ext.-2: Medical report.

Ext.-3: Sketch map

Ext.-4: Charge-sheet.

(B) Materials Exhibits : Nil.

(C) Defence Exhibits : Nil.

(D) Exhibits produced by witness: Nil.

(E) Court Exhibits : Nil

(F) Prosecution witnesses:

PW1- Mrs. Tanai Boro.

PW2- Victim-A.

PW3- Dr. Ganesh Das.

PW4- Pradip Swargiary.

PW5- Kanika Swargiary.

PW6- Phanidhar Boro.

PW7- Jayanti Boro.

PW8- S.I., Maheswar Sarmah.

(G) Defence witnesses : Nil.

(H) Court witnesses : Nil.

(N.Talukdar) Addl. Sessions Judge.

Udalguri.