

(2023) 09 GAU CK 0020

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 2899 Of 2023

Swati Bidhan Baruah

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 14-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 32, 226

Indian Penal Code, 1860 — Section 34, 147, 149, 307, 323, 324, 341, 354A

Code Of Criminal Procedure, 1973 — Section 36, 41A, 154, 154(3), 156(3), 161, 164, 167(2), 173(8), 200, 482

Citation : (2023) 09 GAU CK 0020

Hon'ble Judges : Kalyan Rai Surana, J; Susmita Phukan Khaund, J

Bench : Division Bench

Advocate : D. Nath

Judgement

1) Heard the petitioner-in-person, who is an advocate. Also heard Mr. D. Nath, learned Senior Govt. Advocate.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner has made two prayers, viz., (a) for directing the Deputy Commissioner of Police (West), Guwahati to conduct an enquiry and prejudice caused to the petitioner and to take disciplinary action against the second officer-in-charge for the same; and (b) to direct the Police Commissioner, being the head of Guwahati City Police to transfer the case to All Women Police Station for proper investigation of the same.

3) The petitioner projects herself to be a transgirl and by citing the decision of the Supreme Court of India in the case of National Legal Services Authority v. Union of India & Ors., (2014) 5 SCC 438, it has been submitted that she is entitled to be treated as a "third gender".

4) It may be mentioned that on 07.09.2023, when the matter was called, the petitioner-in-person had made a prayer for in-camera hearing in the Judge's Chamber as submissions made in the open Court may cause her some

embarrassment. The in-camera hearing in Judge's Chamber was refused, but the petitioner- in- person was permitted to provide a written note to be kept in a sealed cover to protect and respect her privacy. On the last date of hearing, before the hearing had commenced, the Court had given an opportunity to the petitioner-in- person to hear the matter as the last item so that by then other advocates would have left and she would not feel any embarrassment. However, the petitioner-in-person had declined the offer and expressed her willingness to make her submissions in open Court. Nonetheless, in order to protect her identity as well as her privacy, the live streaming of Court proceeding was stopped. In light of above, the Court is of the considered opinion that the Registry be directed to mask the name of the petitioner-in-person wherever possible.

5) On 17.05.2023, the petitioner-in-person had lodged an FIR before the Officer-in-Charge of Jalukbari P.S., which was registered as Jalukbari P.S. Case No. 296/2023 under sections 341, 323, 354A, 34 IPC, inter alia, alleging as follows:-

"Sir,

In regards to the subject cited above, I do humbly bring to your kind attention that yesterday at about 11:25 pm on 16.05.2023, at Pandu Cabin, when I was crossing road at my colony, one of our neighbor namely, Jakir Hussain rang me up for a discussion pertaining to his illegal and unauthorized catering service (which includes supply of alcoholic items and supply of boys and girls), which I immediately denied for the legal assistance and warned him not to approach me further, and at that same moment Md. Mansur Alam, Md. Taslim, Md. Aslam, Mrs. Munni Khatun, Miss. Afsana Khatun, and Bittu Begum came from behind and hold my hairs and touched my private parts and assaulted me in a group by kicking me on my belly, face, on my private parts and scratched my body. Following which, I was completely shocked and petrified and somehow I managed to call on 112 (National Help Line), and I was rescued after then.

That seeing no other way out, I am approaching you for the necessary investigation and provide me justice accordingly."

6) The petitioner-in-person had submitted that after the incident, she had called national helpline number 112 and she was rescued. However, the police personnel, instead of making on-spot enquiry, brought the petitioner to the police station, then took her for her medical examination, and the FIR was lodged later. It was submitted that although the main culprits with their motivators and supporters were apprehended after 2-3 hours of the incident, but due to repeated intervention of the Second Officer-in-charge, neither the case was registered under appropriate sections, nor her statement was immediately recorded under section 161 CrPC. It was submitted that the Second Officer-in-Charge made no attempt to have her statement recorded under section 164 CrPC and moreover, the statement of other witnesses were not recorded, the crime scene was not examined and no evidence was collected. It was submitted that on

the next day, i.e. at about 1.00 am on 17.05.2023, the petitioner-in-person had lodged the FIR. It was further submitted that on 17.05.2023, the accused persons had once again made an attempt to assault her, which was promptly reported to the police, but nothing was done and rather, she was informed that the police would be submitting an FF/FR (Final Form/ Final Report) in the case. It was submitted that on medical examination, injuries were found on her body, but the police had not registered the case under section 307 CrPC.

7) It was submitted by the petitioner-in-person that notwithstanding that as per her medical examination report, it was shown as if she had sustained simple injury, yet this was a clear case of an attempt to murder her and therefore, the case ought to have been registered under section 307 IPC, and by not doing so a great prejudice has been caused to her. By referring to the case of *The State of Madhya Pradesh v. Kanha @ Omprakash*, (2019) 0 Supreme(SC) 106: AIR 2019 SC 713, it was submitted that in the said case the Supreme Court of India had deprecated the alteration of conviction under Section 307 IPC to section 324 IPC by the High Court.

8) The petitioner-in-person has submitted that from Jalukbari P.S., the Pandu FRU Hospital was the nearest medical unit located 2.7 km away, but the police personnel took her to Government Ayurvedic College and Hospital, which is at a distance of 4.6 km from the Jalukbari P.S., only to obtain a concocted and fabricated medical report of simple injury, thereby prejudicing her.

9) By referring to the decision of the Supreme Court of India in the case of *In Re: Assessment of the Criminal Justice System in response to sexual offences*, SMW (Crl.) Nos. 04/2019, decided on 18.12.2019, and reported in (2019) 0 Supreme(SC) 1394, as well as Advisory dated 20.04.2015, issued by the Govt. of India, Ministry of Home Affairs (Centre- State Division), it was submitted that it was the mandate of law that the victim of sexual offence was to be attended by a female police women, her statement should have been expeditiously recorded by the police as well as by the Magistrate and there was a requirement to collect evidence as expeditiously as possible. It was further submitted that those procedures were not done and the accused persons were allowed to go after serving them notice under Section 41A CrPC.

10) It was further submitted by the petitioner-in-person that the respondents are raising the issue of maintainability of the writ petition for transfer of the investigation of Jalukbari P.S. Case No. 296/2023 to All Women Police Station. In this regard, by citing the case of (i) *Godrej Sara Lee Ltd. V. The Excise and Taxation Officer- cum- Assessing Authority & Ors.*, (2023) 0 Supreme(SC) 85: AIR 2023 SC 781, it was submitted that availability of alternative remedy will not come in the way of the High Courts to entertain a writ petition. Moreover, by citing the case of *Ritu Chhabaria v. Union of India & Ors.*, (2023) 0 Supreme(SC) 416, it was submitted that writ petition was maintainable whenever there was an infringement of legal and fundamental right.

11) Per contra, the learned Senior Government Advocate has submitted that from the affidavit-in-opposition filed by the respondents, it is seen that on 23.05.2023, the petitioner-in- person had filed an FIR with the Officer-in-Charge of All Women P.S., which amongst others, refers to incidents which had occurred on 16.05.2023, but there is no disclosure about registration of Jalukbari P.S. Case No. 296/2023 under sections 341, 323, 354A, 34 IPC for reasons best known to her.

12) It was also submitted that as per his instructions, at night time, doctors are not always available in Pandu FRU Hospital and therefore, the first choice of police personnel of Jalukbari P.S. is to take her to Govt. Ayurvedic College and Hospital, if medical attention is required.

13) Upon hearing both sides, the materials available on record and the case diary produced by the learned Senior Government Advocate have been perused.

14) At the outset, it may be mentioned that with regard to the nature of prayer (a) made, the issue regarding police high-handedness, actions, etc. is required to be determined by the Division Bench of this Court. However, in so far as prayer (b) of the writ petition is concerned, the learned Single Judge would have the power and jurisdiction to adjudicate such prayer. The matter was being listed before the Single Bench, but pursuant to order dated 09.08.2023, the matter has been listed before the Division Bench of this Court.

15) At the outset, it may be mentioned that the Court is aware that this is not a stage to appreciate the merit of the allegations made in the FIR. However, the petitioner-in-person has raised an issue that the actions and/or omissions of the Second Officer-in-Charge of Jalukbari P.S. has caused her prejudice, for which she is praying for a direction from this Court to the Commissioner of Police to take disciplinary action against said officer. It is in the said context that this Court has been compelled to appreciate the contentions of the petitioner-in-person.

16) It may be mentioned that the petitioner-in-person had filed an affidavit-in-reply on 16.08.2023, and as per statement made in para-4 thereof, prayer was made of demanding CCTV footage of the Jalukbari P.S. from 11:30 pm of 16.05.2023 to 04:30 am on 17.05.2023. Thereafter, this Court in its order dated 22.08.2023, had recorded to the effect that the petitioner had given a detailed description of what transpired in the police station on the night of 16.05.2023 between 11:30 pm to 04:30 am of 17.05.2023.

17) Accordingly, in course of hearing on 08.09.2023, the learned Senior Government Advocate had produced a password protected pen-drive containing footage of 6 (six) CCTV cameras from 11:30 pm of 16.05.2023 to 04:30 am of 17.05.2023. Along with video footage, the audio is also captured. The Court had viewed the said footages and it is observed that on or about 12:17 am on 17.05.2023, the petitioner-in-person had walked into the police station with the police patrolling team. On or about 12:18 am, she had walked out from one

room and entered another room of the police station and at about 12:21:40 am, she showed her hand to the police personnel, apparently, presumably where she had sustained injury. Thereafter, she had spoken with someone on the mobile phone of the police personnel. On or about 12:46:00 am, she was asked by the police personnel as to whether she was comfortable with them to which she responded in the affirmative and then on or about 12:46:47 am, she had left in police vehicle for her medical examination, accompanied by male policemen, and returned back to police station in the police vehicle at on or about 01:51 am with apprehended 3 (three) accused persons. It is seen that she was accompanied by a fourth male person. Thereafter, the petitioner-in-person herself typed out her FIR in the computer of the police station on or about 01:54 am and before commencing typing, she is seen to be patting on the shoulder and back of the police personnel with her left hand.

18) The learned Senior Government Advocate had also produced a copy of the Report of the Deputy Commissioner of Police, West Guwahati Police District under Memo No. DCP/WGPD/ R-II/C/2023/3296 dated 28.08.2023. The contents thereof is as follows:-

Sir,

With reference to the subject cited above, I would like to submit herewith the report in connection with the above referred petition submitted by the petitioner before the Hon'ble Court as to what had happened at the Jalukbari PS on the night of 16-05- 2023 ie 11:30 PM to 4:30 AM of 17-05-2023, which is as follows:

On 16-05-2023, at 11:39 PM, the night patrolling party of Jalukbari PS received one call through Police Control that one caller had called the emergency 112 no. and stated that she has been physically assaulted by her neighbor at Pandu Cabin under Jalukbari PS. Immediately, the night patrolling party in the ERSS 27 vehicle moved to the PO from where the call was received. After reaching there, the police personnel saw the complainant and two persons in front of the complainant's residence at Pandu cabin. As alleged by the complainant, two-three persons entered her home and assaulted her. The complainant then requested the police party to go with her and raid the house of those alleged accused persons and apprehend them. As there was no women police constable (WPC) in the patrolling team, the police party refused and insisted that the matter needed to be brought to the knowledge of the emergency night officer in the PS. Then, the complainant said that she would like to go with the police party to the PS to meet the emergency officer. When the police party hesitated to take her with them as there was no WPC she insisted that she will take her brother Bishal Baruah. As the complainant and her brother insisted on coming to the PS, the police party escorted her as per her repeated request. On reaching the PS at around 12:17 AM, the police party informed about the incident to the SI(P) Mridupawan Kakoti who was the emergency night officer that day. SI(P) Mridupawan Kakoti at that time was on round duty and on receipt of the information, he came to the PS. After reaching PS, SI (P) Mridupawan Kakoti

took stock of the incident and reported the whole incident over phone to SI Mridul Rudra Pal, the officer-in-charge who in turn asked the emergency officer to take the victim for medical examination as she complained of being assaulted by the alleged accused persons. It is to be noted that at night no doctors are usually present at Pandu FRU- the nearest Government medical facility, and therefore on a regular basis, medical examination at night is done at Govt. Ayurvedic Hospital, Sundarbori. For medical examination as no WPC was present at that time, the emergency officer asked the complainant to wait for some time till a lady constable arrives, but the complainant insisted that she needs medical help immediately and also stated that her brother, namely Bishal Baruah who had accompanied her will be there. As the complainant's family member was present along with the complainant all along, and in order to ensure timely medical treatment to the victim, the emergency officer took the complainant accompanied by her brother to the hospital at 12:46 AM.

Reportedly while returning from the hospital, the complainant again pressurized the emergency officer to go to arrest the accused persons. She also insisted on going together to identify the accused at his residence. After that in order to ensure that the accused persons do not escape, the police team as led by the complainant and her brother, went to the residence of the alleged accused persons and three of the FIR named accused persons namely Hakim Ali, S/o Lt Hanif Ali, Ajim Ali, S/o Lt Hanif Ali and Md Taslim, S/o Md Sami all residents of Pandu Cabin were apprehended and the police team returned to the PS along with the accused persons. While returning, SI (P) Mridupawan Kakoti asked the complainant and her brother if they needed to be dropped home but she again insisted of coming to PS and submitting the FIR immediately. She also insisted on writing the complaint by herself then and there itself immediately at the PS despite SI(P) Mridupawan Kakoti telling her that she can file FIR at any time the next day. So as desired by the complainant, SI (P) Mridupawan Kakoti came to the PS along with her brother at around 1:50 AM after which the officer provided the complainant with the desktop so that the complainant did not face any problem while preparing the FIR. The emergency officer also helped her with taking out the print-out of the same as she desired.

Later as there was no vehicle available at the PS as all the vehicles were out for their respective duties, and as per the request of the complainant, SI (P) Mridupawan Kakoti out of goodwill and on humanitarian grounds dropped the complainant and her brother Bishal Baruah at Pandu cabin near her home at around 2: 50 AM.

The FIR submitted by Swati Bidhan Baruah was registered on 17.05.2023 vide Jalukburi PS Case No. 296/2023 u/s 341/323/ 354A/34 IPC and investigated into.

It is hereby again stated that the petitioner was brought to the PS at night only on the repeated requests of the petitioner herself and that too in the presence of her brother Mr Bishal Baruah. Further she was not at all forced to stay or detained at the PS as can be clearly seen from the enclosed CCTV footage. She

was taken to Government Ayurvedic College and Hospital and not the Pandu FRU because of the absence of doctors at Pandu FRU. Again, despite being informed that she was at liberty to file the FIR the next day, the petitioner insisted on filing the complaint then and there itself and due to such a request from her all facilities were extended to her by the officer on duty. Finally, on humanitarian grounds, the officer on duty escorted the petitioner and her brother to her residence on his personal vehicle as there was no police vehicle available at the PS. The petitioner's affidavit in reply may be perused in light of the above facts which can be corroborated through the CCTV footage of Jalukbari PS from 11:00 PM of 16.05.2023 to 05:00 AM of 17.05.2023 which is enclosed herewith.

Submitted for favour of your kind perusal and needful action."

19) It is seen from the CCTV footage that the police personnel had expressed whether the petitioner-in-person was comfortable with them to which she had answered in the affirmative. Only thereafter, she was taken for her medical examination. As per the CCTV footage, the petitioner-in-person had given her express consent to go with male police personnel without any demur. In para-7 of the writ petition, the petitioner-in-person has alleged that her gender was put to question in the police station, she was subjected to neglect and the attributes of the constables in the police station forced her to remain un-entertained. On viewing the CCTV footage, none of the said allegations appear to be true. If that be so, the petitioner would not have patted the police personnel, a complete stranger on his shoulder and back after she was provided access to the police station computer to type-out her FIR. The CCTV footage also discloses that this is not a case where despite refusal by the petitioner-in-person, she was compelled to go with male police personnel for her medical examination, rather, she had given her express consent. Therefore, the Court is unable to return a finding that the action and/or omission, if any, of the Second Officer-in-Charge of Jalukbari P.S. was sufficient for this Court to direct the Deputy Commissioner of Police, Guwahati to initiate disciplinary action against the said police personnel.

20) As per the report dated 28.08.2023, the petitioner was accompanied by her brother, namely, Bishal Baruah when she was in police station and taken for medical examination and was also present when the three accused persons were apprehended. The CCTV footage confirms the presence of a fourth person along with three apprehended accused persons. Thus, the learned Senior Government Advocate has been able to successfully demonstrate that facts material to the case has been suppressed by the petitioner-in- person.

21) As per the "Medico-legal Case Report" dated 13.07.2023, which is annexed to the affidavit-in-opposition filed by the respondents, the description of injury recorded therein are as follows; (i) pain and swelling little finger (left hand), (ii) scratch left hand, (iii) pain right side abdomen. The medical opinion is to the effect that the injuries were caused by blunt weapon, which are simple in nature.

22) Thus, it is seen that till the time the petitioner-in-person was being taken to

Govt. Ayurvedic College and Hospital, she had no grievance. In this writ petition, the petitioner had not expressed any grievance on being taken to the said medical establishment but not to Pandu FRU. But only after the respondents have annexed the medico-legal report to the affidavit-in-opposition, which was served on the petitioner-in-person, she has questioned the action of the police personnel of taking her to Govt. Ayurvedic College and Hospital and not to Pandu FRU. In the writ petition, the petitioner has not alleged that there was an unholy nexus between (i) the accused persons, (ii) the police personnel of Jalukbari P.S., and (iii) and the doctors attending her in Government Ayurvedic College & Hospital, and therefore, the medico-legal report had been manufactured. Thus, the Court is of the considered opinion that the actions of the Second Officer-in-Charge, complained of, are not found to be a sufficient reason for this Court to direct the Assam Police authorities to initiate disciplinary proceeding against the Second Officer-in-Charge. It is not the case of the petitioner-in-person that police protocol prohibits police personnel of Jalukbari P.S. to take persons requiring medical examination and/or attention to be taken to Govt. Ayurvedic College and Hospital but they are required to be taken to Pandu FRU. Moreover, just because the petitioner-in-person was taken to Govt. Ayurvedic College and Hospital and not to Pandu FRU, it cannot be presumed by the Court that the action of the Second Officer-in-Charge was sufficient for the Court to issue a direction to the Police authorities to initiate disciplinary proceeding against the said police personnel.

23) Having regard to the contents of the FIR dated 17.05.2023 by the petitioner-in-person, which has already been reproduced herein before, the Court finds that the facts under which the case of Kanha @ Omprakash (supra) was decided, is different and distinguishable from the facts of the present case in hand. In the said case, the accused persons were convicted by the trial Court, but the High Court had altered the conviction from section 307 IPC to section 324 IPC. The relevant paragraphs 3, 4, 16 and 17, which are self-explanatory, are quoted below:-

"3 . According to the prosecution, on 8 October 2003, an altercation took place between two parties. The respondent, with an intention to kill one Dashrath Singh, shot him with a fire-arm and caused bleeding injuries on his right thigh. The brother of Dashrath Singh filed a complaint on the same day at the Gwalior Police Station. It was stated in the complaint that there was enmity between the parties over a love marriage which was opposed by the families as well as a dispute over a disc cable connection business. The allegation against the accused was that armed with deadly weapons, they formed an illegal assembly with a common motive of causing harm to the injured. The charge-sheet was filed under Sections 147 and 307 read with 149 and 323 of the Penal Code. The respondent was found guilty of the offence under Section 307 of the Penal Code and was sentenced to undergo rigorous imprisonment for three years along with a fine of Rs 1,000 by the Trial Court. Seven other co-accused were acquitted of all the charges levelled against them.

4. The respondent preferred an appeal before the High Court. The High Court converted the conviction of the respondent from that under Section 307 to Section 324 of the Penal Code and sentenced him to imprisonment for forty days, which had already been undergone by him, with a fine of Rs 3,000.

* * *

16. The evidence establishes that the injuries were caused by a fire-arm. The multiplicity of wounds indicates that the respondent fired at the injured more than once. The fact that hurt has been caused by the respondent is sufficiently proven. The lack of forensic evidence to prove grievous or a life-threatening injury cannot be a basis to hold that Section 307 is inapplicable. This proposition of law has been elucidated by a two-judge bench of this Court in *Pasupuleti Siva Ramakrishna Rao v. State of Andhra Pradesh*, (2014) 5 SCC 369:

"18. There is no merit in the contention that the statement of medical officer that there is no danger to life unless there is dislocation or rupture of the thyroid bone due to strangulation means that the accused did not intend, or have the knowledge, that their act would cause death. The circumstances of this case clearly attract the second part of this section since the act resulted in Injury 5 which is a ligature mark of 34 cm × 0.5 cm. It must be noted that Section 307 IPC provides for imprisonment for life if the act causes "hurt". It does not require that the hurt should be grievous or of any particular degree. The intention to cause death is clearly attributable to the accused since the victim was strangled after throwing a telephone wire around his neck and telling him that he should die. We also do not find any merit in the contention on behalf of the accused that there was no intention to cause death because the victim admitted that the accused were not armed with weapons. Very few persons would normally describe the Thums up bottle and a telephone wire used, as weapons. That the victim honestly admitted that the accused did not have any weapons cannot be held against him and in favour of the accused." (Emphasis supplied)

17. In the present case, the nature of the injuries shows that there were eleven punctured wounds. The weapon of offence was a firearm. The circumstances of the case clearly indicate that there was an intention to murder. The presence of 11 punctured and bleeding wounds as well as the use of a fire arm leave no doubt that there was an intention to murder. Thus, the second part of Section 307 of the Penal Code is attracted in the present case. The judgment of the High Court overlooks material parts of the evidence and suffers from perversity."

24) In the present case in hand, the petitioner-in-person has annexed her medical advice slip, which contains 5 (five) clinical notes as follows- (i) "assault by ex- partner", (ii) "scratch mark found on left hand", (iii) "swelling on the left hand little finger along with pain", (iv) reddish mark with ..in on the back of the neck", (v) "pain on the right side of the abdomen by hitting with the fist by the attacker". The medical advice was for "USG W/A", which would mean "ultra-sonography of whole abdomen". It is not the case of the petitioner that such a

test could be done at dead of the intervening night between 16.05.2023 and 17.05.2023, but not done. It is not the pleaded case of the petitioner-in-person in this writ petition that at the time when she was been attended by the doctors, USG facility was open but the Second Officer-in-Charge disallowed the doctors to conduct such a test. It is also not the case of the petitioner-in-person that after the day-break on 17.05.2023, she had appeared before the Jalukbari P.S. to take her for "USG W/A" test, but the Second Officer-in-Charge had refused to take her for such a test. It is also not the case of the petitioner she had got USG W/A test done at her own cost and she was diagnosed of suffering grievous injury. Thus, the Court is constrained to hold that the circumstances appearing so far cannot lead to an inference by this Court that it was inappropriate on part of Second Officer-in-Charge of Jalukbari P.S. not to register the FIR under section 307 IPC.

25) Thus, the case of Kanha @ Omprakash (supra), does not appear to help the petitioner-in-person in any manner. It is reiterated at the cost of repetition that as per the "Medicolegal Case Report" dated 13.07.2023, which is annexed to the affidavit-in-opposition filed by the Officer-In- Charge of Jalukbari P.S., the description of injury recorded therein are – (i) pain and swelling little finger (left hand), (ii) scratch left hand, (iii) pain right side abdomen. The injuries are stated to be caused by blunt weapon, which are simple in nature. The Court is unable to accept that the contention of the petitioner-in-person that the Second Officer-in-Charge, by registering the case under sections 341/323/354A/34 IPC and by omitting to investigate the case under Section 307 IPC had committed such a glaring error or mistake which would invite disciplinary proceeding against him.

26) No doubt, the action of the police in taking the petitioner for her medical examination after mid-night cannot be appreciated. Moreover, the recording of the statement of the petitioner-in-person by male police personnel also cannot be appreciated. However, in this case, the petitioner-in-person, who is the alleged victim of sexual assault, is an advocate, and is presumably conscious of her rights. From a rough English translation of the talk recorded in the CCTV footage, she is asked whether she was comfortable with the police and she had clearly expressed that she was comfortable with male police personnel and she had insisted that her medical examination be done and that while being taken for her medical examination, apprehending of the three accused persons were done and return to the police station, she was accompanied by her brother. Under such circumstances, the Court is constrained to hold that the petitioner-in-person having insisted to have herself subject to medical examination in the presence of her brother, cannot be permitted to take a u-turn and accuse the Second Officer-in-Charge of not complying with the mandate of law to have the victim dealt with by a lady police personnel. In this case, the petitioner-in-person, was permitted by the male police personnel to use the computer in the police station to type out the FIR. Before typing the FIR, the petitioner-in-person is seen in the CCTV footage to pat the police personnel on his shoulder and back before typing out the FIR.

27) In the writ petition, the petitioner has not disclosed in her writ petition or in the affidavit-in-reply that she was accompanied by her brother (i) when she was in police station in late night, (ii) during her medical check-up, (iii) while she went with the police personnel who had gone to apprehend three accused persons, and (iv) when those accused persons were brought to the police station. Thus, the petitioner has not come to Court with clean hands by suppressing material facts having bearing on the case. On the ground of suppression of material facts, which amounts to playing fraud upon the Court, the writ petition is liable to be dismissed.

28) It would be relevant to mention herein that the petitioner had submitted her FIR on 17.05.2023. On the same date, the police had apprehended the three accused persons. Whether rightly or wrongly, the FIR is registered under sections 341, 323, 354A, 34 IPC, which are all bailable. Therefore, the police could not have arrested and detained the accused and hence, the petitioner-in-person cannot have any valid grievance for the accused persons not being arrested and detained, which would have been contrary to the law laid down by several authoritative judicial pronouncements all over the Country.

29) The Court is of the considered opinion that at this premature stage of investigation, it would be proper for the Court to examine whether the case was registered under appropriate sections, because if after investigation it is found that the accused persons had committed offences punishable under other provisions of law, the investigating officer is not powerless to file charge-sheet for the same under appropriate sections of law.

30) The petitioner-in- person had submitted that there was little and/or no progress of investigation till date. In this regard, the Court is compelled to mention that in this case the FIR was lodged on 17.05.2023. The affidavit in support of this writ petition was sworn on 19.05.2023 i.e. after 2 (two) days of lodging of the FIR. Advance copy of the writ petition was served upon the office of the Senior Government Advocate on 19.05.2023 and the date of filing of this writ petition is recorded as 22.05.2023. The matter was listed before the Court on 24.05.2023, but the petitioner-in-person was not present. Vide order dated 26.05.2023, the case was ordered to be listed on 31.05.2023, but on 31.05.2023, none appeared for the petitioner and therefore, the matter was passed over for the day. The matter was then listed on 23.06.2023, on which date notice of motion was issued and status report of investigation was called for. The Court presumes that this writ petition was communicated to the respondents herein within a reasonable time thereafter. The case diary was sent to the learned Public Prosecutor of this Court vide forwarding letter dated 11.08.2023. It may be mentioned that on 17.05.2023, the I.O. of the case had recorded the statement of the petitioner-in-person. The case diary reveals that thereafter, the I.O. has recorded the statement of one witness and seven accused persons. The last entry in the case diary is on 13.07.2023. Presumably, by then the I.O. had become aware of the pendency of this writ petition, where one of the prayer is to

direct the police authorities to initiate disciplinary proceeding against the Second Officer-in-Charge. Nonetheless, the case diary was lying with the Office of the Public Prosecutor/ Senior Government Advocate since 11.08.2023 for being produced before this Court. Under such circumstances, the Court is unable to find fault with tardy progress of the investigation.

31) Therefore, in light of the discussions above, the Court is of the considered opinion that none of the actions and/or omissions, if any, made by the Second Officer-In-Charge is of such a nature which would invite displeasure of the Court so as to direct the Deputy Commissioner of Police, Guwahati to initiate disciplinary proceeding against such officer. Therefore, prayer (a) of this writ petition is liable to be rejected.

32) It may be mentioned that as per the cause title of this writ petition, the respondent no. 3 is "The Second Officer In Charge (to be represented by the Investigation Officer of the Jalukbari Police Station)." Therefore, the concerned officer who is currently posted as Second Officer-in-Charge of Jalukbari P.S. has not been impleaded by name. Therefore, in the absence of proper and necessary party, the prayer (a) for directing the Deputy Commissioner of Police (West), Guwahati to conduct an enquiry and prejudice caused to the petitioner and to take disciplinary action against the Second Officer-in-charge for the same would not be maintainable. This is an additional reason to reject prayer (a) made in this writ petition.

33) Coming to prayer (b) of the writ petition, it is seen that the prayer is to transfer the investigation to All Women Police Station. In this regard, in support of her stand that the writ petition for transfer of investigation was maintainable, the petitioner-in-person had placed reliance on the case of (i) Godrej Sara Lee Ltd. (supra) and (ii) Ritu Chhabaria (supra). Both the said cases are not on the point. In the case of Godrej Sara Lee Ltd. (supra), it was observed that when the controversy was a purely legal one, a writ petition would be maintainable. The facts in the present case is not similar to the one under which the cited case was decided. In the case of Ritu Chhabaria (supra), the petitioner before the Supreme Court had approached the Court under Article 32 of the Constitution of India, seeking default bail because the prosecution had submitted part charge-sheet and continued investigation in respect of some offences and in the meanwhile statutory period prescribed under Section 167(2) CrPC had expired, for which the writ petition was entertained. The facts of the present case are nowhere near the facts of the cited case.

34) In this writ petition, the prayer (b) is to direct the Police Commissioner, being the head of Guwahati City Police to transfer the case to All Women Police Station for proper investigation of the same. The issue of transfer of investigation, as raised by the petitioner, has been dealt with by the Supreme Court of India in the case of Sakiri Vasu v. State of Uttar Pradesh & Ors., (2007) 0 Supreme(SC) 1563; (2008) 2 SCC 409. In the said case it was observed as follows [extracted from "Supreme(SC)" a digital journal]:-

10. It has been held by this Court in CBI & another vs. Rajesh Gandhi and another 1997 Cr.L.J 63 (vide para 8) that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

* * *

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII Cr.P.C. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power, and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order re-opening of the investigation even after the police submits the final report, vide State of Bihar v. A.C. Saldanna, AIR 1980 SC 326 (para 19).

17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself

ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

* * *

24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) Cr. P.C., we are of the opinion that they are implied in the above provision.

25 . We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr. P.C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 Cr.P.C. simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the concerned police officers, and if that is of no avail, under Section 156(3) Cr.P.C. before the Magistrate or by filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under

Section 482 Cr.P.C.

28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere.

29 . In *Union of India v. Prakash P. Hinduja and another*, 2003 (6) SCC 195 (vide para 13), it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application under Section 156(3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in-charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate).

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation has not been made by the officer-in-charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station and such superior officer can, if he so wishes, do the investigation vide *CBI v. State of Rajasthan and another*, 2001 (3) SCC 333 (vide para 11), *R.P. Kapur v. S.P. Singh*, AIR 1961 SC 1117 etc. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide *State of Bihar vs. A.C. Saldanna*, AIR 1980 SC 326.

35) It is already been mentioned herein before that the petitioner-in-person had lodged an FIR on 17.05.2023 and the affidavit in support of this writ petition was sworn on 19.05.2023 and the writ petition was filed on 22.05.2023. The nature of investigation carried out, as reflected in the case diary, is also briefly stated hereinbefore. It may be mentioned herein that the Court has refrained from divulging the details of investigation carried out so far in the interest of investigation and to avoid premature disclosure of the contents of the case diary which again may hamper the investigation. In this regard the Court is of the considered opinion that as the petitioner has filed this writ petition with a prayer to direct the authorities to initiate departmental proceedings and thereafter when the case diary was called before this Court, the lack of progress in investigation is not found solely on account of the Investigating Officer, who may be feeling apprehensive about his future service career. Nonetheless, be that as it may as cautioned by the Supreme Court of India in the case of *Sakiri Vasu* (supra), the Court is of the considered opinion that it would not be appropriate to exercise writ jurisdiction under Article 226 of the Constitution of India to order transfer of investigation from Jalukbari Police Station to All Women Police Station.

36) It may also be referred to the case of *Sudhir Bhaskarrao Tambe v. Hemen Yashwant Dhage & Ors.*, (2010) 0 Supreme(SC) 1235: (2016) 6 SCC 277, where

the Supreme Court of India had observed as under:

4. By the impugned order, the Bombay High Court has, in paragraph 9 of its order, changed the Investigating Officer and appointed a Special Investigating Officer to investigate into the alleged offence.

5. This Court has held in *Sakiri Vasu v. State of U.P. & Others*, reported in AIR 2008 SC 907, that if a person has a grievance that his F.I.R. has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the concerned Magistrate under Section 156(3), Cr.P.C. If such an application under Section 156(3), Cr.P.C. is made and the Magistrate is, *prima facie*, satisfied, he can direct the F.I.R. to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the Investigating Officer, so that a proper investigation is done in the matter. We have said this in *Sakiri Vasu's* case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

6. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the concerned Magistrate under Section 156(3), Cr.P.C. and if he does so, the Magistrate will ensure, if *prima facie* he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.

7. In view of the settled position in *Sakiri Vasu's* case (*supra*), the impugned judgment of the High Court cannot be sustained and is hereby set aside. The concerned Magistrate is directed to ensure proper investigation into the alleged offence under Section 156(3), Cr.P.C. and if he deems it necessary, he can also recommend to the S.S.P./S.P. concerned change of the Investigating Officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police).

37) It may also be mentioned that this Court in the case of *Abdur Rahim v. State of Assam & Ors.*, (2023) 0 Supreme (Gau) 159, had refused to exercise jurisdiction under Article 226 of the Constitution of India to transfer investigation by granting liberty to the petitioner to approach the jurisdictional Magistrate under section 156(3) of the Cr.P.C., if so advised.

38) In the aforesaid view of the matter, the Court is disinclined to grant relief under prayer (b) of the writ petition on the ground that the petitioner has an adequate and efficacious remedy under the law. Accordingly, we are disinclined

to entertain this writ petition in so far as prayer (b) is concerned, by which the petitioner is seeking transfer of investigation to another police station. However, the petitioner is granted liberty to approach the jurisdictional Magistrate under section 156(3) Cr.P.C., if so advised. It is provided that if the petitioner approaches the jurisdictional Magistrate along with supporting materials, the learned jurisdictional Magistrate shall consider the materials in accordance with law and as per the procedure.

39) The Court hastens to make it clear that this Court has not made any observation on the merit of the claim made by the petitioner-in-person and therefore, none of the observations made herein shall prejudice either the petitioner during trial or to any police personnel in any manner whatsoever.

40) Taking note of the mandate of the Supreme Court of India in the case of In Re: Assessment of the Criminal Justice System in response to sexual offences (supra), the Officer-in-charge of Jalukbari Police Station is directed to instruct the Investigating Officer of the case to ensure that wherever appraisal arises to examine the petitioner-in-person or any other female witness in this case, it should be ensured that the statement is recorded only by a lady police personnel and not by a male police personnel.

41) In terms of observations made in para-4 above, the Registry shall mask the name of the petitioner-in-person, wherever possible to protect the identity of the petitioner-in-person.

42) Let the case diary along with Pen-drive containing the CCTV footage be returned to the learned Senior Government Advocate.