

GAHC010097372020



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

Case No. : CRL.A(J)/52/2020

BUDHIRAM MARDI
UDALGURI, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. B PRASAD, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT

Date : 11-03-2024

[Manish Choudhury, J.]

The instant appeal from jail is directed against a Judgment and Order dated 21.11.2019 passed by the learned Additional Sessions Judge, Udalguri in Sessions Case no. 22[DU]/2014. By the said Judgment and Order dated 21.11.2019, the accused-appellant has been convicted for the offences under Sections 302/448/143, Indian Penal Code [IPC]. For the offence under

Section 302, IPC, the accused-appellant has been sentenced to undergo life imprisonment and to pay a fine of Rs. 10,000/-, in default of payment of fine, to undergo rigorous imprisonment for further 6 [six] months. For the offence under Section 448, IPC, the accused-appellant has been sentenced to undergo rigorous imprisonment for 1 [one] year and for the offence under Section 143, IPC, the accused-appellant has been sentenced to undergo rigorous imprisonment for 6 [six] months. As per the impugned Judgment and Order dated 21.11.2019, all the sentences are to run concurrently.

2. The case of the prosecution, in brief, as has emerged from the First Information Report [FIR] [Ext.5] lodged by the informant-P.W.6 on 07.04.2010 before the Officer In-Charge, Udalguri Police Station, was that five accused persons viz. [1] Sri Buddhi Mardi [the accused-appellant]; [2] Sri Deban Mardi; [3] Sri Lakhiram Soren; [4] Sri Rajkumar; and [5] Sri Prakash, all residents of Village – Jangal Bari, Police Station – Udalguri, came to the house of the informant-P.W.6 [Smti. Sapan Hasda, daughter of Sri Mangal Hasda] at about 12 O'clock mid-night in the night intervening 06.04.2010 and 07.04.2010. It was alleged that the accused persons gagged her mouth and also the mouth of the informant-P.W.6's elder sister, Renuka Hasda and took both of them away towards Golandi River. In the FIR, it was stated that Renuka Hasda had a love-affair with one Sri Niran Daimari of Kanpur, who used to visit the house of Renuka Hasda often. The informant-P.W.6 had further alleged that some youths from their village used to prevent Sri Daimari from visiting Renuka Hasda as Sri Daimari belonged to another community. The informant-P.W.6 had further stated that on 06.04.2010 when the youth from the village found Sri Daimari inside their house, they sent him away and committed the incident. The informant-P.W.6 had further alleged that the accused persons took her away as well as her elder sister and thereafter, got separated into two groups. Two of the accused persons took the informant-P.W.6 away and the remaining three accused persons took the elder sister of the informant-P.W.6, Renuka Hasda to another direction. It had also been alleged that the two accused persons, who took the informant-P.W.6 away, had also committed rape upon her and other three accused persons who took her elder sister away, murdered her [Renuka Hasda].

3. On receipt of the said FIR [Ext.-5], the Officer In-charge, Udalguri Police Station

registered the same as Udalguri Police Station Case no. 70/2010 [corresponding to G.R. Case no. 106/2010] on 07.04.2010 for the offences under Sections 143/448/376/302, IPC. The Investigating Officer [I.O.] of the case upon completion of the investigation, submitted a charge sheet under Section 173[2], Code of Criminal Procedure [CrPC], 1973 being Charge-Sheet no. 77/2012 on 30.09.2012 [Ext.6] finding a *prima facie* case under Sections 143/448/376/302, IPC established against three out of the five accused persons named in the FIR. In the Charge-Sheet, two out of the three charge-sheeted accused persons viz. [1] Lakhiram Soren; and [2] Budhiram Mardi @ Dhesa, that is, the accused-appellant, were shown as absconders and the only accused person, who was sent up for trial was Deban Mardi @ Madan Mardi. After submission of the Charge-Sheet, apart from the sent-up accused person Sri Deban Mardi @ Madan Mardi, the accused-appellant also made appearance. Upon appearance of the said two charge-sheeted accused persons, the learned Judicial Magistrate, 1st Class, Udalguri as the committal Magistrate furnished copies to them in compliance of the provisions of Section 207, CrPC. As the offences under Section 376, IPC and Section 302, IPC are exclusively triable by the Court of Sessions, the case records of G.R. Case no. 106/2010, arising out Udalguri Police Station Case no. 70/2010, were committed to the Court of Sessions, Udalguri by an Order of Commitment dated 13.02.2014. On receipt of the case records of G.R. Case no. 106/2010, the Court of Sessions, Udalguri registered the case as Sessions Case no. 22[UD]/2014 and transferred the case to the Court of learned Additional Sessions Judge, Udalguri [‘the trial court’, for short] for disposal.

4. Before the learned trial court, the appearance of the accused-appellant was caused from jail and the other accused person, Deban Mardi @ Madan Mardi who was earlier granted bail, appeared to stand the trial. The learned trial court after hearing the learned Public Prosecutor and the learned defence counsel, and upon perusal of the materials on record, framed three charges against the said two accused persons, 26.02.2014 as under :-

Firstly, that you, on or about the 06.04.2010 at about 12-00 p.m. at jungle Borigaon under Udalguri Police Station, were a member of unlawful assembly, committed house trespass into the dwelling house of Mangal Hasda and thereby committed an offence punishable under Sections 448/143, IPC and within my

cognizance.

Secondly, that you, on the same day, time and place, were a member of unlawful assembly, committed rape upon Sapan Hasda and thereby committed an offence punishable under Sections 376/143, IPC and within my cognizance.

Thirdly, that you, on the same day, time and place, were a member of unlawful assembly, caused death to Renuka Hasda by intentionally causing her death and thereby committed an offence punishable under Sections 302/143, IPC and within my cognizance.

5. The particulars of the charges were then read over and explained to the two accused persons then facing the trial, to which they pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined as many as 11 [eleven] witnesses and exhibited 7 [seven] nos. of documents in order to bring home the charges against the accused persons. In addition to the prosecution witnesses, one witness was examined as E.O. During the course of the trial, the other accused person, Sri Deban Mardi @ Madan Mardi absconded and the learned trial court declared him absconder with the issuance of non-bailable warrant of arrest and proclamation. As a result, it was only the accused-appellant who had faced the trial till the end. After closure of the prosecution evidence, the accused-appellant was examined under Section 313, CrPC and his plea was of denial. When asked by the learned trial court whether he would adduce evidence, he answered in the affirmative and the defence evidence was adduced by three witnesses as D.W.1, D.W.2 and D.W.3. On appreciation of the evidence on record and after hearing the learned counsel for the parties, the learned trial court has found the accused-appellant guilty of the charges, mentioned above, and he has been sentenced in the manner, indicated above. The learned trial court has, however, acquitted the accused-appellant from the charge under Section 376, IPC.

6. We have heard Mr. B. Prasad, learned Amicus Curiae and Mr. B. Baruah, learned counsel for the appellant; and Ms. B. Bhuyan, learned senior counsel & Additional Public Prosecutor, Assam assisted by Ms. M. Chakraborty, learned counsel for the respondent State

of Assam.

7. Mr. Prasad, learned Amicus Curiae has submitted that in the FIR [Ext.5], five persons were named as accused including the accused-appellant, but the I.O. had submitted the Charge-Sheet [Ext.6] under Section 173[2], CrPC only against three accused persons including the accused-appellant. As such, the charges framed against the accused-appellant under Section 448, IPC; Section 376, IPC; and Section 302, IPC, by adding Section 143 to each of them, were not proper as for the offence under Section 143, IPC, there had to be a minimum five persons. He has contended that from the prosecution witnesses, it is clearly discernible that it is the evidence of informant-P.W.6 only which was material. He has pointed out that though the informant-P.W.6 had made an allegation of rape specifically against two accused persons, named in the FIR, but the learned trial court found the evidence deficient in respect of the said charge and had acquitted the accused-appellant. He has submitted that in any view of the matter, the informant-P.W.6 did not allege commission of rape against the accused-appellant. It is his further submission that as the charge regarding alleged commission of rape had failed, the evidence of informant-P.W.6 would require strict scrutiny. If the evidence of informant-P.W.6 is analyzed, Mr. Prasad has contended, it would emerge that the evidence of informant-P.W.6 is inconsistent on vital and material aspects and from the point of separation of the two groups, her testimony is not to be believed. He has further submitted that the act of exhumation of the deadbody of the deceased preceded institution of the FIR. There was a time-gap between the alleged incident and the act of exhumation of the deadbody of Renuka Hasda. The prosecution case was based on conjectures and surmises from the point of separation of the informant-P.W.6 from the deceased and the prosecution side had failed to prove the charge of murder against the accused-appellant beyond reasonable doubts, not to speak of all reasonable doubts, by completing the chain of circumstances. In such view of the matter, the impugned Judgment and Order of conviction and sentence is liable to be set aside.

8. Ms. Bhuyan, learned senior counsel & Additional Public Prosecutor, Assam has, at first, submitted that in view of the provisions contained in Section 215, CrPC, addition of the charge under Section 143, IPC along with the offences under Section 448, Section 376 and

Section 302 of the Indian Penal Code [IPC] would not occasion a failure of justice. Referring to the Order dated 26.02.2014 framing charges, excerpts from which quoted above, Ms. Bhuyan has submitted that the particulars as regards the time, date and place of commission of the alleged offences were clearly incorporated in the charges and it cannot be said that the accused was not in a position to properly defend himself. Ms. Bhuyan has further submitted that the informant-P.W.6 was the younger sister of the deceased and along with the deceased, she was also taken out of the house forcibly. As she was an eye-witness to the alleged incident, the learned trial court had correctly relied on the evidence of the informant-P.W.6 whose testimony was cogent, to convict the accused-appellant. From the evidence including the doctor's evidence and the Post-Mortem Examination Report [Ext.-2], it has clearly emerged that the death was homicidal in nature as a fatal injury was sustained by the deceased in the vital organ, brain. As all the accused persons were from the same village, there was no dispute as regards identification of the accused persons. Moreover, the alleged night of the incident was a moonlight night. Ms. Bhuyan has urged that there was also a motive behind the act as the elder sister of the informant-P.W.6, that is, Renuka Hadsa was maintaining a relationship with a boy from another community. Ms. Bhuyan has further submitted that in the defence evidence, the version of the accused-appellant as D.W.1 was at variance with the versions of the other two defence witnesses, D.W.2 and D.W.3. Moreover, the accused-appellant was found absconding after the alleged incident and the same would be a relevant factor for the purpose of considering complicity of the accused-appellant in the incident.

9. We have given due consideration to the submissions advanced by the learned counsel for the parties and have gone through the materials available in the case records of Sessions Case no. 22[DU]/2014, in original. We have also gone through the decisions cited by the learned counsel for the parties.

10. Before appreciation of the rival submissions of the learned counsel for the parties, it is apposite to refer the testimonies given by the prosecution witnesses as well as by the defence witnesses in the course of the trial, while keeping the testimonies of the informant-P.W.6 and P.W.1, the Doctor who examined the informant-P.W.6, for appreciation at a later

point. The witnesses examined on behalf of the prosecution witnesses were :- [1] P.W.1 - Dr. Binod Chandra Kalita; [2] P.W.2 - Dr. Prasanta Goswami; [3] P.W.3 - Sri Chanjila Mardi; [4] P.W.4 - Sri Sunil Hambram; [5] P.W.5 - Sri Sapal Hasda; [6] P.W.6 - Smti. Sapan Hasda [the informant]; [7] P.W.7 - Sri Koshor Sirpoli; [8] P.W.8 - Sri Girish Das; [9] P.W.9 - Sri Dharmakanta Mili; [10] P.W.10 - Sri Lakhya Jyoti Das; and [11] P.W.11 - Sri Nabin Chandra Das. Three defence witnesses examined were :- [1] D.W.1 - Sri Budhiram Mardi [the accused-appellant]; [2] D.W.2 - Sri Ramu Mardi; and [3] D.W.3 - Sri Haren Murmu.

11. P.W.2, Dr. Prasanta Goswami was serving as the Sub-Divisional Medical & Health Officer [SDM&HO], Mangaldai Civil Hospital when he performed the post-mortem examination on the deadbody of the deceased, Renuka Hasda on 08.04.2010. During autopsy, he had found the following injuries :-

- [i] Laceration right scalp parietal area 2 x 1 x 1 inch size exposing the torn muscles with fracture bone pieces.
- [ii] On cut open the scalp contain with big haematoma about 4 x 2 inches run over right parietal and vertical area.
- [iii] Multiple fracture of right parietal bone with separation of horizontal sutures from right temporal to left temporal region blood comes out through exposing brain.

P.W.2 had also deposed that there was collection of blood, about 200 ml, over left parieto vertical brain. Upon laboratory examination of vaginal swab for spermatozoa, nothing was seen. He had opined that the death was due to shock and haemorrhage due to injury to the vital organ, brain. He exhibited the Post-Mortem Examination Report as Ext.-2. When confronted by the defence, he had stated that he did not see any injury in the private parts of the deceased.

12. P.W.3, Sri Chanjila Mardi and P.W.4, Sri Sunil Hembram were co-villagers of the informant-P.W.6 and the accused-appellant. In their depositions, they stated that they did not witness the incident.

12.1. P.W.3 was a witness to the seizure list, Ext.-3 dated 07.04.2010, whereby, the following articles were seized :- [i] about 20 broken pieces of light blue coloured glass bangles; [ii] a black coloured underwear; and [iii] a piece of bamboo measuring about 2.5 feet long; from Jungal Borigaon. After declaring him hostile, the prosecution side with permission from the learned trial court, had cross-examined P.W.3. P.W.3 was declared hostile by the prosecution and he was cross-examined by the prosecution as he had stated that the police did not interrogate him. During cross-examination, the prosecution side had put a suggestion to S.W.3 to the effect that during his previous statement made to police, he had stated in a particular manner and such suggestion was denied by S.W.3. S.W.3 was, however, not shown and confronted with any part of any marked part from the previous statement and the Investigating Officer [I.O.], P.W.10 in his testimony did not refer to any marked part of any previous statement of S.W.3. In fact, P.W.10 could not find the statement of P.W.3 recorded earlier under Section 161, CrPC in the case diary. Therefore, further dilation on this aspect is not necessary.

12.2. Similarly, the P.W.4 was also a witness to the same seizure list, Ext.-3. P.W.4, while deposing that he did not witness the incident, had further stated that he came to know about the incident from others. Thus, the nature of his evidence is hearsay.

13. P.W.5, Sri Sapal Hasda was/is the elder brother of the deceased and the informant-P.W.6. Like P.W.3 and P.W.4, P.W.5 was also not an eye-witness. In his evidence-in-chief, P.W.5 had deposed that the incident was narrated to him by the informant-P.W.6 and their father, who was not examined as a witness by the prosecution. He had deposed that the accused persons committed rape upon both of his sisters. Like P.W.3 and P.W.4, P.W.5 was also a witness to the seizure list, Ext.-3. In cross-examination, P.W.5 had admitted that he did not witness the occurrence. He had further deposed that the I.O. did not record his statement during the course of investigation. He had stated that he knew the accused persons.

14. The witness, P.W.7 had stated that he knew the informant-P.W.6 and the accused persons. He had stated to the effect that he identified the deadbody of the deceased, but he did not know how the incident took place.

15. P.W.8, Sri Girish Das was serving as the In-Charge, Bhairabkunda Police Outpost on 14.02.2012. In his testimony, he had stated that he was not involved in the investigation of the case. As such, his evidence is not of much relevance to either of the sides.

16. P.W.9, Sri Dharmakanta Mili was serving as the Circle Officer, Udalguri Revenue Circle at the relevant point of time and it was he who conducted inquest on the deadbody of the deceased on 07.04.2010. He exhibited the Inquest Report, Ext.-4 and his signature thereon as Ext.-4[1]. When cross-examined by the defence, P.W.9 had admitted that there was no mention of any injury upon the deceased person in the Inquest Report, Ext.-4.

17. P.W.10, Sri Lakhya Jyoti Das was the Investigating Officer [I.O.] in the later part of the investigation carried out in connection with Udalguri Police Station Case no. 70/2010. P.W.10 had deposed that when he was posted as In-Charge, Bhairabkunda Police Out Post on 17.02.2012, he was entrusted with the task to continue with the investigation of the case by the Officer In-Charge, Udalguri Police Station. He exhibited the FIR as Ext.-5. This witness had stated that he conducted a number of house searches to arrest the accused-appellant and the other accused, Lakhiram Soren. P.W.10 had further deposed that after collecting the Medical Examination Report of the informant-P.W.6, he submitted the Charge-Sheet against [i] the accused-appellant; [ii] Sri Deban Mardi @ Madan Mardi; and [iii] Sri Lakhiram Soren, showing the two accused persons therein, that is, the accused-appellant and Lakhiram Soren as absconders in the Charge-Sheet, exhibited as Ext.-6. In cross-examination, P.W.10 had stated that he re-examined the two witnesses, P.W.3 and P.W.4 on 14.03.2012 as he could not find their previous statements recorded under Section 161, CrPC in the case diary. But, such subsequent previous statements of P.W.3 and P.W.4 were not marked and exhibited.

18. P.W.11, Sri Nabin Chandra Das was posted as the In-Charge, Bhairabkunda Police Out Post under Udalguri Police Station on 07.04.2010 and he was the I.O. to the first part of the investigation carried out in connection with Udalguri Police Station Case no. 70/2010. He had testified that at about 11-00 a.m. on 07.04.2010, one Damodar Sarma from Village – Khusrabari informed him over phone that he noticed blood marks on the bank of Golandi

River and a recently dug pit nearby. On getting the information, he proceeded to the place of occurrence. At the place of occurrence, he noticed some blood stains over a stone and a recently dug pit measuring 5x4 feet. The matter was immediately informed to the concerned Executive Magistrate over phone. In the meantime, the villagers also assembled there. The place was dug and a deadbody was exhumed from there in presence of the Executive Magistrate, who also conducted inquest on the deadbody. The deadbody was identified by the witnesses, more particularly, by the informant-P.W.6, who was the sister of the deceased, as that of Renuka Hasda. The deadbody was thereafter, sent to the Civil Hospital for post-mortem examination. P.W.11 had further deposed that he recorded the statements of the witnesses at the place of occurrence. He also stated about the seizure of the articles vide Ext.-3. P.W.11 had stated that he returned to the Police Station at 03-00 p.m. and recorded the necessary entry in the General Diary of the Police Station as General Diary Entry no. 11 dated 07.04.2010. It was on 07.04.2010, the informant-P.W.6 lodged the written FIR [Ext.-5] before the Officer In-charge, Udalguri Police Station and after registering the FIR, the investigation of the case, Udalguri Police Station Case no. 70/2010 was entrusted to him by the Officer In-Charge, Udalguri Police Station. In the cross-examination, P.W.11 had stated that he did not record the statement of the person who informed him first about the occurrence. He had also stated that after registration of the FIR, he did not record the statement of any witnesses. He had stated that he did not notice any blood stain in the bamboo stick, seized vide Ext.-3. The articles seized vide Ext.-3 were also not produced before him. In his cross-examination, P.W.11 had stated that inner-garment of the informant-P.W.6 could not be seized as she did not produce the same before him.

19. When the accused-appellant adduced his evidence as D.W.1, he deposed to the effect that on the date of the alleged incident, he was celebrating a feast in his house along with few villagers as an amount in cash was given by a candidate who was campaigning for his election at that point of time. The feast continued till about mid-night and he came to know about the murder only on the next day. In his testimony, D.W.1 had admitted that he knew both P.W.5 and P.W.6. From his cross-examination, it had emerged that he was also aware about the relationship between the informant-P.W.6 and the deceased. In the cross-examination, D.W.1 had stated that he did not know the other four accused persons named in

the FIR, namely, [1] Sri Deban Mardi @ Madan Mardi; [2] Sri Lakhiram Soren; [3] Sri Rajkumar; and [4] Sri Prakash. In his cross-examination, he also admitted that he was aware about the affair existing between the deceased and Sri Niran Daimari. He had, however, denied about his presence in the house of the informant-P.W.6 and the deceased in the night of the alleged incident. The other two defence witnesses - D.W.2 and D.W.3 - had, in clear terms, in their cross-examination, stated that they knew all the other four accused persons, named in the FIR, apart from the accused-appellant, D.W.1. D.W.3 is the brother-in-law of D.W.1 and D.W.2 is a co-villager of D.W.1. Both D.W.2 and D.W.3 had deposed, like D.W.1, that on the night of the alleged incident, they were celebrating a feast in the house of D.W.1. D.W.2 had stated that the feast ended at about 12-30 a.m. and the accused-appellant was then present along with them. Like D.W.1, D.W.2 also stated that he came to know about the murder only on the next day. D.W.3 had deposed that the feast ended at around 01-00 a.m. Both D.W.2 and D.W.3 had mentioned that about 12-13 persons were present in the feast.

20. From the testimonies of the prosecution witnesses, what have emerged are that on receipt of a telephonic information, the I.O. of the case, P.W.11, proceeded immediately to the place of occurrence, that is, to the bank of Golandi River. Finding blood stains on the bank of the river and a recently dug pit at a place therein, the place was dug and after digging, a deadbody was exhumed therefrom. The deadbody was identified to be of Renuka Hasda by the informant-P.W.6 among others. An Executive Magistrate, P.W.9 conducted inquest on the deadbody of the deceased on 07.04.2010 and an Inquest Report vide Ext.4 was prepared. Thereafter, the informant-P.W.6 lodged the FIR [Ext.5] before the Officer In-Charge, Udalguri Police Station on 07.04.2010 and as per the Post-Mortem Examination Report [Ext.2], the death of the deceased was due to shock and haemorrhage due to the injury to the vital organ of brain. The prosecution witnesses – P.W.3, P.W.4, P.W.5, P.W.7 – were not eye-witnesses. The prosecution side did not examine Sri Niran Daimari, who, according to the FIR and the informant-P.W.6, was present inside the house when the incident happened.

21. The witness, P.W.1 who was serving as Senior Medical & Health Officer [SM&HO] at Mangaldai Civil Hospital deposed to the effect that he examined the informant-P.W.6 on 08.04.2010. He had deposed that upon physical examination of the informant-P.W.6, he did

not find any injury marks in her private parts. He had deposed to the effect that as per the expert opinion from the radiologist, the approximate age of the informant-P.W.6 was 18 to 19 years. He had further opined that he would not be in a position to give any comment as regards the matter of rape. Referring to his Report, exhibited as Ext.1, he had stated that no spermatozoa was seen on examination of vaginal swab of the informant-P.W.6.

22. In her testimony, the informant-P.W.6 had deposed to the effect that she lodged the FIR [Ext.-5] and the deceased was her elder sister. Narrating about the incident, she deposed that both the accused persons [the two accused who were facing trial at that point of time] were her co-villagers and she knew them well. It was at around 12 O'clock mid-night, both of them came to their house and asked to open the door of the house. She had deposed that recognizing their voices, Renuka Hasda opened the door of the house. On the door being opened, both the accused persons pulled Renuka Hasda by holding her hands and took her away. P.W.6 had also deposed to the effect that she remained inside the house out of fear. Sri Niran Daimari who was also in the house with Renuka Hasda at that point of time, tried to prevent them but the two accused persons took Renuka Hasda away towards Golandi River. P.W.6 had further deposed that there were two accused persons who took her away along with them. The two accused persons were joined by some other accused persons later on and the other group of accused persons took Renuka Hasda towards another direction. According to the P.W.6, it was Deban Mardi @ Madan Mardi and Lakhidhar Soren who took her away. P.W.6 further stated that the accused persons, Lakhidhar Soren and Rajkumar removed her undergarments and committed rape upon her. As regards the other group of accused persons, P.W.6 had stated that the other group of accused-persons consisted of the accused-appellant, Rajkumar and Prakash who took away her elder sister, Renuka Hasda to a separate place. While she [P.W.6] was being taken away, both the accused persons then present in the court, that is, the accused-appellant and Deban Mardi @ Madan Mardi were standing on the road. Though it was night, P.W.6 claimed to have recognized them from their voices. P.W.6 had alleged that it was the accused-appellant and other accused persons, who killed her elder sister. P.W.6 claimed to have disclosed those facts to her father, who was at the house at the time of occurrence, on returning from the place of occurrence P.W.6 deposed that after she informed about the occurrence to her father, her father, in turn, informed about

the occurrence to the villagers. The villagers had thereafter, searched for Renuka Hasda and having seen blood near the river bank, the police was informed. It was thereafter, the deadbody of Renuka Hasda was exhumed and she identified the deadbody. She further stated that her statement was recorded before the Magistrate and her medical examination was also done through the police. In her cross-examination, P.W.6 stated that the five persons resisted her from raising alarm when her elder sister was being taken away from the house. In her cross-examination, P.W.6 had stated that it was Deban Mardi @ Madan Mardi, Lakhiram Soren and Rajkumar who took her towards a separate place and out of them, Lakhiram Soren and Rajkumar committed rape upon her. P.W.6 also stated that Budhiram [the accused-appellant] and Rajkumar took her elder sister away. She denied the suggestion that the accused persons did not do anything with her.

23. On an analysis of the testimony of the informant-P.W.6, it is noticed that in her examination-in-chief, P.W.6 had stated that it was the accused-appellant and Deban Mardi @ Madan Mardi who took her and her elder sister from their house and the other group who joined later, had thereafter, took the elder sister to other place. However, she attributed the act of rape to Lakhiram Soren and Rajkumar. She reiterated the same version in her cross-examination, but stated that Deban Mardi @ Madan Mardi was also with them. In her examination-in-chief, she at another point, had stated that it was the accused-appellant and Deban Mardi @ Madan Mardi who came to their house and took her away and it was only thereafter, the other three accused persons joined the accused-appellant and Deban Mardi @ Madan Mardi. According to P.W.6, it was the other group consisting of the remaining three accused, that is, Lakhiram Soren, Rajkumar and Prakash, who took Renuka Hasda to another place. Meaning thereby, it was not the accused-appellant who had taken Renuka Hasda away to another place. But, at a subsequent stage, P.W.6 changed her version and stated that it was the accused-appellant and Rajkumar who took Renuka Hasda away to another place. One more inconsistency noticeable in the testimony of the P.W.6 is that the accused, Rajkumar was alleged to have committed the rape upon P.W.6 and the same accused person, Rajkumar was also along with the accused-appellant and Prakash, who had allegedly took Renuka Hasda away from the place while P.W.6 was being taken to another place.

24. From the testimony of P.W.2, it has emerged that the act of taking P.W.2 away towards one direction and the act of taking her elder sister away towards another direction happened simultaneously. From the testimony of P.W.6, it has further emerged that the two incidents, that is, the act of commission of rape on P.W.6 by taking P.W.6 first to a separate place and the act of taking away Renuka Hasda to another place with subsequent commission of her murder allegedly had occurred at two different places. Meaning thereby, P.W.6 got separated from her elder sister, Renuka Hasda at one point and after that separation point, P.W.6 was not aware of the events which ultimately led to the death of her elder sister, Renuka Hasda. Though the informant-P.W.6 had made specific allegation in the FIR as well as in her testimony that she was forcibly committed rape but in the Medical Examination Report [Ext.1], it was reported that there was no injury in the private parts. In the deposition of P.W.1, Dr. Binod Chandra Kalita who medically examined the informant-P.W.6 on 08.04.2010, had stated that he found no injury marks in her private parts. As per the version of P.W.1, no spermatozoa was seen when vaginal swab was examined. The informant-P.W.6 was examined on 08.04.2010 whereas the alleged incident of rape stated to have occurred on 07.04.2010. As the ocular evidence of P.W.6 is at variance with the medical evidence, the evidence of P.W.6 as regards commission of alleged murder calls for a stricter scrutiny.

25. What has emerged is that the informant-P.W.6 was not an eye-witness to the events, which occurred after the separation point. The time-gap of the two events from the point of separation, that is, between the alleged incident of taking Renuka Hasda away from the company of the informant-P.W.6 and the recovery of the deadbody of Renuka Hasda was not so small that it can be conclusively held that it was the accused-appellant alone, who could be the perpetrator of the crime of killing Renuka Hasda unless the two events are found linked by other circumstantial evidence.

26. It has been sought to be advanced on behalf of the prosecution that the accused-appellant was found absconding for a long period of time since the date of the alleged incident and the same would be a relevant factor as regards complicity of the accused-appellant in the act of homicidal death of Renuka Hasda and an adverse inference has to be drawn against him. It has been contended that the defence plea of alibi cannot be accepted

in view of the inconsistencies amongst the three defence witnesses, D.W.1, D.W.2 and D.W.3. One of the pleas found to have been taken by the accused-appellant herein through the evidence adduced by the defence witnesses, was the plea of alibi. It is settled law that when a plea of alibi is taken by an accused, the burden is upon him to establish the same by positive evidence after the onus as regards presence of the accused at the place of occurrence is established by the prosecution. While weighing the plea of alibi, the same is to be weighed against the positive evidence led by the prosecution.

27. A subsequent conduct can be a relevant fact under Section 8 of the Evidence act. But, mere absconding by itself cannot constitute as the sole factor to convict a person. It is possible that an accused may abscond fearing an illegal arrest. To abscond means to go away secretly and hurriedly to escape from custody or to avoid arrest. Dilating on the aspects of an act of absconding and the failure of the defence plea of alibi, the Hon'ble Supreme Court in *Sunil Kundu vs. State of Jharkhand*, reported in [2013] 4 SCC 422, has observed as under :-

28. It was argued that the accused were absconding and, therefore, adverse inference needs to be drawn against them. It is well settled that absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest [See : *Sk. Yusuf v. State of W.B.* [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620]]. It is also true that the plea of alibi taken by the accused has failed. The defence witnesses examined by them have been disbelieved. It was urged that adverse inference should be drawn from this. We reject this submission. When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabalise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.

28. If an accused takes a plea of alibi, the same does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein. A plea of alibi taken by the accused is only to be considered subsequent

to the prosecution having discharged satisfactorily its burden of prove, which burden comes first. The burden to establish the plea of alibi is albeit on the person taking such a plea and the same must be achieved by leading cogent and satisfactory evidence. Although a standard of strict scrutiny is required in respect of a plea of alibi, the plea of alibi is to be tested only after the prosecution has been able to prove its case beyond reasonable doubt.

29. In *Sharad Birdhichand Sarda vs. State of Maharashtra*, the Hon'ble Supreme Court has laid down the following five golden principles ['Panchsheel'] which are required to be satisfied before a case based on circumstantial evidence against an accused can be said to be fully established :- [i] the circumstances from which the conclusion of guilt is to be drawn should be fully established; [ii] the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; [iii] the circumstances should be of a conclusive nature and tendency; [iv] they should exclude every possible hypothesis except the one to be proved; and [v] there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. The contention that if the defence case is false it would constitute an additional link as to fortify the case of the prosecution has been rejected with a word of caution. It has been observed therein that a false explanation given can be used as a link when :- [i] various links in the chain of evidence laid by the prosecution have been satisfactorily proved; [ii] circumstance points to the guilt of the accused with reasonable definiteness; and [iii] the circumstance is in proximity to the time and situation. If these conditions are fulfilled only then the court can use the false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. Thus, a distinction has to be drawn between incomplete chain of circumstances and a circumstance after a chain is complete and the defence or explanation given by the accused is found to be false, in which event the said falsehood is added to reinforce the conclusion of the court.

30. From the evidence on record, more particularly, on analyzing the testimony of the informant-P.W.6, in the backdrop of the fact that the informant-P.W.6's allegation as regards

commission of rape upon her has been belied by the medical evidence, it is found that the informant-P.W.6 was not an eye-witness to the events beyond the point of separation, that is, from the point when the informant-P.W.6 was taken away by two persons towards one place and her elder sister, Renuka Hasda was taken towards another direction by the remaining accused persons named in the FIR. It was not the testimony of the informant-P.W.6 that she witnesses any act of assault on her sister at the head by the accused-appellant. From the testimony of the informant-P.W.6, it is found that this witness was also not consistent about the accused persons who separated her away from her elder sister, Renuka Hasda. From the point of separation to the recovery of the deadbody of Renuka Hasda after exhumation, the prosecution has not been able to bring home the charge of murder against the accused-appellant beyond reasonable doubt, not to speak of all reasonable doubts, by completing the chain of all the circumstances beyond the separation point till the recovery of the deadbody. There was no eye-witness to the events which occurred during the said period and the time period was not so small that one can conclusively reach an opinion that it was the accused-appellant, who alone was responsible for the death of the deceased. Except for the two ends of the chain, the prosecution has not been able to prove satisfactorily the links to complete the chain of circumstances to hold conclusively that it was only the accused-appellant who was guilty and there was no other possibility of involvement of others in the acts which led to the death of the deceased. Thus, the circumstances from which the conclusion of guilt are to be established are found missing. In such obtaining fact situation, it is difficult to hold that the prosecution has been able to prove the charge of murder against the accused-appellant beyond all reasonable doubts. Consequently, we are of the unhesitant view that the accused-appellant is entitled to the benefit of doubt.

31. As the prosecution has not been able to establish its case beyond all reasonable doubt, no further discussion on the plea of alibi appears necessary.

32. The informant-P.W.6 was categorical in her testimony as regards committing trespass into the house of the informant-P.W.6 and the deceased by the accused-appellant along with another accused, Deban Mardi @ Madan Mardi in the night intervening 06.04.2010 and 07.04.2010. It is stated at the Bar that the accused-appellant has already undergone the

sentence period imposed upon him under Section 448, IPC and the sentence was ordered to run concurrently. It is, therefore, observed that the accused-appellant has completed his sentence as regards his conviction under Section 448, IPC. Thus, we do not find any reason to interfere with the conviction of the accused-appellant under Section 448, IPC and the sentence period, already undergone by the accused-appellant.

33. As the Charge-Sheet was submitted only against three accused persons, no charge under Section 143, IPC could have been framed against three charge-sheeted accused persons. The charge under Section 143, IPC is attracted when one is a member of an unlawful assembly and to be a member, there should be an assembly of five or more persons. The I.O. of the case did not submit the Charge-Sheet against five or more persons and at the time framing charge, there were only two accused persons who were facing trial with the third charge-sheeted accused not before the learned trial court. As such, conviction and sentence passed against the accused-appellant in respect of the offence under Section 143, IPC is set aside.

34. We have found force in the contention of the learned Additional Public Prosecutor, who has submitted that the accused-appellant was fully aware of the charges because the particulars as regards time, date and place of commission of offences were clearly incorporated in the charges and the same did not occasion any failure of justice.

35. In view of the discussions made above and the reasons assigned therein, this Court is of the unhesitant view that the prosecution has not been able to bring home the charge under Section 302, IPC against the accused-appellant beyond all reasonable doubts and as such, the accused-appellant is entitled to the benefit of doubt in respect of the charge under Section 302, IPC. Accordingly, the accused-appellant is acquitted of the charge under Section 302, IPC as well as of the charge under Section 143, IPC.

36. Accordingly, the instant appeal stands partly allowed to the extent indicated above.

37. The accused-appellant is to be released forthwith from jail, if his detention is not

required in connection with any other case.

38. This court records its appreciation for the assistance rendered by the learned Amicus Curiae. The learned Amicus-curiae be paid remuneration as per the rules in force.

39. The Jurisdictional District Legal Services Authority is to consider the matter of grant of compensation as per the extant procedure.

40. Send back the trial court records with a copy of this judgment.

JUDGE

JUDGE

Comparing Assistant