

(2010) 08 GAU CK 0115
In the Gauhati High Court
Case No : Criminal Appeal No. 54 of 2003

Chandan Muhuri and Another

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 18-08-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 109, 34, 342, 376, 376(1)

Citation : (2010) CriLJ 4566 : (2010) 4 GLT 478

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : S. Sarkar, for the Appellant; A. Ghosh, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

U.B. Saha, J.—This appeal is preferred by two accused persons, namely, Chandan Muhuri and Rakhal Biswas, against the judgment and order dated 28-6-2003 passed by the learned Addl. Sessions Judge, Belonia, South Tripura in S. T. case No. 21(ST/B)/ 2002 convicting the Appellant Chandan under Sections 376(1) and 457 IPC and sentencing him to suffer R. I. for seven years and to pay a fine of Rs. 5,000/-, in default to suffer further R. I. for one year u/s 376(1) IPC and to suffer R. I. for one year u/s 457 IPC, and also convicting the Appellant Rakhal u/s 109 read with Section 376(1) and Section 342 IPC and sentencing him to suffer R. I. for seven years and to pay a fine of Rs. 5000/-, in default to suffer further R. I. for one year u/s 109 read with Section 376(1) IPC and also sentencing him to suffer R. I. for one month u/s 342 IPC. Sentence of the both the Appellants will run concurrently.

2. Heard Mr. S. Sarkar, learned Counsel for the Appellants and Mr. A. Ghosh, learned Addl. P. P. appearing for the Respondent State.

3. The prosecution story, in short, is that, on 27-8-2001, the informant, the prosecutrix, a married woman, (P. W.4) lodged a complaint in the Court of the

learned Sub-divisional Judicial Magistrate, Belonia to the effect that on 23-8-2001, at night, at about 11 p.m., while the prosecutrix was sleeping with her husband, (P. W. 5), the accused Appellant Chandan came to their house and called her husband to come out for discussion. As the accused Chandan was known to them, the husband of the prosecutrix came out of the hut. Then accused Chandan took him away on the plea of some discussion. The husband of the prosecutrix was taken to a nearby place where the other accused Rakhal was waiting. Then they confined the husband of the prosecutrix by tying his hand with a tree and the accused Rakhal was guarding him. On the other hand, the prosecutrix was waiting for her husband, but she fell asleep. Thereafter, at about 12 p.m. the accused Chandan returned and entered into the said "dwelling hut where the prosecutrix was sleeping alone without her husband. He gagged her mouth with cloth so that the prosecutrix could not raise her voice, and raped her forcibly. She tried to scuffle with the accused Chandan who then made threat to kill her. As such, she could not raise any alarm for her rescue. On the night of the occurrence, the prosecutrix was pregnant of about three months and the mother in law who was living with them stayed in other place. After commission of rape, the accused Chandan left the house of the prosecutrix. Then the prosecutrix went to the house of her sister-in-law Smt. Shova Das(P. W. 8) and narrated the entire incident and she stayed in the house of P. W. 8. But the husband of the prosecutrix was released at late night at about 4.00 a.m. and he returned home who in the following morning met with his wife in the house of his sister which is situated nearby his house and learnt about the aforesaid incident of rape from his wife. It is stated that as the mother-in-law of the prosecutrix was not at home on the date of occurrence, there was delay in lodging the complaint.

4. Upon receipt of the aforesaid complaint, the learned SDJM, Belonia, South Tripura forwarded the same to the Officer In-charge of the Belonia police station for investigation, on the basis of which the Belonia P. S. Case No. 65 of 2001 was registered u/s 448/376 IPC against the both the accused.

5. On completion of investigation, the Officer In-charge of the Belonia Police Station who conducted the investigation has filed the charge-sheet against both the accused under Sections 457/376/34 IPC and also u/s 27 of the Arms Act. Learned Sub-Divisional Judicial Magistrate, Belonia took cognizance of the offence punishable under Sections 457/376/34 IPC and thereafter committed the case in the Court of learned Addl. Sessions Judge, Belonia, South Tripura for trial. Thereafter, as the case was triable by the Sessions Court, the same was committed in the Court of learned Addl. Sessions Judge, South Tripura for trial. In the course of Trial, the learned Additional Sessions Judge framed the charges against the Appellant No. 1 Chandan Muhuri for committing offence under Sections 457 and 376(1) IPC and the charges against Appellant No. 2, Rakhal Biswas for committing offence under Sections 342, 109 read with Section 376(1) IPC.

6. The accused Appellants pleaded not guilty to the charges and claimed to be

tried while the defence case is of total denial.

7. To bring home the charges, the prosecution examined as many as 11 witnesses including the official witnesses and also brought some documents and some material objects in evidence. The defence did not adduce any evidence. After completion of recording of evidence of the prosecution witnesses, the accused Appellants were examined u/s 313 Code of Criminal Procedure. At the conclusion of the trial, the learned Additional Sessions Judge passed the impugned judgment of conviction and sentence as stated supra. Being dissatisfied with the said judgment, the instant appeal is preferred by the Appellants herein.

8. Out of eleven witnesses, the prosecution mainly relied on the evidence of P. W.3, P. W.4, P. W. 5, P. W. 8. On the other hand, defence relied on the evidence of P. Ws. 1 and 2.

9. P. W. 1 Smt. Sefali Majumder is the member of Hrishyamukh Panchayat Samity, who stated in her deposition that in the last part of August, 2001, one day, in the morning, P. W. 5 informed her near Champaknagar market that one Chandan Muhuri and another Rakhal Biswas outraged the modesty of his wife about three four days back. She advised him to take shelter of law. In her cross, she stated that the accused persons gave a petition to their Panchayat Samity to the effect that out of some land dispute with the accused Chandan Muhuri, the informant lodged a false case against them. Thereafter, on two occasions, meetings were held in their Panchayat Samity in presence of both the parties. The last meeting was held on 3-11-2002 and in that meeting the dispute in between both sides were settled amicably with the intervention of South Matai Gram Panchayat. She was present in both the meetings. Pradhan and other members of South Matai Gram Panchayat were present in that meeting. She also stated that in the meeting the prosecutrix told them that she was not raped and her modesty was not outraged by the accused persons.

10. P. W. 2, Sri Susankar Dutta is an Ex-member of Rajnagar Block Panchayat Samity. In his deposition, he told that in the last week of August, 2001, one day, in the morning, P. W. 5, husband of prosecutrix, went to his house and informed him that on the previous night accused Chandan Muhuri and Rakhal Biswas committed rape upon his wife. He also told him that before commission of rape both the accused persons tied him by the side of his house and thereafter committed rape upon his wife. He advised him to inform the matter to their Panchayat and also to Sefali Majumdar (P. W. 1) who is the member of their Panchayat Samity. In his cross, he stated that two meetings were held and last meeting was held on 3-11-2002 in which both the parties were present and the P. W. 5 told them that there was land dispute in between him and the accused Chandan Muhuri and out of that land dispute, his wife lodged the instant case against both the accused persons. P. W. 5 also told that his wife was not raped by the accused persons. On 3-11-2002 the matter of dispute in between two parties were amicably settled with the intervention of South Matai Gram Panchayat and

at present there is no dispute in between the parties.

11. P. W. 3 Manik Das is the husband of the sister of P. W. 5. He stated in his deposition that about one and half years back, on a Thursday, at night, at about 2 a.m. when he was sleeping in his hut, he heard the alarm raised by the prosecutrix. So he woke up and came out from his hut and saw the prosecutrix coming towards his hut dressed with petty coat and a blouse. He took her in his hut and on query she told that at about 24.00 hours the accused Chandan came to her hut and requested her husband for loading some wooden logs. Chandan and her husband went out from her hut and at about 2.00 a.m. Chandan again came to her hut alone and raped her in her dwelling hut and on the following morning her husband (P. W. 5) came to his house who told him that he was tied with a tree on a tilla land by one Rakesh Das.

In his cross, he also stated that previously there was a quarrel in between husband of the prosecutrix P. W. 5 and the accused Chandan Muhuri regarding landed property. A meeting was held in the South Matai Gram Panchayat on 3-11-2002 regarding the instant case. He also stated that the accused Chandan and accused Rakhal are known to him and as both of them were present in the Court, he also identified them.

12. P. W. 4 is the prosecutrix who stated in her deposition that about one year and two months back one day at night when she was sleeping in her hut along with her husband P. W. 5, the accused Chandan came to her hut and took her husband away. Then when she was sleeping alone, the accused Chandan came to her hut again at about 2.00 p.m. and raped her forcibly by undressing her cloth and then went away. She also stated that the accused Chandan raped her by inserting his penis in her vagina. Immediately after, she went to the house of Manik Das, (P. W. 3), the husband of her sister in law, P. W. 8 and narrated the incident. After three days, she lodged a case against the accused Appellants. She also stated that on the following morning of the occurrence, when she met with her husband (P. W. 5), she narrated the incident to him and she came to know that her husband was tied with a tree on a tilla by the side of their house on the night of the occurrence by the accused Rakhal Biswas. She also stated that after lodging the case, the Belonia P. S. took her to the medical officer of the Belonia Sub-Divisional Hospital and she was examined by one lady doctor. She also told that both the accused persons are known to her prior to the occurrence.

In her cross she stated that on 3-11-2002 a meeting was held in connection with the instant case and she was present in that meeting. Shuvankar Dutta, Pradhan of South Matai Gram Panchayat and others were present in the said meeting. She further stated that about 2/3 years back from the date of occurrence, there was land dispute in between them and the accused Chandan.

She further stated that she sustained marks of injury in her breast, hand and legs. She also sustained some nail marks at the time of rape. She also gave nail marks on the body of the accused. She also stated that the instant case was

amicably settled in between her and the accused person on 3-11-2002 with the intervention of South Matai Gram Panchayat.

13. P. W. 5 is the husband of the prosecutrix, who stated in his deposition that about one year back, one day at night when he was sleeping with his wife, accused Chandan came to his hut and asked him to go with Chandan to do some works. Accordingly, he went out from his house along with Chandan who took him to a nearby lunga and thereafter the accused Chandan and other accused Rakhal tied his hands with a tree. Then the Accused Rakhal also guarded him on that night sitting there and accused Chandan left that place. Thereafter at about 4 a.m. he was released by the accused Rakhal and he returned home and he saw that his wife was not at home and he slept in his hut. In the morning, he met with his wife in the house of Manik Das (P. W. 3), husband of his sister (P. W. 8) where his wife, prosecutrix narrated the incident of rape on her caused by the accused Chandan. After 2/3 days of the occurrence, he along with his wife came to Belonia Court and lodged a case against the accused persons in which his wife is the complainant and the complaint was written by the Advocate Durga Sankar Chowdhury (P. W. 7).

In his cross, he stated that there was land dispute with the accused Chandan which was amicably settled prior to the occurrence. On 3-11-2002 a meeting was held at South Matai Gram Panchayat regarding the instant case and the same was amicably settled in between them. He also stated that in the said meeting his wife, prosecutrix, was also present.

14. P. W. 8 Smt. Sova Das, the sister of the husband of the prosecutrix who stated in his deposition that hearing the call from the prosecutrix, she along with her husband (P. W.3) woke up and her husband came out of their hut. She also stated that the prosecutrix entered into their hut wearing petty coat and blouse along with her husband (P. W. 3). On query, the prosecutrix told that the accused Chandan entered into her hut and raped her forcibly in her dwelling hut while her husband was not present at home and her husband was called by someone before the occurrence.

In her cross, she stated that the house of the prosecutrix would be about 30 cubits from her house and in between, there is no house and on that night, the prosecutrix stayed in their house. She further stated that there was a land dispute between the accused Chandan and the family of the prosecutrix before the occasion and the said dispute was amicably settled in a meeting held at South Matai Gaon Panchayat after institution of this case where the prosecutrix told that she lodged the instant case against the accused persons for amicable settlement of the land dispute with the accused Chandan.

15. P. W. 9 is Dr. Arup Kr. Bhattacharjee who was the Medical Officer (Pathologist) of Tripura Sundari District Hospital, Udaipur and examined vaginal swab of the prosecutrix received on 30-8-2001 and his report was as such: (1) No spermatozoa was found by him (2) Squamous epithelial cells were plenty. He

stated that the medical examination report of the prosecutrix was prepared by Dr. Nilima Roy of Belonia sub-divisional Hospital on 20-8-2001 and on his identification, the said report was marked as Exbt. 5.

16. Mr. Sarkar, learned Counsel while assailing the impugned judgment of conviction has strenuously argued that it would be evident from the evidence of prosecution witnesses that there was a village meeting regarding the alleged incident of rape and the same was amicably settled between the parties on the basis of the statement of the prosecutrix as she stated in the said meeting that she was not raped and her modesty was not outraged by the accused persons. She lodged the instant case against the accused persons for settlement of land dispute between her husband and the accused Chandan which would be evident from the deposition of P. Ws. 1, 2 and 8 and the learned Trial Court ought to have relied on those three witnesses, on the basis of which, the trial Court should have acquitted the present Appellants on the ground of benefit of doubt, even if not clear acquittal.

17. Mr. Sarkar also contends that the learned Trial Court disbelieved those three witnesses without assigning any proper reason, hence it would be proper for this Court to re-appreciate those evidence of P. W. 1, P. W. 2 and P. W. 8, as it is the duty of the appellate Court to re-look the evidence on record and re-appreciate the same for the interest of justice. To demolish the evidence of the prosecutrix, the learned Counsel further contended that the story of the alleged rape as narrated by the prosecutrix is totally an unbelievable one as in a case of rape, normally the prosecutrix would try to save herself and raise alarm so that the nearby people can come and save her, but in the instant case, it appears from the evidence of P. W. 4 the prosecutrix that she did not raise any alarm at the time of alleged offence of rape. He again contended that had she raised any alarm, then the P. Ws. 3, 8, 10 and 11 whose house were situated at a distance of 30/40 cubits from the house of the prosecutrix, could have easily heard the alarm and rushed to her house to rescue her, or could have apprehended the culprit on the spot. He also contended that it is not even the case of the prosecution that the prosecutrix was raped by the accused Appellant Chandan at the point of any arms for which she was forced to keep silent and could not get opportunity for raising alarm. According to him, non-raising of alarm also create a doubt regarding story of rape as narrated by the prosecutrix. He further contended that when it appears that the witnesses examined by the prosecution are divided into two groups, one is supporting the case of the prosecution and other is supporting the case of the defence, then the Court should pass the judgment considering the evidence of that group which supports the case of defence and release the accused giving benefit of doubt. According to him, in the instant case, it appears from the cross examination of P. Ws. 1, 2 and 8 that the meeting held in South Matai Gram Panchayat on 3-11-2002 wherein the prosecutrix was present and stated that she lodged the instant case against the Appellants for amicable settlement of the land dispute with the Appellant Chandan and her husband and that the Appellant Chandan did not rape her and

outraged her modesty. He finally contended that such a statements of prosecutrix in the meeting creates doubt about the prosecution story and the Appellants are entitled to get the benefit of such doubt.

18. The learned Counsel further contended that if the question of non-raising alarm by the prosecutrix and her statements in the meeting inter alia that she was not raped by the accused Appellants and her modesty was not outraged are taken together, then it can be easily held that the story of alleged rape as narrated by the prosecutrix is not free from doubt and the Appellants are entitled to get the benefit of such doubt. He further contended that while examining the evidence of prosecutrix it is the duty of the Court to consider the probability of the story narrated by prosecutrix which in the instant case the trial Court failed to consider.

19. Mr. Sarkar again contended that the Trial Court while examining the accused Appellants u/s 313 Code of Criminal Procedure put composite questions and due to that, the Appellant could not appropriately answer the same and moreso, they were also prejudiced due to putting of such composite questions.

20. Mr. Sarkar also contended that there is no explanation even for delay of 3 days in lodging the complaint relating to heinous offence like rape. He also contends that the story of the victim prosecutrix for an offence relating to rape cannot be taken as gospel truth as some time such a plea of rape is taken falsely either by the prosecutrix or by her family to take the grievance (sic) of enmity. In support of his aforesaid contention, he placed reliance on a case decided by the Apex Court in Rajoo and Others Vs. State of M.P., and submits that there is no doubt that the rape causes mental distress and humiliation to the victim, but there are also cases where to get rid of any dispute and enmity, a false complaint like allegation of rape can be filed which may cause equal distress and humiliation and damage to the accused as well. He also relied on a decision of the Apex Court in the case of Dinesh Jaiswal Vs. State of M.P., to demolish the evidence of P. W. 5, the husband of the prosecutrix, inter alia, that the Appellant Chandan took him away and subsequently tied him up with a tree by the Appellant Rakhal cannot be believed as it is the admitted fact that there was prior dispute between the Appellant Chandan and the husband of the prosecutrix inasmuch as the husband of the prosecutrix did not raise any objection while going away with the accused Chandan and also while he was tied up by the accused Appellant in a place which was nearer to his house. He further contends that it is also not believable that a man like P. W. 5 will go out at night (from) his house with his enemy, like the accused Chandan without raising any alarm. Moreso, the said statement is also not corroborated by any other individual witness or any other piece of circumstantial evidence. He again contended that behaviour of P. W. 5, husband of the prosecutrix, if considered, after his alleged release is improbable as he went on to sleep in his hut even after not getting his wife there and also did not feel to enquire about her. Not only that he also did not inform the matter to other neighbours on the following day morning. He

further contended that though the I. O. of the case seized a torn blouse of the prosecutrix but neither P. W. 3 nor P. W. 8 stated in their statement that when they saw the prosecutrix in their house first time after the alleged rape, the blouse of the prosecutrix (P.W.4) was in torn condition. Therefore, according to him, the said seized blouse is not the blouse wearing which she went to the house of P. Ws. 3 and 8. His another contention is that the prosecutrix may be believed irrespective of corroboration by the other evidence, but before believing the prosecutrix, the Court is to see whether the given story of rape, prima facie, inspires the confidence of the Court upon the prosecutrix or not.

21. The learned Counsel for the Appellants also challenged the order of conviction and sentence of the accused Appellant Rakhal on the ground that the learned Trial Court convicted the accused Rakhal only on the basis of the uncorroborated statement of P. W. 5, the husband of the prosecutrix, which is not proper according to him. He also contended that there is no evidence that the Appellant Rakhal was aware that consequent upon his alleged tying up of P. W. 5, the Appellant Chandan would allegedly commit rape on the prosecutrix, the wife of P. W. 5, and unless the Appellant Rakhal is aware of the alleged offence of rape, or in any way linked with the said offence, he cannot be convicted for committing offence u/s 109 read with Section 376 IPC. According to him, the prosecution also failed to prove the motive of Rakhal towards committing the alleged crime.

22. He finally contended that the medical report was not put into the evidence in the proper way and P. W. 9, the doctor, who examined the vaginal swab also did not give any opinion regarding the alleged incident of rape. According to him, the medical officer who prepared the report after examining the prosecutrix nowhere stated in the report that the prosecutrix was raped and he did find any sign of that and if report of the medical officer is considered with the evidence of the prosecutrix, then also a doubt is created regarding the story of the alleged rape.

23. He further contended that the fundamental cannon of criminal jurisprudence is that when two views are possible, then the view which favours the accused should be considered and the accused should be given the benefit of doubt. The prosecution story should also dressed on its own strength and a conviction cannot be based on evidence of defence. In support of his aforesaid contention, he relied upon the decision of the Apex Court in Krishnan Vs. State represented by Inspector of Police, , particularly he referred to para 20 and para 8 of the judgment in the case of Toran Singh Vs. State of Madhya Pradesh,

24. While resisting the submission of Mr. Sarkar, Mr. A. Ghosh, learned Addl. P. P. would contend that the Court should bear in mind the human psychology and the behavioural probability when assessing the testimony of the victim, the prosecutrix. A young woman like the prosecutrix why should entangle the Appellant Chandan unless she was really raped by him, he contends. He also contended that in a case of rape, always corroboration is not necessary when the injury on person of the prosecutrix specially on her private part has corroborated

the story narrated by her. In the instant case, it is the admitted position that just after the incident of rape, the prosecutrix rushed to the nearby house i.e. the house of P. Ws. 3 and 8 who are the close relatives to her husband whom she narrated the incident of rape. It is also admitted position that she went to the house of those witnesses only with petty coat (under garment) and blouse. Unless she was raped, why she would come out with such a dress at the dead hour of night and go to the house of neighbours, who are also the relatives of her husband. He also contended that the Court should believe the evidence of the prosecutrix as she is the victim and a victim woman normally would not implicate a person other than a real culprit of the incident as her aim would be to punish the real culprits. He further contended that in a case of rape, normally, the victim and their family members would initially loath to make complaint before the police before discussing the matter with the elderly members of the family. Because, an incident if made public, then that would create a stigma not only on the prosecutrix, but to the family also. Normally an Indian woman has the tendency to conceal the offence because it involves her prestige as well as prestige of her family. Therefore, some sort of delay in lodging complaint relating to the offence of rape is natural. In the instant case, it is the admitted fact that on the date of incident, the mother in law of the prosecutrix was not at home at the relevant time and both P. W. 4 and 5 had to wait for her arrival at home for lodging complaint and accordingly after her return, a complaint was lodged. Therefore, the delay in lodging the complaint after about two days is not fatal at all and on that count only, the prosecution case cannot be thrown away.

25. He also contended that the evidence of the prosecutrix is enough to convict the accused Appellants and no further corroboration is called for as in the Evidence Act, nowhere it is said that the evidence of the victim woman cannot be accepted unless it is corroborated in material part.

26. He further contended that during the passage of time, it is settled that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor and even if, the doctor who examined the victim could not be examined for any reason, then the report prepared by him can also be taken into consideration if the, same is proved by any other doctor who is aware about the hand writing of that doctor. In support of his aforesaid contention, he relied on a decision in the case of Moti Lal Vs. State of M.P.,

27. He further contends that only in few cases of rape, the victim approaches the Court to punish the accused. The case in hand is one of those cases. Therefore, the Court is to consider that normally a married woman would not falsely implicate any innocent person as an accused for scuttling away her own prestige and honour.

28. He further contended that from the evidence of the husband of the prosecutrix, (P. W. 5), it is also revealed that the dispute between the accused Chandan and the husband of the prosecutrix was settled prior to the alleged

incident of rape of his wife. Therefore, question of implicating the Appellant Chandan due to enmity relating to land dispute does not arise at all. However, he again contended that so far as disbelieving the evidence of P. Ws. 1 and 2 and 8 relating to their statement, inter alia, that the prosecutrix and her husband told in the panchayat meeting that the complaint alleging rape was lodged for settlement of the land dispute between the P. W. 5, husband of the prosecutrix and the Appellant Chandan is rightly discarded by the Trial Court as neither the P. W. 1 nor the P. W. 8 were present in the alleged meeting.

29. He further submits that in an incident of rape, it is not always necessary to be corroborated by the medical evidence as the medical evidence is always an opinion evidence and on the basis of opinion evidence, it would not be proper for the Court to disbelieve the ocular evidence of the prosecutrix, person who suffered the effect of the offence like rape on her person.

30. To appreciate the submission of the learned Counsel of the parties, this Court has gone through the judgment impugned as well as the evidence of the prosecution witnesses and the law reports cited by the learned Counsel for the parties. It is a settled law that in a rape case, duty of the Court is more than the other offences. Moreso, in a case of rape, the evidence of the prosecutrix have to be given predominant consideration, as normally no self-respectful woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape, on her, but at the same time, the Court should not consider the statement of a prosecutrix as a gospel truth. There are cases where the relation is inimical and attempt is made to falsely implicate the other party. Hence, the Court is to be cautious while scrutinizing the evidence on record. In the instant case, it is the admitted position from the evidence of the prosecution witnesses including the prosecutrix and her husband, P. W. 5 that there was enmity between the family of the prosecutrix and the accused Appellant No. 1 Chandan over a land dispute.

31. Upon going through the evidence on record, it is also admitted position that regarding the allegations against the accused Appellant Rakhal for tying the husband of the prosecutrix with a tree and guarding him for whole night on the alleged date of incident is not corroborated by any other witnesses except P. W. 5, the husband of the prosecutrix, though some of the witnesses stated that P. W. 5 narrated the aforesaid story of tying him with the tree as they heard the same from P. W. 5. From the evidence of the prosecutrix also, it appears that she did not see any person while she heard that her husband was called to go out from the hut at that night and her husband also did not disclose the name of any person before going out from hut. Not only that, P. W. 5 also did not identify that tree to the investigating agency. Thus, the conduct of P. W. 5, the husband of the prosecutrix, creates suspicion over the story of his detention by the accused Appellant Rakhal on the date of incident.

32. Now let us see whether the allegations of rape against the accused Chandan is established by the prosecution. It appears from the record that the prosecutrix

alleged that she was raped on 23-8-2001 and the complaint was lodged before the learned SDJM, Belonia on 27-8-2001 i.e. after a delay of four days and she was examined by one doctor, namely, Dr. Nilima Roy, the then Medical Officer of the Belonia Sub-Divisional Hospital on 28-8-2001, who has not been examined by the prosecution though the report submitted by the said doctor was exhibited as Exbt.4 which was identified by P. W. 9, another doctor who examined the vaginal swab and found no spermatozoa. In the medical report of Dr. Nilima Roy, she stated that on examination, she found abrasion in the right arm (post aspect) measuring 2" x 1/4"th x 1/4" and abrasion in the left forearm measuring 1 1/2" x 1/4" x 1/4" and hymen was ruptured, uterus was bulky and she did not give any opinion whether prosecutrix was raped or not, rather stated that swab taken from the vagina has been sent to the Tripura Sundari Hospital, Udaipur for examination and the Tripura Sundari Hospital, Udaipur will give the final report. It also appears from the record that no final report has been submitted giving any specific opinion regarding rape upon the prosecutrix. The said report was exhibited in the absence of the doctor who examined and as no specific opinion was given by the doctor relating to the incident of rape on the person of the prosecutrix, it would be difficult for a Court to come to a specific finding only on the basis of the evidence of the prosecutrix. There is no such evidence available in the evidence as adduced by the prosecution that the accused Chandan was ever medically examined. There is no doubt that the evidence of a medical officer is an opinion evidence and such an evidence can be used only for the purpose of corroboration and even in absence of opinion evidence also, in a rape case, conviction can be based on the corroborated sole evidence of the prosecutrix subject to her testimony inspires the confidence of the Court and considering the other circumstances. Even if the medical report, Exhibits-3 and 4 are taken together with the evidence of the prosecutrix, then also it is very difficult to rely on the prosecution story as P. W. 1, P. W. 2 and PW-8 specifically stated that in the panchayat meeting both the prosecutrix and her husband P. W. 5 stated that the prosecutrix was not raped as well as her modesty was not outraged by the accused Appellant Chandan and the instant case was lodged against the accused Appellants as there was a land dispute between P. W. 5, the husband of the prosecutrix and the accused Chandan. The learned Trial Court while passing the order of conviction and sentence, though took note of the aforesaid fact, but failed to properly appreciate the same. The learned Trial Court also considered the deposition of the I. O., P. W.6 who stated, inter alia, that while he raided the house of the accused Rakhal to apprehend him in connection with the said P. S. case, the accused Rakhal was found absconding to evade arrest and hence, according to him, the said fact incriminated the accused Rakhal. By this time, it is settled that absconding by itself is not conclusive either of guilt or of conscience. In *Matru alias Girish Chandra v. The State of U. P.*, AIR 1971 SC 1050, the Apex Court held that the act of absconding is no doubt relevant piece of evidence to be considered along with other evidence, but its value would always depend on the circumstances of each case. Generally, the Courts consider it as a very small item in the evidence for sustaining the conviction. It cannot

certainly be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused. The Apex Court in *Raham v. State of U. P.*, AIR 1972 SC 110 held that:

....the absconding by itself is not conclusive either of guilt or of a guilt of conscience. For a person may abscond on account of fear of being involved in the offence or for any other allied reason.

33. The aforesaid decisions of the Apex Court were also relied by a Division Bench of this Court in *Promode Das and Others Vs. State of Tripura*, Therefore, finding of the Trial Court relying on the aforesaid statement of P. W. 6 cannot be accepted. The learned Trial Court while passing the order of conviction also considered the decision of the Apex Court, in *State of Punjab Vs. Gurmit Singh and Others*, wherein the Apex Court observed that "the testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking Corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy the judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inference have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Court cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case of spoken of by the victim of sex crime strikes the judicial mind as probable."

34. There is no quarrel with the aforesaid observation of the Apex Court. The Court is to see that the evidence of the prosecutrix who was subjected to sexual assault is all along constant or not. If the evidence of the prosecutrix is all along constant, then obviously the Court relying on the testimony of the prosecutrix can convict the accused even without corroboration. But when the statement of prosecutrix is not constant and also she made a statement otherwise from time to time what the present prosecutrix did in the instant case at the panchayat meeting, then obviously Court should be cautious for relying on such prosecutrix.

35. In *Motilal* (supra) as relied by Mr. Ghosh, the Apex Court also took note of *Gurmit Singh* (supra). While assessing the guilt performed by the accused Appellant of that case held that it needs no emphasis that physical scar of a rape victim may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury, but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted legal jugglery.

36. Upon examination of the decision in *Motilal* (supra), it appears that underwear which was used by the accused at the time of commission of rape to the prosecutrix of that case was seized by the investigating authority which bore some stain and the accused was also sent for medical examination regarding his capability of performing intercourse. In the instant case, those facts are totally absent. In that case, the prosecutrix also did not shift from her initial testimony even for a moment which in the instant case, the prosecutrix did. Therefore, the aforesaid decision of the Apex Court cannot be treated as a precedent for deciding the case in hand and, as such, that decision in no way help the prosecution.

37. There is no doubt that the crime against woman in general and rape in particular is on increase in the society. It is also admitted position that a murder destroys physical body of the victim, a rapist degrades the very soul of the helpless female as stated by the Apex Court, but at the same time the Court is also to see whether the story narrated by the prosecutrix is a probable one or not and whether due to enmity the prosecutrix implicated her rival in such a grave offence so that her enemy ultimately surrender to her or her family. There are cases where even the prosecutrix is coming with some improbable story.

38. In *Dinesh Jaiswal* (supra) as referred to by Mr. Sarkar, the Apex Court after considering the case of *Motilal* (supra) noted that there can be no quarrel with this proposition that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story, prima facie, inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. In *Rajoo and Ors.* (supra) the Apex Court after taking note of *Ranjit Hazarika Vs. State of Assam*, and considering all the facts of that case held that it cannot be lost sight

of that rape causes the greatest distress and humiliation to the victim, but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly, where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis of assuming that the statement of such witness is always correct or without any embellishment or exaggeration. In that case the Apex Court also held that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable, but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be judged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

39. In view of the judgment of the Apex Court as referred to by Mr. Sarkar, it can be easily held that in each and every case of rape, the prosecutrix version cannot be believed as a gospel truth. There may be some cases where law laid down by the Apex Court in Motilal (*supra*) following the case of Gurmit Singh (*supra*) as relied upon by the Trial Court would not apply. The case in hand is one of those cases. Therefore, according to this Court, the submission of Mr. Ghosh does not require to get any favour.

40. In a criminal case, when the Court has to appreciate the evidence of the witnesses, the Court is also duty bound to keep in mind the human psychology and behavioural probability of a witness, particularly the conduct. If the evidence of the prosecutrix does not, *prima facie*, inspire confidence of the Court, then the Court should not pass an order of conviction only on the ground that normally the prosecutrix does not implicate an innocent person and also she would always try to implicate the real culprit as the justice is demanded not only by the prosecutrix but also the accused who should be protected from unnecessary harassment. In the instant case, the prosecution also fails to explain the reasons why the evidence of P. Ws. 1, 2 and 8, who are the independent witnesses, more so, the P. W. 8 is the sister-in-law of the prosecutrix, in whose house she took shelter, should be disbelieved. Unless the prosecutrix stated, *inter alia*, that she was not raped and her modesty was not outraged by the accused Chandan as stated in the panchayat meeting, then why should those witnesses depose the said fact before a Court of law when there is admittedly no enmity between the prosecutrix and those witnesses.

41. From the evidence of P. W. 5, husband of the prosecutrix, it appears that the land dispute between the Appellant Chandan and him was settled earlier, and if such statement of P.W. 5 is to be believed, then question remains as to why they approached the member of the Panchayat to settle up the dispute between the

accused Appellant Chandan and the husband of the prosecutrix and why those three prosecution witnesses made statement against the prosecution. According to this Court, Mr. Sarkar rightly pointed out that there are two sets of witnesses examined by the prosecution, one set consisted of P. Ws. 1, 2 and 8 and other consisted of the remaining witnesses. When the prosecution leads two sets of witnesses and one set contradicts other, then the prosecution story has to be disbelieved. Not only that, it would be the duty of the Court to believe the statement of that set of witnesses whose statements support the case of the accused. More so, it is also settled that when two views are possible, then the view which favours the accused should be considered and the accused should be given the benefit of doubt, if any. Aforesaid views of this Court get support from the decision of the Apex Court in Harchand Singh and Another Vs. State of Haryana, , wherein the Apex Court noted, inter alia, "the eyewitness upon whose testimony the prosecution wants to sustain the conviction of the Appellants is shown to be an unreliable witness by the other evidence produced by the prosecution. The present is a case wherein one set of prosecution evidence condemns the other set of evidence produced by the prosecution. In the above state of affair, we find it difficult to secure a firm ground upon which to base the conviction of the accused Appellants". In para-11 of the said report, the Apex Court further held,

11. The function of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the Court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

42. In the instant case, in view of the statements of P. Ws. 1, 2 and 8 and also medical report, wherein no opinion is expressed by the doctor, who examined the prosecutrix and also the fact of non-examination of the said doctor (Dr. Nilima) by the prosecution creates a doubt in the mind of the Court regarding the prosecution story of alleged rape by the accused Appellant Chandan and when there is a doubt in the mind of Court relating to commission of alleged offence, then obviously a doubt is also created regarding the offence of abetment of rape by the accused Appellant Rakhal as charged by the Trial Court u/s 109 read with Section 376(1), IPC.

42A. The case of the prosecution creates a high degree of suspicion regarding the involvement of the aforesaid accused Appellants, but suspicion whatever high cannot take place of proof and in a criminal case, the conviction cannot be based without proof unless exceptional cases where by all circumstances, the guilt is

proved.

43. In view of the above and peculiar facts and circumstances, this Court is of considered opinion that the learned Trial Court failed to properly appreciate the evidences on record and thus erred in convicting the accused Appellants vide impugned judgment and order of conviction and sentence for alleged crime. Hence, it is necessary to interfere with the said judgment and order. Accordingly, the impugned judgment and order is set aside. In the result, the appeal is allowed. As the Appellants are on bail, they be discharged of their bail bonds.

Appeal allowed.