IN THE HIGH COURT OF MEGHALAYA AT SHILLONG

:: J U D G M E N T ::

CRL.APPEAL No. 15 of 2010

Shri Bharat Bhusan ….. Appellant/Accused

\- Versus –

State of Meghalaya ….. Respondent

Date of Judgment: 28th April, 2017

PRESENT
HON'BLE SHRI JUSTICE DINESH MAHESHWARI, CHIEF JUSTICE

Shri H Abraham, for the appellant

Shri S Sen Gupta, PP, for the respondent

AFR **BY THE COURT**:

Preliminary

The instant appeal under Rule 22 of the Rules for Administration of Justice and Police in the Khasi and Jaintia Hills, 1937 read with Section 374 (2) of the Code of Criminal Procedure, 1973 [CrPC] is directed against the judgment and orders dated 15.09.2010, as passed in GR Case No.128 (A) of 1997 whereby, the learned Additional District Magistrate, Shillong has convicted the accused-appellant for offences under Sections 376 and 448 of the Indian Penal Code [IPC]; and has sentenced him to 5 years' imprisonment with a fine of Rs.3,000/- for the offence under Section 376 IPC and to one month's imprisonment for the offence under Section 448 IPC.

It may be summarised at the outset that the alleged incident leading to the trial and conviction of the appellant dates back to 17.01.1994 and charge sheet in this case was filed on 12.07.1996. The trial and other proceedings in this case got protracted in a rather perplexing manner where even after pronouncing the judgment of conviction on 18.07.2000, the learned Trial Court re-opened the matter for defence evidence while 'suspending' its

judgment and indeed recorded the statements of three defence witnesses. Thereafter and before any other decision, the case stood transferred to the Fast Track Court who made a reference to the then jurisdictional High Court while raising doubts on the validity and legality of the procedure so adopted in this matter, of 'suspending' the pronounced judgment and recording defence evidence after the judgment. The questioned procedure was disapproved by the then jurisdictional High Court on 06.03.2006 while answering the reference; and the Fast Track Court was directed to decide the matter while discarding such evidence led by the defence. However, the fresh decision dated 31.03.2006 was also disapproved by the High Court in the order dated 02.06.2008 as passed in Criminal Appeal No. 1 (SH) of 2006; and the matter was remanded for further proceedings from the stage of Section 233 CrPC. After remand, the Trial Court recorded the statements of four witnesses produced in defence and thereafter, convicted and sentenced the appellant by the impugned judgment and orders dated 15.09.2010. Aggrieved, the accused-appellant preferred this appeal but then, before the appeal was taken up for hearing, served out the sentence awarded; and, on 06.06.2013, this fact, that the appellant had served out the sentence, was itself taken as sufficient by a learned Single Judge of this Court to dispose of the appeal. However, the Hon'ble Supreme Court in its order dated 09.01.2015, as passed in Criminal Appeal No.15 of 2015 [SLP (Crl) No. 6667 of 2014], did not approve of the order so passed by this Court while observing that the appeal before the High Court was not rendered infructuous merely because the appellant had undergone the sentence; and hence, remanded the appeal for afresh consideration on merits.

Thus, this appeal, pertaining to the alleged incident of the year 1994 has now been heard on merits after the matter has gone through several rounds of reference, appeal and remand. The most unfortunate aspect of the

matter is that even in the impugned judgment and orders dated 15.09.2010, the learned Trial Court has not taken care to deal with the entire evidence on record and has convicted the appellant only after rejecting the defence evidence that was adduced after remand. Ordinarily, in such circumstances, this Court would have considered the option of setting aside the impugned judgment and requiring the decision afresh by the Trial Court but, such a course would only lengthen the life of this fairly old matter that has already gone through several rounds of remand and would not serve the cause of justice. Therefore, in the given set of circumstances, it is considered appropriate that the entire matter be examined on merits by this Court. Hence, a somewhat detailed reference to the relevant evidence and proceedings in this case is inevitable.

RELEVANT BACKGROUND ASPECTS

***The prosecution case; charge sheet; and* the judgment of conviction dated 18.07.2000**

The First Information Report ('FIR') leading to this appeal was registered on 18.01.1994 as Cherra Police Station (East Khasi Hills District) Case No.2 (1)1994 under Sections 376/448 IPC on the basis of an oral complaint made by the victim to the In-charge, Tyllap Police Outpost, who reduced the information in writing at about 8:00 p.m. on 17.01.1994. The material contents of this FIR, wherein the victim, inter alia, alleged that the appellant, who was a Constable working in Border Security Force committed rape and house trespass at about 5:30 p.m. on 17.01.1994, read as under:-

> *"On 17.01.94 from 8:00 am to 5 pm one B.S.F. personnel, later I came to know his name as Shri. Bharat Bhusan of Beltola B.S.F. Camp came to our locality for 3/4 times and entered in some houses near to my house and he used to go back accrossing my court-yard. For the fourth time while he was going back he talked to me and enquired about my husband. Since I was a widow, I did not talked to him much but he provoked me saying that I do not understand him what he used to come to that place. He wanted to give money to my children, but I warned him not to do so and he proceeded. Again at about 5:30 while I was inside my room and busy with domestic work, the B.S.F. personnel entered my house through the open door and immediately after entering the house, he closed the door and caught hold of*

me from the backside and forcibly laid me on the floor and forcibly committed rape on me by pressing my mouth and my hands.

However, I raised hue and cry and on hearing the same, one Shri. Noren, Suda Das, Shri. Horendro Biswas, Shri. Anil Singh and some other entered my house from the back-door and caught hold of him inside my house. The village Headman and many others were informed. After sometime the information was given to the Police. Police came and took B.S.F. constable Bharat Bhusan to Tyllap Out-Post. At the same time of committing rape on me he kept his belt and cap inside my house which were also handed over to the Police. At the time of acting on me he tore my blouse. The above complaint is written according to my statement and the same is read over to me and I admitted it to be correct."

It is noticed from the record that investigation of the matter was handed over to S.I. Shri G.M. Marak, the In-charge of Tyllap Outpost. During the course of investigation, the Investigating Officer, on 18.01.1994 at about 2.30 p.m., seized the clothes of the victim, which she was allegedly wearing at the time of the incident, though a few of them had been washed in the morning of 18.01.1994. The description of seized clothes in the seizure list (Exhibit-9) has been as under:-

"1. One green colour Makhala
2. One saree piece (Chadal)
3. One torn blouse, torn in both side of the shoulder (not washed)"

However, another seizure list was also drawn by the same Investigating Officer on the same date and time i.e., 18.01.1994 at 2:30 p.m. whereby, a bunch of four keys, allegedly left by the accused-appellant, was also seized on being produced by the victim at her house. Though this other seizure list is available on record but neither the same was exhibited in evidence nor the alleged bunch of keys was ever produced before the Court. The matter relating to this bunch of keys and this seizure list has formed the subject of long-drawn arguments in this case, as shall be noticed hereinafter later.

As regards investigation, it is further noticed that the victim was sent for medical examination and she was examined by the senior Medical and Health Officer, Sohra Community Health Centre on 19.01.1994 indicating,

inter alia, that she was wearing a torn blouse but there was no associated injury; that the private part was normal with no injury or mark; and further that she was a married woman and no smegma or semen stains were found. However, vaginal swabs were taken and handed over for further investigation. The clothing aforesaid and the pipe containing vaginal swab were forwarded to the Forensic Science Laboratory, Shillong, who made the report in relation to the said articles, marked for the purpose of the report as Exhts. S-53 (1), S-53 (2), S-53 (3) and S-53 (4), that seminal stains were detected in all these articles but, there was no definite opinion as to whether the tear marks found on the blouse were of recent origin. The material contents of the Laboratory Report (Exhibit-11) read as under:-

> "*After a thorough and careful examination of the Exh. S-53 (1), Exh. S-53 (2), Exh. S-53 (3) & Exh. S- 53 (4) seminal stain could be detected in all the above exhibits.*
>
> *Two elongated tearmarks are found on the exhibit marked as Exh. S-53(3) on both sides below the armpit. As the case is very old no definite Opinion could be given whether these are of recent Origin."*

After recording the statements of victim as also of the other witnesses including some of the persons named by her in the FIR, the charge-sheet in this matter was filed on 12.07.1996, leading to GR Case No.128 (A) of 1997. On 21.01.1998, the charges were framed against the accused-appellant, who pleaded not guilty and claimed trial. Accordingly, the case was put to trial where the prosecution examined as many as 14 witnesses and exhibited 13 documents and ultimately, the prosecution evidence was closed on 01.05.1999. Thereafter, the accused/appellant was examined under Section 313 CrPC on 07.06.1999 and as per the record, the accused-appellant clearly stated that he was not desirous of leading any evidence in defence. Ultimately, the learned Additional Deputy Commissioner, East Khasi Hills District, Shillong delivered the judgment in this GR Case No.128 (A) of 1997 on 18.07.2000, convicting the accused-appellant for the offences under

Sections 376/448 IPC and posted the matter on 28.07.2000 for hearing on the question of sentence.

After the judgment dated 18.07.2000

It is noticed that after the judgment of conviction for the offences under Sections 376/448 IPC on 18.07.2000, the matter was posted for hearing on the question of sentence, but the accused-appellant remained absent wherefor, non-bailable warrants had to be issued. However, on 28.11.2000, a prayer was made on behalf of the accused-appellant for an opportunity to adduce defence evidence and, curiously enough, the learned Judge granted this prayer for leading defence evidence after pronouncement of judgment of conviction while purportedly 'suspending' the pronounced judgment. Thereafter, on 06.12.2001, 11.01.2002 and 12.03.2002, three witnesses were examined in defence and the matter was again posted for arguments and was again adjourned on several occasions for one reason or the other. However, on 19.03.2004, the case stood transferred to the Fast Track Court, Shillong pursuant to the instructions of the Law Department, Government of Meghalaya dated 29.01.2004; and was registered in that Court as FTC No. 13 of 2004.

Now, the learned Judge, Fast Track Court, Shillong, after having examined the record, expressed doubts on the procedure adopted in the matter and hence, by the order dated 01.09.2004, made a reference to the High Court on three questions as to: (i) whether the learned Trial Court had the competence to suspend its own judgment after its pronouncement; (ii) whether after the pronouncement of judgment, the case could be reopened for defence evidence; and (iii) whether Fast Track Court could proceed with the case? The aforesaid reference was dealt with and answered by the then jurisdictional High Court on 06.03.2006. The High Court referred to Section

235 of the Code of Criminal Procedure and held against the procedure adopted in the case while observing as under:-

> *"Thus a bare perusal of section 235(1) shows that the mandate of the legislature is clear and unambiguous, that a judgment "shall" be delivered after hearing all the arguments and points of law, if any. Suspension of judgment once delivered and allowing the accused to adduce defence evidence is no-where provided in the Code of Criminal Procedure, The same is therefore a total violation of the provisions of law. Production of defence witnesses after delivery of judgment is prima face illegal and without jurisdiction and thus the deposition of defence witnesses DW1, DW2 and DW3, are hereby quashed. The same may be kept out of the record."*

The High Court further held that the matter could be heard by the Fast Track Court and directed that the accused be heard on the question of sentence; and further directed the accused-appellant to surrender before the Fast Track Court on 16.03.2006.

The aforesaid order of the High Court paved the way for final decision of the matter in the Trial Court. On the given date, the accused-appellant surrendered before the Court and while declining the prayer made on his behalf for bail, the Trial Court remanded him to judicial custody and posted the matter for hearing on the question of sentence. Ultimately, by the order dated 31.03.2006, the Trial Court awarded him the sentence of 7 years' imprisonment for the offence under Section 376 IPC and 3 months' simple imprisonment for the offence under Section 448 IPC.

The previous appeal and remand

After the aforesaid conclusion of the case in the Trial Court, the accused-appellant preferred an appeal in the then jurisdictional High Court, being Criminal Appeal No. 1 (SH) of 2006, questioning the judgment and order dated 18.07.2000 whereby he was convicted for the offences under Sections 376/448 IPC and the order dated 31.03.2006, whereby he was awarded the sentence of imprisonment with the contention that in the trial, he was never called upon to enter on his defence, as required by Section 233(1) CrPC and such an omission vitiated the conviction and sentence. It appears that this contention was not even contested on behalf of the State; and the

only submission on behalf of the State was that on remand, the proceedings shall have to start from the stage of Section 233 CrPC wherefor, the accused-appellant be put to the terms of adequate security, as the prosecution faced enormous difficulties in the past in procuring his attendance.

In the order dated 02.06.2008 as passed in disposal of the said appeal [Criminal Appeal No. 1 (SH) of 2006], another learned Single Judge of the jurisdictional High Court, though referred to the above-noted proceedings relating to reference and the order passed in reference on 16.03.2006 but then, observed that the appellant was never asked to adduce evidence to defend his case even at the time of examination under Section 313 CrPC. The learned Judge also took note of the submissions on behalf of the appellant that material documents like WT message dated 17.01.1994 and ocular evidence like that of the son of prosecutrix were required to be produced in order to establish his innocence; and, while observing that omission to allow the accused-appellant to enter on his defence had certainly caused him prejudice, proceeded to allow the appeal and remanded the matter, for afresh proceedings from the stage of Section 233 CrPC. The learned Judge, inter alia, observed as under:-

> *"5.....I have carefully gone through the proceedings of the trial court and have found that the appellant was never asked to adduce evidence to defend his case even at the time of examination of the accused under Section 313 CrPC.....*
> "*....The fact that the appellant was not given an opportunity by the trial court to enter on his evidence in terms of Section 233 of the Code is not disputed. However, the crucial point to be examined is whether any prejudice has been caused to the appellant by not complying with this provision. The learned counsel for the appellant submits that when the settled position of law is that the sole evidence of prosecutrix can be used as the basis for conviction in a rape case, a grave prejudice will be caused to the appellant if he is not allowed to adduce ocular evidence to defend his case. The learned counsel for the appellant also submits that a material document like the WT Message dated 17.01.1994 and witnesses like the son of the prosecutrix are required to be adduced to prove the innocence of the appellant, which cannot be done without allowing him to enter on his evidence. I find force the contention of the learned counsel for the appellant. Criminal Jurisprudence in India is based on the principle that a person accused of an offence is presumed to be innocent until and unless*

he is proved to be guilty of charges. At this stage, it is not possible to speculate as to what type of defence evidence is to be adduced by the appellant to defend his case. However, the appellant must be given an opportunity to prove his innocence. This is a minimum requirement of the principles of fair trial. By not allowing the appellant to enter on his evidence, on the facts and circumstances of the case, prejudice has certainly been caused to him. Consequently, the impugned judgment of conviction and sentence cannot be sustained in law and is liable to be set aside.

"6. The result of the foregoing discussion is that this appeal is allowed. The judgment and sentence dated 18.07.2000 and 31.3.2006 are hereby set aside. The case is remanded to the trial court for further proceedings at the stage of Section 233 of the Code of Criminal Procedure.....".

Thus, by virtue of the aforesaid order dated 02.06.2008 as passed in Criminal Appeal No. 1 (SH) of 2006, the trial of this matter, pertaining to the incident of the year 1994, revived before the Trial Court, albeit from the stage of Section 233 CrPC.

The proceedings after remand; impugned judgment & orders dated 15.09.2010

Further examination of the record reveals that though after the remand aforesaid, the matter was taken up by the Fast Track Court, who had finally disposed of the matter earlier but, on the submissions made by the learned Public Prosecutor that in the past, he had been a counsel for the accused, the matter was re-transferred to the original Court; and was thus, taken up in the Court of Additional District Magistrate, East Khasi Hills District, Shillong, again as GR Case No. 128(A) of 1997. This trial, again, got lengthened with issuing processes for the witnesses and even non-bailable warrants for the accused-appellant. Be that as it may, four witnesses were in all examined by the accused-appellant on 24.10.2008, 29.05.2009, 28.08.2009 and 30.10.2009. Again, after various defaults on the part of the accused-appellant in attendance and after long drawn arguments, the judgment to be pronounced in the matter was ready on 26.08.2010 but could not be pronounced for another absence of the accused-appellant. All said and done, ultimately, the judgment was pronounced on 15.09.2010, again convicting the appellant for the offences aforesaid; and, on the same date, after hearing

the appellant on the question of sentence, the Trial Court awarded him the punishment of 5 years' imprisonment with a fine of Rs.3,000/- for the offence under Section 376 IPC and to one month's imprisonment for the offence under Section 448 IPC.

In the impugned judgment dated 15.09.2010, the learned Judge, after a short summary of the evidence led in defence and of the arguments advanced, proceeded to draw up her conclusions in the following:-

> *"From the above exhibits, statements, documents and arguments by the two sides the points that emerge are:-*
>
> *1. Only the accused was tied up and beaten up by the Villagers. His colleague Rajendra Prasad was not beaten up nor there is any allegation against him as per statements of DW1, DW2 and DW3 (All statements corroborate each other).*
> *2. A bunch of keys were seized from the victim by DW1 on being produced by her. According to DW1, the accused has admitted that the bunch of keys belonged to him.*
> *3. In his statement the DW2 stated that the BSF Party never enters anybody's house without representatives of Civil Police i.e. the BSF should be accompanied by Civilian Police when they enter into any house located in the Village. In the instant case, the fact that the Bunch of Keys were seized from the victim and the admission of the accused before the DW1 that the bunch of keys belonged to him more or less confirms that the accused had entered the victim's house. If he had entered the house during the course of his duty he should have been at least accompanied by his colleague Rajendra Prasad even if he was not accompanied by the civilian police. The fact that he entered the house alone cast a spell of doubt of his intentions.*
> *4. The FSL report dated 25th May, 1996 corroborates the allegation that the accused was raped since semen stains were found on the samples of the victims cloths.*
>
> *Conclusions drawn:-*
>
> *I have gone through the entire case record meticulously. I have read and re-read the statements of PW 1 to PW 14, statements of DW1 to DW4, the FSL report dated 25th May 1996, all the Judgments and order as mentioned above and also gone through the Judgments and rulings given by various Hon'ble High Courts which listed below. I have also tried to be objective and dispassionate during appraisal of the evidences on file.*
> *I. Shangura Singh & Others –Vrs- State of Punjab on 10th May, 2010. Cr. Appeal No.1211-SB of 2-001(O & M) in the H.C. of Punjab & Haryana (ANNEXURE A).*
> *II. Sanjay Kumar Vs. State & Others on 10th February, 2010 Cr. Appeal No.3-A of 2003, Jammu H.C.(Annesure B)*
> *III. Om Prakash Vs. State of U.P.(2006) INSC 297(11th May 2006) Arising out of SLP(Crs) No.6111 of 2005 (Annexure C)*
> *IV. Motilal Vs. State of MP (2008) INSC 1133 (15th July 2008) Judgment Cr. Appellate Jurisdiction Crl. App. No. of 2008 arising out of SLP(Cri) No.4751 of 2000 (Annexure D).*

Sufficient/Enough time and consideration was given to the defence to prove their case. After examination and cross-examination of DW1 to DW4 I find the story that the accused was chasing the infiltrators is not very convincing in the defence could not prove anything new from the stage of Section 233 Cr.PC. If that was the case, both the jawans should have been in action. The fact that the accused was the only one to be captured and assaulted while the other was still in the Outpost cast a spell of doubt.

A bunch of keys was recovered from the victim who stays in a one-roomed house and has no use of the bunch of keys. Later on the accused has admitted in front of the I/O that the Bunch of Keys belongs to him (Statement of DW1). If that is so, it is indicated that the accused Bharat Bhushan had entered the house of the victim.

If accused Bharat Bhushan had entered the house of the victim, why did his colleague Rajendranath Prasad not accompany him. As per the statement of DW 2 – When the BSF Personnel enter a Civilian house they have to be accompanied by Civilian Police. In this instant case- accused was not accompanied by Rajendra Prasad nor by the civilian police.

Therefore from the above detailed narrations and justifications in my opinion the defence has failed to convince me that the accused was performing his duties diligently and was chasing infiltrators. I am also not convinced that the allegation of rape was leveled against him only with a motive to harass him and(illegible). On the other hand the prosecution has been able to prove the case beyond reasonable doubt. The accused is therefore found guilty for commission of offence U/s 448/376 IPC. He shall be remanded to Judicial Custody forthwith."

It is ex facie evident that in the impugned judgment dated 15.09.2010, except a cursory reference to the FSL report, nothing has been discussed of the prosecution evidence at all; and only after rejecting the submissions made in defence, the learned Judge straightaway recorded the conviction of the appellant. The only probable explanation for such a wholly inappropriate and rather hollow judgment seems to be that when the matter was remanded for afresh proceedings from the stage of Section 233 CrPC, the learned Judge assumed that only the evidence now being led was to be examined and analysed. Whatever be the reason, the manner of dealing with this matter at every stage, particularly at the hands of the executive officers exercising judicial powers, has been thoroughly unsatisfactory, where in the first round of proceedings, even the pronounced judgment was purportedly "suspended" in the year 2000 and where the fresh judgment delivered a decade later was not of a considered decision at all. In the given set of

circumstances and looking to the age of this matter, as observed at the outset, the only appropriate course is to examine the evidence on record and to decide if the prosecution has been able to substantiate the charges or not.

THE PROSECUTION EVIDENCE

The prosecution examined as many as 14 witnesses in this case and exhibited 13 documents. The prosecutrix was examined as PW1 and the persons who allegedly reached the spot on her cries were examined as PW2 to PW-4 and PW6. The examination-in-chief of the prosecutrix, as recorded on 29.10.1998, has been as under:-

> *"On 17/1/94 one Fuji (Defence personnel) came to my house at around 5.30 PM & asked for drinking water. I enquired form inside my house who is that person. But the person entered my house(room) & caught hold of me & pressed my mouth by his hand & pulled me down to the floor of the house & he started raping me & in the process I tried to save myself I bite on his finger. As a result he had to remove his hand from my mouth & then I start shouting for help. One Pushpurani Biswas and Maya Rani Biswas first heard my cry & came for my rescue and along with them one Suda Das and Anil Sinha also arrived the spot for my rescue. Around 5 minutes he raped me. He tried to penetrate his private part to my private part but I was trying my best to refuse the same. His private part entered to my private part. Then those my neighbor mentioned above & I, caught hold of him & tied him with rope & inform the matter to our local headman one Mr. Marak & then the Headman brought the police and the police took the accused to the Police Station & I also been taken by the police to the Police Station & police asked me in details. As I am illiterate I could not write myself the FIR but the police noted down the FIR & I put my signature there. Ext-1 is the said FIR & Ext-2 is the contents of the FIR in form No.1. Ext-1 (1), Ext 1(2) & Ext-1(3) are my signatures & Ext 2(1) in the prescribed form No.1 is also my signature. Then the Police took me for medical check up to Cherrapunjee hospital & doctor examined me there. There after I have been also produced before a Magistrate at Sohra for recording my statement. Ext.-3 is the statement recorded by the Mgte Sohra. Ext 3(1) and 3(2) are my signatures. I know the accused & I can identify him & the accused is present in the Court's dock. The accused once again visited my place alongwith one CID Personnel & they obtained my signature in one blank paper. The accused told me what happened happened, let us forget the matter & he told me that we will go to Shillong."*

In her cross-examination, apart from the suggestion that she was making false allegations and that no such incident occurred as alleged, there had been two-fold suggestions to the prosecutrix. One line of suggestions had been that the authorities were keeping watch on her house as she was harboring the criminals of a foreign nation; and on the date of incident, BSF

personnel came to her house in search of alleged foreign nationals who were carrying arms and had taken shelter in her house. The second line of suggestions had been that she was in love with the accused and wanted to marry him; and that it had been a matter of consensual sex and rather, she provoked the accused for the same. The deposition of the prosecutrix in her cross-examination reads as under:-

> *"I can speak only Bengali. I know a little Hindi. I am born at Ishamati bordering Bangladesh. I am married to (*omitted*) 16 years back according to the customary rites & usages. I have three issues (1) (*omitted*) aged about 11 years, (2) (*omitted*) aged about 9 years, (3) Sri. Raju Sinha, aged about 8 years. All my son & daughters are residing with me at Kollaghat, Tyllap O.P. My husband died 8 years back when my son was 2 months old. Besides my two daughters and one son, my younger brother Sri. Anil Sinha, aged 20 years is also residing with me. My said brother is a cultivator. On 17/1/1994 myself and my younger son were at home & my two daughters & my brother went out to the playground about only five houses cross from my house. I am residing at Kollaghat in my own house.*
>
> *Within my compound there was a separate room and I have given to one person without rent to stay. In that room both husband & wife were residing namely Maya Rani Bis was.*
>
> *It is not a fact that some Bangladeshi National used to come & stay in my house occasionally.*
>
> *It is not a fact that on 17/1/94 three Bangladeshi Nationals carrying with revolver taken a shelter in my house to commit crime.*
>
> *It is not a fact that the B.S.F. party on 17/1/94 came to my house to search the alleged foreign nationals.*
>
> *It is not a fact that I used to give shelter to anti social foreign national with a motive to send them to different parts of the N E region to create L & O problem as such Army, BSF & Customs persons kept watch on my house.*
>
> *It is not a fact that alleged accused came to my house on earlier occasion and used to take tea. On 17/1/94 at about 5.30 PM the door of my house was open. I am residing only in one room along with my children & I used to cook.*
>
> *I raised alarm when the alleged accused entered my room but none appeared. Ext-1 is written by one Khasi person but I do not know him. He wrote it in my house. But the said person do not know Bengalee language. I spoke to Headman in Bengalee language & the Headman explained the said matter to the writer of this FIR & accordingly he wrote. I do not know the contents of FIR but I signed it. Who has written the Ext 2, I do not know but one person of Thana. The contents of Ext 2 I do not know but I signed. O/C took me to court Cheerapunjee & the concerned Mgte asked me in Hindi & I replied with understanding the contents.*
>
> *It is not a fact that the alleged accused used to pay money to me or my children as I have never seen him earlier.*
>
> *I did not say to the writer of Ext-1 that the alleged accused wants to give money to my children. On 17/1/94, in the evening I wore a green Magla, one sky blue piece of cloth and one green blouse. I cannot say by which hand accused opened my clothes from my body as I was not in sense.*
>
> *It is not a fact that I on my own opened my clothes.*
>
> *It is not a fact that I on my own opened my clothes & provoked the accused for sexual enjoyment.*

It is not a fact that on 17/1/94 at about 5.30 PM I on my own opened clothes from my body in front of the alleged accused & feel relief/enjoyment & I caught hold of the accused & lie down on the floor. It is not a fact that as my husband died 8 years back, & I am now 30 years & as such I want to catch a boy & to live together. It is not a fact that I propose to marry the alleged accused & he refused as he was already married.

It is not a fact that on refusal to marry me by the alleged accused I falsely made an attempt to involve the accused in the case.

*It is not a fact that I have not been raped by the accused. Last year two persons came to our place they are known by the name Rajendra Sharma & Bharat Bhusan (*illegible*) accused. It is not a fact that I welcomed them & offer tea. I signed the paper with an intention & idea for transferring the said case from Sohra to Shillong & I signed the papers on believing both the persons i.e. Bharat Bhusan & Rajendra Sharma former is the accused. It is not a fact that I loved the accused. It is not a fact that I filed the FIR in my own but it is a fact that BSF Major and other person make the case big as the BSF Major shown his revolver to the OC of the PS. It is not a fact that I falsely deposed before this Court."*

It is noticed that the articles related with this case were produced before the Court later and hence, the prosecrutix was further examined on 23.03.1999 when she identified her clothes that were seized on 18.01.1994 and also testified to her signatures on the Seizure List (Exhibit-9). In her further cross-examination, the prosecutrix was questioned on the number of clothing she had and their size; and a suggestion was put that the said green makhala did not belong to her. The prosecutrix, of course, denied such a suggestion too.

PW2 Smti. Pushpa Rani Biswas is said to be one of the persons who allegedly reached the house of the prosecrutix after having heard the hue and cry with her daughter as also brother of the prosecrutix; and who allegedly forced the door of the room open and saw the accused and victim on the floor with clothes of the victim torn. This witness deposed as under:-

"I know the victim. On 17/1/94 the accused entered the house of the victim & raped her. When we heard the hue and cry from the victim we came to the spot & entered the room by breaking the door. Myself, my daughter and the brother of the victim, one Anil Sinha broke the door & entered the room. While entering we saw the accused & victim are on the floor & saw that all the clothes of the victim have been torned into pieces & (victim) was crying. After that we tied the accused & victim went to inform the Headman & accordingly Headman brought the police & police took the accused to the P.S. I can identify & I identify the accused who is present in the Court dock."

In her cross-examination, this witness PW-2 was also suggested that the accused and the prosecrutix were in love and knew each other and that

the accused used to come to the locality and to the victim's house now and then. The witness, inter alia, stated in her cross-examination as under:-

> *"…… on 17/1/94 at about 5:30 PM myself & my one daughter & Anil Sinha was at my house. I heard the cry at 5:00 PM. It is in a loud voice & I heard the voice 'help me some male person entered my house'.*
>
> *It is not a fact that the alleged accused used to come in the locality & in the (*victim's*) house every now & then. I do not know the name of the alleged accused. I know the accused used to reside at BSF camp. It is a fact that I know the accused residing at BSF Camp.*
>
> *It is not a fact that on 29/12/96 at about 7.30 PM the BSF party came to my house for search.*
>
> *It is not a fact that out of (*illegible*), I have come to depose before this Court against the alleged accused.*
>
> *It is not a fact that I have not seen on 17/1/94 at 5.30 PM that the accused had raped the victim.*
>
> *It is not a fact that I have falsely deposed before the Court.*
>
> *It is not a fact that accused & the complainant love each other & they know each other.*
>
> *It is a not a fact that on 17/1/94 at 5.30 PM I was not at home at Kollaghat & as such I did not know anything. I have come before this court on receipt of summons".*

This witness was re-examined and re-cross examined in relation to her assertion about the time of incident for which, she deposed as under:-

> *"Re-Examination*
>
> *I do not know how to see the watch. As such it was not possible for me to say the exact time either it was five, five thirty or five forty-five."*
>
> *Re-cross Examination*
>
> *Regarding the time at 5.30 PM on 17/1/94 I have stated in the Ex.in chief I came to know the time from persons who are talking in the area. I came to know the time from one person Sudha Das."*

PW3 Smti. Maya Rani Biswas, allegedly the other person who reached the spot at the time of incident deposed, inter alia, as under:-

> *"….. On 17/1/94 I went to my regular work & came back at 4.00 PM evening. After that I took bath & took my evening tea & at the time of evening prayer (Trishandha) I heard some noise at first instance, I did not go. But when this noise was loud, I went to the spot & after reaching the spot I saw one BSF personnel caught hold of the victim & she is trying her best for rescue. Seeing this I got scared and started shouting for help saying that one BSF person has entered the room of victim and caught hold of her and asking for help. Many of the neighbours came forward for the help of the victim."*

In her cross-examination, this witness PW-3 stated as under:-

"My house is just adjacent to the complainant house. I am residing in my own house alongwith my husband and two years son.

*It is not a fact that on 17/1/94, I did not see anything in the house of (*victim*) & I do not know anything about the incident. It is a fact that I do not enter the house/room of (*victim*) at 5.30 PM on 17/1/94.*

It is not a fact that I do not know anything about this case. It is a fact that on 17/1/94 I returned home at 7.00 PM maybe. It is not a fact that I falsely deposed before this Court."

On the Court's question, this witness PW3 explained that she saw the incident while peeping through the door.

PW4 Shri Sudha Das also claimed that he reached the spot after having heard the hue and cry of the victim on 17.01.1994 at about 5 to 5:30 PM and found the accused lying on the top of the victim and caught hold of him. This witness deposed as under:-

"I know the victim. On 17/1/94 at about 5 to 5.30 P.M. I heard the hue & cry of the victim & immediately we rushed to the spot & found that the door of the victim is locked from inside & victim's brother namely one Anil Sinha broke the door & I entered along with others & found that the accused was on the top of the victims & we caught the accused & detained him there & I informed the village Headman & accordingly Police came & took the accused & victim accompanied by the village Headman & others."

This witness PW4 was also suggested in the cross-examination that there was a love affair between the accused and the complainant and that the accused had been giving money to the complainant but he denied such suggestion while stating as under:-

"On 17/1/94 I came back to my home from my work at 3.00 PM. My house is situated after a gap of one house from the house of the complainant. I am residing at Kollaghat since birth & I am residing in my own house. The relation between me & the complainant is a neighbor.

It is not a fact that there is a love affair between the alleged accused and the complainant. It is not a fact that the alleged accused used to visit the house of the complainant & use to pay money to the complainant now & then. I cannot say exactly when the husband of the complainant died. I cannot say when the complainant got married……"

PW5 Shri Nelson Marak, the headman of the village concerned, stated that he had no personal knowledge regarding the alleged incident but pointed out that the accused was brought to the Police Outpost when the BSF Major and several other BSF personnel arrived and forcibly took the accused away. This witness, inter alia, stated as under:-

"One Mr. Noken informed me that there is some trouble in my area & accordingly I left for the PO with Police. After reaching there I saw the accused was tied up with rope & we took the accused to the P.S. Outpost & there after victim also arrived at the Police Outpost. When the accused was in the Police Outpost & the O/C & myself were thinking to handover the accused to the BSF Major, the BSF Major along with (seven) BSF personnel arrived at the Thana/Outpost & charged the O/C that why my person has been arrested. The BSF persons were fully armed with sten gun & threatened the O/C either to release the accused or they will shoot & they took the accused by force from the police custody and I went home."

PW6 Shri Anil Sinha, said to be the brother of the victim, deposed in his examination-in-chief as under:-

"….. On 17/1/94 I was not at home at that relevant time as I went to play along with my niece and nephew who are the sons & daughters of the victim. When I heard the hue & cry I came running to the spot & found the door of the room of the victim is locked from inside. Then I break the door & entered the room & saw the accused is on the top of the victim & found that the clothes of the victim are opened and saw that the accused kept his belt and cap on the floor & I saw also the accused is half naked. Then I along with the help of some persons present there tied the accused with rope. I also have seen that the victim caught the accused with her two hands because of not to allow him to escape the spot. I saw also the victim all the clothes were torn. I know the accused and he is present in the dock."

This witness PW6 was again put to the same suggestions that the accused had been paying money to the children of the victim and was regularly visiting her place; and that his sister intended to marry the accused. This witness, while denying such suggestions, stated in his cross-examination, inter alia, as under:-

"….. It is not a fact that the accused used to visit the house of the complainant every now & then.

It is not a fact that the alleged accused pay money to my niece every now & then. I have seen him that day only the day of incident first time. I cannot say exactly the age of my sister in 1994 but it may be 26 or 27 years.

It is not a fact that I or the complainant search for a boy for the complainant being a widow.

It is not fact that my sister the complainant proposed to marry the alleged accused.

It is not a fact that my sister the complainant offer the accused to marry her & he also refused.

The alleged occurrence took place on 17/1/94. I heard the hue and cry at about 5.40 or 5.45 PM. The distance between my house & the playfield where I was playing on 17/1/94 is approximately 60 (sixty) meters.

It is not a fact that I did not reach the spot or P.O. without hearing the hue and cry and it is also not a fact that as because in the month of January the shortest day I was at home and not in the playfield. There was no electricity in our house and there was also no electricity at Kollaghat village.

There are two doors and no window in the room where the complainant used to stay. Both the doors are weak doors.

It is not a fact that the door is so weak that it can be opened by simple push from outside.

It is not a fact that it just can be opened and need not break it. It is not a fact that I did not see anything on 17/1/94 on entering the rooms of the complainant.

It is not a fact that I was at home on 17/1/94 at about 5.30 PM to 5.40 PM. I cannot say on 17/1/94 in the evening time what clothes and what colour my sister/complainant was wearing.

It is not a fact that I falsely deposed before this court and I have been tutored. I have stated before this Court on what I have seen with my own eyes."

The testimony of PW7 Shri Nokendra Kr. Das in his examination-in-chief had not been of much bearing except that according to him, the victim came to his house and narrated the incident whereupon he expressed inability to do anything as Headman and Police were there. The witness, however, stated that after sometime he went to the place of occurrence with Headman and Police. The witness stated, inter alia, as under:-

"…… On 17.1.94 the victim at about 6.32 PM came to my house & say one BSF personnel has entered her house and raped her. I told her as I cannot do anything in this case because village Headman & Police is there. After sometime Headman/Police & myself went to the place of occurrence then Police entered the room of the victim & found the accused there & then Police took him out from the room of the victim alongwith his Rifle then Police took the statement of the victim and seized the torn clothes worn by the victim and took both the accused and victim to Police station."

In his cross-examination, this witness PW7 was again put to the similar nature suggestions about love affair of the accused and victim as also about the links of the victim with the foreign nationals. The witness stated, inter alia, as under:-

"….. I have no knowledge whether the complainant has any love affairs with anybody and her personal life except she has three (3) child and farmer by profession. I have no knowledge whether the complainant has love affair with the alleged accused. It is not a fact that on 17.1.94 on invitation made by the complainant the alleged accused has come to the resident of the complainant. I cannot say what type of rifle taken by the police on 17.1.94 from the house of the complainant as I never handle it. It is not a fact that I haven't seen that the Police taken the rifle from the house of the complainant on 17.1.94.It is also not a fact that I haven't seen anything on 17.1.94 at the house of the complainant. Whatever I have stated in examination in chief is correct. …… I cannot say how many dwellers settle in our village. I do not know whether the complainant has linked with the criminal Bangladeshi national used to come and stay at the house of the complainant as such the BSF, Army and the Police used to maintain strong

vigilance and on some occasion a raid has been conducted at the house of the complainant. It is a fact that whatever I have stated all are tutored."

PW8 Dr. (Mrs) Dapbiang Nongkynrih, who had been the Senior Medical and Health Officer at Community Health Centre, Sohra and had examined the victim on 19.01.1994, stated, inter alia, that it was difficult to confirm in the case of married lady, who was mother of three children, if she had been raped except if the victim was produced immediately after the incident. The witness also stated that she had collected the vaginal swab and sent it for FSL. The deposition of this witness has been recorded in such an unintelligible manner that several sentences are not comprehensible at all. However, the material part of her testimony is taken note of, as far as possible, as under:-

*"….. it is very difficult to confirmed in case of a married lady mother of three child if is raped. It is very difficult in our medical science to confirm if a married lady is raped except if the victim is produced immediately for medical checked up after raped(*sic*). When the victim came for medical examination, I had to collect vaginal swab and sent it for FSL as the victim was produced for medical checked up after a long (*illegible*) of raped. After collection of vaginal swab and handed over the same to one S.I. GM Marak. Ext. 5 is my report and Ext.5/1 is my signature. Exhibit 4 is the copy forwarding letter and the original is in hospital."*

The witness stated in her cross-examination and further examinations as under:-

*"I have stated in examination-in-chief was raped on the basis of copy of Ext. 4 sent by SI GM Marak I/C OC Tyllap. In medical science it is possible for a doctor to come in conclusion actual happen or not (?*sic*)…..... required on the part of the Doctor before going to examine any person particularly which is examine in a private part of the person. Before examining (*victim*) on 19.1.94 did not obtain her consent whether she is willing to offer herself for medically checked as she has come along with the police.*

"Re- Examination.

I again confirmed in any rape case if victim does not come for medical examination immediatly after the rape it is not possible on the part of the medical authority to give any definite conclusion about the rape, it is only possible for medical science to say definitely about the rape if the victim comes for medical examination immediately after the rape.

"Re-cross examination:-

Immediately I mean to say that one or two hours of time in the same day. The above opinion is on the basis of medical science and on the basis of "Technical knowledge" (Under objection by the defence counsel)."

PW9 Shri H. War was the Officer-in-Charge of Cherrapunjee police station, who deposed that on 17.01.1994, he got the information from In-charge Tyllap Outpost about the rape case in the area and he visited Tyllap Outpost to enquire about the matter and came to know that one BSF personnel was caught by the village people upon committing rape on a widow. This witness further deposed that he met the victim lady and witnesses; and narrated the facts stated by them. This witness further stated that after the incident, the accused was brought to the police station but was taken away by the BSF personnel on gun point; and that a separate case was registered against the person who took the accused away with his cap and belt. This witness further stated that after registration of rape case, they approached the higher authority of BSF and thereafter, the accused was produced before the police station who was arrested and was forwarded to the Court. In the Trial Court's record, the deposition of this witness has also been scribed in an irresponsible manner. However, the relevant parts of his cross examination could be noticed as under:-

> *"I am in Police Deptt. since 1973. I am appointed as Sub-Inspector. I am posted as the O/C Cherrapunjee P.S. 12.11.1993. I went to Tyllap on 18.1.94 at about 9.30 alongwith SDPO to supervise the case. Only the O/C of P.S. concerned case register the case. On 18.1.94 in the morning I have seen the FIR. I made G.D. entry before registering the case. I have ascertain the FIR before registering the case. The I/C G Marak has written the FIR on the version of the complainant. I have ascertain before registering the FIR that the actual version of the complainant has been translated by the I/C of the O.P. Whatever I have stated in examination chief such as village elder came to the spot, door was closed etc. on the statement of the complainant and the witnesses. I personally examine the witness as well as victim also at P.O. I am not acquainted with Bengalee language or Manipuri language. I have examined the complainant in Hindi language, some witnesses know Khasi language especially headman. It is not a fact that the complainant and the witnesses except the Headman do not know any language other than Bengalee and Manipuri language. It is not a fact that I do not examine to complainant and witnesses. I do not know by name to whom I have made a request to the BSF authority but to the Commandant 193 BN Head quarter, Shillong. It is a written request. I have not produced any paper or letter to testify the fact that I have made a personal request to the commandant of BSF to produce the accused wanted in connection Sohra P.S. No. 21(1)94. I cannot say the numbers and section of the case has been registered against the havildar on which date. It is not a fact that I falsely deposed before the court and all are tutored. (*sic*)"*

PW10 Shri T Dkhar had been the Additional District Magistrate at Sohra at the relevant point of time and who had examined the victim in the first instance; and testified to the statement of the victim recorded by him, marked as Exhibit-3, while pointing out that though the victim was asked in Hindi language but, she fully understood the questions and replied accordingly. This witness also deposed that the material exhibits were forwarded by him to the Director FSL, Shillong.

PW11 Smti. D. Lyngdoh, had been the Scientific officer (Biology) Forensic Science Laboratory, Shillong, who testified to the report Exhibit-11, the contents whereof have already been noticed hereinbefore.

PW12 Shri Horindro Biswas, had been the person in whose presence the clothes of victim were seized by the police on 18.01.1994 and he testified to the seizure list Exhibit-9 bearing his thumb impression.

PW13 Shri B. Talang, was the In-charge of Tyllap Outpost at the later stage in the year 1996, when the case was endorsed to him. This witness deposed that after going through the Case Diary, he found that the investigation was almost complete except sending of material articles for FSL and accordingly, he sent the same for FSL report on 10.05.1996 with the permission of the Court after proper packing and specimen seal. This witness further deposed that he received the report of FSL on 12.07.1996 and after finding prima face case against the accused, filed the charge sheet Exhibit-13. This witness, of course, deposed in his cross examination that before filing the charge sheet, he did not examine any witness in connection with this case.

PW14 Shri Gilbert M. Marak, had been the principal Investigating Officer of this case, who deposed on all the relevant particulars of the matter, including the steps taken by him when the incident came to be reported; the taking away of the accused by the BSF personnel; and the process of

investigation carried out by him. This witness stated in the examination-in-chief as under:-

> *"I am the I/O in the Sohra P.S. No.2(1)94 [GR 128(A) 97]. On 17/1/94 about at around 6:00 PM the H/man Sri Nelson Marak headman of Tyllap & one Sri Nogen Das reported at Tyllap OP that one woman at Kpllaghat has been raped by the BSF personnel. Immediately after that I along with my staff & H/man & Nogen Das visited the place of occurrence. After visiting the PO I find that the accused has been kept tied with the rope inside the house of the victim & I saw also the victim…. was crying & there was a gathering of the people. It was also noticed by me that the accused though wearing his uniform but without cap & belt & after that I brought both the accused & victim to the Police Station for interrogation & after that victim gave oral complaint which was reduced in writing. At about 9:30 PM when I was doing my investigation our Outpost was gheraoed by the BSF personnel armed with weapons & twice one of the BSF personnel his name is S. Boumik pointed his gun on my chest & forcibly taken the accused & his belt & cap which were later produced by the villagers were taken forcibly by the BSF personnel. They were about 10 (ten) of them. Seeing this, villagers & victim who were present in the Outpost got frightened & ran away. After that I informed the matter to higher authority by W.T. Message but the same could not be sent that very night & it was very late & so it was sent in the morning. Next day the SDPO & O/C Sohra PS came. Ext-1 is the FIR which was lodged by the complainant on 17/1/94 & Ext-1(2) & 1(3) is the signature of the victim. Ext-2 is the copy of the FIR & Ext-2(1) is the signature of the victim. Next day i.e. 18/1/94 SDPO Sohra, OC Sohra & myself visited the PO again and after visiting the PO the SDPO verbally examined the witnesses and other villagers. On 18/1/94 I seized the clothes from the victim which she was wearing at the time of incident. That consists of (1) one green colour Magla (2) one saree piece chadar and (3) one torn blouse torned in both sides of shoulders. I prepare the seizure list (*illegible*) in presence of seizure witnesses. Ext-9 is the said seizure list & Ext-9(1) is the signature of victim & 9(2) is my signature & 9(3) is the signature of witness. After completion of investigation at the PO, I brought the victim to the Police station & tried to get her medically checked up but could not do so as the doctor was not available. As such, I sent the victim on 19/1/94 morning for medical checkup. Ext-5 is the medical report & Ext-5(1) is the signature of the Medical Officer & after that, I sent the victim to the SDM Sohra for recording the statement. Ext-3 is the statement of the victim & Ext-3(1) is the signature of the victim & Ext-3(3) 3(4) & 3(5) is the signature of the Magistrate.*
>
> *Today I identified the material exhibits i.e. one green colour Magla, one saree piece chadar, & one torn blouse torned in both sides of shoulder which I have seized on 18/1/94 & these are packed under a box & marked as Material Ext-1.*
>
> *I could not send the accused for medical or for confessional statement as the accused has been snatched away by the BSF personnel under threat and I have lodged a complaint through I/C Sohra to register a case against such illegal snatch of the accused by the BSF personnel.*
>
> *After one or two months of the incident, accused has been produced before me by the BSF personnel & after producing the accused in the Court & completing almost all investigation except before sending the material Ext. to FSL & before filing c/sheet, I have been transferred and the matter has been taken up by my successor.*
>
> *As far as my investigation & statement of the witnesses & victim I find that it is a pure case of rape.*

This witness PW14 being the principal investigating officer who had carried out the larger part of investigation before transfer was thoroughly

cross-examined on the question relating to the language spoken and understood by the victim and about alleged incident at his Outpost were the BSF personnel allegedly took away the accused. The witness also suggested that he had falsely deposed before the Court in order to have the BSF personnel tried. The witness explained all the circumstances and the facts in his cross-examination that reads as under:-

> *"I am in Police Deptt. since 1986. I joined in the capacity of sub-inspector & posted at Shillong PS. I am transferred at Tyllap OP in 1991 in the month of March/April as the I/C & I am continuing to hold the same post up to the month of August (*illegible*). From my Outpost to the alleged PO is nearly ½ KM distance. On 17/1/94 at 6:00 PM myself and two other Constables namely PP Singh & K Talukdar visited the PO. At 6:35 PM on 17/1/94 I left the PO and took the alleged victim, alleged accused & about 5 or 6 villagers to the Police Outpost. At about 8:00 PM on 17/1/94 oral complaint was lodged to me by the alleged victim & I have reduced into writing in English. I know other than English & Hindi, Bengalee, Assamese. I cannot say the Bengalee version of the word rape but I have written in the FIR the word rape. I have asked the alleged victim in Hindi & Bengalee through constables. She has given her statement in Hindi & Bengalee.*
> *It is not a fact that the alleged victim does not know any other language other than Bengalee. I feel frightened when the BSF personnel gheraoed my O/post & one of the Havildar put gun twice on my chest. Immediately after the BSF personnel gheraoed my O/post & one of the personnel put gun on my chest atop trying to kill me, I feel very scared & want to punish the BSF personnel according to law.*
>
> *On 18/1/94 I filed the FIR against the BSF personnel to the O/C Sohra stating regarding snatching away the accused & pointing gun at Thana & prayed for registering a case against the BSF personnel. OC registered a case U/s 147, 148, 149, 225, 506 IPC. I do not know whether O/C Sohra has made any arrest/taken any action against my complaint. I have sent W.T. Message to SP to tie up with BSF authorities for handing over the accused to me and the BSF authority have handed over the accused to me at Sohra on 21/7/94. I forwarded to the SDM Sohra Court and prayed the Court to forward the accused in judicial custody but I have not prayed to allow me for police custody. I have not prayed the Hon'ble Court to record the C/S U/s 164 CrPC. I have not prayed the Court to medically checked up the alleged accused (*sic*). I have prayed the Court to record the statement of the alleged victim U/S 164 CrPC & the Court accordingly examined. I cannot say the ingredient in Sec 164 CrPC but I have to look to the law book. I agree with the D/L that Sec 164 CrPC is to record the C/S of the alleged accused & not recording the statement of the alleged victim & I agree that I have committed a mistake praying the Court to record the statement of the alleged victim U/S 164 CrPC.*
>
> *I have examined seven persons as witnesses. I alone examined all the 7 (seven) witnesses & I examined them in Hindi & Bengalee like this & Garo also for one person. I can understand nicely but I cannot speak nicely Bengalee.*
>
> *It is not a fact that I do not understand Bengalee language properly.*
>
> *It is not a fact that I am in collusion with the SP and the villagers by not investigating the case properly. The C/S was filed.*
>
> *It is not a fact that I falsely deposed before the Court and want to harass the BSF personnel.*
>
> *As per the statement of the victim I have stated in-chief that the Material Ext.1 were wearing by the alleged victim at the time of incident (*sic*).*

Seizure list marked as Ext-9 was prepared at the Tyllap Police O/post.

It is not a fact that I have not strictly followed the law & properly investigated the case."

In re-examination, this witness PW14 identified the accused present in the dock; and in re-cross, it was suggested that the person standing in the dock was not the same person whom he had taken to the police Outpost on 17.01.1994.

In documentary evidence, the prosecution exhibited 13 documents. Exhibit-1 is the FIR lodged by the complainant; and Exhibit-2 is the copy of the said FIR. Exhibit-3 is said to be the statement made by the victim before the Sub-Divisional Officer, Sohra. Exhibit-4 is the communication forwarding the victim for medical examination on 18.01.1994. Exhibit -5 is the medical examination report of the victim. Under Exhibit-6 dated 10.05.1996, the articles were sent for FSL report; Exhibit-7 is the brief of the case sent along with the said letter and Exhibit-8 is the authorization extended by the ADM for carrying the articles in question for FSL examination. Exhibit-9 is said to be the list prepared by the Investigating Officer on seizure of the clothes of the victim. Under the letter dated 04.07.1996 (Exhibit-10), the Additional Deputy Commissioner In-charge Sohra Civil Sub-Division forwarded the FSL report to the I/O. Exhibit-11 is the FSL report dated 27.05.1996, the contents whereof have already been noticed hereinbefore. Exhibit-12 is the receipt of FSL and Exhibit-13 is the charge sheet.

PROCEEDINGS AFTER PROSECUTION EVIDENCE; AND THE DEFENCE EVIDENCE AFTER REMAND

Perusal of the record makes out that the I/O was examined as the last prosecution witness on 05.09.1999 and thereafter, the accused-appellant was examined under Section 313 CrPC on 07.06.1999 where he specifically denied the suggestions of all the witnesses. In regard to the question that he was taken away from the Outpost by armed BSF personnel and the police

moved the matter to the BSF higher authorities, the accused denied the allegation that he was snatched away by the armed BSF personnel but thereafter, admitted that when the police moved the matter to the BSF higher authorities, he appeared before the Thana on the instructions of his Commandant. The significant aspect of the matter had been that on 07.06.1999, the accused-appellant specifically stated that he had no defence witnesses, as distinctly recorded in the left hand space column on first two pages of his statement. This very statement of the accused that he was not having any defence witness was also distinctly recorded in the order sheet dated 07.06.1999 that records, inter alia, that,-

> *"……. the accused stated in the open Court that he does not have any defence witness to adduce in presence of the defence counsel and the prosecution. DW closed accordingly."*

Such an unequivocal assertion of the accused-appellant obviously escaped the attention of the Trial Court when it chose to pass a wholly illegal order of suspending the order of conviction and posting the matter for defence evidence. This apart, the aforesaid aspect appears to have escaped the attention even of the learned Single Judge of the then jurisdictional High Court when the matter was remanded for the alleged non-compliance of Section 233 CrPC. When the accused himself had stated in clear terms that he had no defence witness to produce, the Trial Court could not have been faulted in posting the matter for arguments. However, as noticed, though the earlier defence witnesses, as examined by the Trial Court after suspending the judgment for conviction, were discarded in view of the order passed by the jurisdictional High Court on 08.03.2006 but then, the defence witnesses were, of course, examined pursuant to the remand order dated 02.06.2008. A summation of the testimony of these defence witnesses is necessary for a just and effective determination of this case.

Interestingly, the said Shri G.M. Marak, who had been the Investigating Officer and had already deposed in the Court as PW14 and had been thoroughly cross-examined, was called as the first witness in defence and was examined as such on 03.10.2008. He, now deposing as DW1, reiterated the fact that the information of incident was received through Headman Nelson Marak and one Nogen Das and thereafter, he visited the place of occurrence. There are a few relevant aspects in this testimony which have formed the subject of long drawn arguments in this case particularly those relating to the door of the room in question, the bunch of keys allegedly recovered, and WT Message sent by him. As regards the place of occurrence and the bunch of keys, the witness stated as under:-

> *"….. When I visited the place of occurrence, I found the door was intact & not broken. So far I remember, I have seized only a bunch of keys from the place of occurrence. The accd. told me that the keys belong to him, which I did not record. It is a fact that I have not recorded the statement that the accd. has said that the keys belong to him. It is a fact that, I have not seized any other things other than the keys from the place of occurrence. It is correct that as per the seizure list (exb.9) the bunch of keys was seized by me on 18/1/94 & not on 17/1/94. It is also a fact that the said bunch of keys was produced by the victim & not seized from the possession of the accd. ....."*

As regards the GD Entry and WT Message, the witness stated as under:-

> *"….. It is correct that I have received a report of this case on 17/1/94, and the said report was recorded by me & registered vide GD entry No.239 dtd 17/1/94. The said GD entry was never produced before this Court as it was never asked to be produced. The WT Message was forwarded dtd 17/1/94 (shown to the witness today) is prepared by me with my own hand. It is also a fact that the said WT Message was forwarded by me to the SDPO, Sohra/OC Sohra PS. It is also a fact that the said WT Message was prepared by me on 17/1/94 after receiving a verbal complaint from the complainant/victim. It is correct that I specifically stated in the said WT Message that one BSF Personnel wanted/attempted to rape the victim. Exb.A is the said WT Message dtd 17/1/94 and Exb A/1 is my sign on Exb A. It is correct that after having received complaint from the victim my Out Post was attacked by the BSF alongwith its Post Commandant & they have forcibly taken the accd by threatening us. The said GD entry may be available with the I/C of the Tyllap O.P. ….."*

The examination of this witness was continued on 24.10.2008, when he stated as under:-

"I have not taken the statement of the children of the victim as they were small say about 2½/3 years (at that time). I cannot say whether the age of the son of the victim was 08 yrs old at that time of the incident. It is a fact that the youngest son of the victim was physically present in the house where the occurrence took place, on the day of the incident. I did not make any attempt to examine the son during the course of my investigation. I never seized any rope from the place of occurrence as I never found the same. I have not found any injury marks on the person of the victim when I first saw her after the incident. I have also not found any injury on the person of the accd. when I just saw him on the day of incident. It is correct to say that I have recorded the statement of the accd. during the course of investigation. Exb.D is the statement of the accd. recorded by me and D/1 is my signature. It is correct to say that as per the statement recorded by me, as given by the accd, he stated that on the day of incident he was deputed by his superior official to enquire into the quarrel among the youths at the place of occurrence and pursuant to which the accd. had visited the place of occurrence, but, however 'gheraod' by the villagers and put inside the house of the victim & later, tied with a rope. However, the police from Tyllep Outpost arrived & put the accd. in the Thana, alongwith Rajendra Prasad & public of Koilaghat. It is also correct to say that on the day of incident I have brought the accd. and his colleague Shri Rajendra Prasad to the Tyllep Outpost. I have not made any attempt to verify the statement of the accd. was true/false recorded by me from his superior officials. It is the village where the incident took place does not have any electricity…."

In his cross-examination in relation to the above statement, this witness stated as under:-

"It is a fact that the day of occurrence was in the month of January & at 6.00 PM it was already dark. The victim used latern as there was no electricity. I could not see properly inside the room. It is a fact that the victim is a very poor person. She did not have any trunk/almirah in the room. It is correct to say that the bunch of key handed over to me by the victim is of no use to her. The bunch of keys had a number of big & small keys. Before sending the WT Message I could not clear the whole fact from the victim as there was lot of hue & cry from the outside.

It is correct to say that as soon as the BSF people came to the Outpost, they gheraod the Outpost. Our Havaldar of BSF pointed a gun at my chest.

I personally did not check the physic of victim & the accd. whether they sustained any injuries or not.

On 18th/01/94 the victim was out for medical. But, we could not sent the accd. person for medical as he was snatched away by the BSF personnels.

Not all the BSF personnels were kept tied by a rope inside the house of the victim except the accd., because only this accd. person went inside the house of the victim as such the villagers tied him by rope & kept him in the house of the victim. Though that he (accd.) has stated in his statement that he has been beaten by the villagers, I did not find any such mark.

It is a fact that this accd. person is involved in this case & Rajendra Prasad has got nothing to do with this case. The condition of the victim when she was present in the outpost was very shy and she did not talk much to me."

One Shri Madan Ram was examined as DW2 who deposed on the fact that he was Head Constable in 193 Bn BSF on 17.01.1994 at BOP Balat Outpost bordering Bangladesh and the accused was a Constable in his

section. This witness stated that the appellant and one Rajendra Prasad were on duty from 12.00 to 6.00 PM at BOP Tyllap; that at about 4.30-4.35 PM, he proceeded with other two constables to relieve him and near the village, they saw about seven or eight persons trying to load a boat while carrying baskets on their head. According to the witness, reaching closer, they heard the voice of the appellant shouting for help and then, they saw that the appellant was beaten up by a crowd. The witness stated that the said constables informed that when they were following a few infiltrators, civil population caught hold of the appellant. The witness further stated that after 15 minutes, civil police arrived and took the appellant away but he could not accompany the appellant since his duty was starting in 6.30 PM. The witness further stated that on 17.01.1994, he did not come across any incident of rape alleged to have been committed by the appellant. In his cross-examination the witness admitted that generally they never enter anybody's house unless accompanied by officers and by a representative of civil police. He also stated that upon reaching the camp next day, he saw the appellant but did not make any enquiry because he was concerned with his own duties. The witness further stated that Rajendra Prasad was not beaten because he was in the OP Tower. The witness denied any knowledge that the appellant was charged with the rape case.

The appellant produced another witness from his department DW3 Tarun Dutta, who retired as a constable. This witness asserted that when he had gone on 17.01.1994 from the Naka party to relieve the appellant and the said Rajendra Prasad at around 4.30 PM with the Head Constable Madan Ram (DW2), they heard the cries of the appellant and on reaching the spot, they saw some people crossing the border through river. He made the statement more or less in corroboration of what was stated by DW2 Madan Ram about the escape of the infiltrators. This witness also stated that he

never came across any rape allegation against the accused-appellant. The witness stated that on reaching the spot, he saw 8-10 persons quarreling and assaulting the appellant but he did not see the appellant being tied by the group.

As the last defence witness, the son of the prosecutrix was examined as DW4. He was not cross-examined by the prosecutor but his entire statement, being also material and relevant in relation to the arguments advanced, could be taken note of as under:-

> *"I have received the summon to appear before this Court in connection with this case. I know all the residents of my village that is Koilaghat by their names & faces as it is a very small village. Anil Sinha is my uncle & is residing in his own house, but at times he used to stay in our house. My mother is still leaving the life of a widow after the death of my father. I don't know Smti. Maya Rani Beswa & Pushpa Rani Beswa. I know Shri (L) Nelson Marak who was the headman of our locality. I don't know Shri Sudha Das. I also know Shri Nogendro Das who is the resident of our locality. The houses in our locality are located in close circuit. The house were we resided earlier was located in close quarters with some other houses and any form of noise could be heard by the other resident. I don't know anything about the incident that occurred on 17/01/94. The BSF personnels posted at Koilaghat also used to visit our locality time and again till date. The Bangladesh border is situated near our locality. I have never heard any incident of rape upon my mother (victim). I came alongwith my mother today."*

RIVAL SUBMISSIONS

Having taken note of all the relevant aspects of the proceedings of this case and the evidence adduced, appropriate it would be to notice the rival submissions made in this appeal.

Assailing the judgment and order dated 15.09.2010, learned counsel for the appellant has vehemently argued that the learned Trial Court has proceeded wholly illegal in shifting the entire burden of the case on the appellant and in convicting him with a cursory of rejection of the evidence of defence. Learned counsel submitted that the impugned judgment and orders are vitiated for the reason that the statements of prosecution witnesses have not been examined at all and without such examination, the conclusion of guilt could not have been recorded against the appellant. The learned

counsel further submitted that there had been fundamental inconsistencies in the prosecution case and such inconsistencies would only lead to the conclusion that the case against the appellant had been a concocted one.

The learned counsel submitted that the alleged seized clothes under the Seizure List Exhibit-9 do not tally with the statements of the prosecutrix as regards the clothes she was wearing at the time of the alleged incident and in any case, such seized clothes having been washed before seizure, could not have formed the basis of any finding against the appellant. Further, according to the learned counsel, though the presence of semen stains on the articles is allegedly reported in the FSL report, but then, the clothes were seized the next day after having been washed and the medical examination of the prosecutrix was carried out only on 19.01.1994 i.e., two days after the incident. Thus, the presence of seminal stains on the clothes or vaginal swab cannot be decisive in this matter. Moreover, according to the learned counsel, it is nowhere established on record that the seminal stains were referable to the appellant because neither his semen sample was taken nor was matched. Yet further, according to the learned counsel, the prosecution failed to examine the son of the prosecutrix, who was admittedly present in the room in question at the time of alleged incident; and the said son of the prosecutrix, on being examined in defence, specifically stated that he had never heard about any incident of rape of his mother. Learned counsel pointed out other alleged inconsistencies that though according to PW 6 Anil Sinha, he had broken the door of room but the Investigating Officer, when examined as DW 1 clearly pointed out that the door was not at all broken.

Apart from the aforesaid, the learned counsel has vehemently argued that the learned Trial Court has passed its judgment of conviction on the so called bunch of keys said to have been recovered but then, seizure of bunch of keys was not proved in evidence of prosecution nor any evidence was led

to prove that the alleged bunch of keys belonged to the appellant. Thus, according to the learned counsel, the findings against the appellant remained hollow and baseless.

Learned counsel for the appellant contended that there had been further inconsistencies in prosecution evidence where PW2 went on stating that she had seen all the clothes of the prosecutrix torn but such a fact is not occurring even in the statement of the prosecutrix. Learned counsel also submitted that even in the statement under Section 313 CrPC, the appellant was never put any question as regards the bunch of keys or as regards seminal stains and hence, such factors cannot operate against the appellant. Learned counsel would also argue that PW12, Shri Horindro Biswas, has not corroborated the prosecution case. Learned counsel further submitted that there had not been any associated injury or mark on the body of the prosecutrix or her private part and in the totality of circumstances, the charge of rape falls to the ground.

Learned counsel further submitted that there has been no evidence as regards house-trespass and the alleged articles namely, the belt or cap were ever produced in the evidence. Thus, according to the learned counsel, the prosecution has failed to substantiate its case and the appellant deserves to be acquitted.

The learned PP on the other hand, has referred to the entire evidence on record and has vehemently argued that the prosecution evidence, taken as a whole, clearly establish the guilt of appellant on both the charges of rape and house-trespass. According to the learned PP, there is no reason to disbelieve the unshaken testimony of the prosecutrix as duly corroborated by the ocular and documentary evidence; and in this view of the matter, minor discrepancies indicated by the counsel for the appellant are of no effect on the substance of the matter.

The impugned judgment dated 15.10.2010 is disapproved but the matter is to be finally decided in this appeal.

As noticed, in this matter, the impugned judgment dated 15.10.2010 is as laconic, rather superficial, as it could be where nothing has been discussed of the prosecution evidence, except a cursory reference to the FSL report; and only after rejecting the submissions made in defence, the learned Judge has recorded the conviction of the appellant. The learned counsel for the appellant, is obviously right in his first line of submissions that the learned Trial Court has acted wholly illegally in shifting the entire burden of the case on the appellant and in convicting him after a cursory rejection of the defence evidence. Ordinarily, after accepting these submissions, this Court would have considered the option of setting aside the impugned judgment and requiring a decision afresh by the Trial Court but, as indicated hereinbefore, such a course would not serve the cause of justice and would only lengthen the life of this old matter pertaining to the alleged incident of the year 1994 that has already gone through several rounds of reference, re-trial and remand. Therefore, in the given set of circumstances, as observed at the outset, the only appropriate course is to examine the evidence and to decide if the prosecution has been able to substantiate the charges or not.

THE POINT FOR DETERMINATION AND THE PRINCIPLES APPLICABLE

Obviously, the basic point for determination in this case is as to whether the prosecution has been able to substantiate the charges that on 17.01.1994 at about 5.30 pm., the appellant committed criminal trespass by entering into the house of the prosecutrix and committed rape on her?

For the purpose of determination of the questions involved in this case, a few of the essential principles of law need to be kept in view, particularly as regards appreciation of the testimony of prosecutrix/victim in such a case of

accusation of rape; and as regards appreciation of other evidence including the medical opinion.

The fundamental principles of law remain settled that the testimony of a victim in a case of sexual offence is taken as vital; and unless there are compelling reasons, corroboration as such is not a *sine qua non* for conviction in a rape case. In other words, in a given case, the sole testimony of the victim may be sufficient to establish the crime of rape even in the absence of corroborative evidence. In the case of ***State of H.P. v. Sanjay Kumar: (2017) 2 SCC 51***, the Hon'ble Supreme Court has reiterated the fundamentals of these principles in the following:

> *"31….By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance [See Bhupinder Sharma v. State of H.P.: (2003) 8 SCC 551: 2004 SCC (Cri) 31]"*

The requisites of approach of the Court in the case of present nature has also been laid down by the Supreme Court in several of its decisions. For the present purpose, suffice it would be to notice the following observations in the case of ***State of Punjab v. Gurmit Singh and Others: (1996) 2 SCC 384***:

> *"21…The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal*

nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

The equally important corollary propositions of the aforesaid are that the minor contradictions or insignificant discrepancies in the case of prosecution in such cases are immaterial; and marginal mistakes or minor inconsistencies cannot by themselves demolish the prosecution case.

As regards the medical evidence, it remains settled that in a case related with the crime of rape, the medical evidence, being that of an opinion, plays only a supporting role; and it is not the requirement of law that the case of prosecution would be accepted only when supported by the medical evidence. It is also settled that the medical evidence by itself is not decisive as regards the question of rape because such a question is to be decided only by the Court on the factual matrix of each case.

The judicial quest in the matter of the present nature is of looking for a proof beyond all reasonable doubt. In other words, the criminal charges are required to be brought home beyond any such doubt which may reasonably arise commensurate with the nature of the offence. The Hon'ble Supreme Court in the case of ***Inder Singh and Anr versus The State (Delhi Administration): (1978) 4 SCC 161*** pointed out that the principles of proof beyond reasonable doubt were only of a guideline, while observing as under:

"2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up?

Because the Court asks for manufacture to make truth look true? No, we must be realistic."

Further, in the case of ***Gurbachan Singh versus Satpal Singh and Others: (1990) 1 SCC 445,*** the Hon'ble Supreme Court explained as to what implies in the expression "reasonable doubt" in the following:

"4.....There is a higher standard of proof in criminal cases than in civil cases, but there is no absolute standard in either of the cases. See the observations of Lord Denning in Bater v. Bater but the doubt must be of a reasonable man. The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escapes than punish an innocent. Letting guilty escape is not doing justice, according to law.

5. The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated."

The present case may now be examined while keeping in view the principles aforesaid.

THE CHARGES ARE SUBSTANTIATED BEYOND REASONABLE DOUBT

In the present case, the entire prosecution evidence, on all the material aspects, has been noticed hereinbefore. The facts established in the prosecution evidence and the features emerging on record could be summarised as follows:

(1) The prosecutrix PW1 has categorically stated that at about 5.30 p.m. on 17.09.1994, the appellant forcibly entered her house (room), caught hold of her and pulled her down to the floor. The prosecutrix further clearly narrated the acts and deeds of the appellant, giving out the necessary ingredients of the offence of rape, while stating in no uncertain terms that, *"he tried to penetrate his private part to my private part but I was trying my best to refuse the same. His private part entered to my private part."*

(2) The prosecutrix was examined by the doctor on 19.01.1994. The doctor PW8 merely stated that it was difficult to confirm in case of a married lady,

who is a mother of three children, if she had been raped. According to the medical report Exhibit-5, the victim was wearing a torn blouse but no associated injury or mark was found on the blouse or on her private part and no smegma or semen stains were found.

(3) The FIR in question was scribed by the in-charge of the Tyllap Outpost on 17.01.1994 at 8.00 p.m. as per the oral narration of the victim. The victim was examined by the SDO of Sohra on 18.01.1994 where she stated that a person came to her house (room) forcibly at 5.30 p.m., locked all the doors, and forced her to lie down and raped her.

(4) PW2 Smti. Pushpa Rani allegedly reached the room of the victim, after having heard the hue and cry, with her daughter and the brother of the victim and they forced the door of the room open and saw the accused and the victim on the floor with clothes of the victim torn. PW3 Smti. Maya Rani had been the other person, who allegedly reached the spot after having heard the noise from the house of the prosecutrix where she saw one BSF man having got hold of the prosecutrix and she was trying her best for rescue. She stated to have seen the incident while peeping through the door. PW4 Shri Sudha Das also claimed that he reached the spot after having heard the hue and cry of the victim and found the accused lying on the top of the victim. PW6 Shri Anil Sinha, brother of the victim stated that he was out playing with his niece and nephew, who are the daughters and sons of the victim when he heard the hue and cry and came running to the spot and then, broke the door open; and saw the accused on the top of victim with clothes of the victim opened. According to this witness, the accused was, thereafter, tied with rope. He also stated that all the clothes of the victim were torn.

(5) PW11 Smti. D. Lyngdoh, who had been the Scientific Officer (Biology) FSL, Shillong, testified to the report Exhibit-11. The contents of this report have already been noticed hereinbefore. By this report, the prosecution

attempted to prove that the clothes of the victim as also the vaginal swabs carried seminal stains.

In an overall analysis, this Court is clearly of the view that the prosecution case is established beyond reasonable doubt; and the minor discrepancies or inconsistencies in the testimony of the witnesses are hardly of any material bearing on the case.

As noticed, the prosecutrix in her statement clearly established the basic ingredients of the offences of rape as also house-trespass by the appellant and nothing has appeared on record to discredit or disbelieve her testimony. The incident in question took place at around 5.30 p.m. and the FIR in question was lodged at around 8.00 p.m. at the Tyllap Outpost of Cherrapunjee Police Station. The prosecutrix was indeed examined the next day by the SDO concerned, and she maintained that she was raped on 17.01.1994 at 5.30 p.m (Exhibit-3). The other witnesses, who allegedly reached the place of occurrence after having heard the cries of the prosecutrix, are more or less consistent in their assertion that after reaching the place, they found the door closed and after forcing the door open or while peeping through it, they found that the accused was on the top of victim and both were lying on the floor.

Thus, all the fundamental facts stand established in the primary prosecution evidence. The alleged inconsistencies in the testimony of some of the witnesses are not of any material infirmity as noticed hereafter.

One of the material inconsistencies suggested in this case is that in the first WT Message, made on the basis of the information of the alleged victim, only this much was alleged that there had been a case of attempt to rape. This WT Message was produced in the defence evidence as Exhibit-A. It is noticed that this WT Message was sent at about 11 p.m. on 17.01.1994. Before this time, the events had already taken place, as specified by the

Investigating Officer that report of the incident was made; and the accused-appellant was detained at Tyllap Police Outpost but was forcibly taken over by the BSF personnel. The said WT Message had been essentially to inform the authorities concerned about the happening at the Outpost and any mention therein about the nature of accusation i.e., whether it were a case of completed rape or an attempted rape could hardly falsify the assertions of the prosecutrix as made in the FIR, in her first statement before the SDO, and then in her specific unshaken testimony in the Court. The said WT Message does not take away the substance of the matter established in the prosecution evidence.

It is next submitted that though as per the witnesses, all the clothes of the victim were torn but such torn clothes were not sent to FSL. This Court is clearly of the view that this part of testimony of the witnesses like PW2 and PW6 need to be visualized in the context of the scenario alleged. The statements as regards the clothes of the victim being torn to pieces cannot be taken to mean as if each and every part of the clothing of the victim was slit, split and ripped. It has surfaced on record that the blouse of the victim was indeed found torn on shoulders and the same was seized by the I.O. on 18.01.1994.

Another inconsistency, according to the learned counsel for the appellant, is that though some of the prosecution witnesses alleged to have broken the door of room but the Investigating Officer, when examined as DW 1, clearly pointed out that the door was not broken. In this regard, again, the fact regarding breaking of the door is required to be visualized in the context of the incident as alleged. In the given set of facts and circumstances, the statements of the witnesses about breaking the door could only be taken to mean that on reaching the spot, they forced their entry into the room. The

statements regarding breaking of the door do not necessarily mean damaging the door altogether.

It is, of course, true that as regards the son of the victim, there had been an inconsistency in the matter where the prosecutrix stated that her younger son was at home and her two daughters and brother had gone out to the playground whereas her brother PW6 stated that he had gone to the playground with the niece and nephew. Moreover, the son of the prosecutrix was not examined by the I.O. nor was produced in evidence. The son of the prosecutrix on the other hand was examined as a defence witness (DW4) and stated that he had never heard about any incident of rape of his mother. However, a close look at the matter makes it clear that this factor relating to the son of the prosecutrix does not in any manner falsify the case of the prosecution. It is noticed that the son of the prosecutrix, when examined as DW4 on 30.10.2009, give out his age at 17 years; and as per the evidence on record, he was about 2½ years of age at the time of incident in the year 1994. Thus, as regards the incident in question, the testimony of this witness (DW4), son of the prosecutrix, is of no relevance at all nor the Investigating Officer could be faulted in having not examined a child of about 2½ years of age for the purpose of the investigation at the relevant point of time. In fact, this witness (DW4) has clearly stated that he did not know anything about the incident that occurred on 17.01.1994. Whether this witness, then only about 2½ years of age, was present inside the room or was playing nearby with his uncle is also hardly of any bearing on the material facts established in the testimony of the prosecutrix.

True it is that the prosecutrix in her first version in the FIR stated the name of Shri Horendro Biswas also as the person who reached the spot but the said Shri Horendro Biswas, when examined as PW12, did not state that he too reached the spot. However, this factor is also too remote and cannot

operate against the unshaken testimony of the prosecutrix and other prosecution witnesses.

This Court is clearly of the view that for the alleged inconsistencies, the prosecution case is neither falsified nor even a reasonable doubt is created; rather such minor inconsistencies in the testimony of the prosecution witnesses appear to be very natural, in the given background of the prosecutrix and the other witnesses, who appear to be more or less illiterate persons, essentially working as farmers/agricultural labourers.

A great deal of argument has been advanced on the point that the story about recovery of bunch of keys belonging to the appellant from the place of occurrence is an entirely fanciful and concocted story and in fact, neither any bunch of keys was recovered nor produced in evidence. This, according to the learned counsel for the appellant, clearly shows that the entire prosecution case is a concocted one. However, this argument also does not carry any weight on the material aspects of this case. An overall comprehension of the record makes out that according to the witnesses, a bunch of keys, allegedly belonging to the appellant, was handed over by the prosecutrix to the Investigating Officer. While scanning through the record, it is also noticed that apart from the List Exhibit 9, whereby the Investigating Officer seized the clothes of the victim, another seizure list was allegedly prepared on 18.01.1994 by the Investigating Officer, for seizure of a bunch of four keys with VIP cover, said to have been produced by the victim at her house, as being allegedly left by the culprit. However, neither this seizure list was exhibited in evidence nor the said article (bunch of keys) was ever produced. The Investigating Officer, in his initial deposition as PW14 did not state anything about this bunch of keys but, in his deposition as DW1, stated that he had seized only a bunch of keys from the place of occurrence. The inconsistency on the record is further confounded with the fact that in this

statement of DW1, the Seizure List Exhibit-9 is referred as being related to the bunch of keys. It appears that there had been a mix-up while recording the statement because the List Exhibit-9 had only been of the clothes, as already noticed above.

However, this Court is clearly of the view that the mix-up or inconsistency on the aforesaid aspects relating to bunch of keys, even if attributable to the Investigating Officer, cannot in any manner falsify the specific case established by the prosecutrix in her testimony. Even otherwise, as noticed, it has been clearly established in evidence that after the incident in question, though the Investigating Officer had taken the accused-appellant to the Police Outpost, he was forcibly taken away by the BSF personnel and in fact, surrendered as late as in the month of July 1994. The appellant himself admitted the fact in his examination under Section 313 CrPC that he appeared before the civil police only later and on the instruction of his Commandant. Obviously, when the accused was not even available for interrogation for a long time, several aspects of a proper investigation in the matter had gone missing. Viewed in this context, the mix-up or inconsistency about this bunch of keys does not result in such a doubt on the prosecution case that the version of the prosecutrix be rejected altogether.

It is also submitted that the conviction of the appellant cannot be based on the FSL report suggesting seminal stains on the examined articles because semen sample of the accused-appellant was never taken and was never matched. As noticed, the appellant-accused could not be detained by the police for investigation and admittedly, he appeared before the civil police only later and on the instruction of his Commandant. In any case, it remains a fact that the investigation did not take care to get the necessary report on

the matching of semen but, again, this factor by itself does not take away the weight of the testimony of the prosecutrix and other witnesses.

Thus, in an overall view of the matter, the prosecution evidence does not appear suffering from material contradictions or inconsistencies; rather, on all the material aspects, the prosecution evidence unfailingly establish that the accused-appellant had committed the offences of criminal trespass into the house of the prosecutrix and of rape.

True it is that while deciding this case on the accusation of rape against the appellant, any weakness of the defence case would not by itself lead to the finding of guilt but, while taking an overall view of the evidence on record, the defence version cannot be ignored altogether. As noticed, on behalf of the accused-appellant, two-fold suggestions were put forward in defence. One line of suggestion had been that the prosecutrix was harbouring the criminals of a foreign nation and her house was under watch; and that on the date of incident, the BSF personnel came to her house in search of such criminals who were carrying arms and had taken shelter in her house. This very line of suggestion has been expanded in the testimony of the defence witnesses; and particularly with reference to the testimony of DW2 and DW3, it is sought to be suggested that the appellant was one of the BSF personnel chasing the infiltrators and in the process, he was caught and thrashed by the villagers. Squarely cutting across this line of suggestion that the appellant was dutifully manning the borders and was chasing the infiltrators, another line of suggestion in the cross-examination of the prosecutrix as also her witnesses had been that the prosecutrix was in love with the accused; that she wanted to marry him; and that it had been a matter of consensual sex for which, rather, she provoked the accused.

The first line of suggestion about the appellant attending on his duties and about the prosecutrix sheltering the criminal appears to be too weak and

uncertain. No record has been produced to show if the prosecutrix was anywhere recorded as a person harbouring the criminals. Moreover, if at all the appellant was chasing the infiltrators, there could not have been any question of him being found in the house of the prosecutrix and in the position as already noticed. Yet further, if the prosecutrix was suspected to be a lady harbouring the criminals of foreign origin while living at the border area, a BSF jawan like the accused-appellant would have been the last person to respond to the alleged lustful desires of the lady or to offer any monetary contribution to her. Although, as already observed, the weakness of defence case by itself is not decisive of the matter but the stark incompatible suggestions made in the cross-examination of the prosecutrix and her witnesses only give out the deduction that in order to falsify the prosecution case, the attempt on the part of the accused-appellant had been of levelling baseless allegations against the character of the prosecutrix as also of imputing motives on her and even branding her as the person harbouring the criminals. The entire story as suggested in the lengthy cross-examination of the prosecution witnesses and by way of the defence witnesses is required to be rejected.

In a summation of what has been discussed hereinabove, this Court is clearly of the view that the testimony of the prosecutrix establishes the basic ingredients of the offences alleged against the appellant and is duly corroborated on the material particulars by the other prosecution witnesses. Coupled with this remains the fact that the incompatible defence suggestions are not worthy of any credence.

CONCLUSION

The upshot of the discussion foregoing is that the accused-appellant deserves to be convicted for the offences under Sections 376 and 448 IPC. Thus, even when the impugned judgment and order of the Trial Court dated

15.09.2010 has not been proper so far as the requirement of discussion of the prosecution evidence is concerned, the conclusion as reached therein calls for no interference.

Accordingly and in view of the above, this appeal stands dismissed.

As noticed, the accused appellant has already served out the sentence awarded. No further orders as regards his appearance are requisite.

The record be returned to the Trial Court with a copy of this judgment.

CHIEF JUSTICE