

IN THE COURT OF THE SESSIONS JUDGE, UDALGURI, ASSAM

Sessions Case No.19/2017
(U/S :376D IPC)

State
Versus
1. Debendra Bhumij,
S/o- Mitku Bhumij,
2. Anthoni Jajuwas,
S/o- Fulsen Jajuwas,
3. Jim Lakra,
S/o- Joshef Lakra
All are resident of
Vill- Betibari TE,
P.S.- Mazbat, Dist-Udalguri.

PRESENT: Sri P.Saikia,A.J.S.,
Sessions Judge,
Udalguri.

APPEARANCE:

For the Prosecution : Sri A. Basumatary, P.P.,Udalguri

A N D

For the accused : Mr. M.C. Narzary, Advocates.

Evidence recorded on : 21.6.17, 20.7.17, 19.1.18,
15.6.18,6.10.18,12.11.18,21.1.19,
6.2.19.

Argument heard on : 27.8.2019.

Judgment delivered on: 31.8.2019.

J U D G M E N T

1. The prosecution case, in brief, is that on 23.6.2016 the prosecutrix (real name is withheld, henceforth referred as the prosecutrix) lodged an FIR with the Officer-In-Charge of Mazbat PS alleging, inter-alia, that on 21.6.2016 at night at around 7 PM while she was proceeding from her house at Kuchurabari to her father's house, at that time the accused persons Debananda Bhumij, Jim Lakra and Kasu wailed her suddenly by gagging her mouth with a cloth and taken inside Betibari TE. Thereafter, the accused persons tied her hands and

legs and proceeded to commit rape on her one by one. Thereafter, she came to her home.

2. Basing on the FIR the Officer-In-Charge, Mazbat P.S. registered a case being Mazbat PS case No.47/2016 U/S 376D I.P.C. and commenced the investigation of the case. On completion of the investigation the accused persons persons Debananda Bhumij, Jim Lakra and Antoni Jajuwas were charge-sheeted U/S 376D IPC to face trial.

3. On filing of the charge-sheet the learned Chief Judicial Magistrate, Udalguri took cognizance of the offence and ensured the presence of the accused persons in compliance of the process of the court. Whereupon, the learned Chief Judicial Magistrate, Udalguri having found an offence U/S 376D IPC being exclusively triable by the court of Sessions committed the case to this court vide order date 18.3.2017 after complying the provision of Section 207 Cr.P.C.

4. On commitment, with all requisite papers my learned predecessor in office on perusal of the copies of documents supplied U/S 173 Cr.P.C. having found a prima-facie case and sufficient ground for proceeding against the accused persons U/S 376D IPC and accordingly framed formal charge there under. The charge on being read over and explained to the accused persons to which they pleaded not guilty and claimed to stand trial.

5. In order to romp home the charge as many as fourteen witnesses have been examined by the prosecution and also relied on some documents marked as exhibits.

6. On closure of the prosecution evidence the accused persons were examined U/S 313 Cr.P.C. They have taken a plea of complete denial and false accusation as a result of concoction. However, no evidence was led in support of the defence case.

7. In the context of the above facts and circumstances of the case, the point for determination in the case is set forth as follows:

Whether the accused persons on 21.6.2016 at about 7 PM at 29th number Tea Estate (Betibari) committed gang rape upon the prosecutrix and thereby committed an offence punishable under Section 376D IPC?

8. I have heard arguments canvassed by the learned counsel of both the sides and also minutely scrutinised the evidence on record in its entirety to arrive at a just decision in the case.

DISCUSSION, DECISION AND REASONS THEREOF:

9. PW1, Abiram Rajowar is the first informant of the case. His version postulates that prosecutrix is his daughter. Prosecutrix was married to Budhua Orang at Betibari T.E. on 21.6.16 at about 7/7.30 PM his daughter was coming towards his house from her matrimonial house. Then accused Jim, Kasu and Debananda gagged her and dragged her to the 29 tea estate. Thereafter, the accused persons committed rape on her. His daughter fled away from the place of occurrence. She narrated before him about the occurrence on 23.6.16. Police seized wearing apparel of his daughter. Ext.1 is the seizure list. Ext.1(1) is my signature.

10. In cross-examination, he has stated that the distance between his house and his daughter's house is about 1 KM. My house is situated at Betibari TE. There are garden quarter in between his house and his daughter's house. There is also electrification of light in front of quarters. On the day of occurrence there was "Sadhra" ceremony in the tea estate. His daughter did not divulge about the occurrence directly to him. He heard from his wife and he has no personal knowledge about the occurrence. He has denied the defence suggestion that his daughter stated separate story to his wife but his wife said another story to him.

11. PW2, Ananta Tanti has deposed to the effect that on the day of occurrence "Sadhra" ceremony was performed in the house of Fulsen. He was

in the "Sadhra" ceremony. The accused persons were also present with him serving food to the guest till his stay. Next day, He heard that accused persons committed rape on the prosecutrix.

12. In cross-examination, he has maintained that he was in the "Sadhra" ceremony till 12 O'clock night. Till then the accused persons were also with him. He heard about the occurrence from one Fulsen. He does not know where and how the incident took place nor does he know the time when incident had taken place. The person who reported him about the occurrence did not state him the time of occurrence. He did not ask the prosecutrix about the occurrence. He denied the defence suggestion that the person Fulsen did not state that accused persons committed rape but he stated another story.

13. PW3 is Tufan Tanti. According to his evidence the occurrence took place in June,2016. He used to sleep at his shop. On the day of occurrence he was waken by the prosecutrix and told him that the accused persons tied her and committed rape on her inside the garden. She sought for help. So, he escorted her towards her home. She was frightened and crying. She is a widow. The time was about 12.24 AM while he returned to his shop after keeping her at her house.

14. In cross-examination, he stated that the distance between his shop and the house of victim woman is about ½ KM. He stays in garden quarter. He did not ask the prosecutrix where she was tied. She was wearing a white colour nighty. He did not notice whether the nighty was torn or not. When the prosecutrix sought for help, he did not wake up the people nearby. The victim told him that she was coming from her parental house. The distance between the house of the father of the victim and his house is less than 1 KM. The prosecutrix stated that she came to her father's house at 7 PM. He did not ask the prosecutrix when the occurrence had taken place. But she came to his shop at about 12 O'clock night. At the relevant time 'Sadhra' ceremony was held in the house of accused kasu. He did not see the incident.

15. PW4, Lakhan Sahu is the scribe of the FIR. He has stated that he is a petition writer of Mazbat PS. On 23.6.16 the prosecutrix came to Mazbat PS and asked him to write an FIR. He wrote the FIR according to her version and the contents of the FIR was read over to her which was accepted to be correct by her and then she put her thumb impression in the FIR. Ext.2 is the FIR. Ext.2(1) is his signature and Ext.2(2) is the thumb impression of the prosecutrix which was taken by him.

16. In cross-examination, he has revealed that he did not put his initial below the thumb impression. The prosecutrix came to him after 2 days of incident i.e. on 23.6.16. He did not ask anything except writing the FIR.

17. PW5 is Bharat Digar. He stated in his evidence that at the time of occurrence he was the Line Chowkidar of Betibari TE. On the next day morning of the incident the prosecutrix reported to him that the accused persons of this case committed rape on her. Thereafter, he informed about the incident to the manager of Betibari TE.

18. In cross-examination, he has stated that his duty is to allot the work in different Line of the TE.

19. Dr. Shyamal Basumatary (PW6) is the doctor who examined the prosecutrix on 26.6.16 in connection with this case and found the following:-

Physical examination:-

Height- 5feet 3 inches, weight- 45 Kg, teeth- normal, axillary hair- normal, pubic hair- normal, breast- normal, hymen- absent, vaginal injury- nil.

Vaginal swab examination for spermatozoa:- no spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray for age determination:- Approximate age 25 or above years.

The doctor opined that-

(1) Approximate age is 25 or above years.

(2) No mark of violence or injury at private part found; she is not pregnant; no sign of recent sexual intercourse.

Ext.3 is his report and Ext.3(1) is his signature. His cross-examination is declined by the defence.

20. PW7 is Joshmina Toppo. Her hearsay evidence reveals that at the material time one day she was informed by the Chowkidar of the tea garden that the prosecutrix was raped by some one else.

21. In cross-examination, she has stated that she does not have any knowledge as to who committed rape on the prosecutrix nor did she meet the prosecutrix after the incident.

22. PW8 is Smti. Anita Bagowar. Her evidence discloses that on the day of occurrence she came to work in the house of Fulsen Jajowa due to "Sadhra" ceremony held on that day. She had been working since 8 AM till 2 AM of intervening night. In the next morning she came to know from one Lal Babu, the Chowkidar of Betibari Tea Estate, that the victim was raped by the accused persons. The Chowkidar Lal Babu told her that the victim has stated to him that the accused persons had committed rape upon her. She did not meet the victim after the alleged commission of rape upon her.

23. In cross-examination, she has stated that the accused persons are her co-villagers. On the day of occurrence "Sadhra" ceremony was held in the house of Fulsen Jajowa where accused persons were also present and they were preparing meal with her till 2 AM. She came to know about the incident of rape from one Lal Babu.

24. PW9 is Satina Sawasi. She is not an eye witness to the occurrence. Her evidence reveals that on the day of occurrence she was working in the house of Fulsen Jajuwa alongwith accused persons on account of "Shardha" ceremony. In the night at around 9 pm she went to her home after finishing her work in the house of Fulsen Jajuwa while informant-cum-victim remained there. On the next day in the morning she came to know from the Line

Chowkidar of Betibari tea estate that accused persons committed rape on the prosecutrix.

25. In cross-examination, she has divulged that she does not know whether the accused persons committed rape on the victim or not as she was not present there.

26. PW10, Sarika Horo is another hearsay witness. She has testified that on the day of occurrence she was working in the house of Fulsen Jajuwa due to "Shadhra" ceremony held there. At around 1 am in the intervening night she left for her home. On the next day in the morning the Line Chowkidar Lal Babu of Betibari tea estate told before her that the accused persons committed rape on the victim.

27. In cross-examination, she has disclosed that she alongwith accused persons including were working in the house of Fulsen Jajuwa due to "Shadhra" ceremony held on that day. The victim was not seen in the house of Fulsen Jajuwa during "Shadhra" ceremony till her return home. She worked in the house of Fulsen Jajuwa from 7 am to 1 am in the intervening night. The accused persons remained at the house of Fulsen Jajuwa till her return. She did not witness the incident of rape on the prosecutrix as she was only reported to them by Line Chowkidar Lal Babu.

28. PW11 is the prosecutrix. Her evidence bears that the occurrence took place about 2 years ago. At the material time on the date of occurrence at around 7PM she was proceeding to her father's house alone at Khusurabari from Bettybari TE through the village path. Suddenly the accused persons namely, Debananda, Zim and Kochu @ Anthony intercepted her and against her will and consent dragged her into the Tea Estate by gagging her mouth. Thereafter, the accused tied her hands and legs with ropes. Thereafter, the accused Debanand committed rape on her by disrobing her. Then the other accused Zim and Kochu @ Anthony also committed rape on her one by one on the ground. As the accused persons gagged her mouth with cloth and as such, she could not rise shout for help. After commission of rape against her consent

and will she asked the accused to bring water to quench her thirst. Accordingly accused person Zim and kochu went to fetch water leaving accused Debandand to guard her. At that time she told the accused Debandand that she had to answer call of nature falsely in order to escape from the clutches of the accused persons to save her. When the accused let her go to answer her call of nature she tried to escape but the accused Debandanda saw her and caught her again and committed rape upon her. Thereafter, she managed to run away from the clutch of the accused Debandand and reached the house of one Tufan at a distance of about 400 meters from the place of occurrence and narrated him about the incident. Then Tufan brought her to her house at around 1 AM. On the next day in the morning she narrated about the incident to night Chowkidar Bharat Dighal of Bettybari TE who in turn informed the incident to the manager of the Bettybari TE who asked her to lodge an FIR to the police. Accordingly she lodged the FIR before the police on 23.6.2016 written by a scribe as per her version. Police also got her statement recorded u/s 164 Cr.P.C before the Magistrate and also sent her to medical examination.

29. In cross-examination, she has stated that she resides in the quarter of Bettybari TE. The accused persons also reside in their respective quarters of the Bettybari TE at a distance of about 600 meters away from her residence. The incident occurred in the night and it was complete dark. On the day of occurrence in the night a "Shradha" ceremony was held in a house near the residence of the accused persons. She did not attend the "Shradha" ceremony. She does not know as to who suddenly gagged her mouth with a cloth when she was proceeding to her father's house. However, she recognized the accused persons later. She cannot say the distance from the road where from the accused dragged her to Tea Estate. The accused persons committed rape on her one by one on the ground. She did not receive injuries on her back when the accused persons committed rape on her one by one inside the Tea Estate. During that time at the time of commission of rape the accused persons though removed the cloth from her mouth but she did not shout as because nobody would have heard her sound from that place. The accused persons committed rape on her from 8 pm till 12 O' clock at midnight. Police seized her

nighty and petticoat which she was wearing at the time of occurrence. Police also seized the rope by which the accused persons tied her hands and legs. She did not sustain injury either on her hands and legs even when she tried to run away from the clutches of the accused persons from the clutches of the accused persons. All the accused persons were married at the time of occurrence. She has denied the defence suggestion that on the day of occurrence the accused were working in the house where the "Shradha" ceremony was being held right from 7 PM till 1 AM in the intervening night. She has denied the defence suggestion that she has deposed falsely against the accused persons and they were not involved committing gang rape on her.

30. PW12, Jiban Ch. Deka is one of the investigating officers of the case. He has stated in his evidence that on 23.06.2016 he was posted as ASI at Mazbat PS. On that day at 2:30 PM the prosecutrix lodged an FIR before the O/C, Mazbat PS. On the basis of the FIR Mazbat PS case No. 47/2016 U/S 376(D) IPC was registered and entrusted him to investigate into it. During investigation he visited the place of occurrence, recorded the statement of available witnesses U/S 164 CrPC and prepared the site plane of the place of occurrence. The victim was sent for medical examination and obtained her medical report. The statement of the victim was also recorded before the Magistrate U/S 164 CrPC. He arrested the accused Debendra Bhumij, Jim Lakra and Anthony Jojowar and forwarded them to the court. He also seized one petticoat and nightgown belonging to the victim as produced by her. On completion of the investigation he submitted the case diary to the O/C, Mazbat PS for necessary action in this regard. Ext 1 is the seizure list of one petticoat. Ext. 1(2) is his signature. Ext. 4 is the sketch map Ext. 4(1) is his signature.

31. In cross-examination, he has stated that he did not send the seized petticoat and the nightgown for forensic examination to trace out any stain of semen therein. The FIR was lodged on 23.06.2016 and the occurrence took place on 21.6.2016. As regards delay in lodging the FIR no explanation had been put forth therein.

32. Sitangshu Kumar Ghosh (PW13) is the other investigating officer of the case. His evidence postulates that on 23.6.2016 he was posted as O/C, Mazbat PS. On that day the prosecutrix lodged an FIR on the basis of which he registered the Mazbat PS case No. 47/16 U/S 276(D) IPC and entrusted the investigation to ASI Jiban Ch. Deka. On 1.8.2016 he received the case diary from ASI Jiban Ch. Deka after completion of the preliminary investigation of the case. On evaluation of the case diary he found prima facie materials against the accused persons U/S 376(D) IPC and hence laid the formal charge-sheet against the accused persons there under to face trial. Ext. 5 is the charge-sheet. Ext. 5(1) is his signature therein.

33. In cross-examination, he has denied that accused persons were not involved in the present case and that he laid the charge-sheet against the accused persons U/S 376(D) IPC without proper investigation of the case.

34. PW14, Rajesh Boro is the then SDJM(S), Udalguri, who recorded the statement of the prosecutrix U/S 164 Cr.P.C. According to his evidence on 24.6.16 while he was working as SDJM(S), Udalguri he was the Aleka Magistrate of Mazbat PS. On that day, in connection with Mazbat PS case No.47/16 prosecutrix was brought before him for recording her statement U/S 164 Cr.P.C. Accordingly, as per the version of the prosecutrix he recorded her statement U/S 164 Cr.P.C. On completion of the recording of the statement of the prosecutrix the same was read over and explained to her. The victim having found the statement was recorded as per her version put her thumb impression and he also put his signature therein. Ext.6 is the statement. Ext.6(1) is his signature.

35. In cross-examination by the defence, he has stated that the victim stated before him that she knows the accused persons.

36. Before embarking on as to the process of analyzing the evidence on record, it is apposite to point out at the threshold that this being a case of allegation of gang rape by the prosecutrix (PW11) brought against the accused persons and there being no ocular evidence as to such alleged gang rape and,

as such, it is obvious that the main evidence in this case is that of victim herself.

37. In practice a conviction of rape almost entirely depends on the credibility of the victim so far as the essential ingredients are concerned the other evidence is only corroborative. It is not necessary that there should be independent corroboration of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant should in itself be sufficient to sustain conviction. It is well settled by catena of decisions in the Hon'ble Apex Court that there is no rule of law or practice that the evidence of a prosecutrix cannot be relied on without corroboration and as such, it has been laid down that corroboration is not a sine quanon for a conviction in a rape case if the evidence of the prosecutrix does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, there is no insist of corroboration except from medical evidence, where having regard to the circumstances of the case medical evidence can be accepted to the forthcoming.

38. In fact, for this very purpose, as to how indeed the evidence of a victim can be accosted we are quite aware of the eliminating Apex Court judgment rendered in the case of **Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat, 1983 SC 753**. The quintessence of the judgment is that even on an uncorroborated testimony of a sexual assault accused can be convicted but ultimately that does not transpires with the overall intensive credibility and consequences dependable of such a witness. In other words if the evidence of the victim girl/woman is found to be of sterling quality there is indeed no requirement of law to seek for further corroboration.

39. In the decision reported in **Ashok Kumar v. State of Haryana (supra)**, this court while dealing with the offence under Section 376 (2) (g) IPC read with explanation held as under in Para 8:

“8. Charge against the appellant is under Section 376(2)(g) IPC. In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.”

40. In the decision reported as **Lalliram & Anr. v. State of Madhya Pradesh (supra)** in regard to an offence of gang rape falling under Section 376 (2) (g) this Court laid down the principles as under in paras 11 and 12:

“11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana.)

12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a

higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial.” (emphasis added)

41. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

42. It is a settled principle of law that testimony of prosecutrix is sufficient enough to convict the accused if it inspires confidence. **(Ref. Rajesh Patel Versus State of Jharkhand (2013) 3 SCC 791 and State of Rajasthan Versus Babu Meena 2013) 4 SCC 206).**

43. The Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

44. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. Prosecution case has to stand on its own legs. Unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

(Vide: Tukaram & Anr. v. The State of Maharashtra, (2979) 2 SCC 143; and Uday v. State of Karnataka, (2003) 4 SCC 46).

45. The Court is duty bound to appreciate the evidence in the totality of the background of the entire case. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The apex Court in **Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171**, has held as under:-

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr., (2003) 3 SCC 175; and Vishnu v. State of Maharashtra, (2006) 1 SCC 283: (AIR 2006 SC 508).

46. The evidence of the prosecutrix (PW11) having attuned and so cause ourselves to the guiding principle as to how we are to evaluate the evidence of the prosecutrix we straight away now proceed to appreciate the evidence of PW11 (prosecutrix) before the court.

47. According to her evidence the incident in question where she came to be gang raped by Debananda, Zim and Kochu @ Anthony inside Betibari T.E. under the tree bushes while she was proceeding to her father's house from her house in the evening at around 7 PM. When she was proceeding to her father's house at Khusrabari from Betibari T.E. through the village path the accused persons intercepted her and against her will and consent dragged her into the Tea Estate by gagging her mouth. The accused tied her hands and legs with ropes. The accused Debanand committed rape on her by disrobing her. Then the other accused Zim and Kochu @ Anthony also committed rape on her one after another. She has also maintained that as the accused persons gagged her mouth with cloth and as such, she could not raise hue and cry. After commission of rape against her consent and will she asked the accused to bring water to quench her thrust. Accordingly accused persons Zim and Kochu went to fetch water while accused Debandand was alongwith her. At that time she told him that she had to answer call of nature falsely so as to escape from the clutches of the accused persons to save her. When the accused let her go to answer her call of nature she tried to escape but the accused Debananda saw her and caught her again and committed rape upon her. Thereafter, she managed to run away from the clutch of the accused Debanand and reached the house of one Tufan at a distance of about 400 meters from the place of occurrence and narrated him about the incident. On the next day she narrated about the incident to night Chowkidar Bharat Dighal of Bettybari TE and Bharat Dighal informed the incident to the manager of the Bettybari TE who asked her to lodge an FIR to the police. Accordingly she lodged the FIR before the police.

48. Thus, it has come out from the evidence of the prosecutrix (PW11) that the accused persons committed gang rape on her in the night from 8 PM till 1 AM of midnight as divulged in the cross-examination inside the Betibari T.E. According to the prosecutrix she could not raise sought as because the accused persons had not only gagged her mouth with a cloth but also tied her hands and legs and committed forceful sexual intercourse with her.

49. In the context of the facts and circumstances of the case the forcible intercourse on the prosecutrix by the accused persons might have resulted

injury on the person of the prosecutrix (PW11), but the prosecutrix has surprisingly disclosed in cross-examination that she did not receive injuries on her back when the accused persons committed rape on her one by one on the ground inside the Tea Estate. She also did not sustain injury either on her hands or legs even when tried to run away from the clutches of the accused persons in spite of being tied with plastic rope. On the other hand, it is evident from the evidence of the doctor and his report after examination of the prosecutrix that there was no mark of violence or injury at private part was found. Victim was found neither pregnant nor was found in recent sexual intercourse. On vaginal swab examination for spermatozoa there was no indication of any spermatozoa in the vagina. In other words the doctor (PW6) did not find any sign of violence on the body of the victim as well as her private parts though she was alleged to have been gang raped by the accused persons one by one in a most brutal manner on the ground inside the tea estate. However, it is surprising that the prosecutrix (PW11) herself revealed in her evidence in most usual manner about her hands and legs were tied by the accused persons after dragging her from the road while she was proceeding to her father's house but she did not receive any injury either on her person and her private part. In the facts and circumstances of the evidence of prosecutrix (PW11) in absence of corroboration from the medical evidence when she was sexually molested by the accused persons and her own evidence that she did not sustain any injury on her person has created a doubt as to her veracity and her credibility as to commission of gang rape by the accused persons when as per the testimony of the prosecutrix (PW11) the accused persons committed rape on her one after another penetrating their entire male organ in her vagina. In such a violent rape alleged to have been committed by the accused against her will and consent by lying her down on the ground inside the tea estate she would have naturally struggled to save her from the clutches of the accused persons and if she had struggled to escape from the clutches of the accused persons she would have invariably sustained injury mark or violence in her private parts or her body when she has stated that the accused persons committed forceful sexual intercourse with her for a long period from 9 PM to 12 PM. But absence of even a scratch of injury in the private part and in the body of the prosecutrix (PW11) in such a forceful rape committed by as many

as three accused persons at a stretch does not strike in my judicial mind to accept the version of the prosecutrix (PW11) as truthful one. It is the testimony of the prosecutrix (PW11) that when she was dragged from the road gagging her mouth her hands and legs were tied inside the tea estate. If she had been subjected to forceful rape in such a state she would have definitely suffered major injury not only in her private parts but also in her body. But the medical evidence is completely contradictory to accommodate even to a slightest extent to support the version of the prosecutrix (PW11) to make her statement believable one. The statement of the prosecutrix (PW11) that she did not raise shout as because nobody would hear her sound from the place of occurrence is also implausible one inasmuch as in such a dire situation the prosecutrix (PW11) would have made all efforts to save herself from the clutches of the accused persons who alleged to have been gang raped on her for a long period.

50. On account of various contradictions in the testimony of the prosecutrix (PW11) it cannot be safely concluded from her version that she is telling a gospel truth without exaggeration and embellishment.

51. Another striking feature in this case is that none of the other prosecution witnesses has supported the prosecution version. If we unfold the testimony of PW2, PW3, PW4 and PW5 it would appear that on the day of occurrence accused persons were with them in the "Shadhra" ceremony function of one Fulsen Jajuwa till 12 O'clock in the night. There is nothing to disbelieve the testimony of these witnesses. The prosecutrix (PW11) has also admitted that on the day of occurrence "Shadhra" ceremony was performed in the house of Fulsen Jajuwa but she did not attend the "Shadhra" ceremony.

52. The testimony of the other independent witnesses is quite contrary to the incongruous testimony adduced by the prosecutrix (PW11) disclosing that all the accused persons were present in the house of one Fulsen Jajuwa where "Shadhra" ceremony was held on the day of occurrence till 12 O'clock in the night. As accused persons remained in the house of Fulsen Jajuwa where "Shadhra" ceremony was held till 12 O'clock night then the question of

commission of gang rape by the accused persons on the prosecutrix (PW11) is absolutely impossible and in the face of incoherent and inconsistent evidence adduced by the prosecutrix (PW11) the set of the evidence adduced by the independent witness is found plausible that the accused persons with them in the house of one Fulsen Jajuwa due to "Shadhra" ceremony till 12 O'clock in the night.

53. The truthfulness of the evidence of the prosecutrix (PW11) has been further demolished by the testimony of her own father (PW1). According to his evidence his daughter (prosecutrix) informed him about the occurrence on 23.6.2016 though the incident occurred on 21.6.2016 at about 7/7.30 PM while she was coming to his home. It is beyond comprehension as to why the prosecutrix (PW11) who was subjected to gang rape by the accused persons while she was going to her father's house did not disclose it to her father till after two days of the incident has made the veracity of the prosecution case a doubtful one.

54. In the instant case, what is also appropriate to note that there was two days delay in lodging the FIR by the prosecutrix (PW11). Considering the gravity of the incident prosecutrix should have lodged the FIR immediately.

55. It is well settled that delay in lodging the FIR cannot be a ground of doubt the prosecution case and also cannot be used as a ritualistic formula for doubting the prosecution case and doubting its authenticity. It only puts the Court in its guard to search for and considered if any explanation has been offered for the delay. Once it is offered the court is only to see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment and exaggeration in prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactorily explain of delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. Further more, whether delay is so long as to throw a ground of suspicion and sets the prosecution only depends upon the validity factor which will vary from case to case.

56. In **Gyanpath Vs. State of U.P. (1981) CriLJ 1335**, it has been held that **delay in lodging the first information report quite often results in embellishment which is a creature of afterthought, on account of delay the report riot only gets bereft of the advantage of spontaneity; danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. When delay in the first information report has not been explained it would be unsafe to pass conviction of the accused upon the evidence produced by the prosecution.**

57. In the instant case, though the prosecutrix (PW11) was brutally gang raped by the accused persons on the day of occurrence but she failed to lodge the FIR till the lapse of two days from the date of occurrence. There is also no explanation as to what had caused delay in lodging the FIR either in the FIR as well as in the testimony of the prosecutrix. Hence, unexplained delay in lodging the FIR in my considered view without any plausible explanation has rendered the prosecution story doubtful one.

58. Bearing in mind the above vital discrepancies, contradictions and infirmities in between the testimony of the prosecutrix (PW11) and other independent witnesses on the material particular of the case coupled with the discrepancy in between the testimony of the prosecutrix (PW11) and the medical evidence of PW7 has further raised doubt as to the commission of gang rape on the prosecutrix (PW11) by the accused persons as it has already been noted that the prosecutrix (PW11) did not suffer from any kind of injury either on her private parts and on her body after commission of gang rape has cast a spell of doubt as to the authenticity of her testimony. No doubt, the evidence of the prosecutrix (PW11) and the facts and circumstances of the case is most vital and on the principle of evidence that the version of a lady who is a victim of rape is normally accepted and corroboration is not the sine qua non for a conviction in a rape case but the evidence of the prosecutrix (PW11) has suffered from basic infirmities and vital contradictions and as a result, the probability factor as to the commission of rape by the accused in

absence of any other positive evidence including from the medical evidence is found to be out of tune.

59. Considering the questionable propensity of the prosecutrix, it is profitable to refer to the case of **Moinul Hoque and Ors. v. State of Assam (2001) 1 GLR 516**. In paragraph 16 of the judgment it has been held as under:

"It is true that a Court has to take seriously the cases relating to violence against woman. Simultaneously, the Court has a duty to guard itself against false charges of rape. The narration of the prosecution case is full of vital omissions and contradictions and it raises strong doubt which over-shadows the genesis of the prosecution case. In my opinion, it would be unsafe to sustain the conviction in this case relying upon the testimony of the prosecutrix alone. Dignity of woman will have to be protected, but without aid of emotion. This is undoubtedly not a case where the prosecutrix has the last 'say'."

60. This Court is also not unmindful of the observations made by the Hon'ble Apex Court in **Sadashiv Ramrao Hadbe v. State of Maharashtra (2006) 10 SCC 92**, wherein it has been observed that **it is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix if it is capable of inspiring confidence in the mind of the Court and if the version given by the prosecutrix is supported by medical evidence and the whole surrounding circumstances makes the case set up by the prosecutrix highly probable and believable. Therein it is also observed that the Court shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.**

61. Keeping in mind the observations referred to the above of the Hon'ble Apex Court in the light of the present facts and circumstances of the evidence on record, particularly the evidence of the prosecutrix (PW11), whose evidence has been found artificial, unreliable and inconsistent, which, as per the settled position of law cannot be accepted and acted upon to prove the guilt of the accused due to improbability factor. Hence, the possibilities of making false

allegation against the accused persons are not unusual and cannot be ruled out.

62. Situated thus, the prosecution has failed to fulfill the broad principle as to its burden to prove its case beyond reasonable doubt which applies equally to a case of rape like this, and therefore, the accused persons are entitled to benefit of doubt.

63. In view of the consequences, I am constrained to hold that the accused persons Debananda Bhumij, Jim Lakra and Anthony Jajuwas are not guilty U/S 376D IPC. Therefore, they are acquitted thereunder on and set them at liberty forthwith.

64. Bail bond executed by the accused persons and the surety shall remain in force for another six months under the purview of Section 437(A) Cr.P.C.

Given under my hand and seal of this Court this 31st day of August,2019.

Dictated and corrected by me and each page bears my signatures.

Sessions Judge,
Udalguri.

(P.Saikia)
Sessions Judge,
Udalguri.

APPENDIX:

A) Prosecution witnesses:

- | | |
|-----------|------------------------|
| i) PW1 | Abiram Rajowar |
| ii)PW2 | Ananta Tanti |
| iii)PW3 | Tufan Tanti |
| iv)PW4 | Lakhan Sahu |
| v)PW5 | Bharan Digar |
| vi)PW6 | Dr. Shyamal Basumatary |
| vii)PW7 | Joshmina Toppo. |
| viii) PW8 | Anita Bagowar |
| ix) PW9 | Satina Sawasi |

x)PW10	Sarika Horo
xi)PW11	Moni Rajowar
xii)PW12	Jiban Ch. Deka
xiii)PW13	Sitangshu Kr. Ghosh
xiv)PW14	Rajesh Boro

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1	Seizure list
ii) Ext.2	FIR.
iii) Ext.3	Medical report
iv) Ext.4	Sketch map
v) Ext.5	Charge-sheet.
vi) Ext.6	Statement of the victim U/S 164 Cr.P.C.

Dictated and corrected by me.

Sessions Judge,
Udalguri