DISTRICT: DHUBRI

IN THE COURT OF THE SPECIAL JUDGE, DHUBRI

PRESENT: Shri A. Chakravarty, M.A., LL.M., AJS

Special Case No. 14 of 2016

U/S 366(A)/376 IPC r/w Section 4 of POCSO Act, corresponding to G.R. Case No. 487/2016

State of Assam

.....Complainant

Versus

Abu TaherProdhani

... Accused

Charge framed on : 10-08-2016

Evidence recorded on : 16-09-2016, 03-11-2016 and 07-12-2016

Statement recorded on : 17-02-2017 Arguments heard on : 09-03-2017

Judgment delivered on : 22-03-2017

Advocates who appeared in this case are:

ShriManiruzZaman, P.P. for the Prosecution

ShriShafiqulHoqueProdhani, Advocate, for the Defence

J U D G M E N T

1. This case was registered on 05-02-2016, at Golakganj Police Station, under section 366(A) of the Indian Penal Code, 1860 (in short "the IPC") and Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short "the POCSO Act"), based on a first information report (in short "FIR")filed by the prosecutrix against accused TaherProdhani.

- 2. The case of the prosecution, as stated in the FIRis that in the evening of 15-01-2016, at Chagolia Part-II, the accused TaherProdhani called the prosecutrixover phone and when the prosecutrixmet him, he gagged her by means of a piece of black cloth and took her away to a lonely place and repeatedly raped her. Thereafter, proclaiming himself to be a Hindu boy, the accused married the prosecutrix. After the marriage, the prosecutrixdiscovered that the accused is a Muslim boy. Then the prosecutrixsomehow persuadedthe accused to take her to her parental home and the accused also took her to her parental home. Thereafter, the prosecutrix filed the instant FIR against the accused with the Chagolia Police Outpost on 05-02-2016.
- **3.** On receiving the FIR, the In-Charge of the Chagolia Police Outpost entered it in the General Diary Book of the Outpost vide entry No.105, dated 05-02-2016 and forwarded the F.I.R. to the Officer In-charge of the Golokganj Police Station for registration of a case. He also started investigation anticipation.
- **4.** Based on the FIR, the Officer In-charge of the Golokganj Police Station registered the case No. 90/2016, for commission of offences punishable under section366(A) IPC and section 4 of the POCSO Actagainstthe accused TaherProdhaniand entrusted the ASI of Police A. Talukdarto investigate the case. Accordingly, ASI of Police A. Talukdarinvestigated the case. During the course of investigation, the prosecutrix was medically examined. Her statement was recorded by the Magistrate under section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C."). Statements of several witnesses were also recorded and after completion of investigation, a charge sheet was filed for commission of offencespunishable under section 366(A) IPC, r/w section 4 of the POCSO Act against the accused Abu TaherProdhani @ TaherProdhaniin this Court as the offences under the POCSO Act aretriable by the Special Court and this Court has been designated as the Special Court to try offences under the POCSO act.
- **5.** During trial, my learned predecessor framed charges under sections366(A), 376 IPC and section 4 of the POCSO Act against the accused person. When the contents of the chargeswere read over and explained to the accused, he pleaded not guilty and claimed to be tried.

- **6.** The prosecution, in order to prove its case, examined seven witnesses. The accused did not examine any witness.
- **7.** In his examination under section 313 Cr.P.C., the accused has denied the prosecution case and has stated that the allegations levelled against him are false and baseless.
- **8.** The points for determination in this case are:-
 - I)Whether on 15-01-2016, at Chagolia Part-II, under Golakganj Police Station, the accused Abu TaherProdhani @ TaherProdhani, kidnapped the prosecutrix?
 - II)Whether after kidnapping the prosecutrix, who was a child under eighteen years of age, the accused Abu TaherProdhani @ TaherProdhanicommitted penetrative sexual assault on her?
 - II)Whether after kidnapping the prosecutrix the accused Abu TaherProdhani @ TaherProdhanicommitted rape on her?

If so, what punishment he deserves?

DECISION AND REASONS THEREOF

9. I have carefully examined the evidence on record, gone through the relevant documents on record and after hearing the arguments advanced by the learned counsels for both the sides give my decision on the above points as follows:-

POINT NOS. I&II

- **10.** These two points are relating to crime against child less than eighteen years of age. Hence, both these points are discussed and decided jointly.
- **11.**The prosecutrix(PW-5), has deposed that she knows the accused. The accused expressed his intention to talk to her over phone. On the day of the alleged incident, along with her friend Lakshmi, she went to witness "*Kali Puja*". On the way, at an isolated place, the accused met them and asked her to go with him on his two

wheeler. When she refused, the accused covered her face by means of a black cloth at knife pointand took her away to some unknown place. Thereafter, she was taken to Guwahati in a train. She was kept at a house ona hill top. There, the accused raped her. The accused told her that his name is Joy Roy. After reaching the house of the accused, she came to know that the accused is a Muslim boy. She then refused to live with the accused and returned to her parental home. Thereafter, she lodged the FIR of this case. Ext-1 is the said FIR and ext-1 (1) is her signature therein. During the course of investigation, her statement was recorded by the Magistrate under section 164 Cr.P.C. The ext-2 is her said statement and ext-2 (1), 2 (2) and 2 (3) are her signatures therein.

- 12. In the cross-examination, she has stated that she has read up to class-VII. Thereafter, she did not pursue studies. Prior to the said incident, for twenty days, she was in constant touch with the accused. They got down from the train at the Guwahati railway station. There was a large crowd at the railway station, but she did not raise alarm. Thereafter, they travelled in a city bus and went to a house on a hill top. She has denied the suggestion that she had love affair with the accused and as the accused belonged to a different religion, the members of her family and AKRASU (a student union) did not accept her relation with the accused and hence, she has refused to marry the accused. She has also denied the suggestion that the accused never concealed his identity. This is admission by the defence that the accused had taken away theprosecutrix. After three months of the said incident, she has married another person. She has denied the suggestion that she has not attained the age of marriage.
- **13.** PW-1 Narayan Roy, the father of theprosecutrixhas deposed that he knows the accused. One day, the prosecutrixwent to witness "*Kali Puja"*. Thereafter, she went missing. At that time she was 16 years old. The prosecutrix went with one Joy and came back with Joy Roy. She was staying with him.
- **14.** In the cross-examination, he has stated that he has since married off the prosecutrix. The prosecutrix had talked with him before returning to his house. She came back after twenty days from the day she went missing. He did not lodge any

missing report with the police. He does not know the accused. He has denied the suggestion that at the time of the alleged occurrence, the prosecutrix was major.

- **15.** PW-2 Dipak Roy has deposed that theprosecutrix is his neighbour. Hearing a hue and cry, he went to the house of the prosecutrix and learnt that the prosecutrix was missing. She was taken away by the accused. The police came and took away the prosecutrix and the accused. At the relevant time, the prosecutrix was about 13 years old.
- **16.** In the cross-examination he has stated that on presumption, he has stated that at the relevant time, the prosecutrix was 13 years of old.
- **17.** PW-3 AjitSarkar has deposed that he knows the accused and the prosecutrix. The prosecutrix is his neighbour. The accused had taken away the prosecutrix. The police took away the prosecutirx and the accused from the house of the prosecutrix.
- **18.** In the cross-examination, he has stated that the parents of the prosecutrix did not tell him that the prosecutrix and the accused had an affair. He does not know if prior to the said incident, the prosecutrix had affair with the accused.
- **19.** PW-4 ShriShyamal Roy has deposed that the prosecutrix lives a few houses away from his house. One day,he saw a large crowd at the house of the prosecutrix. He also saw police personnel there. He heard that one boy had taken away the prosecutrix. He does not know the name of the boy. The police took away the prosecutrix and the accused.
- **20.** In the cross-examination, he has stated that he was not in visiting terms with the members of the family of the prosecutrix. The members of the family of the prosecutrix did not tell him that the prosecutrix was missing.
- **21.** PW-6 Dr. (Mrs.) Rinku Ahmed, the Medical Officer who had examined the prosecutrix has deposed that she did not find any proof of commission of recent sexual intercourse on the prosecutrix. Ext-3 is the medical report prepared by her.

- **22.** In the cross examination, she has stated that the prosecutrix did not tell her that she was raped. She referred the prosecutrix to the Radiologist for determination of age, but the same is not mentioned in the medical report prepared by her. She is not sure about the age of the prosecutrix mentioned in the ext-3.
- **23.** PW-7ASI AmarendraTalukdar, the Investigating Officer is a formal witness of the case.
- **24.** It can be seen from the above discussion that though the Investigating Officer has filed the charge sheet against the accused under section 366 (A) IPC and section 4 of the POCSO Act, he did not make any attempt to establish that at the relevant time, the prosecutrix was less than eighteen years of age. The prosecutrix has stated that she has read up to Class-VII. Therefore, the Investigating Officer should have collected the school certificate of the prosecutrix to ascertain her age. Further, as the prosecutrix was sent for medical examination, the Investigating Officer should have asked the Medical Officer to ascertain her age by conducting necessary medical tests. But, he did not do so. Therefore, though in the FIR, in the statement recorded under Section 164 Cr.P.C., in the ext-3 medical report and in her deposition recorded by my learned predecessor, the prosecutrix has stated that at the relevant time, her age was about sixteen years, in the absence of any document like birth certificate, school certificate, medical report etc., to prove the same, the age of the prosecutirx cannot be held to be about sixteen years as in a criminal case the accused is entitled to benefit for any lacuna in the prosecution case. Therefore, though at the time of the commission of the alleged offence, the age of the prosecutrix was about sixteen years, as the prosecution did not prove the same, it must be held that the prosecutrix was above eighteen years of age and as such, the accused cannot be held guilty of committing the offence of kidnapping punishable under Section 366 (A) IPC and penetrative sexual assault under section 4 of the POCSO Act. Thepoint Nos. I & II are decided in the negative, accordingly.

POINT NO. III

- **25.** The only question that remained to be answered now is whether the accused has committed rape on the prosecutrix?
- **26.** It can be gaugedfrom theabove discussion that the prosecutrixhad love affair with the accused and she eloped with the accused. But, the said affaire was developed as the accused misrepresented himself to be the Hindu boy Joy Roy and not as the Muslim boy Abu TaherProdhani. In the cross-examination, the defence merely suggested to the prosecutrixthat she had love affair with the accused and that the accused never concealed his identity. But, the defence did not challenge the prosecutrixin the cross-examination that the prosecutrixdid not go with one Joy Roy and came back with Joy Roy. The defence suggested to the prosecutrix that she had love affair with the accused and as the accused belonged to a different religion, the members of her family and AKRASU (a student union) did not accept her relation with the accused and hence, she has refused to marry the accused. The suggestions cannot be accepted to be true. Because, the evidence on record does not support the suggestions and accused did not adduce any positive evidence to prove the suggestion. This is also an admission by the accused that he had taken away theprosecutrix. The PW1 has also deposed that the prosecutrix had gone with Joy and returned to his house with Joy Roy. Therefore, it is crystal clear that misrepresenting himself to be a Hindu boy, the accused induced the prosecutrix to go with him. Therefore, it can be safely held that had the prosecutrixknew that the accused is not a Hindu boy, but is a Muslim boy; she would not have eloped with him.
- **27.**Section 376 of Indian Penal Code prescribes the punishment for the offence of Rape. Section 375 of the Indian Penal Code defines the offence of Rape, and enumerates six descriptions of the offence. The description "secondly" speaks of Rape "without her Consent". Thus, sexual intercourse by a man with a woman without her Consent will constitute the offence of Rape. Therefore, we have to examine whether in the case in our hand, the accused is guilty of committing sexual intercourse with the prosecutrix 'against her Consent'. As can be seen from the above discussion, in the instant case, the prosecutrix gave the consent believing the

accused to be a Hindu boy. When she discovered that the accused is not a Hindu boy, she left his company and filed the FIR of the instant case.

28.Section 90 of the Indian Penal Code defines Consent known to be given under 'fear or misconception' which reads as under:

"90. Consent known to be given under fear or misconception - A Consent is not such Consent as it intended by any section of this Code, if the Consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the Consent was given in consequence of such fear or misconception..."

29. Thus, if Consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the instant case, the accused had sexual intercourse with the prosecutrix misrepresenting himself to be a Hindu boy. Therefore, as the accused procured the consent of the prosecutrix and had sexual relations with her misrepresenting himself to be a Hindu boy, though he was a Muslim boy, the said act of the accused falls under the definition of Rape as he had sexual intercourse with the prosecutrix with her consent, which was obtained under a misconception of fact as defined under section 90 of the Indian Penal Code. Thus, the alleged Consent said to have obtained by the accused was not voluntary Consent and the accused indulged in sexual intercourse with the prosecutrix by suppressing his true identity. This kind of Consent taken by the accused misrepresenting himself to be a Hindu boy, though he was a Muslim boy and persuading the prosecutrix to believe that he is a Hindu boy and obtained her Consent for the sexual intercourse under that misconception cannot be treated to be consent. Therefore, the accused must be held quilty of committing the offence of Rape as he had obtained the Consent of the prosecutrix fraudulently, under a misconception of fact.

30.In **STATE OF U.P. Vs. NAUSHAD**, reported in (2013) 14 SCALE 51, the Hon'ble Supreme Court has held as follows:- "It appears that the intention of the accused as per the testimony of PW1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of Consent obtained by the accused cannot be said to be any Consent because she was under a

misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs. 1, 2 and 3 and before Panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of Consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her Consent for the sexual intercourse under total misconception, cannot be treated to be a Consent."

- **31.**The consent obtained in the case in our hand was similar in nature as the accused obtained Consent of the prosecutrix for the sexual intercourse under a misconception.
- **32.**Now, therefore, we have to consider whether the accused can be convicted based on the solitary testimony of the prosecutrix?
- **33.**In **RAMDAS AND OTHERS Vs. STATE OF MAHARASHTRA, reported in AIR 2007 SC 155; (2007) 2 SCC 170,** the Hon'ble Supreme Court has held that, "It is no doubt true that the Conviction in a Case of Rape can be Based Solely on the Testimony of the Prosecutrix, but that can be done in a Case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of Conviction Solely on the basis of her Testimony."
- **34.**In the instant case, I find the evidence of the prosecutrix to be of quality sufficient to sustain an order of conviction solely on the basis of her evidence. I find the testimony of the prosecutrix to be trueand there exist no circumstance which cast a shadow of doubt over the veracity of her testimony.
- **35.**It is crystal clear from the testimony of the prosecutrix that the accused had the knowledge of the fact that the prosecutrix had consented to have sexual intercourse

with him as a consequence of a misconception of fact that had arisen from his misrepresentation as a Hindu Boy. Had it been known to the prosecutrix that the accused was not a Hindu Boy but a Muslim boy, she perhaps would not have eloped with the accused or consented to have sexual intercourse with him and also would not have married him. Otherwise, she would not have filed the instant case against the accused and would not have deposed against him and married another person.

- **36.** In the result, from the facts and circumstances of the case and above discussion, I hold that the prosecution has succeeded in bringing home the charge under section 376 IPC against accused Abu TaherProdhani @ TaherProdhani beyond all reasonable. But, the prosecution has failed to bring home the charges under section 366 (A) IPC and section 4 of the POCSO Act against the accused. Hence, I hold the accused Abu TaherProdhani @ TaherProdhani guilty of committing an offence punishable under section 376 IPC and convict him under the said section of law and acquit him from the charges under section 366 (A) IPC and section 4 of the POCSO Act. The point No. III is decided accordingly.
- **37.** The Probation of Offenders Act is not applicable to a case under section 376 IPC. Hence the accused is not entitled to get the benefit of the ameliorative relief as envisaged under the said Act.
- **38.** Heard the convicted accused on the question of sentence. He has pleaded leniency in awarding the punishment on the ground that he is a youth of about 21 years of age and is the sole bread earner of his father's family. These are no grounds for inflicting lesser sentence. The accused is not an innocent man inasmuch as he had played with the religious sentiment of an innocent girl and committed the alleged offence by concealing his religion.
- **39.**In**STATE OF M.P. Vs. MADANLAL, reported in (2015) 7 SCC 681,** the Hon'ble Supreme Court has held that, "The aforesaid view was expressed while dealing with the imposition of sentence. We would like to clearly state that in a case of Rape or attempt of Rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the

reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility."

"Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mind-set that she should be elegantly servile to men."

40. In **NAUSHAD** (supra)the Hon'ble Supreme Court has held that, "A woman's body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into Consenting to sexual intercourse simply

because he wants to indulge in it. The accused in this case has committed the vile act of Rape and deserves to be suitably punished for it."

41.In view of the above, I deem it proper to punish the accused deterrently, to deter him from committing such crime in future and to dissuade other such potential offenders from committing such crime. Themaximum punishment prescribed by the law is his just deserts.

ORDER

- **42.** Considering the entire facts and circumstances of the case, I sentence the accused Abu TaherProdhani @ TaherProdhani to undergo rigorous imprisonment for life and to pay a fine of Rs. 50,000/- (Rupees fifty thousand) only, in default to undergo simple imprisonment for oneyear, for committing the offence under section 376 IPC, which, in my opinion, will meet the ends of justice in this case. The bail bond of the accused stands cancelled.
- **43.** Furnish a copy of the judgment to the convicted accused free of cost, immediately.
- **44.** Signed, sealed and delivered in the open Court on this the 22ndday of March, 2017, at Dhubri.

(A. Chakravarty) Special Judge, Dhubri

Dictated & corrected by me.

(A. Chakravarty) Special Judge, Dhubri

APPENDIX

PROSECUTION WITNESSES:

PW-1 Narayan Roy

PW-2 Dipak Roy

PW-3 AjitSarkar

PW-4 Sri Shyamal Roy

PW-5 the prosecutrix

PW-6 Dr. (Mrs.) Rinku Ahmed

PW-7 ASI AmarendraTalukdar

2. PROSECUTION EXHIBITS:

Exhibit- 1 The FIR

Exhibit- 2 The statement of the prosecutrix recorded under Section 164 Cr.P.C.

Exhibit-3 Medical report

Exhibit-4 Site Plan

Exhibit-5 Charge Sheet

(A.Chakravarty)

Special Judge, Dhubri