



2024:GAU-AS:9151

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

Criminal Appeal no. 431/2017

1. Sahid Ahmed @ Soid Ahmed, S/o Ala Uddin, R/o Village
- Borbari, Police Station – Karimganj, District –
Karimganj.
2. Saddam Hussain @ Sadu @ Amir Hussain, S/o Achab
Uddin, R/o Village – Rahimpur, Police Station –
Karimganj, District – Karimganj

.....Appellants

-VERSUS-

The State of Assam

.....Respondent

Advocates :

Appellants : Mr. H.R.A. Choudhury, Sr. Advocate
Mr. A. Ahmed, Advocate

Respondent : Ms. B. Bhuyan, Addl. Public Prosecutor
Ms. R. Das, Advocate

Date of Hearings and Judgment & Order : 05.09.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MRS. JUSTICE MITALI THAKURIA

JUDGMENT & ORDER [ORAL]

[Manish Choudhury, J.]

The present criminal appeal under Section 374[2], Code of Criminal Procedure [CrPC], 1973 [‘the Code’ or ‘the CrPC’, for short] is preferred by the two appellants by taking exception to a Judgment and Order dated 11.09.2017 passed by the Court of learned Sessions Judge, Karimganj [‘the trial court’, for short] in Sessions Case no. 16 of 2017. In the trial before the learned Sessions Judge, Karimganj, the two accused-appellants viz. [i] Sahid Ahmed @ Soid Ahmed [hereinafter also referred to as ‘A-1’, at places, for easy reference]; and [ii] Saddam Hussain @ Sadu @ Amir Hussain [hereinafter also referred to as ‘A-2’, at places, for easy reference], faced the charges for the offences described under Section 458, Section 352, and Section 376D of the Indian Penal Code [IPC]. After the trial, the learned trial court found both the accused persons, A-1 and A-2 guilty of the offences under Section 458, Section 352 and Section 376D, IPC read with Section 34, IPC.

2. For the offence under Section 376D, IPC read with Section 34, IPC, the accused-appellants have been sentenced to undergo rigorous imprisonment for 27 [twenty-seven] years each and to pay a fine of Rs. 20,000/- each, in default of payment of fine, to undergo further rigorous imprisonment for 5 [five] months each. For the offence under Section 458, IPC read with Section 34, IPC, the accused-appellants have been sentenced to undergo rigorous imprisonment for 10 [ten] years each and to pay a fine of Rs. 5,000/- each, in default of payment of fine, to undergo further rigorous imprisonment for 3 [three] months each. For having committed the offence under Section 352, IPC read with Section 34, IPC, the accused-appellants have been sentenced to undergo rigorous imprisonment for 3 [three] months each and to pay a fine of Rs. 500/- each, in default of payment of fine, further rigorous imprisonment for 7 [seven] days each. The learned trial court has observed that all the sentences are to run concurrently. The learned trial court

has further observed that if the fine amounts are realized, then the same shall be paid to the victim.

3. The case, Sessions Case no. 16 of 2017 arose out of Karimganj Police Station Case no. 08 of 2017 and corresponding G.R. Case no. 20/2017. The initiation of investigation of the case, Karimganj Police Station Case no. 08 of 2017 was commenced after registration of a First Information Report [FIR] before the Officer In-Charge, Karimganj Police Station on 04.01.2017 in respect of an alleged incident of forcible penetrative sexual assault occurred in the wee hours of 01.01.2017.
4. From the materials on record and the testimonies of the prosecution witnesses including the testimony of the Investigating Officer [P.W.8], the manner in which the investigation progressed and the charge-sheet came to be submitted against the accused persons can be narrated, at first.
5. On 02.01.2017, the husband [P.W.3] of the prosecutrix lodged a complaint before the Court of learned Chief Judicial Magistrate, Karimganj naming the two accused persons herein, A-1 and A-2 as the accused for commission of the offences under Section 457, IPC, Section 323, IPC and Section 376, IPC read with Section 34, IPC. The complainant had alleged that the offence under Section 376, IPC was committed on the prosecutrix, that is, the wife of the complainant at about 01-00 a.m. on 01.01.2017. The contents of the complaint would be adverted to in the later part of this order. On receipt of the complaint, the same was registered as C.R. no. 04/2017. After registration of the complaint, C.R. no. 04/2017, the learned Chief Judicial Magistrate, Karimganj transferred the complaint to the Court of learned Judicial Magistrate, First Class - II, Karimganj for disposal. It transpires that on receipt of the case records of C.R. no. 04/2017, the Court of learned Judicial Magistrate, First Class – II, Karimganj in exercise of the power under Section 156[3], CrPC forwarded the complaint to the Officer In-Charge, Karimganj Police Station for registering a case and to investigate into the matter. As per the version of the then In-Charge, Manashangan Patrol Post under Karimganj Police Station who was also the Investigating Officer [I.O.] of the case, Gulzar Hussain Ahmed [P.W.8], the Officer In-Charge, Karimganj Police Station received the written complaint, forwarded by the Court of learned Chief Judicial Magistrate, Karimganj, on 04.01.2017 and the same was

registered as Karimganj Police Station Case no. 08/2017 under Sections 457/323/376, IPC read with Section 34, IPC.

- 5.1. The FIR was then forwarded to Manashangan Patrol Post and Gulzar Hussain Ahmed [P.W.8], the then In-Charge, Manashangan Patrol Post was entrusted with the task of investigation into the case. According to P.W.8, the FIR was received at 09-30 a.m. on 05.01.2017. After receipt of the FIR, the case diary was opened.
6. Thereafter, the place of occurrence [P.O.], that is, the house of the victim [hereinafter referred to as 'the prosecutrix'] was visited by the I.O. at 10-00 a.m. on 05.01.2017. At the P.O., the statements of the complainant [P.W.3], the prosecutrix [P.W.1] and other witnesses including P.W.4 and P.W.5, were recorded. No object and no wearing apparels of the prosecutrix were seized by the I.O. from the P.O. The I.O. [P.W.8] had, however, prepared a Sketch Map of the P.O. [Ext.-3]. The prosecutrix was sent to Karimganj Civil Hospital for medical examination on 06.01.2017. After medical examination, the prosecutrix was forwarded to the Court of learned Chief Judicial Magistrate, Karimganj for recording of her statement under Section 164, CrPC and the statement of the prosecutrix under Section 164, CrPC was recorded by P.W.9, Sri T. Dey, Judicial Magistrate, First Class, Karimganj on 06.01.2017. On 16.01.2017, both the accused persons surrendered at the Police Station and on such surrender, they were produced before the jurisdictional Magistrate's Court. On being so produced before the Court, both the accused persons, A-1 and A-2 were remanded to judicial custody. The Medical Examination Report [Ext.-1] of the prosecutrix was collected on 17.01.2017. Thereafter, a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 27 was laid on 31.01.2017 against the two accused persons, A-1 and A-2 finding a prima facie case under Sections 457/353/376 IPC read with Section 34, IPC well established against them.
7. After submission of the charge-sheet, the Court of learned Chief Judicial Magistrate, Karimganj, by an Order of Commitment dated 23.02.2017, committed the case records of G.R. Case no. 20 of 2017, arising out of Karimganj Police Station Case no. 08/2017, to the Court of Sessions, Karimganj after complying with the procedure prescribed in Section 207, CrPC and finding the offence under Section 376, IPC exclusively triable by the Court of Sessions. Learned Public Prosecutor was accordingly notified. On appearance of the accused persons, A-1 and A-2 before the Court of Sessions, Karimganj the learned

Sessions Judge, Karimganj [‘the trial court’, for short] after hearing the learned Public Prosecutor and the learned defence counsel; and perusal of the materials available in the case records; framed the following charges against the two accused persons, A-1 and A-2, on 08.02.2017, :-

Firstly, both of you had developed common intention of committing gang rape on the victim the prosecutrix [name withheld] and had, in pursuance of the said common intention, trespassed into her house at around 01-00 a.m. on the intervening night of 31.12.2016 and 01.01.2017 by breaking open the door of her house situated in the Village - Rahimpur after making preparation for sexual assault on the victim and thereby committed an offence under Section 458/34 of the Indian Penal Code, within the cognizance of the Court of Sessions.

Secondly, both of you had, at the same time, date and place, and in pursuance of your common intention as aforesaid had used criminal force upon the said victim by gagging her mouth and thereby committing an offence under Section 352/34 of the Indian Penal Code, within the cognizance of the Court of Sessions.

Thirdly, both of you had, at the same time, date and place, after committing the house breaking by night as aforesaid in pursuance of the common intention to commit rape on the said victim, had committed rape on the said victim within the meaning of Section 375 of the Indian Penal Code and thereby committing an offence under Section 376D of the Indian Penal Code, within the cognizance of the Court of Sessions.

8. When the charges were read over and explained to the accused persons, the accused persons pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side in order to bring home the charges against the accused persons, A-1 and A-2 examined nine nos. of witnesses and exhibited seven nos. of documents. The prosecution witnesses examined were – [i] P.W.1 : the prosecutrix; [ii] P.W.2 : Suparna Paul, Senior Medical & Health Officer, Karimganj Civil Hospital; [iii] P.W.3 : the complainant-husband of the prosecutrix; [iv] P.W.4 : Fakar Uddin; [v] P.W.5 : an uncle of

P.W.3; [vi] P.W.6 : a sister-in-law of the prosecutrix; [vii] P.W.7 : a sister-in-law of the prosecutrix; [viii] P.W.8 : Gulzar Hussain Ahmed, I.O.; and [ix] P.W.9 : Tarun Dey, Judicial Magistrate, First Class, Karimganj. The documents exhibited during the trial were – [i] Ext.-1 : Medical Examination Report of the Prosecutrix; [ii] Ext.-2 : Complaint Petition; [iii] Ext.-3 : Sketch Map of the P.O.; [iv] Ext.-4 : Charge-Sheet no. 27 dated 30.01.2017; [v] Ext.-5 : FIR; [vi] Ext.-6 : Order dated 06.01.2017 passed in G.R. Case no. 20/2017; and [vii] Ext.-7 : Statement of the prosecutrix recorded under Section 164, CrPC.

9. After closure of the evidence from the prosecution side, the accused persons, A-1 and A-2 were examined under Section 313, CrPC to enable them to explain the circumstances appearing against them in the evidence led by the prosecution. The plea of both the accused persons, A-1 and A-2 was denial. In their explanation, the accused persons had taken a plea of false implication in view of previous monetary dispute as well as a plea in the nature of alibi. When the accused persons were asked whether they would adduce any evidence in support of their defence, the accused persons declined to adduce any defence evidence. After hearing the learned counsel for the parties; and upon appreciation of the evidence/materials on record; the learned trial court after finding both the accused persons guilty of the offences, mentioned above, has proceeded to deliver the Judgment and Order of conviction and sentence, mentioned above.
10. We have heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. A. Ahmed, learned counsel for the accused-appellants and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the respondent State, assisted by Ms. R. Das, learned counsel.
11. Mr. Choudhury, learned senior counsel appearing for the accused-appellants has submitted that from the nature of testimony of the prosecutrix [P.W.1], the prosecutrix cannot be termed as a sterling witness to inspire confidence to base any conviction on the basis of her sole testimony and it could not have been termed, at any stretch, as safe to base the conviction on her sole testimony. It has been contended that the version of the prosecutrix as regards the entry of the two accused persons into the house/room in the middle of the night was not consistent, as apparent from her statement recorded under Section 164, CrPC; the FIR; and her testimony before the court as P.W.1. Mr.

Choudhury has further contended that the prosecution witnesses – P.W.5, P.W.6 and P.W.7 - are close relatives of the prosecutrix and her husband [P.W.3], and their testimonies required examination not only as related witnesses but also as interested witnesses and only by exercise of due care and caution. On scrutiny of the evidence of these prosecution witnesses with due care and caution, the prosecution story as regards a serious offence like Section 376D, IPC, in absence of supporting medical evidence, would fall apart. Mr. Choudhury has contended that there were four children who were present at the P.O. but the prosecution side, for reasons best known to it, did not examine any one of those children and such non-examination has created doubt as regards the veracity of the prosecution case. Mr. Choudhury has also contended that the identification of the accused persons was also doubtful as despite statement of the prosecutrix that the accused persons were identified by her due to a lit kerosene lamp, the said kerosene lamp was not seized and exhibited during the trial. In view of such inconsistencies in the prosecution case, the case of the defence that there was previous dispute in existence between the accused persons and the husband [P.W.3] of the prosecutrix would gain relevance. It has been further contended that the side of the prosecutrix had raised an allegation of threat without any material basis. Mr. Choudhury has also raised a doubt in the manner the case was initiated. He has contended that the complainant side instead of approaching the Police authorities had chosen to file a complaint before the court and in the process, vital medical evidence, if any, against or in favour of the accused persons had been lost leaving only the testimony of the prosecutrix for scrutiny to reach a conclusion on guilt. In the process, delay had occurred and such delay resulted in prejudice to the accused persons. In view of doubtful nature of the testimony of the prosecutrix coupled with the testimonies of the inconsistent nature of the related and interested witnesses, it cannot be said that the prosecution has been able to prove the serious charge for the offence under Section 376D, IPC which requires proof in the standard of beyond all reasonable doubts. With such projections, it has been argued that the Judgment and Order of conviction and sentence passed against the accused-appellants, A-1 and A-2 is not sustainable in law and the same is liable to be set aside.

12. Ms. Bhuyan, learned Additional Public Prosecutor appearing for the State has supported the Judgment and Order of the learned trial court with the reasoning that the learned trial court had reached the finding of guilt with well recorded reasons. Learned State

Counsel has contended that in a case of forcible sexual assault, the testimony of the prosecutrix is to be considered at a pedestal even higher than an injured witness and the prosecutrix is not an accomplice to the crime. In the case in hand, the testimony of the prosecutrix is found to be consistent in nature. As regards the manner of entry into the room/house, learned State Counsel has submitted that there is no apparent inconsistency in the versions of the prosecutrix. In so far as the testimony of the prosecution witnesses – P.W.5, P.W.6 and P.W.7 – are concerned, learned State Counsel has contended that the defence side was not able to bring any kind of previous enmity between these prosecution witnesses with the accused persons and as such, they cannot be termed as interested witnesses. Being close neighbours of the prosecutrix, besides being relatives, their presence at the P.O. immediately after the alleged incident was natural and their testimony cannot be dubbed as doubtful. It is further contended by the learned State Counsel that non-examination of the children who were present inside the room is, at best, a defect in the investigation and the same would not carry any benefit to the defence in view of the fact that the case has already been established beyond all reasonable doubts. Learned State Counsel has submitted that the delay which had occurred in lodging the complaint was due to absence of the husband of the prosecutrix and the delay had been properly explained. With such contentions, learned State Counsel has submitted that the Judgment and Order of conviction and sentence passed by the learned trial court needs no interference.

13. We have duly considered the rival submissions of the learned counsel for the parties. We have also perused the evidence/materials on record including the testimonies of the prosecution witnesses and the documentary evidence, available in the case records of Sessions Case no. 16 of 2017, in original. We have also considered the judgments referred to by the learned counsel for the parties and the same would be adverted to in the later part of this order.
14. As the prosecutrix was examined as P.W.1, it appears apt to refer to her testimony at first. In her testimony, P.W.1 stated that on the date of the alleged incident, she was sleeping in the house along with her four children, who were then aged about 9 years, 8 years, 5 years and 10 months respectively. Out of those four children, three were her own children. At that time, her husband [P.W.3] who was a Mason, was in Mizoram. P.W.1 stated that the house where she and her family used to stay was a kutchha house

made of bamboo. At the time of the incident, the house was not in good condition and there was a gap between the bamboo walls and the ground. As regards the incident, P.W.1 stated that at around 02-00 a.m. on the relevant night, the two accused persons entered into the house through the gap between the bamboo walls and the ground. Due to the sound of knock on a table after their entry, she woke up and on waking up, she found that the accused person, A-1 was trying to put out the kerosene lamp lit at that time inside the room. When she tried to scream, the accused person, A-1 gagged her mouth with his hands and thereafter, both the accused persons removed her wearing apparels and committed forceful sexual intercourse with her. P.W.1 testified that the accused, A-1 committed forceful penetrative sexual assault on her first and thereafter, it was the other accused person, A-2 who had committed forceful penetrative sexual assault on her. P.W.1 stated that before A-1 could put out the kerosene lamp, she identified the other accused person, A-2 as well. Before the accused persons had committed the forceful sexual act, all the children woke up from their sleep and as soon as the kerosene lamp was put out, the children started crying. P.W.1 stated that the accused person, A-1 dragged her down from her bed on the ground and committed penetrative sexual assault on her. Despite request made by her to the accused persons, the accused persons did not grant any respite. P.W.1 deposed that the entire incident continued for about forty to fifty minutes. Thereafter, when the two accused persons were about to leave the house, she started screaming along with her children and hearing their screams, P.W.5 who lived in the same courtyard, and P.W.6, her sister-in-law came to her house and saw the two accused persons running away from the P.O. P.W.1 further stated that the entire incident was then narrated to P.W.5 and P.W.6. P.W.1 further stated that she stayed in the house of P.W.5 for the night and informed her husband, P.W.3 about the incident over phone. Her husband [P.W.3] came from Mizoram at around 10-00 p.m. on 01.01.2017 and on the next day, the complaint was lodged in the court. P.W.1 also stated about sending of the complaint to the Police Station; recording of her statement by the Police; about her medical examination; narrating the incident to the Doctor; who medically examined her; and recording of her statement before the Magistrate.

- 14.1. During cross-examination, P.W.1 denied the suggestions put to her by the defence. She denied that she did not state before the I.O. [P.W.8] that the two accused persons entered into the house through the gap between the bamboo wall and the ground. P.W.1

stated that all the four children woke up at the time of the incident and they started crying. P.W.1 further stated that before the accused persons had left, no relative or neighbour came to the P.O. It was after the incident, her relatives and neighbours gathered at the P.O. P.W.1 stated that she suffered an injury on her upper left back but she did not consult a doctor in respect of the said injury at any time earlier to her medical examination. P.W.1 denied that she did not narrate the incident to the doctor. P.W.1 stated that Police did not seize the wearing apparels she was wearing at the time of the incident. P.W.1 admitted that it would take about 10/15 minutes to reach the nearest Police Post from her residence. P.W.1 further stated that P.W.6 was able to identify the two accused persons and P.W.5 came after P.W.6. P.W.1 deposed that by the time P.W.5 reached the P.O., the accused persons had already left the scene. She denied a suggestion that there was a dispute between her husband [P.W.3] and the accused person [A-2] as regards money and because of demand raised by A-2 for the money, her husband [P.W.3] instituted a false case against him [A-2] and she deposed falsely implicating the accused persons.

15. The prosecution witnesses - P.W.5, P.W.6 and P.W.7 – are related to the prosecutrix [P.W.1] and their houses are in close proximity to the house of the prosecutrix and her husband [P.W.3]. It is also demonstrated in the Sketch Map of the P.O. [Ext.-3]. The prosecutrix [P.W.1] and her husband [P.W.3] used to call P.W.5 as their uncle. P.W.6 and P.W.7 are wives of the brothers of the husband of the prosecutrix [P.W.1], that is, they are sisters-in-law of the prosecutrix.
16. P.W.5, in his testimony, stated that on the date of the incident, he woke up from sleep hearing some screams at around 02-00 a.m. As the screams were found to have come from the house of the prosecutrix, P.W.5 came out of his residence and heard the prosecutrix calling 'Abba, Abba' from her residential house. Then, he [P.W.5] went to her [prosecutrix's] house and found the door of the house of the prosecutrix closed. Then he called out for her [prosecutrix] children to open the door. Thereafter, the prosecutrix opening the door told P.W.5 that the two accused persons had entered into her house. When he [P.W.5] asked the prosecutrix that if the miscreants were in her house why had she closed the door and in reply, the prosecutrix [P.W.1] told to him [P.W.5] that after the miscreants had left, she closed the door out of fear. According to P.W.5, P.W.3's elder brother's wife [not named] also came there. P.W.5 admitted presence of the

children inside the house at that point of time. When the prosecutrix disclosed to him [P.W.5] that she would not stay in her house due to fear, she was taken to his house for that night and P.W.3's elder brother's wife [not named] also stayed in his house for that night. It was in the following morning the husband [P.W.3] of the prosecutrix came from his place of work and thereafter, the prosecutrix had filed the case. P.W.5 further stated that he could know one of the accused as Saddu but he could not name the other accused person. P.W.5 had stated that A-1 and the mother of the other accused person, A-2 belonged to their village.

16.1. During cross-examination, P.W.5 stated that the wife of the elder brother of P.W.3 arrived at the P.O. after him. P.W.5 stated that he did not have any knowledge as regards any dispute between P.W.3 and the accused persons prior to the incident. P.W.5 denied the suggestions given to him by the defence with regard to his previous statement before the Police. P.W.5 denied that no incident as alleged by him, had taken place and he had deposed falsely.

17. In her evidence-in-chief, P.W.6 stated that on the date of the incident, she was sleeping in their house with her mother and her husband was not there. On the incident, P.W.6 stated that at around 01-30 a.m./02-00 a.m. they hearing a scream, came out of their residence and they found that the screaming had come from the house of the prosecutrix. Then, they flashed the torch light and in that light, they saw the accused persons running away. Then, she went to the house of the prosecutrix to ask the reason behind their screaming and in reply, the prosecutrix stated that the accused persons had forceful sexual intercourse with her inside her house after breaking open the bamboo wall of the house to make their entry. P.W.6 disclosed that at that time, the children of the prosecutrix were also present inside the room. P.W.6 further stated that hearing the screaming of the prosecutrix, P.W.5 also came to the P.O. from his nearby residence. Then, she [P.W.6] along with the prosecutrix and the children went to the house of P.W.6 to stay for the night in the house of P.W.5. The husband [P.W.3] of the prosecutrix came to his house in the after-noon on the following day. P.W.6 stated that she knew the two accused persons as both of them belonged to their village.

17.1. In cross-examination, P.W.6 stated that in their courtyard, there were several other houses. P.W.6 also stated that Police recorded the statement of P.W.7. P.W.6 stated that

Police did not seize any broken part of the house when she accompanied the Police personnel to the house of the prosecutrix. P.W.6 stated that the two accused persons were friends and they usually stay together. P.W.6 denied that she did not state to the Police that she had seen the two accused persons running away from the P.O. P.W.6 also stated that at that time, she also came out from her house and also saw the presence of P.W.5 there. According to P.W.6, after hearing screams, several other persons reached the P.O. but she did not know their names. P.W.6 also denied about existence of any dispute between the prosecutrix and the accused persons.

18. P.W.7, another sister-in-law of the prosecutrix like P.W.6 and whose residence was also nearby, deposed to the effect that on the date of the incident, she was sleeping in her residence with her children and her husband was not present in that night. At around 01-30 /02-00 a.m., she heard a scream and hearing the scream, she [P.W.7] came out from her house and saw two male persons running away from the place. Then, they went to the house of the prosecutrix and at that point of time, P.W.5 also came there. When she enquired to the prosecutrix about the reasons behind her screaming, she was told that the accused persons had committed rape on her [prosecutrix] inside her house. P.W.7 stated that she was told by the prosecutrix that the accused persons had entered into the house by breaking open the bamboo wall of the house. P.W.7 was further told that at the time of the incident, the three children of the prosecutrix were also inside the house. Thereafter, she [P.W.7] along with the prosecutrix [P.W.1] went to the house of P.W.5 and stayed there for the night. P.W.7 further testified that before she went to the house of the prosecutrix, P.W.6 had gone there but P.W.6 left the place before she [P.W.7] reached there. P.W.7 further stated that after the incident, she left for her parental house.

18.1. During cross-examination, P.W.7 stated that P.W.5 came after she reached the house of the prosecutrix. P.W.7 disclosed that P.W.6 stayed in her own house after the incident and did not go to the house of P.W.5. P.W.7 denied the other suggestions put to her by the defence while admitting that there were other houses near the house of the prosecutrix. P.W.7 stated that the Police recorded her statement after the accused persons were arrested. P.W.7 had found that at time of the incident, the prosecutrix and her three children were present inside the house. P.W.7 denied the suggestion that there was monetary dispute between the prosecutrix and the accused person, A-1.

19. The I.O. of the case, Gulzar Hussain Ahmed who had testified as P.W.8, as already mentioned hereinabove, stated about the manner the investigation of the case was carried out. P.W.8 stated that he did not seize the wearing apparels of the prosecutrix. P.W.8 admitted that there were several children in the house of the prosecutrix but he did not record their statements because of the reason that they were very young. P.W.8 stated that he did not make any prayer before the jurisdictional Magistrate for recording of the statement of the said children. P.W.8 further stated that he did not seize any kerosene lamp from the P.O. According to P.W.8, the nearest Police Patrol Post, Manashangan Patrol Post is situated at a distance of 4 kms from the P.O. whereas Karimganj Police Post is situated at a distance of 9 kms and Madanmohan Patrol Post is situated at a distance of 15 kms from the P.O. P.W.8 stated that the prosecutrix did not state to him that on her raising alarm, P.W.5 came to her [prosecutrix] house and after the incident, she [prosecutrix] stayed in the house of P.W.5. P.W.8 further stated that the prosecutrix did not state to him that the two accused persons entered into her house through the gap between the bamboo wall and the ground and did not also state to him that on hearing the knock on the table, she woke up and saw the two accused persons in the light emanating from the kerosene lamp. P.W.8 further stated that the prosecutrix stated to him that the accused persons removed her wearing apparels and thereafter, committed the forceful penetrative sexual intercourse with her. P.W.8 further stated that P.W.6 and P.W.7 did not state before him that each of them had seen two persons running away.
20. P.W.9, Tarun Dey was, on 06.01.2017, serving as a Judicial Magistrate, First Class at Karimganj. On that day, the case records of G.R. Case no. 20/2017, corresponding to Karimganj Police Station Case no. 08/2017, was received by him for the purpose of recording the statement of the prosecutrix. After ascertaining about her voluntariness, P.W.9 recorded the statement of the prosecutrix under Section 164, CrPC. P.W.9 exhibited an Order dated 06.01.2017 and the statement of the prosecutrix recorded under Section 164, CrPC as Ext.-6 and Ext.-7 respectively. In cross-examination, P.W.9 denied a suggestion that the statement was not made voluntarily.
21. Dr. Suparna Paul was serving as Senior Medical & Health Officer in Karimganj Civil Hospital on 06.01.2017 and it was on 06.01.2017, the prosecutrix was sent to Karimganj

Civil Hospital for medical examination. In her testimony, Dr. Suparna Paul testifying as P.W.2, stated that the prosecutrix was examined on 06.01.2017 at around 01-50 p.m. in connection with Karimganj Police Station Case no. 08/2017, registered for the offences under Sections 427/323/376/34, IPC, after being identified by a woman constable named Beladhar Das. The prosecutrix was examined after obtaining consent from her and her husband [P.W.3]. P.W.2 testified that the prosecutrix gave a history of the rape on her. As per the story narrated to her [P.W.2], the prosecutrix, a mother of three children, was molested at around 01-00 a.m. on 31.12.2017 inside her house when her husband was in Mizoram. P.W.2 after examination, recorded the findings in the following manner :

ON GENERAL PHYSICAL EXAMINATION :-

The victim was oriented in space and time;

Pulse 72/min., blood pressure 120/80, temperature normal, respiratory rate of 18 per minute, pupils normal, reacting to light, clothing fresh.

No injury was found on her body and private parts.

Hymen was absent.

On examination of vaginal swab, no spermatozoa was seen under microscopic examination.

Opinion : no sign of recent intercourse; no sign of injury on her body and on a private parts.

P.W.2 exhibited the Medical Examination Report as Ext.-1 and identified her signature therein as Ext.-1. P.W.2 stated that as the prosecutrix was examined after a gap of six days, vaginal swab could not have given positive test for spermatozoa. At the same time, P.W.2 stated that the above findings though did not specifically support the hypothesis of rape having been committed on the prosecutrix, the same could not also negate the possibility of rape having been committed either.

- 21.1. During cross-examination, P.W.2 stated that the prosecutrix did not give her history of rape. P.W.2 stated that in case of forcible rape, injury marks would have been present on the person of the victim. P.W.2 denied that as the prosecutrix was examined after a gap of six days, vaginal swab could not have given positive test for spermatozoa was not correct.

22. P.W.4, Fakar Uddin was declared hostile by the prosecution and was cross-examined by the prosecution and thereafter, by the defence.
23. The case of the prosecution, as emerged from the testimony of the above prosecution witnesses, is to the effect that in the wee hours on 01.01.2017, the prosecutrix and four children were sleeping inside the house. Out of the four children, three were children of the prosecutrix and her husband [P.W.3]. P.W.3 is a Mason by profession and at the relevant time, he was working in Mizoram, meaning thereby, at the time of the incident, P.W.3 was not in the house. According to the prosecution, it was at around 02-00 a.m. the accused persons made their entry inside the room of the house where the prosecutrix and the four children were sleeping. After the entry of the accused persons, the prosecutrix woke up from her sleep hearing some sound and thereafter, all the four children also woke up from their sleep. It was the version of the prosecutrix that the accused persons dragged her from bed to the floor of the room. Though the prosecutrix beseeched with the accused persons to spare her, the accused persons did not pay any heed to her such request. The accused persons had removed the wearing apparels of the prosecutrix and thereafter, committed forceful penetrative sexual assault on her one after another with the accused person, A-1 committing such forcible act first and he was followed by the other accused person, A-2. As per the version of the prosecutrix, the entire incident continued for a period of forty to fifty minutes. After committing such act of forcible sexual assault, the accused persons went out of the room. It was thereafter, the prosecution witnesses – P.W.5, P.W.6 and P.W.7 – hearing her screams, arrived of the P.O. As the husband [P.W.3] of the prosecutrix was in Mizoram, he [P.W.3] was accordingly informed and P.W.3 came back to his house from Mizoram in the afternoon/night on the following day.
24. As regards appreciation of evidence in a case of sexual assault, it is considered that a prosecutrix complaining of having been a victim of the offence of forcible penetrative sexual assault rape is not an accomplice after the crime. In the case of forcible sexual assault, it has been settled by a line of decisions that the testimony of a prosecutrix stands at par with that of an injured witness and in some decisions, it has been observed that such testimony is to be considered at a pedestal even slightly higher than an injured witness. Ordinarily, the evidence of the prosecutrix is not to be suspected and should be

believed and if the evidence of the prosecutrix is found reliable and trustworthy, no corroboration is necessary. It is also a settled legal proposition that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix even if there are minor contradictions or insignificant discrepancies, not affecting the core of the prosecution case.

25. In the case in hand, it is found that the alleged incident had occurred in the wee hours on 01.01.2017 and according to the prosecutrix, at around 02-00 a.m. on 01.01.2017. From the testimony of the I.O. [P.W.8], he received the FIR at 09-30 a.m. on 05.01.2017 and he visited the P.O. after opening the case diary, at around 10-00 a.m. on 05.01.2017. The aforesaid events indicate that there was a gap of about four days in initiation of the investigation.
26. Apart from recording the statement of the prosecutrix under Section 161 CrPC, the prosecutrix was sent to the Court of learned Chief Judicial Magistrate, Karimganj on 06.01.2017 and on that day, her statement was recorded under Section 164, CrPC. The said statement of the prosecutrix recorded under Section 164, CrPC was exhibited as Ext.-7. In Ext.-7, the prosecutrix was found to have stated that the accused persons made their entry into their kucha house/room through a gap below the tin roof by unfastening the hook of the door. In the complaint [Ext.-2] lodged on 02.01.2017, it was mentioned that on 01.01.2017, the accused persons made their entry to the house illegally by breaking the door of the house. However, when the prosecutrix testified as P.W.1, she stated that the accused persons made their entry to the room of the prosecutrix through the gap in existence between the bamboo walls and the ground. Contrary to her such version, the prosecutrix stated to have told P.W.6 that the two accused persons made their entry inside the house by breaking the bamboo wall of the house. P.W.7 was told by the prosecutrix that the accused person broke open the bamboo wall of the house and entered into the house. P.W.5 was not told by the prosecutrix that any act of forcible rape was committed upon her. P.W.5 was only told by the prosecutrix that two persons had entered into her house. The I.O. [P.W.8] did not find anything broken in the house. Thus, there is apparently inconsistent version as regards the entry of the accused persons inside the house/room of the house of the prosecutrix on the date of the incident.

27. As per the offence defined under Section 376D, IPC, the same is attracted where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape. In the case in hand, the prosecutrix stated that the incident of forcible penetrative sexual continued for a period of forty to fifty minutes and such acts were committed by the accused persons on her on the floor of the house. It has been admitted by the prosecutrix that the house was made of bamboo and was not in good condition. The prosecutrix had categorically asserted that such acts were committed by both the accused persons on her with one after another.
28. The prosecutrix herein is a married woman and a mother of three children. From the testimony of P.W.2 and the Medical Examination Report [Ext.-1], it is established that there was neither any injury on the private parts of the prosecutrix nor on the person of the prosecutrix. There was no sign of recent intercourse. The examining doctor – P.W.2 had neither negated the possibility of commission of forcible rape nor affirmed the possibility of commission of forcible rape. According to the examining doctor – P.W.2, when the prosecutrix narrated the story to her [P.W.2], only molestation was indicated and the prosecutrix did not give any history of a rape. P.W.2 stated that in the case of forcible rape, injury mark would have been present on the person of the victim. It is true that mere fact that no injuries were found on the private parts of the prosecutrix cannot be a ground to hold that she was not subjected to sexual assault considering the fact that the prosecutrix is a married lady and a mother of three children. Holding of the medical examination of the prosecutrix after a period of five days from the date of the alleged incident could also be reason behind absence of injury on the private parts. However, in the case in hand, the prosecutrix stated that she suffered an injury on her upper left back. When the prosecutrix was examined on 06.01.2017, the examining doctor – P.W.2 did not find any kind of injury on the person of the prosecutrix.
29. It is true that the presence of injury on the person of the prosecutrix/victim is not a sine qua non to prove a charge of forcible penetrative sexual assault/rape. Having regard to the manner and extent of forcible penetrative sexual assault allegedly committed by the accused persons on the prosecutrix on the floor of the house for a period of forty to fifty minutes one after the other; and to the projected situation of forcible penetrative sexual assault with no consent of the prosecutrix; with no meek surrender; and some amount of

resistance or struggle from the prosecutrix, to the forcible rape during such duration; there was a strong likelihood to suffer some kind of injury both on the person and in the private parts of the prosecutrix. With not even a slightest injury; no sign of any kind of injury on the person of the prosecutrix; no injury on her private parts; and no sign of recent intercourse with the prosecutrix; as stated by the examining doctor – P.W.2; the medical evidence is found not supporting the case of the prosecutrix.

30. From the testimony of the prosecutrix and P.W.5, P.W.6, P.W.7 and the Sketch Map of the P.O., it is not in dispute that the houses of P.W.5, P.W.6 and P.W.7 are situated in close proximity to the house of the prosecutrix. In case of occurrence of any incident, their arrival at the P.O. immediately after the occurrence cannot be doubted. These prosecution witnesses - P.W.5, P.W.6 and P.W.7 - are close relatives of the prosecutrix and her husband. In view of such fact situation, these prosecution witnesses are related witnesses. It is trite to say that a related witness cannot, in all situations, be termed as an interested witness. Being close relatives of the prosecutrix, these prosecution witnesses would undoubtedly be interested in seeing an accused person punished.
31. It is settled that merely because the witnesses are related to the prosecutrix or the husband, their evidence cannot outrightly be thrown out if their evidence is found to be consistent and true. After considering the differences between a related witness and a interested witness and all the related aspects by discussing a line of precedents, the Hon'ble Supreme Court in *Raju @ Balachandra and others vs. State of Tamil Nadu*, [2012] 12 SCC 701, has observed as under : -

28. More recently, in *Waman vs. State of Maharashtra* [(2011) 7 SCC 295 : (2011) 3 SCC (Cri) 83] this Court dealt with the case of a related witness (though not a witness inimical to the assailant) and while referring to and relying upon *Sarwan Singh vs. State of Punjab* [(1976) 4 SCC 369 : 1976 SCC (Cri) 646], *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211], *Prahalad Patel v. State of M.P.* [(2011) 4 SCC 262 : (2011) 2 SCC (Cri) 205], *Israr v. State of U.P.* [(2005) 9 SCC 616 : 2005 SCC (Cri) 1260], *S. Sudershan Reddy vs. State of A.P.* [(2006) 10 SCC 163 : (2006) 3 SCC (Cri) 503], *State of U.P. vs. Naresh* [(2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216], *Jarnail Singh vs. State of*

Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] and *Vishnu vs. State of Rajasthan* [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] it was held: (*Waman case* [(2011) 7 SCC 295 : (2011) 3 SCC (Cri) 83], SCC p. 302, para 20).

“20. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care.”

29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in *Dalip Singh* [(1953) 2 SCC 36 : AIR 1953 SC 364 : 1953 Cri LJ 1465 : 1954 SCR 145] and pithily reiterated in *Sarwan Singh* [(1976) 4 SCC 369 : 1976 SCC (Cri) 646].....

32. Taking into purview the observations made in *Raju @ Balachandra* [supra] when a comparative analysis of the testimony of the prosecution witnesses - P.W.5, P.W.6 and P.W.7 - are made, it is found that the versions of P.W.6 and P.W.7 are at variance to each other as regards the events after the alleged occurrence. As per P.W.6, it was P.W.6 who with the prosecutrix and the children stayed for the night in the house of P.W.5. On the other hand, as per the version of P.W.7, it was P.W.7 who stayed in the house of P.W.5 for the night along with the prosecutrix and the children. P.W.7 stated that P.W.6 did not even go to the house of P.W.5 after the incident as she [P.W.6] stayed in her own house after the incident. P.W.5 stated that it was P.W.6 who stayed in his house after the incident. P.W.6 in her testimony-in-chief did not make any mention about appearance or presence of P.W.7 at the P.O. after the occurrence. P.W.7 had

mentioned about P.W.6 in her testimony. According to P.W.7, P.W.6 went to the P.O. prior to her arrival but P.W.6 left the P.O. before P.W.7 reached the P.O. Thus, there arises a clear doubt about the respective time of arrival of P.W.6 and P.W.7, whose houses are in very close proximity to the house of the prosecutrix.

33. As per the version of the prosecutrix, as soon as the accused persons made entry into the house/room, she woke up from her sleep and closely thereafter, all the four children who were sleeping with her, also woke up from their sleep. After waking up, all the children, as per the version of the prosecutrix, started crying. An act of cry is accompanied by vocal sounds. Cry of children is not normally associated with quiet and subdued weeping. If in the middle of the night all the children started crying for a prolonged period of forty to fifty minutes, joined later on by the prosecutrix after getting herself free, it is found inexplicable that the close neighbours of the prosecutrix like P.W.5, P.W.6 and P.W.7 did not hear such cry of four children together and had heard only the screaming of the prosecutrix at the end of the alleged incident which continued for forty to fifty minutes. Both P.W.6 and P.W.7 admitted that there were several other houses near the house of the prosecutrix. It is also difficult to comprehend that no person from those nearby houses also heard the concerted cry of four children coming from the house of the prosecutrix during the period of forty to fifty minutes and they arrived at the scene only after the screams of the prosecutrix.
34. It is understandable that the children of such tender years, aged between 10 months, 9 years, may not understand the exact nature and effect of an act of forcible penetrative sexual assault on the prosecutrix. But it cannot be conceived that such children, more particularly, a child aged between 8 and 9 years, would not be able to testify as regards the presence of two strangers inside a room in the middle of the night and had scuffle with the prosecutrix for a duration of forty to fifty minutes. A child witness if found competent to depose on the facts, his or her testimony is admissible. Even in the absence of oath, the evidence of child witness can be considered under Section 118 of the Evidence Act, subject to the rider that such child witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and the credibility depends upon the facts and circumstances of each case. There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events

which take place in his life and would never forget those events for the rest of his life. A child may be able to recapitulate exactly about an unusual event when asked about the same in future, as an unusual event is likely to leave an indelible imprint in his mind. If the court is satisfied that the testimony of a child witness is not tutored or influenced, the testimony of a child witness is admissible after exercise of due care and caution. It is true that non-examination of a child witness may not create any dent to the core of the prosecution case in a case. But in the present case, the alleged incident had stated to have occurred inside a room in the wee hours for a period of forty to fifty minutes and during such duration, all the four children were crying after having woken up at the beginning itself. The children, at least the two children aged about 8 years and 9 years respectively, could have been in the best position to testify at least as regards the presence of two strangers inside the room. But the I.O. [P.W.8] despite admitting that there were several children in the house of the prosecutrix, whose presence the prosecutrix had also admitted, he did not find it fit to record their statements on the premise that they were purportedly young in age. I.O. [P.W.8] admitted that he did not even make any prayer before the jurisdictional Magistrate for recording of the statement of the three children. In this case, it appears that the prosecution seemed to have not brought the witnesses, who were in the best positions to testify about the presence of two strangers inside the room/house of the prosecutrix for a period of forty to fifty minutes.

35. Though in the complaint [Ext.-2], the complainant had alleged that for some days prior to the alleged incident on 01.01.2017 both the accused persons were harassing the prosecutrix in the absence of her husband [P.W.3], the prosecutrix and her husband P.W.3, during their testimony before the court, maintained complete silence on the said aspect. It has not emerged from the evidence/materials on record, other than in the testimony of the prosecutrix, that there was any kind of kerosene lamp inside the room. The I.O. [P.W.8] did not seize any kerosene lamp. It is not the case of the prosecutrix or the complainant [P.W.3] that they had handed over the kerosene lamp to the I.O. [P.W.8] during the course of investigation. P.W.7 testified to have seen two male persons running away on the date of the incident. Similarly, P.W.6 also testified to have seen the two accused persons running away. When looking at the Sketch Map of the P.O., such testimony of P.W.6 and P.W.7 are examined, the same is found to be a product of

embellishment qua their testimony that neither of them had meet each other during that night though such running away would be hardly of for a few seconds.

36. In *Nirmal Premkumar and another vs. State represented by Inspector of Police*, 2024 INSC 193, decided on 11.03.2024, a three-Judge Bench after considering a number of precedents like *Ganesan vs. State*, [2020] 10 SCC 573; *Rai Sandeep vs. State [NCT of Delhi]*, [2012] 8 SCC 21; and *Krishan Kumar Malik vs. State of Haryana*, [2011] 7 SCC 130; has observed that the court can rely on the victim as a sterling witness without further corroboration, but the quality and credibility must be exceptionally high and observed in the following manner :-

12. In *Ganesan vs. State*, this Court held that the sole testimony of the victim, if found reliable and trustworthy, requires no corroboration and may be sufficient to invite conviction of the accused.

13. This Court was tasked to adjudicate a matter involving gang rape allegations under Section 376[2][g], IPC in *Rai Sandeep vs. State [NCT of Delhi]*. The Court found totally conflicting versions of the prosecutrix, from what was stated in the complaint and what was deposed before Court, resulting in material inconsistencies. Reversing the conviction and holding that the prosecutrix cannot be held to be a 'sterling witness', the Court opined as under:

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be

natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

14. In Krishan Kumar Malik vs. State of Haryana, this Court laid down that although the victim's solitary evidence in matters related to sexual offences is generally deemed sufficient to hold an accused guilty, the conviction cannot be sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus :

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement [CrPC], FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.”

37. It has been observed in *Nirmal Premkumar* [supra] that statements of the prosecutrix must to be consistent from the beginning to the end, from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. It has been held that the victim's testimony is usually enough for sexual offence cases, but an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.
38. On the aspect of delay as regards initiation of the prosecution, it is quite understandable that as the husband [P.W.3] of the prosecutrix was not at home during the incident in the night, the prosecutrix waited for her husband [P.W.3] to arrive at home from the State of Mizoram. As such, for the period of wait of the prosecutrix till arrival of her husband, there cannot be any adverse presumption. Any report as regards commission of a cognizable offence is to be reported at the earliest point of time but lodging of a report

after delay is not to be doubted always if the delay is properly explained. However, a delayed lodging of report can be viewed with an amount of suspicion if the delay is not properly explained, and if the surrounding circumstances are suggestive of a situation to give rise to suspicion. Sometimes, it can be canvassed that a period of delay had afforded time to the complainant to prepare a version after rethinking, which was not a correct version otherwise. Thus, these aspects are also required to be considered with the other materials/evidence on record and situations surrounding the incident of crime.

39. Approaching a court through a lawyer to lodge the complaint only for the purpose of forwarding it to the Police Station under Section 156[3], CrPC is not to be doubted ordinarily. The complainant [P.W.3], in the complaint [Ext.-2] he filed on 02.01.2017, had mentioned that he had not lodged any report before the Police Station as because the accused persons were influential, without disclosing as to how the accused persons were influential. It has emerged from the evidence/materials on record, including the testimony of the prosecutrix, that it was hardly 10/15 minutes walk from the P.O. to the nearest Police Post. Initiation of the investigation was with delay of five days on 05.01.2017. It is not possible to comprehend whether it was due to bona fide reason such complaint was lodged for forwarding it under Section 156[3] to the Police Station or due to absence of medical evidence to support such charge, such approach was adopted. It is not the case of the prosecution that after approach being made to the Police Station/Police Post with a report and refusal to receive such report, the approach to the jurisdictional court through the complaint was made. It cannot be presumed that the Police authorities are biased not to accept a report disclosing commission of a cognizable offence like a serious offence of gang rape.
40. It has not emerged from the substantive evidence that the prosecutrix was so closely acquainted with the accused persons that they could be easily identified from their voice. Notwithstanding the different versions regarding entry of the accused persons inside the room/house of the prosecutrix, it has not emerged from the evidence/materials on record that there was any sign of forcible entry into the house/room as the I.O. during the course of investigation, did not find any material indicating forcible entry into the house by breaking open any part of the house. In the absence of clinching evidence that a lamp was lit inside the room at the time of entry of the accused persons inside the room/house, we are of the considered view that the evidence/materials are not sufficient

to hold that any offence had been committed by the accused persons to be sentenced under Section 458, IPC. In view of the finding reached in respect of the charge under Section 376D, IPC and Section 458, IPC, the conviction of the accused-appellants for the charge under Section 352, IPC is also found not sustainable in law.

41. When a close look at the overall scenario is taken along with all the surrounding circumstances as well as the testimony of the prosecution witnesses and the medical evidence on record, it gives rise to a substantial doubt regarding the veracity of the prosecution case. The inconsistency in the narrative of the prosecution case has rendered the case of commission of forcible penetrative sexual assault on the prosecutrix inside the room/house in the wee hours of the night in presence of four children doubtful. On the face of such evidence/materials of discrepant nature, recording of conviction of the accused persons, A-1 and A-2 for a serious offence like gang rape, defined in Section 376D, IPC, which is visited with rigorous imprisonment for a term not less than ten years and which may extend to life, which shall mean imprisonment for a remainder of that person's natural life, becomes untenable as the genesis and foundation of the prosecution case is found to have crumbled due to the improbabilities, as discussed hereinabove. To reach such view, we are also persuaded with the fundamental principles of criminal jurisprudence that when from the same evidence/materials on record two hypothesis is possible - [i] one consistent with the guilt of the accused; and [ii] the other consistent with the innocence of the accused - then, the hypothesis which is favourable to the accused, at all stages, is to be favoured.
42. In the light of the discussion made above and for the reasons assigned herein, we are of the considered view that the conviction of the accused-appellants for the offences under Sections 376D/458/352, IPC read with Section 34, IPC on the basis of the evidence/materials on record, is not sustainable in law and the same is liable to be set aside and quashed. Therefore, we set aside the Judgment and Order of conviction and sentence dated 11.09.2017 passed by the Court of learned Sessions Judge, Karimganj in Sessions Case no. 16 of 2017. Consequently, this criminal appeal is allowed.
43. The accused-appellants are to be released from custody forthwith if their custody is not required for any other case or purpose.

44. The records of the trial court are to be sent back forthwith.

JUDGE

JUDGE

Comparing Assistant