# IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 06 of 2017

Under section 493/417 IPC read with section 4 of POCSO Act.

(Arising out GR Case No 6049/16)

#### **State of Assam**

–Vs–

Md. Abdul Rahim ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Mr. K. Deka, Advocate

Date of Argument : 09-08 -2019

Date of Judgment : 22-08-2019.

# **JUDGMENT**

- 1. The genesis of the present case is that for last three years the informant/victim maintained love affairs with the accused Md. Abdul Rahim and he assuring to marry, did have physical relation with her but thereafter on 22-12-2016 at night, the accused without her knowledge married another girl and thereby cheated her.
- 2. On receipt of the FIR **(Ext.1)** on 23-12-2016 from the informant/victim (PW1), O.C of Sootea Police station registered the case being Sootea P.S. Case No. 199/2016 u/s 448/493/417 of IPC and launched investigation of the case. In course of investigation, the

Investigating Officer (PW 7) recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid chargesheet against the accused Abdul Rahim u/s 4 of POCSO Act.

- **3.** On appearance of the accused person before this Court, after furnishing the necessary copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, charge was framed against the accused u/s 493/417 of IPC read with section 4 of POCSO Act by my learned predecessor and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- **4.** To substantiate the case, prosecution examined as many as eight witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and examined none.
- **5.** The points for decision in this case is that -
  - (1) Whether accused Abdul Rahim prior to 23-12-2016 at No. 4 Bhujmari under Sootea Police station deceitfully caused Miss "X" who was not lawfully married to the accused, to believe that she was lawfully married to the accused and in that belief cohabited or had sexual intercourse with her and thereby committed an offence punishable under section 493 of IPC?
  - (2) Whether accused Abdul Rahim prior to 23-12-2016 at No. 4 Bhujmari under Sootea Police station cheated Miss "X" (16 years of age) by inducing her to have sexual intercourse with him promising to marry her but lateron married another girl and thereby committed an offence punishable under section 417 of IPC?

(3) Whether the accused Abdul Rahim committed penetrative sexual assault on the child victim under the age of 18 years and thereby committed an offence punishable u/s 4 of POCSO Act?

#### Reasons, Decisions and reason for decision.

- 6. Mr. Baruah, the learned Special Public Prosecutor submitted that the evidence of the victim inspire confidence that she had love affair with the accused and that the accused with the assurance of marrying her undergone intercourse with her at different time but lateron the accused married another girl without informing her. He also submitted that the conduct of the accused reveals that from the very inception the accused never intended to marry her and by giving promise that he would marry, had sexual intercourse with her. It is further submitted that as consent of the victim was obtained on misconception of fact, hence it cannot be said to be a consent. Moreover, as the prosecutrix is a minor one hence consent is irrelevant in the present case and the accused is guilty for committing penetrative sexual assault on the child victim.
- **7.** Refuting the argument of the learned Special P.P., Mr. Deka appearing for the accused made a lengthy submission that in the case in hand, the prsoecutrix was in love with the accused and if she maintained sexual relation, it was done voluntarily and even if lateron he could not marry her, due to some reason it cannot be said to be a breach of promise and cannot be said to be a case of rape. The learned defence counsel also argued that the prosecution failed to prove the age of the victim to be held as a minor as claimed and as such, it does not come within the ambit of POCSO Act.
- **8.** Considering the rival submissions advanced by the learned counsel of the parties, having regard to the evidence on record, it would be apposite to have a bird's view of the evidence on record.
- **9.** PW 1, victim's father testified that the accused had love affairs with his victim daughter since 3 years prior to the incident and assuring to marry her, he did have illicit relation with his daughter when she was 16

years old. Hence he called the guardian of the accused and decided to solemnize their marriage after one year as because the accused had no income at that time but thereafter, the guardian of the accused sent him outside for work and when he returned from outside, the accused married another girl instead of his daughter. Then his daughter lodged the case.

During cross, he admitted that prior to the incident, the uncle of the accused came to them and gave proposal to marry the victim with the accused. Though they accepted the proposal but lateron the accused married another girl on 22-12-2016.

10. PW 2, the aunty of the victim girl, stated that she knew about the love affair of the victim aged anout 15 years with the accused who promised to marry her. She further stated that the accused quite off and on used to visit their house and during that period whenever she asked the accused the reason for visiting her niece in such a way, he replied that he would marry the girl. Thereafter, the accused had gone to Kerela. The accused told them that after returning from Kerela, he would marry her. But after returning from Kerela one day the accused went to see a bride. Then on being asked the accused for seeing a bride instead of marrying her, he replied that he has nothing to say as his family members arranged the marriage. Then the victim recalling her sexual relation with him on many times, asked him about her fate if he married another girl and that she would die if the accused would not marry her.

During cross she stated that prior to filing of the case, they had no knowledge about the marriage of the accused. She also stated that prior to the incident, the uncle of the accused gave proposal to marry the victim with the accused which they accordingly accepted but on 22-12-2016 the accused married another girl after institution of this case.

**11.** PW 3 the grand mother of the victim stated that on the day of the incident, when she was in the house of her nephew situated near the house of the victim, she heard hulla when victim's brother caught hold the victim along with the accused at night under betel nut bagan. The village

women assembled there, told her that the accused was found with the victim aged about 17 years under betel nut trees in compromising position. This witness also stated that the accused and the victim girl had love affairs since last three years.

During cross, she stated that prior to the incident, they accepted the proposal of uncle of the accused for marriage of the victim with the accused, but lateron the accused married another girl on 22-12-2016 and hence the case was filed.

12. PW 4 is the victim girl herself. She admitting her love affair with the accused since three years stated that the accused used to visit her house and promised to marry her. During that period, inspite of her protest, the accused committed sexual intercourse with her three times assuring to marry her saying that there is nothing wrong in indulging such acts as he would marry her but lateron he arranged to marry another girl and on being asked about this, he advised her to search for another boy. Inspite of her request when he married another girl, she lodged the FIR, Ext.1. She further stated that at the time of incident, she was reading in class VIII and her age was 15 years.

During cross she stated that she did have physical relation with the accused in her house in absence of other family members. She also stated that few days prior to filing this case, the accused's uncle coming to her house gave proposal to marry her with the accused. She admitted that when she learned to ride bicycle, she had fell several times.

mother, PW 5, the grand-father of the victim, deposed that on the day of incident, at around 10 p.m. when he went to nature's call, he saw the accused and the victim in compromising position but seeing him both of them fled away. Then on being asked, the victim reported him that the accused raped her forcefully. He stated that prior to this incident also, the accused used to visit their house inspite of their objection. During cross he

admitted that before police he did not state that he saw the accused and the victim in compromising position.

14. PW 6, the aunty of the victim, who resided with the victim in same house, deposed that since three years prior to the occurrence, victim maintained love affairs with the accused who used to visit their house. Lateron, the accused went to outside of the State for job and after coming from outside, he married another girl and then the case was filed by the victim. She stated that the victim told that the accused committed bad act with her.

During cross, she stated that prior to one month of the incident, the accused went outside for job. Defence suggested that the uncle of the accused gave proposal to them (PW6) to marry the victim with the accused but as the accused did not marry, the case was filed which she denied.

- **15.** PW 7, Madharam Gogoi, the Investigating Officer, deposed that on being endorsed him to investigate the case, he visited the place of occurrence, recorded the statement of the victim and other witnesses, drew the sketch map of the place of occurrence vide Ext.2, sent the victim for medical examination, arrested the accused Abdul Rahim and finding the age of the victim under the age of 16 years as per the medical examination report, submitted chargesheet against the accused u/s 4 of POCSO Act vide Ext. 3. During cross, he confirmed that PW 1 the victim's father stated before him that the accused committed misdeed to his daughter at the garden. He also confirmed that the victim did not state before him that the accused did have physical relation with her for three times.
- **16.** PW 8, Dr. Jonali Gogoi the Medical Officer deposed that on 23-12-2016 she examined the victim and on examination found hymen ruptured and as per X-ray report she is 16 years old but no any injury mark was found on her body. There was no sign of recent sexual intercourse. She proved the medical report as Ext. 4 and X-ray report of both wrist, both elbow and pelvis as Ext. 5.

During cross, she stated that this type on rupture on hymen may be occurred due to cycling, jumping or due to any accident.

17. Now, the question is whether the above evidence is sufficient to show that the victim girl was under 18 years of age at the time of occurrence. So far the question of opinion being based on radiological report is concerned, it may be observed that absolute reliance cannot be placed on such radiological opinion. According to an observation made in Modi's Text Book of Medical Jurisprudence and Toxicology, 20<sup>th</sup> Edition, radiological examination merely indicates an average age and such age is likely to very in individual cases even of the same province owing to eccentricities of developments. Refuting to this observation, a Division Bench of Hon'ble Madras High Court in Shanmugham Vs. The State reported in 1984 Crl.L.J. 1081 has observed that the determination of age on the basis of radiological examination can only be an approximate factor and it cannot be taken as a decisive and incontrovertible feature. The learned court observed as follows:

"Courts have taken judicial notice of this fact and have always held that evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person, but the evidence is not of a conclusive and incontrovertible nature and is subject to a margin of error."

As regards the margin of error in ascertaining age, the Apex Court in **Jayamala Vs. Home Secretary, Govt. of J & K,** reported in **AIR 1982 SC 1297** has observed as follows :

"However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

**18.** Keeping in view the above legal position, we may also take notice of other oral evidence, in this regard. As noted above, the victim's father claimed the age of the victim as 16 years and according to the victim and

her aunty - PW 2, she was 15 years at the relevant time. On the other hand, the grand mother of the victim i.e. PW 3 mentioned the age of the victim as 17 years at the relevant time. The medical report reflects that the victim was 16 years old. Though according to the victim, she was reading in class VIII at the time of incident but no any school certificate or birth certificate of the victim was seized by the I.O. to ascertain her age. In the instant case, statement of the victim u/s 164 Cr.P.C. was not recorded. In the above, the result is that the age of the prosecutrix has been left in doubt. Therefore, the age of the prosecutrix having not been satisfactorily proved to be below 18 years, let us see the other facts and circumstances of the case.

- 19. The story that emerges from the evidence of Pws narrated above is that the victim had love affairs with the accused since three years prior to filing the FIR. Only claim of the victim is that during the period of maintaining love though she opposed in having physical relation, but the accused did have sexual intercourse with her three times promising to marry her saying that there is nothing wrong in doing such acts.
- In Uday Vs. State of Karnataka reported in (2003) 4 SCC 20. **48,** the Apex Court held that consent given by a prosecutrix to sexual intercourse with a person with whom she is deeply in love, on the basis of promise made by such a person that he would marry her on a later day, can never be said to have been given under a misconception of fact. A careful reading of the Hon'ble Supreme Court's case in Dilip Singh @ Dilip Kumar Vs. State of Bhar reported in (2005) 1 SCC 88, shows that while a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90 IPC, a representation deliberately made by the accused with a view to obtaining consent of the victim without having intended to marry her will, vitiate the consent. If at very inception of making of the promise to marry, the accused did not really entertain the intention to marry the victim and the promise to marry was a mere hoax, consent, ostensibly given by the victim, will not exculpate the accused from the ambit of section 376 of the IPC.

Mere failure of an accused to keep his promise of marriage, on future date, will not be sufficient proof, in the absence of anything more, that the promise made by the accused was never intended to be acted upon by him. Even if a prosecutrix had consented believing in the words of the accused that the promise for marriage made to her by the accused is honest and genuine, this will not be sufficient to hold that no consent existed for the purpose of section 90 IPC unless it is further established that the accused, at the time, when he had made the promise, did not have the intention of keeping to his promise.

21. In the present case, the victim alleged that the accused committed sexual intercourse with her three times, but she remained silent, during the long period of three years, on which dates he did have sexual intercourse with her. On the other hand, PW5 the victim's grand father stated another version that on the day of the incident at around 10 p.m. when he went to attend nature's call he saw both the accused and the victim in compromising position and seeing him both the accused and victim fled away. Victim's grand mother PW 3 also in the same tune, stated that on the day victim's brother caught hold the victim and the accused under betel nut trees at night finding them in compromising position. So, the evidence of PW 3 and PW 5, the grand-mother and grand-father of the victim herself admitted that the accused and the victim were found in compromising position at night in the midst of betel nut trees. According to PW 5 seeing him, the accused and the victim fled away and on being asked though the victim reported him that she was raped by the accused forcefully but nowhere the victim alleged rape on her by the accused Abdul Rahim. Perhaps when PW 5 found them in compromising position, she falsely stated that she was raped. I find nothing as to why being grandparents, they would falsely stated against their granddaughter. Further, their evidence also show that, after they were found together at night in compromising position, the FIR was filed and thus the evidence of the victim that when the accused married another girl, she filed the ejahar became unworthy of credence. The evidence of the PWs discussed above, it appears that the victim was a consenting party in committing the sexual act, if any.

- 22. As per the medical evidence, the hymen of the victim was found ruptured but during cross, the Medical officer clarified that such type of rupture may be occurred due to cycling, jumping or in any accident. It is also in the evidence of the victim that at the time of learning to ride cycle, she fell down several times. In the above evidence, it cannot be unhesitatingly held that the rupture was occurred due to physical relation.
- The victim also alleged that the accused promising to marry her, 23. did have sexual intercourse with her. In that respect, PW2 the victim's father stated that the accused promising to marry the victim had illicit relation and committed misdeed with her but the fact of committing misdeed was not stated before the Investigating Officer. As per the evidence of PW 2, the victim's aunty, when the accused went to see his bride, they met the accused and then the victim questioned him as to where she would go if he did not marry her inspite of maintaining physical relation with her. Her evidence indicates that at that time only PW 2 knew about their physical relation, earlier to that when she met the accused while visiting their house, the accused told that he would marry her. But at that time she did not know about their physical relation. Another relative of the victim, PW 6 who resided in same house with the victim knew about love affairs between the accused and the victim and lateron heard from the victim that the accused committed bad act with her. She did not explained what is meant for 'bad act'. She also did not clearly state when she heard from victim about committing bad act. If the victim and the accused were found in compromising position at night just prior to filing the FIR, a question arose, which were the other two days when the accused committed sexual intercourse with her. Further, evidence of the victim PW 4 that the accused did have sexual intercourse at her home is contradicted by the victim's father who before police stated that the accused did have physical relation with her at the garden.

- 24. It is in the evidence that the accused went to Kerala for doing job saying that after returning from Kerela he would marry the victim. It is also in the evidence of PW 1 to PW 4 that accused's paternal uncle (bordeuta) coming to the house of the victim proposed to marry the girl with the accused. So it is not the case that the accused did not have any intention from the very beginning not to marry her. Moreover, as per evidence of PW 2, while the victim asked the accused why he did not marry her, the accused replied that his family members arranged his marriage. This evidence clearly disclosed that he had to marry another girl as arranged by his family members. It is not that he did not intent to marry her.
- 25. The evidence of PW 1 to PW 4 clearly shows that though at first the family members of the accused intended to marry the victim, but lateron they raised objection, whatever the reasons and did not eventually marry her because of objection of his family members, not because that he did not want to marry or that the accused had made a false promise to her that he would marry her. That being the evidence on record, it cannot be said that the representation made by the accused was false to the knowledge of the accused at the time it was made. Subsequent failure of the accused to marry the victim girl does not prove that when he made such promise or assurance, the same were made with knowledge that such promise or assurance were false. In such circumstances, it is not possible to hold confidently that the accused at the time of making promise to marry her did not intend to marry her and thus he also can not be held guilty for the offence of cheating punishable u/s 417 IPC.
- **26.** Because of what has been discussed and pointed above, I am of the opinion that the prosecution has failed to prove the charge against the accused of alleged rape or cheating. Accordingly, point No. 2 and 3 for determination are decided in negative.
- **27.** Regarding the offence u/s 493 of the IPC, there is no iota of evidence that the accused did anything which made the victim to believe that she is his lawfully married wife and in that belief she had sexual intercourse with him and thus the charge u/s 493 IPC also fails.

- **28.** Accordingly, accused Md. Abdul Rahim is acquitted on benefit of doubt from the charge u/s 493/417 of the IPC and Section 4 of POCSO Act and set him at liberty forthwith. His bail bond shall remain in force till next six months.
- **29.** Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **22<sup>nd</sup> day of August, 2019.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

# APPENDIX.

## **Prosecution witnesses.**

PW 1 : Father of the victim.
 PW 2 : Aunty of the victim.

3. PW 3 : Grandmother of the victim.

4. PW 4 : Victim,

5. PW 5
6. PW 6
7. PW 7
8. PW 8
9. Grandfather of the victim.
9. another aunty of the victim.
9. Madharam Gogoi, (I.O.)
9. Dr. Jonali Gogoi (M.O.)

### **Exhibits.**

Ext. 1 : FIR

Ext. 2 : Sketch map

Ext. 3 : Charge sheet

Ext. 4 : Medical report.

(I.Barman)
Special Judge,
SONITPUR: TEZPUR