

(2002) 09 GAU CK 0051

In the Gauhati High Court

Case No : Criminal Appeal No's. 119 and 273 of 2000

Sonmoni @ Prasanta @ Santanu Bordoloi

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 30-09-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 34, 376(2), 448

Citation : (2003) 3 GLR 296 : (2002) 3 GLT 266

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : D.K. Mishra, Y. Doloi, L. Longjin, J.M. Choudhury, D. Talukdar and N. Bharti, for the Appellant; PP, for the Respondent

Judgement

I.A. Ansari, J.—By this common Judgment and Order, I propose to dispose of Criminal Appeal Nos. 199/2000 and 273/2000.

2. The present appeals, which have arisen out, of the Judgment and Order, dated 31.7.2000, passed by the learned Sessions Judge, Jorhat, in Session Case No. 49(J-J) of 1993, convicting the accused-appellants under Sections 448/323/376(2)(g)/34 IPC and sentencing each of them to suffer rigorous imprisonment for one year under the first and the second count and rigorous imprisonment for a period of 10 years and a fine of Rs. 2,000 (Rupees two thousand) and, in default, to suffer rigorous imprisonment for a further period of 6(six) months, on the third count, with direction that the sentences shall run consecutively, reminds us of one of the most salutary principles of our Criminal Jurisprudence, which requires the Court to presume the accused facing trial as innocent until his guilt is proved beyond all reasonable doubt. Though basic and often-repeated, this salutary principle, at times, gets over-looked if the facts, placed before the Court, disclose commission of a heinous and gruesome offence. Though gruesome nature of offence may have a bearing and telling effect on the sentence that may be passed against the accused, if he is proved guilty of the charge, the nature of offence shall not be allowed by the Judge to blur his vision

and his approach to, and appreciation of, the evidence on record and he shall keep his mind free from the effects that the facts of the case may have on him. In the case at hand, the horrendous nature of the description of the offence appears to have influenced the learned trial Court and blurred its vision and made it to appreciate the evidence on record with emotionally charged heart and mind.

2A. Turning from the above prefatory remarks, let me, now, come to the case of the prosecution, which gets unfolded at the trial as follows :

Prosecution case begins with lodging of a written Ejahar by one Shri Gopal Roy, on 29.1.1993, at Pulibor Police Station alleging, inter alia, that on 28.1.1992, at about 12 O'clock at night, accused Sonmoni and 4(four) other youths came to the house of the informant called him out, assaulted him, and tied him to a box behind their house and, thereafter, all the said 5 (five) youths committed rape on his wife, Maina Rai, and after having done so, they left the house of the informant between 5 A.M. and 6 A.M. and that informants wife knew the accused Sonmoni and also 4 (four) other youths, although she did not know their names and that it was at about 6 A.M. that his wife had untied him. Based on this Ejahar and treating the same as First Information Report, Pulibor P. S. Case No. 8/93 under Sections 448/357/376(2)(g) IPC was registered against the accused Sonmoni and four others. During the course of investigation, the victim woman was medically examined and, on completion of investigation, police laid charge-sheet, against the present two appellants namely, Sonmoni @ Prasanta @ Sahtanu Bordoloi and Prasanta Hazarika @ Kalia and 3 others u/s 448/357/323/376(2)(g) IPC.

3. During trial, charges under Sections 448/376(2)(g)/323/34 IPC were framed against the accused facing trial, but when the same were read over and explained to the accused, they all pleaded not guilty thereto.

4. Prosecution examined, in all 15 witnesses including the Investigating Officer. The accused were, then, examined u/s 313 Cr.PC and in their examination, the accused denied that they had committed the offences alleged to have been committed by them, the case of the defence being that of total denial with an additional plea from accused Sonmoni that he had been implicated, out of grudge, on account of the fact that he had a grocery shop in the neighbourhood of the complainant, complainant's family used to buy their grocery items from his shop on credit and when the accused demanded payment of his unpaid dues, the said accused was falsely implicated. The defence also examined one witness, which was to prove the plea of alibi of of accused Tridip Goswami @ Papu (who stands acquitted).

5. Upon conclusion of the trial, learned trial Court found present two appellants guilty of the charges framed against them convicted them accordingly and passed sentences against them, as hereinabove mentioned. The remaining accused facing trial were, however, acquitted.

6. The moot point, which fall for determination in the present appeal, is this : whether the findings of guilt arrived at by the learned trial Court are justified on the basis of the evidence on record and the law relevant thereto ?

7. I have perused the materials on record including the impugned judgment and order. I have heard Mr. D. K. Mishra, learned senior counsel, appearing on behalf of the accused-appellant No. 1, namely, Sonmoni @ Prasanta @ Santanu Bordoloi (hereinafter referred to as "A1") and Mr. J. M. Choudhury, learned senior counsel appearing on behalf of the accused-appellant No. 2, namely, Shri Prasanta Hazarika @ Kalia (hereinafter referred to as "A2"). I have also heard Miss B. Rajkhowa, learned Additional Public Prosecutor, who appeared on behalf of the State respondent.

8. Before coming to the merit of the appeal, it needs to be noted that PW 1 (Smt. Monia Rai) is the allegedly ravished woman, PW 3 (Anil Rai), son of PW 1, is allegedly the sole eye witness to the detestable occurrence of gangrape on his mother, PW 2, (Dr. Sunity Gogoi) is the doctor, who is said to have examined the victim woman, PW 4 is the scribe of the FIR (the real informant, namely, the husband of the victim woman having, however, not been examined as he is stated to have left his house following some altercations with his son), PWs 7, 8, 9, 10 and 12 are neighbouring witnesses, who I have been declared hostile, PW 5 is the Judicial Magistrate, who recorded victim's statement u/s 164, Cr.PC, PW 6 is the Assistant Jailor, who testified to the TIP held inside the jail, PWs 11 and 13 are witnesses to the seizure of wearing apparels of the alleged victim and PW 12 is the Magistrate, who conducted the TIP.

9. Assailing the impugned judgment, Mr. Mishra has submitted, inter alia, that from the descriptions of the occurrence given by the prosecutrix and her son, it clearly transpires that while projecting the occurrence, which allegedly took place, they do not merely contradict each other in material particulars, but that their very descriptions of the occurrence, if dispassionately viewed, will appear to be inherently improbable. Mr. Mishra has also submitted that the case of the prosecution rests on the evidence of PW Nos. 1, 2 and 3, but a close and dispassionate scrutiny of their evidence will show that they are completely unreliable and based on their evidence, no conclusion could have been safely drawn that PW 1 had been subjected to rape, far less gangrape. Mr. Mishra has further submitted that the evidence given with regard to the TIP was inherently unreliable inasmuch as the accused had been, admittedly, shown to the witnesses concerned at the Police Station before the witnesses were called upon to identify the accused at the TIP. Since the accused were, according to the admitted evidence on record, points out Mr. Mishra, not known to the prosecutrix and her son before the alleged occurrence had taken place, their identification by the victim inside the Court-room was valueless. In the face of no reliable TIP, the learned trial Court ought not to have, contends Mr. Mishra, relied upon the identification of the accused at the trial. At any rate, further contends Mr. Mishra, the evidence on record was too weak and could not have been confidently relied

upon to hold the A1 guilty of the charges framed against him.

10. Mr. J. M, Choudhury's submission is that the appellant No. A2 was, according to the evidence on record, not known to the prosecutrix (PW 1) and/or her son (PW 3). Coupled with this, points out Mr. Choudhury, the TIP held against the accused has been discarded even by the learned trial Court as unreliable. There was, thus, contends Mr. Choudhury, no legal evidence on record to fasten the A2 with the alleged occurrence of gang-rape on PW 1. This apart, submits Mr. Choudhury, the evidence on record, if closely scrutinized as a whole, will reveal that there was no reliable and trustworthy evidence on record to hold that the prosecutrix was subjected to rape and/or A2 was involved in the alleged occurrence.

11. Controverting the above submissions made on behalf of the appellants, Miss B. Rajkhowa, learned Additional Public Prosecutor, has submitted that the evidence adduced by the prosecution was adequate in volume and convincing in quality and, hence, based on such credible evidence, learned trial Court has justifiably convicted the appellants and neither their conviction nor the sentences passed against them require any interference. The appeal may, therefore, submits Miss. Rajkhowa, be dismissed.

12. From the conflicting submissions, made on behalf of the parties and upon perusal of the materials on record, what transpires is that this Court has to, first, ascertain as to whether it can be confidently held, on the basis of the evidence on record, that the prosecutrix was subjected to rape or gangrape and if so, then, this Court has to also ascertain if the present appellants can be legally held to have committed rape/gangrape on the prosecutrix. In short, what this Court must, first, determine is whether any occurrence of criminal trespass, assault and/or gangrape as alleged by PW 1 and PW 3, took place at all and if so, what role, if any, the accused-appellants had played in the occurrence so alleged.

13. Keeping in view the above aspects of this appeal, when I come to the evidence on record, what I notice is that according to the evidence of PW 1 (i.e., the victim), at the time of occurrence, they used to live in a rented house, which consisted of 4 (four) rooms, the first room was occupied by Prodip Rajbangshi and his wife (i.e., PWs 7 and 10 respectively), the next room was occupied by the family members of the victim and the remaining 2 (two) rooms were lying vacant. It is also in the evidence of PW 1 that the occurrence took place past midnight.

14. Describing the alleged occurrence, PW 1 has deposed that while they were sleeping at their house, four accused persons (who eventually faced trial) along with Sonamoni (i.e., A1) entered into the house of PW 1 by breaking open its front door and when her husband, Golap Rai (not examined), came out, the present two appellants caught hold of her husband, tied him to a post at the back side of their house and, then, enquired from her about her daughter, whom she had already kept hidden in their cook-shed and when she told the accused

that her daughter had gone to the house of her uncle, accused Santanu dragged away her son, i.e., Anil Rai (PW 3), and, after giving him blows, asked him to sit at the verandah and, then, accused Santanu (i.e., A1) forcibly undressed her and had sexual intercourse with her on her bed in the presence of the other accused and, thereafter, all the remaining accused committed rape on her. The accused made her suck their penises and kept torturing her till dawn. It is in the evidence of PW 1 that accused Babu and Binoy left before the dawn, but the remaining accused left after the dawn and it was thereafter that she untied her husband, who, in turn, informed the police.

15. Close on the heels of the above evidence of PW 1, her son (PW 3) has deposed that when they were sleeping at their house, some persons knocked at the door of their house, he woke up and saw his father opening the door, but his father was dragged out and tied to a post. PW 3 has clarified that when he heard the knock on their door, he was sleeping on bed with his mother and after tying his father to a post, the present two appellants dragged him out and forced him to sit down on the door step (i.e., threshold) and, then, they undressed his mother and committed rape on her. PW 1 has also deposed that when his father opened the door, his mother kept his sister, Asha, hidden inside their cook-shed and that in the early morning of the following day, the accused left their house. PW 3 has also clarified in his evidence that when he woke up on hearing the knock on the door, he was sleeping with his mother and even when his father came out to open the door, he and his mother were still lying on the bed.

16. On a combined reading of the evidence of PWs 1 and 3, what attracts my eyes, most prominently and as correctly pointed out by Mr. U. K. Mishra, is that while the evidence on PW 1 is that the accused entered into their house by breaking open the door, the evidence of PW 3 (i.e., her son) shows that the accused did not break open the door ; rather, the accused knocked on the door of the house, in question, and it was PW 3's father, who opened the door, but after he so opened the door he was dragged out of the house by the accused. When these two versions of the occurrence are dispassionately considered, it becomes glaringly noticeable that these two versions are not only contradictory to, or inconsistent with, each other, but these two versions mutually destroy the credibility of the evidence of these two witnesses as regards the very entry of the accused into their house, where the occurrence had allegedly taken place.

17. When I enter a little deeper into the evidence on record, what I notice is that according to the PW 1, after the accused had tied her husband at the back side of their house, the accused came inside their room and wanted to know from her as to where her daughter was and though she had kept her daughter hidden inside their cook-shed, she (PW 1) told the accused that her daughter had gone to her uncle's house. When this piece of evidence given by PW 1 is juxtaposed the evidence of PW 3, PW 3 in his evidence, I notice, stated that when his father was tied to the post, he (PW 3) was still lying on the bed with his mother and if it were really so, where was the scope, time or opportunity for PW 1 to take her

daughter to the cook-shed and keep her hidden there ? The reasonable answer to this query can be that either the occurrence projected by PWs 1 and 3 is completely concocted or it is a coloured version of the occurrence and the truth has been suppressed. In either case, when one cannot say or hold as to which version is true or what had actually happened, no reliance, far less implicit reliance, can be placed on such evidence.

18. Situated thus, it is necessary to look for some corroboration and in this regard, the learned trial Court appears to have been persuaded by the medical evidence on record to hold that the occurrence, as alleged by PWs 1 and 3, had really taken place.

19. Let me, therefore, consider the relevant pieces of the evidence of PW 1 and PW 3 with regard to rape on PW 1 vis-a-vis the medical evidence on record. In this regard, it is worth noticing that according to PW1, accused Santanu (i.e., A1) forcibly had sexual intercourse with her on the bed and, then, she was subjected to rape by the remaining four accused one after another. PW 1 has asserted that accused Shantanu (i.e., A1) bite on her breasts and cheeks and that the other accused gave blows on her face and breasts and caused injuries to her left hand, she became almost senseless, but the act of rape and torture on her continued till dawn. It is also in the evidence of PW 1 that accused Shantanu (A1) had beaten her with a lathi and she had sustained injuries on different parts of her body.

20. What, thus, emerges from the above evidence given by PW 1 is that more than one accused gave blows on her face and breasts and caused injuries to her left hand, Shantanu (A1) bit her breasts and cheeks and he (A1) also beat her with a lathi and in consequence of all these assaults and the unlawful force used on her, she sustained injuries on various parts of her body.

21. I must pause here to point out that the evidence of assault or unlawful force allegedly used by the accused, as depicted by PW 1 in her evidence, cannot be brushed aside or ignored as mere exaggerations, for, the force, as the evidence of PW 1 shows, was used by accused, as many as five in number, to make her succumb to the sexual lust of the accused and if PW1 had been really made to so succumb to the accused as result offeree applied on her, the medical evidence, on record, must corroborate PW1's assertions of assault on her at the hands of the accused.

22. Keeping in view the above positive assertions of PW 1 when I came to the evidence of PW 2 (Dr. Sunity Gogoi), I find that her evidence is that she examined the victim woman on 29.1.1993 at about 11.45 A.M. (i.e., on the very day of the occurrence) and found as follows :

"Sign of teeth bite present on both cheeks, sign of teeth bite present on the breasts. The teeth bites were recent."

23. It is also in the evidence on PW 2 that the laboratory examination of vaginal

smear showed presence of spermatozoa. PW 2 has opined that spermatozoa remains alive up to 24 hours.

24. On the basis of her above findings, PW 2 has opined that there was sign of rape on the person of PW 1.

25. Before entering into the discussion of the injuries alleged to have been found by PW 2 on the person of PW 1, what is essential to note is that the prosecutrix in this case is, admittedly, mother of grown-up son and daughter and, hence, presence of spermatozoa or semen, even if found on her person, is not in itself, unlike the case of a unmarried girl or woman, proof of the fact that she was subjected to rape. At the most, presence of spermatozoa or semen will show that she had either undergone or subjected to sexual intercourse.

26. In the case at hand, for the purpose of seeking proof of rape, if the medical evidence has to be relied upon, the medical evidence on record must disclose, I reiterate, consistent with the allegations of assault, injuries on the person of PW 1. In this regard, what is of paramount importance to note is that notwithstanding the fact that PW 2 claims to have found signs of teeth-bite on both the cheeks and breasts, she (PW 2) admits, in her cross-examination, that the fact of her having found the injuries on the person of PW 1 has not been mentioned by her in her report.

27. Before proceeding any further, I must point out here that the alleged medical examination took place on 29.1.1993 and PW 2 gave her evidence in the Court on 8.3.1995, i.e., after a lapse of about 11/2 year from the day of the occurrence and yet, in the face of the fact that her report is wholly silent regarding her alleged findings that there were marks of teeth bite on the cheeks and breasts of PW 1 and in view also of the fact that no explanation justifying omission of these vital facts from her report could be offered by PW 2, her mere assertions as to what injuries she had noticed can be given no credence at all. In other words, in the light of no explanation being discernible from the evidence on record in this regard, this Court has no option but to hold that the evidence given by PW 2 from her memory as to what injuries she had found, which is contrary to her own report, cannot be safely relied upon.

28. It is also of immense importance to note that according to PW 1, she had been given blows on her face and breasts, her left hand had sustained injuries and that she had been beaten by lathi too and as a result of all these assaults, she had sustained injuries all over her body ; but belying all these assertions, PW 2, admittedly, found no evidence to sustain the allegations of PW 1 that she had been given blows on her face or that she had sustained injuries on her left hand and/or that she had been beaten by lathi.

29. There is yet another curious circumstance appearing from the evidence of PW 1 and PW 3, which makes their evidence completely untrustworthy and unreliable. According to PW 1, she could not raise alarm out of fear. Belying, however, this assertion of his mother, PW 3 has deposed that though his mother

raised alarm, his neighbours, Pradip and his wife (i.e., PWs 7 and 8) who were present in their house, did not come out. This apart, it is impossible to hold that PW 1 would not have cried out of pain if the occurrence had taken place in the manner as has been alleged and if PW 1 had been really subjected to gangrape, tortured, bitten, beaten and given lathi blows. It is also impossible to hold that if the occurrence has taken place in the manner as alleged, there would have been no noise or commotion attracting the attention of the neighbours, who were, admittedly, present in the next room, but the admitted evidence of PW1 is that she did not raise any alarm. No wonder, therefore, this assertion of PW 1 stands belied as already indicated, by the evidence of her son, namely, PW 3. I find it difficult to believe that PW 1, on being assaulted by lathi, would not have screamed or cried out.

30. Coming to the evidence on record regarding identity of the accused, it needs be noted that even if it is assumed for a moment that an occurrence as alleged by PW 1 and PW 3 had taken place, the prosecution will be still required to prove that the present appellants were amongst the alleged perpetrators of the offence of gangrape. In this regard, what is of vital importance to note is that the clear and unequivocal evidence of PW 1 is that she knows accused Sonmoni alias Santanu (i.e., A1) by name and face from the day of occurrence. Even in her cross-examination, she clarified that she could recognize the accused from the day of occurrence.

31. Though the evidence of PW 1 does not curiously enough, disclose as to how and when they came to know the names of the present appellants, her evidence is, at least, clear on the fact that none of the appellants were known to her by face or by name before the day of the alleged occurrence.

32. In the face of the above facts, when I concentrate on the evidence of PW 1, I notice that she had deposed that two tests identification parades (TIPs) were held in the jail campus and she had identified all the accused persons at the TIP. However, when put to cross-examination, PW 1 admitted that she had already seen the accused at the police station before she identified them at the TIP.

33. Thus, when the accused were unknown to PW 1 and when the accused were already shown to her, at the police station, before the TIP was held, the holding of the TIP was valueless. This position has been realized by the learned trial Court and that is why, the learned trial Court refused to place any reliance on the evidence of the TIP.

34. However, the learned trial Court has mentioned, in the impugned Judgment, that PW 1 and PW 2 had the time and opportunity of seeing accused Santanu and Prasanta (i.e., the present two appellants) and since the evidence of PW 1, with regard to the gangrape committed on her, was believed by the learned trial Court, it concluded that the present two appellants were correctly identified by PW 1 and PW 2 as the offenders.

35. Let me now, consider as to how far the evidence on record supports the

learned trial Court's view that PW 1 and PW 3 had the time and opportunity of witnessing the two appellants on the night of the occurrence. In this regard, what is essential to note is that according to PW 1, there was darkness inside the house, when the occurrence took place and that there was no lamp/chakki (i.e., lantern) in their house. PW 1 has, however, added in her evidence that accused Santanu lighted a candle and after seeing her face, he blew off the candle.

36. Apart from the fact that PW 1 did not, admittedly, state before the police or the Magistrate that any of the accused had lit candle, the evidence of PW 1 is that accused Santanu (i.e., A1) had kept his face covered with a piece of cloth. Hence, merely on account of the fact that accused Santanu had allegedly lighted the candle to see her (PW 1), it is really difficult and unsafe to believe that the alleged momentary glimpse of the offender was adequate and safe for PW 1 to identify accused Santanu, particularly, when accused Santanu as well as the other accused were unknown to her. That apart, it is difficult to believe that merely because accused Santanu brought the candle near the face of PW1 to see her face and blew off the same (after seeing her face), she could identify not only accused Santanu, but other foul-accused also, who, particularly, when not only accused Santanu but also the remaining accused are said to have kept their faces covered with cloth. Moreover, if Santanu had kept his face covered, as has been deposed by PW 1, the purpose/obviously, was to ensure that he was not recognized and when there is no evidence at all that he had removed the piece of cloth from his face to see the face of PW 1, it cannot be realistically held that there was sufficiently reliable and clinching evidence on record to show that PW 1 had adequate time and opportunity to see accused Santanu and/or the other accused and identify them.

37. Though the accused had allegedly remained, at the house of PW 1, for the whole night, there is no evidence on record to show that after having covered their faces as aforesaid, they uncovered their faces. In the face of such evidence, the fact that the appellant Santanu had already been shown to PW 1 before the TIP took place, the identification of the accused-appellants by PW 1, at the trial, inside the Court-room, can be of no avail to the prosecution.

38. It is also Important to note that according to PW 1, it was only accused Santanu, who had kept his face covered with a piece of cloth, but the remaining accused, after entering into the house of PW 1, covered their faces with the "ganjis" (vests) belonging to the family members of PW 1. This assertion of PW 1 does not at all inspire confidence inasmuch as the purpose of covering the face was obviously to conceal the identity. Hence, if the accused really wanted to keep their identity undisclosed, there was no earthly reason for them to enter into the house of the prosecutrix with their faces uncovered and, then, cover their faces after PW1 or, for that matter, after other inmates of the house had enough time and opportunity to see them. Viewed from this angle, it appears that PW 1 has concocted this version to justify the alleged identification of the accused. The impression that she has concocted the story gains strength from the fact that

she has herself, admitted, in her cross-examination, that she implicated the accused persons, except accused Santanu, without knowing their names as she had been tutored by police.

39. The learned Trial Court, it appears, paid no attention to the above admission made by PW 1, though this admission shows that PW 1 is a witness, who is capable of implicating persons at the behest of others in a case of such serious nature as gang-rape is. This witness's admission that she had falsely implicated some persons in such a grave case ought not to have been lightly ignored. The learned trial Court has, however, if I may point out, ignored completely this aspect of the evidence of PW 1.

40. It is also of great importance to note that in her cross-examination, PW 1 has admitted that she had stated before police as well as before the Magistrate that her husband had opened the door, but she has deposed at the trial, as indicated herein above, that the door was broken open by the accused. It is inconceivable that if PW 1 was telling the truth, she would not have remembered whether the door of her house was opened by her husband or it was broken open. This is yet another circumstance, which shows that PW 1 is not at all a trustworthy or reliable woman.

41. It is also of great significance to note that according to evidence of PW 1, as many as 6 (six) persons including the 4 (four) accused, who, eventually, faced the trial, had committed rape on her. Far from this, her assertions before the police and also before the Magistrate were that 5 (five) persons had entered into their house and committed rape on her and, interestingly enough, consistent with these assertions, the FIR claimed that 5 (five) persons had entered into the said house and committed rape on PW 1. The learned Trial Court has completely overlooked this vital aspect of the evidence on record. This is yet another circumstance, which shows how inconsistent PW 1 had been. In fact, with every passing moment, the evidence of PW 1 appears to be more and more unreliable and untrustworthy.

42. When I revert to the evidence of PW 3 on the question of his ability to identify the accused, I find that his evidence is that the accused persons had lighted candles and from the light so generated, he could see the accused persons. This assertion of PW 3 cannot be believed at all inasmuch as, according to the evidence on record, PW 3 was made to sit on the door-step (threshold) of his house and according to the evidence of his mother (PW 1), accused Santanu had lighted the candle merely to see her face and after seeing her face, he had blown off the candle. Within these few moments, it is unsafe to believe that PW 3, who was sitting on the door-step, would have noticed the faces of all the accused, though they all had kept their faces covered with cloth.

43. It is also important to note that according to PW 3, he did not know the accused persons by their names or faces prior to the occurrence and yet he claims to have recognized them by seeing them at night and in the morning,

though neither he (PW 3) nor his mother (PW 1) claims that the accused had uncovered their faces at any time. This apart, as indicated above, since the accused had kept their faces covered with cloth with the object of keeping their identities undisclosed, there was no reason or reasons for them to let. PW 3 see their faces in the morning. Even from the evidence of PW 3, it is dear that they went to police station not only to see the accused there, but also to identify them.

44. Evidence of PW 3 further reveals that he saw six persons altogether on the night of the occurrence, but the prosecution story, as unfolded in the FIR and as revealed to the police, while statements of the witnesses were recorded, was that five persons had committed the alleged offences.

45. Even if for a moment, it is assumed that accused Santanu (A1) lighted a candle and PW 1 had the occasion to see his covered face, it is not only difficult but wholly unsafe to confidently hold, in the absence of any other evidence on record, that PW 1 and/or PW 3 had the time and opportunity to see the face of the two appellants so clearly as to enable them to identify the appellants at the trial, particularly, when such identification was not preceded by, as indicated, hereinabove, by a reliable TIP.

46. It is also of utmost importance to note that the evidence of PW 1 and PW 3 is that all the accused persons were not known to them by face or name. If it were so, it was the bounden duty of the prosecution to prove as to how the FIR happened to mention the name of Shantanu (A1) as one of the rapists and as to when and how PW 1 and or PW 3 and/or any other prosecution witness came to learn, without holding even the Test Identification Parade (TIP), that it was accused Santanu (as mentioned in the FIR), who had along with the others committed rape on PW 1. This is a highly disquieting feature of the entire prosecution case and this query is not satisfied by any piece of evidence on record.

47. In the face of the evidence on record, as discussed above, and in view of the fact that witnesses have not uttered a word to show as to how accused Santanu happened to be named in the FIR, when he was, admittedly, unknown to the alleged victim and members of her family, the inescapable conclusion has to be that PW 1 and PW 3 suppressed the truth from the Court that accused Santanu was unknown to them from before the occurrence and their silence in this regard eloquently speaks that PW 1 and PW 3 had given either a wholly imaginary version without any occurrence of gang-rape having taken place or that they have given coloured and/or concocted version of the alleged occurrence. In either case, without knowing as to what the real occurrence was, prosecution's case could not have been held to have been proved beyond all reasonable doubt.

48. I may also pause here to point out that as far as PW 1 and PW 3 are concerned, all the accused were unknown to them by name and face. It is, therefore, not discernible from the impugned judgment as to why the learned trial Court chose to convict the present two appellants only and acquitted the

remaining accused. In this regard, the impugned judgment throws no light at all. The learned trial Court appears to have failed to take notice of the fact that when all the accused were unknown to PW 1 and PW 3, how could PW 1 and PW 3 happened to mention the names of Santanu and Prasanta as the persons involved in the occurrence.

49. It is also glaringly noticeable that PW 7 (Pradip Raj Bongshi), PW 8 (Dulal Bordoloi), PW 9 (Poresh Bordoloi) and PW 10 (Kamoli Raj Bonshi) were declared hostile, but the learned trial Court has observed that their evidence cannot be rejected and. their evidence shows that an occurrence had taken place on the night of 28.1.1993, because all of them stated before the police to the effect that they had heard nullah of 4/5 voices coming from the house of the prosecutrix and, then, they had also heard commotion inside the said house. Not only this Court, but also the Apex Court has, time and again, pointed out that though the evidence of a hostile witness cannot be rejected outright as unreliable, the previous statement of such a witness is not a substantive witness, it cannot be used for corroboration and that same can be used only for contradiction. In the case at hand, however, despite such a settled position of law, the learned trial Court heavily relied upon the previous statement of these witnesses holding as follows :

" coupled with what have been elicited from the Investigating officer. PW 15 about their (i.e., hostile witnesses) versions before him goes to corroborate PW 1 and her son PW 3 on the point that there was an occurrence on the night of 28.1.1993 at midnight.

50. Similarly, learned trial Court, contrary to what has been indicated above, readily believed the medical evidence on record and apparently, without any close scrutiny of the medical evidence on record vis-a-vis the eye witnesses account of the occurrence, field as follows :

"..... Now from this evidence of the doctor, the evidence of rape was found present on the person of victim-woman Smt. Moina Roy, PW 1"

51. The learned trial Court appears to have dealt with the whole case in a casual manner and ignored every piece of evidence, which contradicted the prosecution's version of the occurrence. It needs to be borne in mind that it is not the duty of the Court to ignore or refuse to consider the evidence appearing in favour of the accused and adopt the role of a prosecutor and ensure conviction of the accused.

52. I am tempted to recall, at this stage, the observation of the Apex Court in Kali Ram Vs. State of Himachal Pradesh, , which run as follows :

"It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system; much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of

an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimized but not ruled out altogether." (Emphasis is added)

53. Though much water has flown down the river Brahmaputra since the above position of law was pronounced by the Apex Court and the Apex Court has come to hold today that unmerited acquittal is as bad as wrongful conviction, one has to bear in mind that it is no part of the duty of a Criminal Court to ensure conviction of an accused brought before it for trial, no matter how heinous the offence is. The Court has to hold the balance of justice evenly and ensure that a fair opportunity is afforded to the accused to have his say in the matter and the Court has also to make a close and dispassionate scrutiny of the evidence on record before holding that the evidence given by prosecution is sufficiently trustworthy and reliable to hold that the case of the prosecution stands proved to the hilt against the accused. This golden tenet of criminal jurisprudence appears to have been given a complete go-bye by the learned trial Court.

54. Let me, now, briefly touch upon the evidence of PW 12 (Pradip Deka), whose evidence has been relied upon by the learned trial Court to show that some occurrence had, indeed, taken place at the house of PW 1. It is important to bear in mind that even if some occurrence had taken place at the house of the PW 1, the prosecution is still required to prove that the evidence given by her and PW 3 as regards the alleged occurrence was true. In this regard, it may be pointed out that PW 12 has deposed as follows :

"..... At the time of occurrence one Golap Rai was residing with his wife near me. Golap Rai was a driver. At that time I was night chowkidar of nearby motor garage. On the night of occurrence, I was on night duty as night chowkidar of the garage. While I was on duty, I heard hulla by some persons towards the house of Golap Rai. On the next morning, I went to the house of Golap Rai. After hearing hulla, I wanted to proceed to the house of Golap Rai, but somebody pelted stones towards me. Hence, I could not go there. On the next morning, I went to the house of Golap Rai. Golap Rai told to me that there was hue and cry in his house. I saw some young boys going toward the Golap Rai raising hulla on the night of occurrence. But I could not recognize them....."

55. Though even PW 12 was declared hostile, what appears from his evidence is that there was hullah raised from the house of the prosecutrix to attract the attention of their neighbours. It cannot, therefore, be said that the alleged occurrence of gangrape was a quiet affair. Contrary to, however, this aspect of the evidence of PW 12, PW 1 has asserted that she did not, out of fear, raise alarm at all showing thereby as if the whole affair was a quiet one. However, her son (PW 3) has belied these assertions by saying that his mother had raised

alarm, but none of the neighbours turned up to help them. This is yet another circumstance, which goes to show that not only PW 1 and PW 3 have contradicted each other on every material aspect of their evidence, but they appear to have tried to suppress the truth, because if the accused wanted to keep the occurrence as a quiet affair, they would not have, as indicated from the evidence of PW 12, raised hullah or pelted stones on neighbours' houses.

56. It is also important to note that according to PW 3, all the accused had kept their faces covered with cloth before committing rape on PW 1. However, according to PW 1, accused Santanu had kept his face covered with a piece of cloth and the remaining accused covered their faces after coming inside the room which was admittedly dark. There is no evidence on record, as already indicated above, that at any point of time, they uncovered their faces. If it were so, how could the accused bite the breasts and cheeks of PW 1. To explain this disturbing feature transpiring from fact on the evidence on record, learned Addl. Public Prosecutor has submitted that the accused must have removed the cloths and that is how, they could from their respective faces bite the cheeks and breasts of PW 1. In the face of, however, no evidence on record to show that the accused had uncovered their faces at any point of time and when the accused obviously wanted to keep their identities undisclosed, it cannot be presumed, in the absence of any positive evidence on record, that they had uncovered their faces to bite the cheeks and breasts of PW 1. No wonder, therefore that the medical report, according to the evidence on record, did not mention, as indicated above, that any injuries/biting marks were found on the person of PW 1.

57. In the absence of any credible evidence on record that marks of biting were seen/found by PW 2, when she had examined PW1, one has no difficulty in concluding, contrary to what the learned trial Court has concluded, that the medical examination did not show any sign of rape, far less gangrape, on the person of PW 1.

58. Since the TIP was valueless, it was not even relied upon by the learned trial Court and when the name of the A2 was not even mentioned in the FIR, it passes our understanding as to how the learned trial Court concluded, on the basis of identification of A2 inside the Court-room by PW 1 and PW 3, that there was adequate evidence to show that this accused was involved in the alleged occurrence. Since all the accused were unknown to PW1 and PW3 and since the name of accused Prasanta (Appellant No. 2) did not appear in the FIR and the TIP held also failed, as indicated above, to instill confidence, mere words, assertions of PW 1 and PW 3 implicating the accused appellant No. 2 in the offence of rape ought not to have been believed or relied upon by the learned trial Court.

59. It is also of immense importance to note that PW 1 has deposed that she does not remember if she stated before the Magistrate that Kalia (accused Prasanta Hazarika, i.e. A2) had raped her first, Notwithstanding this hesitant evidence of PW 1, her statement recorded u/s 164 Cr.PC (Ext. 2) shows that she

had, indeed, stated before the Magistrate that it was Kalia, who had opened the zip of his pant (i.e., trouser) and forcibly had sexual intercourse with her whereas her assertion, now, is that it was accused Santanu (i.e., A1), who, first, had sexual intercourse with her. The occurrence of rape is not an every day occurrence. If PW 1 was really subjected to rape, there was no reason for her not to remember as to who had raped her first. However, PW 1 has not only failed to convincingly state as to who had committed rape on her first, but that she has given two different names at two different stages, one, at the time of investigation, and the other one, at the time of trial, as to who had committed on her rape first. This inconsistency is yet another circumstance, which has made it impossible to confidently hold that PW 1 is a reliable witness and based on her evidence, it was, to my mind, too hazardous to found conviction of the accused appellants.

60. It has been pointed out by Mr. D. K. Misra, learned counsel appearing on behalf of AI, that the bed-sheet on which the alleged occurrence of rape took place was neither seized nor chemically examined nor the allegedly seized wearing apparels of the victim woman, which were seized, were chemically examined. These are, undoubtedly, the weaknesses of the investigating agency and these weaknesses could have been ignored if the evidence of PW 1 and/or PW 3 had been found to be reliable and trustworthy, but when their evidence is, as indicated above, wholly unreliable, these weaknesses of the Investigation Agency cannot be readily ignored.

61. Situated thus, I hold that the evidence given by PW 1 and PW 3 is highly unreliable ; but even if their evidence is not rejected outright as wholly unreliable, their evidence will fall, at the most, in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

62. It is settled position of law that one in firm witness cannot be taken to have corroborated evidence of another infirm witness. Hence, when the evidence of PW 1 and PW 3 individually is wholly unreliable, they cannot be treated to have rendered credible corroboration to each other's evidence. The only corroboration to the alleged occurrence of rape comes from the medical evidence, which, too does not, as already discussed above, inspire confidence. Thus, when the evidence of PW 1 and PW 3 suffers from several twists and turns and glaring embellishments, which they have made, coupled with the omission of the prosecution to explain various disquieting features of the evidence on record, as indicated above, I have no option but to hold that the evidence of not only PW 1 and PW 3, but also of PW 2 cannot be at all relied upon.

63. It is true that the prosecutrix shall not be regarded as an accomplice and the Court must not insist on corroboration of her evidence from any other quarter. However, at the same time, it is also equally true that if the testimony of the prosecutrix suffers from infirmity, the conviction of the accused cannot be founded on such evidence, particularly, if the same is contradicted by the medical evidence on record, as the case at hand is and also other evidence on record.

Reference may be made to Dilip and Another Vs. State of M.P., . In the case at hand, the evidence of the prosecutrix being not only self contradictory but the same having also been contradicted by the evidence of her son and other evidence on record including the medical evidence, it is clearly far from being safe to make such testimony a basis for conviction of the accused. Situated thus, I am firmly of the view that the accused appellants ought to have been accorded, at least, benefit of doubt by the learned trial Court.

64. In the result, and for the reasons discussed above, both the present appeals succeed. The impugned judgment and order of conviction and sentence is set aside. The appellants are held not guilty of the charges framed against them and are acquitted of the same under benefit of doubt. The bail bonds of the accused shall stand cancelled and their sureties shall stand discharged. The accused shall be set at liberty forthwith.

65. Send back the LCR with a copy of this judgment and order.