GAHC010100992023

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

Case No. : Crl.A./165/2023

PABITRA HAZARIKA
S/O LATE BUBAI HAZARIKA,
VILL.- SALMARA GAON,
P.S.- MAJULI, DIST.- MAJULI.

VERSUS

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

2:RUPALI HAZARIKA
D/O BUBAI HAZARIKA

VILL.- SALMARA GAON

P.S.- MAJULI
DIST.- MAJULI

Advocate for the Petitioner : MR M CHOUDHURY, MR N RAY,MR P J DAS

Advocate for the Respondent : PP, ASSAM,

Linked Case : I.A.(Crl.)/398/2023

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Advocate for : MR M CHOUDHURY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGMENT & ORDER (ORAL)

Date : 08-08-2024

Heard Mr. M. Choudhury, learned counsel for the accused/appellant. Also heard Mr. P. Borthakur, learned Addl. PP for the State respondents.

2. This appeal is directed against the Judgment & Order of Sentence dated 15.03.2023 and 18.03.2023 respectively passed by the learned Sessions Judge, Majuli in Sessions Case No. 51(JM)/2020, whereby the accused/appellant was convicted under Section 376 IPC and sentenced thereof to undergo Rigorous Imprisonment for 7 (seven) years with fine of Rs. 20,000/- only and in default Simple Imprisonment for another 2 (two) months in addition as well as under Section 493 IPC and sentenced thereof to undergo Rigorous Imprisonment for 5 (five) years with fine of Rs. 10,000/- only and in default Simple Imprisonment

for another 2 (two) months in addition respectively. Both the sentences were directed to run concurrently.

3. The case of the prosecution is that while the **victim/PW-2** was brought for treatment to Jorhat Hospital, it came into light that she was 7 (seven) months pregnant. Upon learning that it was the accused who was secretly keeping love affairs with her and made her pregnant, the family members informed the same to the accused/appellant and he accepted to take **victim/PW-2** as his wife and accordingly, took her to his home. However, after few days, he left her at the Bongaon Police Station. Thereafter, **PW-1**, the mother of the **victim /PW-2** lodged the present FIR dated 27.08.2019. Upon receiving the FIR, Majuli P.S. Case No. 44/2019 was registered under Section 493 IPC.

4. Thereafter, the case was entrusted to one S.I Tankeswar Gogoi to investigate the case. Accordingly, he proceeded to the place of occurrence and recorded the statement of the witnesses under Section 161 Cr.PC. He also got **victim/PW-2** medically examined and later on, arrested the accused/appellant. After the completion of the preliminary investigation, the remaining part of the investigation was completed by **PW-5**, i.e., the Investigating Officer, who thereof filed charge-sheet against the accused/appellant under Section 376/493 IPC being Ext.4.

5. Accordingly, on 19.05.2020, the case was committed to the Court of Sessions Judge, Jorhat and after receipt of the case records, the Trial Court framed charge under Sections 376/493 IPC against the accused and trial accordingly commenced.

6. During trial, the prosecution side examined 6 witnesses including the Victim, Informant, Investigating Officer and the Medical Officer and also exhibited documentary evidence. The accused/appellant was also examined under Section 313 Cr.PC, wherein all the incriminating circumstances were put to him. However, he generally denied. That apart, the defence adduced evidence of 3 witnesses as Defence Witnesses including the accused/appellant himself.

7. The Trial Court after concluding the trial rendered its Judgment & Order on 15.03.2023, whereby the accused was convicted under Section 376 IPC and sentenced thereof.

8. Mr. M. Choudhury, learned counsel for the appellant submits that the Judgment & Order of Sentence dated 15.03.2023 and 18.03.2023 respectively suffers from infirmites, for which the same warrants interference from this Court. He submits that the records of the case indicates that on 17.08.2019 at 7:10 p.m., the **victim/PW-2** orally informed to S.I. Tankeswar Gogoi of Bongaon Out Post that one Dulu Borah had made her pregnant by establishing physical relation with her.

9. He further submits that though an application on 21.02.2023 was made on behalf of the appellant before the Trial Court for calling the original said G.D Entry, i.e., G.D.E No. 268 dated 17.08.2019 from the Bongaon Out Post and also for examining the said S.I. Tankeswar Gogoi, the Trial Court by Order dated 21.02.2023 rejected the said petition of the accused/appellant. He accordingly submits that non- examination of the said officer is fatal to the prosecution case, inasmuch as, **victim/PW-2** herself had disclosed to him that it was not

the accused/appellant but someone else who made her pregnant. He further draws the attention of this Court to the extracted copy of G.D Entry dated 17.08.2019, which was furnished to the learned Counsel for the defence pursuant to an application filed under the Right to Information Act, 2005.

10. He further submits that it has also come out from the depositions of the prosecution witnesses that prior to filing of the present FIR dated 27.08.2019, the **informant/PW-1**/**mother** had lodged another FIR in connection with the same allegation. He further submits that it has clearly come out from the deposition of **DW-1**/accused/appellant that first FIR was against one Dulu Borah. He accordingly submits that since the Trial Court has convicted the accused/appellant merely on the basis of the testimony of the **victim/PW-2**, that too when her testimony itself is not convincing and suffers from lacuna, the said conviction is not sustainable in law.

11. Mr. P. Borthakur, learned Addl. PP for the State respondents submits that in a case under Section 376 IPC, the testimony of the victim itself is sufficient to convict the accused for the offence alleged. He further submits that in the present case, the **victim/PW-2** in her deposition before this Court has clearly deposed that the accused/appellant had forcefully established physical relation with her and for which, she has become pregnant. He accordingly submits that the Judgment & Order dated 15.03.2023 warrants no interference from this Court.

12. I have given prudent consideration to the arguments made by the learned counsels appearing on behalf of both the parties and have perused the materials available on record including the Trial Court Records and the

judgments cited at the bar.

13. Before adverting to the deposition of the prosecution and defence witnesses, it is apt to refer to the FIR dated 27.08.2019 lodged by the **informant/PW-1**/mother of the **victim/PW-2**. Copy of the FIR dated 27.08.2019 is reproduced hereunder for ready reference:-

"*To,* *Dated: 27.08.2019*

The Officer-in-charge, Majuli Police Station

Sub: FIR

Informant:

Smt. Mamoni Hazarika

W/O: Sri Bubai Hazarika

R/O:Salmora

Police Station: Bongaon

Accused: 1. Sri Pabitra Hazarika, 2. Sri Bhupen Hazarika, S/o: Bubai Hazarika, 3. Sri Bhaben Hazarika, S/o: Sri Kanak Hazarika, 4. Sri Kiringa Kalita, S/o: Sri Ketapu, 5. Sri Deukon Kalita, S/o: Late Anu Kalita, All are resident of Salmora, P.S. Bongaon, Majuli.

Sir,

I beg to state that my daughter Miss Rupali Hazarika is about 19 years old. The Accused No. 1 secretly keeping love affair with her made her 7 months pregnant. We could come to know about the same when we took her for treatment of her ailment before the doctor and when we enquired about the same, she after a long time confessed that Accused No.1 made her pregnant.

Hearing the same I got fainted in the hospital. Thereafter, we immediately informed about the same to the Accused No.1 and asked him to accept my daughter as his wife in the hospital itself, however, the Accused only after 3 days accepted my daughter as his wife before the Jorhat Mahila Samity. Although, the accused accepted my daughter as his wife but few days later, on 20.08.2019 the Accused No.1 at the instigation of Accused No.2, 3, 4 & 5 with the help of Bongaon Police left my daughter at our home.

Finding no other alternative but to accept my daughter now I have to request your honour to take necessary action into the matter."

14. It appears that the FIR was filed after the **mother/PW-1** found that the accused/appellant by secretly keeping love affair with the **victim/PW-2,** made her pregnant. It further appears that upon the family members having come to know about the said pregnancy, initially handed over the **victim/PW-2** to the accused/appellant, who agreed to accept her as his wife and accordingly took her to his home in the presence of Jorhat Mahila Samity. It further appears that later on, after few days, i.e., on 20.08.2019, the accused/appellant dropped her at the Bongaon Out Post. It further appears that 7 (seven) days thereafter, the present FIR was lodged against the accused/appellant.

15. This appeal being arising out of an offence of 'Rape', I shall now refer to the deposition of the **victim/PW-2** made before the Trial Court.

16. PW-2/victim deposed before the Court that on the day of the incident while she was alone in her house, the accused/appellant came to her house and forcefully established physical relation with her. She further deposed that after doing the act, the accused/appellant went away to his house and that the accused/appellant used to come to her house on several different dates and established physical relation with her. She further deposed that the house of the accused/appellant is on the backside of her house. She further deposed that she is an asthmatic patient and when she became very ill, her parents took her to the Jorhat Medical Hospital for treatment and while doing ultra sound, it was discovered that she was 7 (seven) months pregnant. She further deposed that she told about the incident to her sister-in-law, i.e., Bhonikon Kalita, who thereafter told her parents about the same.

17. She further deposed that when her parents asked the accused/appellant

about the incident, he admitted that he was responsible and accordingly took her with him to Sivasagar from the hospital with the permission of their parents. She further deposed that the accused/appellant kept her in a rented house at Sivasagar and after about 7 or 8 days, when she became physically ill as the accused/appellant used to assault her during her stay at Sivasagar, she was brought back to Jorhat for treatment but instead of admitting her at the hospital, she was taken to the Mahila Samity and the members of the Mahila Samity handed her over to her parents.

18. She further deposed that thereafter, her mother/**PW-1** lodged an FIR at Majuli Police Station and her statement was recorded therein and she was also send for medical examination. She further submits that she was produced before the Court for recording her statement under Section 164 Cr.PC and Ext. P-2 is her statement recorded under Section 164 Cr.PC. She further submits that after 3 - 4 months of staying in her parents' house, as she was feeling unwell, she was taken to Jorhat Hospital by a ferry but before she could reach Jorhat town, in the ferry, she gave birth to a male child. However, after 3 (three) months, the child died due to illness.

19. During cross examination, suggessions were made to the effect that she has not stated what she deposed before the Trial Court to the Police at the time of giving her statement under Section 161 Cr.PC, which she denied.

20. It is apparent from the deposition of the **victim/PW-2** made in the Court that the allegation of forceful physical relation by the accused/appellant is not supported by the version given by her **mother/PW-1** while lodging the FIR. In the FIR, it is alleged by **PW-1** that the accused/appellant by secretly keeping

love affair with the **victim/PW-2** made her pregnant and that **victim/PW-2** stated so, upon being detected during medical examination that she was 7 (seven) months pregnant. At this juncture, let me refer to the deposition of the **mother/PW-1.**

21. PW-1, who is the mother of the **victim/PW-2** and the informant in the present case deposed that the accused/appellant is her nephew and while she has taken her daughter/**victim/PW-2** for treatment to Jorhat Medical College & Hospital, it came to their notice that she was 7 (seven) months pregnant. She further deposed that at the hospital, the **victim/PW-2** told her that the accused/appellant used to come during her absence and on the pretext of having 'Sadah (Tobacco)' and then he used to pull her inside by dragging and pushing her hand and used to establish physical relation with her inside the house.

22. She further deposed that she informed the Mahila Samity, who then handed over her daughter to the accused/appellant and that the accused/appellant kept her daughter for about a week at Sivasagar and then returned her at Majuli Police Station. She further deposed that Majuli Police then handed over **victim/PW-2** to her and thereafter, she informed Mahila Samity, who wrote the FIR and submit the same at Majuli Police Station. She further exhibited the FIR as Ext.1.

23. During cross examination, she clarified that before lodging the present FIR, she also lodged another FIR at Bongaon Police Station. She further clarified that **victim/PW-2** has not stated anything about the incident to her before going for treatment at Jorhat Hospital. She further clarified that she lodged the

present FIR against the accused/appellant after about a month after coming to know about the incident.

24. Apparent that **PW-1** even in the deposition given in the Court does not support the version of the prosecutrix to the effect of "forceful" & "consentless" physical relation.

25. PW-3 and **PW-4** are seizure witnesses, who testified the seizure of a document procured from the Gaonburah being Ext.P-2.

26. PW-6, who is the Medical Officer and at the relevant time, who was serving as Deputy Superintendent at Kamalabari CHC deposed that on 05.09.2019, **victim/PW-2** was examined by Dr. Surovi Thakuria and as per her report, the **victim/PW-2** was 28 weeks pregnant. He further deposed that as the report was already prepared by Dr. Surovi Thakuria, he put his signature therein and handed over the report to the Investigating Officer and exhibited the same as Ext. P-5.

27. During cross examination, he clarified that there was no sign of rape and the word 'Rape' is also not mentioned in the said report. He further clarified that neither the victim nor her parents stated the name of the accused/appellant before him.

28. PW-5, who is the Investigating Officer deposed that on 02.09.2019, while he was serving as OC Majuli Police Station, an FIR was filed by **PW-1** alleging that her daughter/**victim/PW-2** was raped by the accused/appellant. He accordingly registered the said case and entrusted S.I. Tankeswar Gogoi to investigate the case. He further deposed that S.I. Tankeswar Gogoi thereafter

proceeded to the place of occurrence, wherein he recorded the statement of the witnesses under Section 161 Cr.PC, drew the rough sketch map, sent the **victim/PW-2** for recording her statement under Section 164 Cr.PC before the Magistrate. He further deposed that thereafter on 20.01.2020, he took over the charge of investigation and thereafter collected a certificate from Gaonburah regarding the death of the child of the **victim/PW-2**. He further submits that the **victim/PW-2** stated that she was a major in age, aged about 19 years. He further submits that he collected the Medical Report and arrested the accused/appellant and filed charge-sheet after conclusion of the investigation by Ext. 4. He further exhibited the seizure list as Ext. 2 and sketch map as Ext. 3.

29. During cross examination, he clarified that though the exact date and time was not mentioned in the FIR, it was mentioned 7 (seven) months before the date of filing of the FIR. He further clarified that the said fact came to light while she was undergoing treatment in the hospital. He further clarified that he was not aware of the fact that the brother-in-law of the **victim/PW-2** took zimma of the **victim/PW-2** after she was detected pregnant and thereafter, again the parents of the **victim/PW-2** took custody of her. He further clarified that he does not know any sort of agreement made by the father of the **victim/PW-2** in the Police Station to take care of the **victim/PW-2** in his house. He further clarified that the preliminary investigation in the present case was done by S.I. Tankeswar Gogoi and he was well versed about the facts in the preliminary stage of investigation.

30. Apparent that none of the other prosecution witnesses has corroborated the version of the victim/PW-2 as regards forceful physical relation established by the accused/appellant with her.

31. During examination of the accused/appellant under Section 313 Cr.PC, the accused/appellant generally stated that he was innocent and that the **victim/PW-2** has falsely implicated him. Thereafter, the accused/appellant adduced evidence by examining 3 witnesses as **DW-1, DW-2** and **DW-3** including himself.

32. **DW-1**, the accused/appellant himself deposed that prior to the occurrence, there was a case against Dulu Borah in which he put his signature as a witness. He further deposed that therefore, the **victim/PW-2** is taking revenge against him by falsely implicating him in the case.

33. He further deposed that Dulu Borah is the brother-in-law of the victim girl. He further deposed that the said case was withdrawn by the victim girl, which was filed against Dulu Borah on 18.08.2019. He further deposed that in that case, he along with Upen Hazarika (**DW-2**), Bhupen Hazarika (**DW-3**), and Tarun Hazarika testified as witnesses.

34. **DW-2** corroborated the testimony of the **accused/appellant/DW-1** to the effect that he saw the **victim/PW-2** filing an ejahar against her own brother-in-law, where her own **mother/PW-1** was also present. It appears from the deposition of **DW-2** that on 18.08.2019, while he was coming from Gogamukh to Bongaon, he saw some of his village people at Bongaon Out Post and accordingly, he went inside to enquire about the matter. He further deposed that inside the Police Station, he saw the **victim/PW-1** was filing an ejahar against her own brother-in-law where her own **mother/PW-1** was also present. He further deposed that the brother-in-law of the **victim/PW-2**, i.e., Dulu Borah admitted his guilt and to that effect, a document was prepared by

one Tanka Das, where he put his signature as a witness.

35. **DW-3** also corroborated the testimonies of **DW-1, DW-2** and **victim/PW-2** to the effect that an ejahar was filed by the **victim/PW-2** against one Dulu Borah. It appears from the deposition of **DW-3** that on 18.08.2019, while he was coming with the **victim/PW-2** to the Police Station along with her mother, the **victim/PW-2** brought allegation against her own brother-in-law, i.e., Dulu Borah. He further deposed that the said Dulu Borah admitted his guilt and to that effect, a document was written by one Tanka Das, where he put his signature as a witness.

36. Reading the Trial Court judgment, it is apparent that the impugned conviction under Section 376 IPC is solely based on the testimony of the **victim/PW-2**. Section 134 of the Indian Evidence Act, 1872 provides that "no particular number of witnesses shall in any case be required for the proof of any fact". Thus, it is not the number of witnesses which is essential for conviction but it is the quality of the evidence which is required to be judged by the Court to place credence on the statement of the witness. It is well settled by now by a catena of decisions of the Apex Court that a conviction under Section 376 IPC can be made solely on the basis of the testimony of the prosecutrix/victim herself provided that the same inspires confidence. In such situation, there is no need for any corroboration before acting on such testimony of the prosecutrix/victim. Thus, in the case of rape, faced with the testimony of the sole prosecutrix/victim, the deposition of the prosecutix has to be carefully examined and if the same inspires confidence, the same can be relied without seeking corroboration. However, if the deposition of the prosecutix/victim suffers from infirmities and the probabilities factors renders it unworthy of credence,

corroboration has to be looked into before acting on the basis of such sole testimony.

37. Reference is made to the decision of the Apex Court in the case of ***State (NCT of Delhi) Vs. Pankaj Chaudhary,*** reported in ***(2019) 11 SCC 575.*** Para 29 of the aforesaid decision is reproduced hereunder for ready reference:-

> "***29.*** *It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu v. State of Maharashtra [Vishnu v. State of Maharashtra, (2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217]]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim 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 reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State of Rajasthan v. N.K. [State of Rajasthan v. N.K., (2000) 5 SCC 30 : 2000 SCC (Cri) 898]]".*

38. Keeping in mind the aforesaid principals, I shall now re-analyse the testimony of the **victim/PW-2** once again.

39. Reading of the said testimony of the **victim/PW-2** appears that she has deposed that the accused/appellant established forceful physical relation, for which she became pregnant. It further appears that she has deposed that the accused/appellant used to come thereafter to her house on several different dates and established physical relation with her. It further appears that till the detection of pregnancy, she did not disclose the incident to anyone. It further appears that after detection of pregnancy, i.e., after almost more than 7 (seven) years, she first disclosed it to her sister-in-law, i.e., Bhonikon Kalita, who

curiously was not examined in the case.

40. It also appears that it was Bhonikon Kalita who first informed the incident to her parents. It further appears that after coming to know of the incident, she was first handed over to the accused/appellant, who accepted her as a wife and later on, when the accused/appellant left her at the Police Station, the FIR was lodged by the **informant/PW-1**. Infact, **informant/PW-1** admits that the present FIR was lodged after about 1 (one) month from knowing the incident.

41. Upon careful analysis of the testimony of the **victim/PW-2**, it appears that she is silent as regards consent. Infact, she has simply deposed that the accused/appellant had established forceful physical relation with her. It appears that she further deposed that thereafter, on several different dates, the accused/appellant by coming to her house, established physical relation with her. However, she has not deposed that the same was forceful and without her consent. Therefore, the testimony of the **victim/PW-2** to the effect of "forceful physical relation" established by the accused/appellant is not appearing convincing enough to bring home the charge of rape against the accused/appellant. Situated thus, it is essential to look into the statements stated earlier by her to the Police either in FIR or in Case Diary and whether such statement is consistent in all material details as well as on vital points so as to rule out any doubt on her evidence.

42. Reference is made to the decision of the Apex Court in the case of ***Marwadi Kishor Parmanand Vs. State of Gujarat*****,** reported in ***(1994) 4 SCC 549.*** Para 31 of the aforesaid decision is reproduced hereunder for ready reference:-

"***31.*** *The evidence of a witness deposing about a fact has to be appreciated in a realistic manner having due regard to all the surrounding facts and circumstances prevailing at or about the time of occurrence of an incident. Some contradictions and omissions even in the evidence of a witness who was actually present and had seen the occurrence are bound to occur even in the natural course. It is a sound rule to be observed that where the facts stated by an eyewitness substantially conform to and are consistent on material points from the facts stated earlier to the police either in FIR or case diary statements and are also consistent in all material details as well as on vital points there would be no justification or any valid reason for the court to view his evidence with suspicion or cast any doubt on such evidence. In the present case as discussed above we find that the solitary witness Ranchhodbhai, PW 1 is a wholly reliable witness and his evidence in itself, without any further corroboration is enough to sustain the conviction of the two appellants for the crime they are charged with, but we find that the evidence of the sole eyewitness Ranchhodbhai finds corroboration on material aspects from the evidence of Jayantilal PW 6, Makkar PW 8, Dr Nathani PW 10, Dr Avasia PW 11, Dr Joshi PW 12 and the Head Constable Moolchand PW 18. Thus the corroboration is also not lacking in the present case and there was hardly any ground or any possibility of taking the view which is unfortunately taken by the learned trial Judge. In our considered opinion the trial court clearly fell in serious error in rejecting the truthful version made by the sole eyewitness PW 1 whose evidence does not suffer from any infirmities, much less the unwarranted criticism made by the trial court. The High Court was therefore, in exercise of its powers under Sections 378 and 386, Criminal Procedure Code, fully justified to reverse the erroneous findings recorded by the trial court. We find ourselves wholly in agreement with the view taken by the High Court and the conclusions recorded by it. Consequently the appeal deserves to be dismissed."*

43. In the present case, it appears that during the FIR which was lodged by her mother/**PW-1** on 27.08.2019, it was stated that the accused/appellant after secretly keeping love affair with the **victim/PW-2**, made her 7 (seven) months pregnancy.

44. Apparent that the testimony of the **victim/PW-2** is not in conformity with the FIR lodged by the mother of the **victim/PW-2**. Reading of the testimony of the **victim/PW-2** and the FIR creates a reasonable doubt in the mind of the Court as regards the factum of 'forceful' and 'consentless' physical relation.

45. Upon perusal of the said statement, there appears doubt as regards the factum of rape in the case in hand. Rape is defined under Section 375 as under:-

"*375. **Rape**.-A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

Explanation 1.-For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.-Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual

activity.

Exception 1.-A medical procedure or intervention shall not constitute rape.

Exception 2.-Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

Thus, to bring home the charge of 'Rape', it is essential inter alia, to establish consentless physical relation.

46. Apparent that the version alleged in the FIR is entirely different from the version deposed by the **victim/PW-2** before the Trial Court. **PW-1**, the informant also during her deposition before the Trial Court does not support the allegation of rape. That apart, upon looking into the statement made by the **victim/PW-2** under Section 164 Cr.PC before the Magistrate, it appears that she has deposed that while the accused/appellant was inserting his penis into her vagina, she did not shout and that after he had established physical relation twice, on that day itself, she told him not to do but he did not listened and when she scolded him, he left. It appears that the **victim/PW-2** was a consenting party to the act. Thus, if the evidences are appreciated in a realistic manner, the ingredient of consentless physical relation does not exist either in her statement under Section 164 Cr.PC or in her statement before the Trial Court. The **victim/PW-2's** own mother/**PW-1's** evidence, if examined properly and read with the FIR, it probabilize that the accused/appellant and the **victim/PW-2** had a love affair, due to which a child was born.

47. Most pertinently it is apparent from the testimony of the **victim/PW-2** before the Trial Court that the same does not also convincingly establish the fact that the accused/appellant had forceful physical relation with the **victim/PW-2** without her consent. On the contrary, their physical relation appears to have

been made due to love affair and with her consent.

48. In view of the above, it is apparent that the prosecution has failed to establish beyond reasonable doubt that the accused/appellant had physical relation with the **victim/PW-2** without her consent. In the absence of any evidence as regards the factum of physical relation without consent, a charge under Section 375 IPC is not made out and therefore, the impugned conviction under Section 376 IPC cannot be up-held.

49. Another aspect that is weighing heavily in the mind of this Court is that it appears from the deposition of the prosecution witness, **PW-1** herself that prior to filing the present FIR dated 27.08.2019, another FIR was lodged at Bongaon Police Station.

50. It appears from the records that the **victim/PW-2** on 17.08.2019 at 7:10 p.m appeared before the Bongaon Out Post and informed the Officer who was on duty at that time, i.e., S.I. Tankeswar Gogoi that one Dulu Borah has made her pregnant by establishing physical relation with her. Copy of the extract of Bongaon Out Post vide G.D.E. No. 268 dated 17.08.2019 is reproduced hereunder for ready reference:-

"*Extract copy of Bongaon O.P. vide G.D.E. No. 268 Dt. 17/08/2019.*

Evening at 7.10 P.M.

Oral Information : Smt. Rupali Hazarika, daughter of Bubai Hazarika, P.S. & District- Majuli, Assam has orally informed me appearing in the outpost that Sri Dul Bora, son of Mudoi Bora, resident of No. 1 Karhal Gaon, P.S. & District- Majuli, Assam has made her pregnant by establishing physical relation with her as such, after sending her for medical examination I have handed over her custody to her father and asked them to be present in

the morning and have made an entry in this context.

Sd/-
Tankeswar Gogoi (SI)
I/C of Bongaon O.P.
Dt-17-08-2019"

51. It appears that thereafter, the said S.I Tankeswar Gogoi sent her for medical examination and thereafter, handed her over to her father. Thus, it appears that there are two versions available before the Police. One is the information which is said to have been given by the **victim/PW-2** herself by appearing in the said Out Post incriminating Dulu Borah as the accused and the other which is lodged by the mother of the **victim/PW-2** incriminating the accused.

52. It further comes out from the deposition of the defence witnesses that the FIR filed before the Bongaon Out Post is against one Dulu Borah, who is the brother-in-law of the **victim/PW-2**.

53. It further appears from the testimony of **DW-1** that the said case against Dulu Borah was withdrawn by the victim girl on 18.08.2019. It further appears that the accused/appellant during the course of the trial, filed a petition being Petition No. 168/2023 dated 21.02.2023, whereby it was prayed before the Trial Court to call for the original said G.D Entry from Bongaon Out Post and also for examining the Inspector-in-charge of Out Post Bongaon to depose before the Trial Court. However, the said petition was rejected by the Trial Court by Order dated 21.02.2023, on the ground that the accused/appellant had already examined 3 (three) defence witnesses and the G.D Entry made in the Police Station is a matter of record.

54. Non-examination of S.I Tankeswar Gogoi and non-exhibiting the said G.D Entry by the prosecution makes the case of the prosecution highly doubtful.

55. Another aspect of the matter that has attracted the attention of this Court is that it has been deposed by the **victim/PW-2** that upon being detected pregnancy, she first told about the incident to her sister-in-law, i.e., Bhonikon Kalita, who thereafter told the incident to her parents. For reason best known to the prosecution, the said sister-in-law, i.e., Bhonikon Kalita has not been examined as a prosecution witness. In fact, there is also no explanation as regards why she was not examined.

56. Non-examination of Bhonikon Kalita as well as S.I. Tankeswar Gogoi, who were material witnesses, raises a reasonable doubt as regards the story of the prosecution. Such non-examination raises inferences against the prosecution that if the said witnesses were brought before the Court, they would have testified against the prosecution. Since the said witnesses could have testified as regards the information given to them about the incident by the **victim/PW-2,** they would certainly have been essential and material witnesses in the case in hand.

57. In the present case, since the testimony of the **victim/PW-2** is not inspiring the confidence of this Court, the testimony of said two witnesses, i.e., Bhonikon Kalita and S.I Tankeswar Gogoi would have given credence to the testimony of the **victim/PW-2**.

58. Reference is made to the decision of the Apex Court in the case of ***Takhaji Hiraji Vs. Thakore Kubersing Chamansing,*** *reported in* ***(2001) 6***

SCC 145. Para 19 of the aforesaid decision is reproduced hereunder for ready reference:-

> "***19.*** *So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."*

59. In the present case, as discussed above, the prosecution has not been able to convincingly bring home the charge of 'Rape' against the accused/appellant. Therefore, it was imperative for the prosecution to bring the said two material witnesses to depose before the Trial Court. Non-examination of the said two witnesses dented the case of the prosecution. Thus, the case of the prosecution is wholly deficient.

60. Viewing from all angles, firstly it appears that there is a reasonable doubt as whether the physical relation established by the accused/appellant was without the consent of the **victim/PW-2** or not. Secondly, it appears that two

versions of the incident emerge out from the evidences laid by the prosecution itself. In fact, there appears to be a reasonable possibility that it is someone else who have committed the offence of rape and not the accused/appellant. In such a situation, it is a settled law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other is innocent, the view which is favourable to the accused should be adopted.

61. Reference is made to the decision of the Apex Court in the case of ***Kali Ram Vs. State of Himachal Pradesh,*** reported in ***(1973) 2 SCC 808.*** Para 25 of the said judgment is reproduced hereunder for ready reference:-

> "*25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accussd. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that is is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of State of Punjab v. Jagir Singh, a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."*

62. In the present case, the case of the prosecution is highly doubtful and as such, the benefit of such doubt must go to the accused/appellant. Therefore, the conviction is not justified. As such, the findings of the Trial Court are totally erroneous.

63. In view of the above, the Judgment & Order of the Trial Court dated 15.03.2023 and 18.03.2023, in the opinion of this Court is not sustainable in law and therefore, the instant criminal appeal succeeds.

64. Accordingly, the Judgment & Order dated 15.03.2023 and 18.03.2023 of the learned Trial Court, impugned herein stands set aside and quashed.

65. As such, the criminal appeal is allowed.

66. Resultantly, the concerned jail authorities is directed to release the accused/appellant from custody forthwith, if his custody is not required for any other case or purpose.

67. Send back the Trial Court Record (TCR).

JUDGE

Comparing Assistant