2026:GAU-AS:16130

THE GAUHATI HIGH COURT

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

PRINCIPAL SEAT

Crl. Rev.P./44/2012

Ram Krishna Pandey,
S/o Santosh Kumar Pandey,
Resident of 265 Transit Camp,
Masimpur, C/o 99 APO, PS-Santaldih,
Dist.-Purulia, Santaldih.

……Petitioner

-Versus-

The State of Assam.

……Respondent

BEFORE

HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the petitioner :- Mr. D. Borah

Advocate for the respondent :- Ms. S.H. Bora, Addl. P.P.

Date on which judgment is reserved : **17.09.2026**

Date of pronouncement of judgment : **03.11.2026**

Whether the pronouncement is of the operative part of the judgment :- No

Whether the full judgment has been pronounced? :- Yes

JUDGMENT & ORDER (CAV)

Heard Mr. D. Borah, learned counsel for the petitioner. Also heard Ms. S.H. Borah, learned Addl. P.P. for the State respondent No. 1.

2. In this petition under Section 401 of the Code of Criminal Procedure, 1973 (as amended) the petitioner, namely, Ram Krishna Pandey, has challenged the Judgment and Order, dated 10/02/2014, passed by the learned Addl. Sessions Judge, Cachar, Silchar, in Criminal Appeal No. 31 of 2011.

3. It is to be noted here that vide impugned Judgment and Order, dated 10/02/2014, the learned Addl. Sessions Judge, Cachar, Silchar, had dismissed the Criminal Appeal No. 31 of 2011, and thereby upheld the Judgment and Order of Conviction, dated 22.09.2011, passed by the learned Assistant Sessions Judge, Cachar, Silchar in Sessions Case No. 82/2008.

4. It is further to be noted here that vide judgement and order of conviction, and sentence, dated 22.09.2011, passed in Sessions: Case No.82/2008, the learned Assistant Sessions Judge No.1. Cachar, Silchar, has convicted and sentenced the petitioner herein, namely, Ram Krishna Pandey, to undergo rigorous imprisonment (R.I.) for 7(seven) years and to pay a fine of Rs.2,000/-, in default of payment of fine, to suffer Simple Imprisonment (S.I.) for another 3(three) months, u/s 376 1.P.C. And also convicted and sentenced him to suffer R.I. for 6(six) months and a fine of Rs.500/- in default of payment of fine, S.I. for another 1(one) month, u/s.448 I.P.C., with further direction that sentence in both the counts shall run concurrently.

5. The background facts, leading to filing of the present petition, is briefly stated as under:-

> "On 2.09.2007, at about 11.30 am, the petitioner herein, had committed criminal house trespass, by entering into the house of the informant, namely, Purnima Bordoloi Roy, while the informant and her husband went to the market and committed rape on her cousin sister, namely, Srimati Mouni Roy (actual name withheld), who was in the house of the informant as her maid. Accordingly, the informant Purnima Bordoloi Roy had lodged an F.I.R. with the In-Charge- Arunachal Police Out Post, Cachar on 04.09.2007. Upon the said FIR, the Officer-in-Charge, Cachar P.S. has

registered a case, being Silchar P.S. Case No. 1597, on 04.09.2007, under Sections 448/376/506 IPC and carried out investigation. Then on completion of investigation, the I.O. had submitted charge sheet u/s 448/376 I.P.C., against the petitioner above named, to stand trial under the said Sections of law.

Then on committal of the case to the Court of Sessions, the same was made over to the Court of learned Assistant Sessions Judge, Cachar, (trial court herein after) for disposal. Then on appearance of the petitioner before the learned trial Court, it had framed charges u/s.448/376 I.P.C. against the petitioner and on being read over and explained the same to the petitioner, he pleaded not guilty and claimed to be tried.

During the trial the prosecution side had examined as many as five (5) witnesses in support of its case. The learned trial court had also examined two more witnesses. Thereafter, the learned trial Court had examined the petitioner herein, under Section 313 Cr.P.C. and after conclusion of the trial, the learned trial Court had found the petitioner herein guilty u/s.448/376 1.P.C. and convicted and sentenced him as aforesaid.

Being aggrieved, the petitioner had preferred an appeal, being Criminal Appeal No. 31 of 2011, before the learned Sessions Judge, and thereafter, hearing both the parties the learned Appellate Court, vide impugned Judgment and Order, dated 10/02/2014, had dismissed the Criminal Appeal No. 31 of 2011, and thereby upheld the Judgment and Order of Conviction, dated 22.09.2011, passed by the learned Assistant Sessions Judge, Cachar, Silchar in Sessions Case No. 82/2008."

Grounds of revision:-

6. Then being highly aggrieved, the petitioner has preferred the present revision petition on following grounds:-

(i) The impugned judgment and order, passed by the learned court below, is bad in law as well as in fact, for being not based on proper appreciation of the materials on record.

(ii) The evidence of victim (PW-2) is not at all a reliable, as at one go, she declines to identify the accused person and in the next moment, she identified the accused person. Also there are material contradictions in her evidence that has been proved by the I/O and such contradictions cast doubt about the veracity of her version.

(iii) The Magistrate, who had recorded the statement of the victim girl, under section 164 of the Code of Criminal Procedure, was examined as Court witness No.2, and she had also, in fact, stated in her evidence that the victim girl did not mention the name of any person as the accused, who allegedly committed the offence of rape, rather she stated before the Magistrate that a boy entered into the house, whose name was not known to her and as such it is clear that the judgment and order is based on erroneous findings.

(iv) It is also an admitted position that the victim, at the time of alleged offence was 16 years, and as per medical evidence of PW-3, her age at the relevant point of time was above 16 years and below 18 years, and assuming but not admitting, the allegation to be true and considering the fact that there are some families, who used to reside in the upstairs and in the neighbouring localities and considering also the fact that the victim had not raised any hue and cry on the alleged time of occurrence, and non-examination of such neighbouring people, as well as independent witness, by the prosecution, during trial, raises reasonable suspicion regarding the occurrence.

(v) The victim was examined immediately after the occurrence, and according to her, she was forwarded to

the Silchar Medical College Hospital on the date of occurrence and considering the evidence of expert, regarding no evidence of recent sexual intercourse as well as detection of any injury on her person, the conviction and sentence is not in consonance with law.

Submission of learned counsel for the petitioner:-

7. Mr. Borah, learned counsel for the petitioner, submits that though several grounds have been taken in the petition, yet the main ground, he has been harping is that there are material contradictions in the evidence of the victim, and the same has been proved by the I/O, and such contradictions cast doubt about the veracity of the evidence of victim (PW-2) and she is not at all a reliable witness. Mr. Borah also submits that the victim, at one go, declines to identify the accused person, and in the next moment she identified him.

7.1. Mr. Borah also submits that the Magistrate, who had recorded the statement of the victim girl, under section 164 of the Code of Criminal Procedure, also testified that the victim girl did not mention the name of any person as an accused, instead she stated that a boy entered into the house, whose name was not known to her and as such the accused could not be identified by her and on

this count also, the finding so recorded by the learned Courts below, are erroneous.

7.2. It is the further submission of Mr. Borah that the age of the victim, as per medical evidence is below 18 years; whereas, per school certificate her age was 16 years. He also pointed out that the victim had raised no hue and cry at the time of occurrence and that neighbouring witnesses have not been examined by the prosecution, though independent witnesses were available in the upstairs, and this cast a doubt about the occurrence.

7.3. Further submission of Mr. Borah is that the FIR was filed after two days of the occurrence, and the delay has not been explained and that there is also no independent witness which makes the very incident doubtful, and under the aforesaid grounds, Mr. Borah has contended to allow this petition.

7.4. In support of his submission Mr. Borah has referred following decisions:-

(i) **Harshad Chiman Lal Modi vs. DLF Universal Ltd.,** reported in **(2005) 7 SCC 791.**

(ii) **Arun Kumar vs. Union of India,** reported in **(2007) 1 SCC 732 :**

(iii) **Amandeep Singh Saran vs. State of Chhattisgarh,** reported in **(2024) 6 SCC 541 :**

Submission of learned Addl. P.P.

8. Per contra, Ms. Borah, learned Addl. P.P., has supported the impugned judgment and order of conviction. She submits that the occurrence took place on 02.09.2007, and the FIR was lodged on 04.09.2007, and though there was some delay, yet the same has been explained. Ms. Borah also submits that the prosecution side has examined as many as five witnesses and they have corroborated the prosecution version. She also submits that there was no animosity between the informant and victim with the petitioner herein, to implicate him falsely. Her further submission is that the petitioner herein, had failed to rebut the evidence of the victim and her evidence is consistent throughout and though some contradictions are here and there, the same are minor in nature and that there is nothing to disbelieve her evidence. Therefore, she has contended to dismiss this petition.

Discussion and analysis:-

9. Having heard the submission of learned counsel for both the parties, this Court has carefully gone through the petition and the documents placed on record and also gone through the impugned Judgment and Order, dated 10/02/2014, passed by the learned Addl. Sessions Judge, Cachar, Silchar, in Criminal Appeal No. 31 of 2011, and also gone through the Judgment and Order

of Conviction dated 22.09.2011, passed by the learned Assistant Sessions Judge, Cachar, Silchar in Sessions Case No. 82/2008.

10. Before a discussion is directed to the issues raised in this revision petition, it would be in the interest of justice to discuss the scope of revisional jurisdiction of this Court. In the case of **Amit Kapoor-vs.-Ramesh Chander and another,** reported in **(2012) 9 SCC 460**, Hon'ble Supreme Court, while dealing with the scope of revisional jurisdiction, has held that the revisional jurisdiction is very limited and cannot be exercised routinely or as a matter of course. It is meant to correct a patent defect, errors of jurisdiction or law, or to prevent abuse of the process/gross injustice, and it is not an appeal in disguise. Revisional jurisdiction should normally be exercised on a question of law. Where factual appreciation is involved, interference is justified only if the finding is perverse. The power must be exercised so that justice is done and there is no abuse of the process of the Court. Mere suspicion or possibility of a different view is not enough. It has also been held that inherent powers, under Section 482 are wider than pure revisional power under Section 397, but even then, it must be used sparingly, with circumspection, and only in the rarest of rare cases, especially to quash a charge. Section 482 does not completely oust the limitation of Section 397, but nothing in the Code can affect the amplitude of inherent power, where an extraordinary situation demand intervention to prevent abuse of the process.

11. Keeping the aforesaid principles in mind, now an endeavour will be made to deal with the grounds, so taken in this petition and the argument so advanced by Mr. Boarh, the learned counsel for the petitioner.

(I) <u>The ground of disbelieving the evidence of the victim on account of contradiction.</u>

<u>Finding of the learned Trial Court:-</u>

12. The learned trial Court, while discussing the evidence of the victim,(P.W.2) had held as under:-

> **"8. The evidence of PW 1, PW.2, CW.1 corroborated their statement of each other and established the prosecution story which had been narrated in Ext.1 that on 2.9.07 in between 10/10-30 a.m. to 12 noon the victim Monali Roy i.e. PW.2 had stayed alone at home with the / baby of P.W.1 and CW1 and on their return of PW.1 and CW.1 when they knocked the door while Monali opened the door and on finding her in indisposed condition when they enquired as to what had happened, to her she replied that father of Chukku and Borki and on entered inside the room being found the door open and on entering, he closed the door from inside and thereafter, he gagged her mouth and removing her wearing garments committed rape on her. She reported the matter by weeping. Thereafter, when they entered inside the**

kitchen of the house they found one helmet lying in the rack of the kitchen. Then the accused came and again had taken away the helmet forcibly from the hand of CW.1 and at that time accused threatened not to lodge any case against him otherwise he would kill them. These facts on evidence in examination in chief of PW 1, PW.2 and CW.1 remained un-rebutted. During cross-examination of PW.1 and PW.2, defendant brought in that quarter of nayak Gobinda Sharma and habildar M.B. Singh is situated in the 1st floor and at the time of occurrence they were available in their quarter. PW.2 further stated that on hearing their hulla they came out from the quarter. From the cross-examination of PW.1 and PW.2 as well as the statement of PW.1 in examination in chief it is established that the place of occurrence is situated in the residential quarter of Army at Machimpur, as such inhabited by other Army personnel along with their families residing in the Army quarter. But P.W.-1 herself during cross-examination had given the version that this people came out of their quarter only when P.W.-1 raised hulla. Considering the relevant time period to be in between 10/10-30 am. to 12 noon presumably the families of these Army personnel residing in the quarter would be busy with their own household work inside their quarter while the male folk gone out to attend office duties. There is found nothing to disbelieve that the alleged occurrence

could not have had happened inside the residential quarter belonging to PW 1 and CW-1 within the residential campus at Masimpur. Rather PW-1 clarified that neighbours came out of their quarter after hearing hulla raised by her. So, from this evidence of PW-1 it becomes clear that neighbours of the Haldar MP Singh and his Family and Gobinda Sarma and his family did not see the incident by themselves and recording of their statement would be futile and meaningless to prove the truthfulness of the occurrence of the incident as PW.1 deposed that she narrated the incident when neighbouring people came to the place of occurrence hearing hulla. So, non-examination of these witnesses would not result in any fatality of the prosecution story and version of the defence during cross examination of PW.1 and PW.2, in this aspect did not yield any result in shaking truthfulness of the deposition of PW.1PW.2 and CW.1. Defence also during cross examination of PW.2 suggested that the person in the court is not the father of Chutke and Borki and she also did not state that father of Chukku and Borki committed rape on her in her statement before police.

12.1. The learned trial Court also referred to a decision in **AIR 1981 (sic) law of evidence (Syed Ahmed Ali)**, held that-

"A mere suggestion in cross-examination and denial is not evidence at all. Suggestion, if denied cannot take place of proof.

Considering the statement of PW.2 in her examination-in-chief wherein she stated that on the day of occurrence, at noon, while she was alone in the house and baby of PW.1 was sleeping PW.1 and her husband went out for market and at that time father of Chukku and Borki came to her room and he, by force, committed rape on her. The door was not bolted from inside at that time. The person who committed rape on her was the person present before the court on the date of deposition i.e. 5.1.09. From this statement of PW.2 rather it is established that being a resident of Army quarter PW 2 could identify the accused person by saying as father of Chukku and Borki, and immediately thereafter, she had identified the accused person in the dock stating that he had committed rape on her. P.W.-1 and also in her examination in chief stated that accused Ram Krishna Pandey was residing in the Army Quarter which is situated adjacent to their quarter in order to support the fact that P.W.-2 had known the accused person as father of Chukku and Borki and defence during cross-examination of either P.W.1 or P.W.2 had not taken the plea that accused person is not the father of Chukku and Borki who had resided in the Army quarter adjacent to the quarter of PW.1 and CW.1, wherein PW.2 was staying with them coming from Kokrajhar district, in order to take care of the child belonging to PW.1 and CW. 1 as maid and related to them as their cousin. From this

statement of PW.2 no further clarification is required to identify the accused person as father of Chukku and Borki, because while narrating the incident PW.2 immediately after saying that father of Chukku and Borki came to the room and by force committed rape on her also stated that the person who committed rape on her was present before the court on the date of her deposition. No prudent person will require any more clarification as to whether PW-2 had identified the accused person in the court describing that he had committed rape with her and was present and stated to be the father of Chukku and Borki who had committed rape on her by force in the same tune. If defence argued during argument that father of Chukku and Borki remained unidentified to be that of the accused person as stated by PW.-2 in her examination in chief, it is established on evidence on record that at the relevant time of occurrence of the incident, according to PW.-1, age of the victim PW.-2 was 16 years. CW.1 also deposed that at the time of occurrence PW.-2 was 16 years and defence did not take any plea that PW.2 was not of the age of 16 years at the time of occurrence of the incident, what has been narrated by her cousin of PW.-1 and CW.-1. PW.-2 also during her examination in chief stated that she was an illiterate; so PW.2, being a minor of the of age 16 years at the same time being an illiterate much cannot be expected from her than that her statement in examination in

chief immediately after such shocking incident occurred to her as to identification of the accused person in the dock before the court and narrating the incident to have been committed by father of Chukku and Borki. There is found no missing link between these two sentences as is mentioned in her examination in chief and from these two sentences deposed by PW.2 in examination-in-chief, it is easily ascertainable that none other than accused person is the father of Chukku and Borki, who committed rape on her on the relevant day of occurrence of the incident. PW.1 also in her examination in chief stated that she knew the accused R.K. Pandey who had been having twin daughters namely Chukku and Borki. This evidence of PW.1 and PW 2 remained un-rebutted and unimpaired except to the suggestion from the defence that the person in the court is not the father of Chukku and Borki.

9. PW.-1 and PW.-2 in their examination-in-chief, corroborating each other, also deposed that inside their house the accused after committing rape on PW.2, fled away through the back door of the house and one Helmet was lying on the rack of the kitchen. Accused after sometime came again to their quarter and forcibly had taken away the helmet. He also threatened not to discuss or lodged any case about the occurrence of the incident otherwise he would kill them. Ld. Advocate from the accused person submitted that police did not

recover the helmet and if the helmet was recovered the identity of the person who had committed rape on the person of PW.2 would had been ascertained. Only because I.O. did not seize the helmet and due to faulty investigation of the I.O., truthfulness of the prosecution witnesses cannot be impaired and shaken as is visible."

12.2. The learned trial Court then relied upon a decision of Hon'ble Supreme Court in 2004 SHR(Criminal) 403 SC (sic), also held as under:-

"Rather during cross-examination of PW.1 from defence it is established that the helmet that, they had seen in their Quarter belonged to accused R.K. Pandey. This piece of evidence had tightened the fact that only because of the concerning helmet belong to accused R.K. Pandey, I.O. did not conduct the investigation properly and for that I.0., did not record the statement of PW.2., that father of Chukku and Borki committed rape on her and further established that the investigation conducted by PWs. 4 & 5 is faulty."

Finding of the learned appellate Court:-

12.3. Upon the aforesaid aspect the learned Appellate Court had recorded its finding as under:-

“7. On careful scrutiny of materials on record it appears that the entire prosecution case, virtually rests upon the sole testimony of victim girl-P.W.-2. Because, at the time of alleged occurrence there was none present at P.O. house.

Learned counsel for the appellant gave much emphasis that the victim as P.W.2, in her evidence before the Court, stated that she does not know the person present in the Court. But, defence failed to notice that P.W.-2-victim though stated in 2nd sentence of her evidence before the Court "I do not know the person who is present in the Court". But, (immediately in 10, 11 and 12 line of her evidence) she stated “person who committed rape with me is present before the Court today". So, it is clear that P.W.-2 identified the accused Ram Krishna Pandey in the dock, who committed rape on her. So, I find no force in the contention of the learned counsel for the appellant that the offender is not identified.

8. Learned counsel for the appellant tried to impress this Court that P.W.-2 in her statement u/s.164 Cr.P.C. (Ext.4) stated that an unknown boy forcibly entered into the house and committed rape on her. He added that the evidence of the victim as P.W.-2 as well as that of P.W.1 and C.W.1 that accused later came back to their house to take the helmet which he left at the rack of the kitchen when

he left the P.O. house. It seems this portion of evidence is a subsequent exaggeration of P.W.1 and C.W.1. P.W.2 nowhere stated in her statement u/s.164 Cr.P.C. (Ext.4) that accused returned back to take his helmet. But, this portion of evidence as it appears not directly concern with the commission of the offence of rape. So, it is not material to cut the root of the prosecution case either on the point of criminal trespass and commission of rape. On the other hand, it appears that victim-P.W.2 is quite consistent in her statement since the time she made her statement before the Magistrate u/s.164 Cr.P.C., or before the trial Court. So, there is nothing to disbelieve the victim-P.W.2 who deposed at the cost of her reputation as well as reputation of her family and at the cost of her future matrimonial life. Besides, the defence also failed to assail the credibility of P.2 on material particulars during cross-examination.

9. It is the cardinal principle of criminal law that it is not the quantity of evidence, but the quality of the evidence is to be weighted for right decision of a criminal case. Mere some exaggeration in the statement of P.W,1 and C.W.1 cannot cut the root of the prosecution case if the evidence of P.W.2-victim inspite confidence.

<u>Finding of this Court:-</u>

12.4. The finding of the learned Courts below, when examined in the light of the given facts and circumstances on the record, this Court finds that the same suffers from no illegality or impropriety. **Firstly,** though minor contradiction appears to be here and there in the version of the evidence of the victim (PW-2), yet the same are minor in nature and the same are not sufficient to spell inveracity to her version. **Secondly,** the evidence of the P.W.1 and C.W.1 have amply corroborated to the version of the victim (P.W.2). **Thirdly,** the victim had identified the accused in the dock of the Court, during trial, and the same is sufficient. Though she had failed to disclose the name of the accused, she identified him as the father of Chukku and Borki, who had committed rape upon her. **Fourthly,** nothing tangible could be elicited in the cross-examination of the P.W.-1., P.W.-2 and C.W.-1. **Fifthly,** entering of the accused inside the room of the P.W.1 and forcefully taking away of the helmet, which he left on the rack of the kitchen in the house of P.W.-1, and threatening of P.W.-1 and C.W.-1, not to disclose the matter and not to lodge the FIR, lends further assurance the evidence of the victim, P.W.-1 and C.W.-1.

12.5. Even though the learned Appellate Court had held that PW-1 and CW-1 had exaggerated by deposing about taking away of the helmet, which the accused left on the rack of the kitchen by threatening the PW-1 and CW-1, on the ground that PW-2, the victim stated nothing about the helmet, yet the said finding seems

to be not based upon any logic, in as much as the PW-2, being the victim of the rape, was in distress and PW-1 and CW-1 found her in such a condition when they returned to the quarter from the market. It cannot be expected from the victim of such a heinous crime to enquire what the perpetrator of such crime left at the place of occurrence. There is no justifiable reason to disbelieve the evidence of PW-1 and CW-1 in respect of helmet. They have no reason to depose falsely. It is true that the I.O. had not seized the helmet. This defective investigation, as rightly been held by the learned Trial Court, could not shake the truthfulness of the prosecution witnesses.

12.6. Though Mr. Borah submits that there are material contradictions in the evidence of the prosecutrix, and the same has been proved by the I/O, and that such the contradictions casts doubt about the veracity of the evidence of prosecutrix (PW-2) and she is not at all a reliable witness, the said submission left this Court unimpressed in view of the fact that the victim, in her statement before the I.O., had actually stated that accused R.K. Pandey had committed sexual intercourse with her, though she had not stated that father of Chukku and Borki committed rape on her.

12.7. Further, it is well settled that identification of accused in the Court, during trial is sufficient. Reference in this context can be made to a decision of Hon'ble Supreme Court in the case of **Ronny @ Ronald James Alwaris Etc. v. State of Maharashtra**

reported in **(1998) 3 SCC 625,** wherein it has been held that identification of the accused by a witness, for the first time in court (without prior TIP) is substantive evidence, under Section 9 of the Indian Evidence Act. Same proposition is laid down in the case of **Malkhansingh & Ors. v. State of Madhya Pradesh,** reported in **(2003) 5 SCC 746** wherein Hon'ble Supreme Court has held that the substantive evidence of identity is the identification of the accused by the witness in court (dock identification) during the trial. This proposition is again reiterated in the case of **P. Sasikumar v. The State Rep. by the Inspector of Police reported in (2024) 8 SCC 600).**

12.8. In view of the aforesaid legal proposition, the submissions of Mr. Borah that in respect of not mentioning of name of the accused/petitioner, in her statement before the Magistrate under Section 164 of the Code of Criminal Procedure, cannot be accepted.

12.9. It is now well settled that minor contradictions may be here and there, in the evidence of the witnesses, but, the same do not spell inveracity into their versions. Reference in this context can be made to a decision of Hon'ble Supreme Court in the **State of Pubjab –Vs- Gurmit Singh,** reported in **1996 Crl. L.J. 1728,** wherein it has been held as under: –

> **"the testimony of victim in case of sexual offence is vital and unless there are**

compelling reason which necessitate looking for corroboration of her statement, the Court should find no difficulties to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspire confidence and is found to be reliable. Seeking corroboration of statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury."

12.10. Though Mr. Borah has argued that the victim had raised no hue and cry at the time of occurrence and that neighbouring witnesses have not been examined by the prosecution side, though independent witnesses were available in the upstairs and this cast a doubt about the occurrence, yet, said submissions also left this Court unimpressed. It is crystal clear from the evidence of the victim that the accused gagged her mouth, for which she could not raise hue and cry and that the accused had threatened to kill her and also threatened the P.W.1 and C.W.1 to be killed in the event of lodging of the case.

12.11. Besides, the occurrence took place inside the room and as such even if there were other neighbours in the said locality they had no occasion the see the occurrence and since the victim could not raise hue and cry on account the her mouth being gagged, the question of hearing the incident, by the neighbours, does not arise. Besides, the accused/petitioner could not demonstrate any reason

or adduce any evidence of his false implication with the offence, during trial.

(II) <u>The argument of delay in lodging the FIR after two days:-</u>

13. With regard to the ground as well as the submission of Mr. Borah, learned counsel for the petitioner, that the FIR was filed after two days of the occurrence, this Court finds that while the occurrence took place on 02.09.2007, the FIR was lodged on 04.09.2007, on which medical examination of the victim was conducted. But, it appears that there is explanation for the delay. The learned trial Court, while dealing with the issue of delayed medical examination of the victim, had held as under:-

> "10. ……..
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> …….
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> …….
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> **"To this effect of delay in conducting medical examination on PW.2 there was a good explanation given by PWs and PW.1 deposed that the accused threatened them not to lodge any case against him for which she immediately could not inform the matter to police. PW.2 also stated that accused had threatened her not to disclose the matter to PW.1 and her husband and PW.1 informed the police and police sent her to S.M.C. Hospital. C.W.1 also stated that accused person threatened not to**

file any case and they could not take any decision but on the next day PW.1 being accompanied by him informed the matter to police and army Police informed them to file a case at Police station as the victim is a civilian. Considering the fact that the place of occurrence was situated within residential quarters of Army camp at Machimpur and CW.1 as well as the accused person have been serving in the Army Department they preferred to report the matter to Army police before filing the ejhar on 4.9.07 at Arunachal outpost. Defence could not assail this part of evidence of PW.1, PW.2 and CW.1 regarding explanation given for filing the ejhar on 4.9.07 as there was two days delay.

11. Considering the facts of locality inhabited by Army personnel these questions arising in the matter of lodging complaint etc cannot be wiped out as false in order to disbelieve the evidence of PW.1, PW.2 and CW.1. and the delay has not been explained and that there is also no independent witness which makes the incident doubtful and under the aforesaid grounds Mr. Borah has contended to allow this petition."

13.1. The learned appellate Court also dealt with the issue of delay in para No.10 of the impugned judgment and order as under:-

"10. On going through the materials on record it appears that the prosecution also

successfully explained the delay in filing FIR. P.W.1, informant stated that since accused gave threatening not to file F.I.R. has caused delay in filing F.I.R. immediately, but on the following day i.e. on 03.09.2007, the matter was informed to Military Police. This fact is not challenged by the defence."

13.2. It is to be noted here that the delay in lodging the FIR and its consequence has been dealt with by Hon'ble Supreme Court in the case of **Gurmit Singh(supra),** where in it has been held as under:-

"In sexual offences delay in lodging FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving a cool thought that complaints of offences are generally lodged. Even if there is some delay in lodging FIR in respect of the offence of rape if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter."

13.3. In the instant case, the finding of the learned trial Court as well as the finding of the learned appellate Court, while examined in the light of the proposition, laid down in the case of **Gurmit Singh**

(supra), this Court find that the findings of the learned Court below, in respect of the delay, also suffers from no infirmity or irregularity requiring any interference of this Court. In view of the explanation, so forthcoming for the delay, and in view of the same being unchallenged by the petitioner, this Court is of the view that the delay in lodging the FIR has no bearing upon the veracity of the prosecution case. Consequently, the submission of Mr. Borah, learned counsel for the petitioner in this regard cannot be acceded to. Accordingly, the same stands repudiated.

14. Now, moving forward to the submission of Mr. Borah that the age of the victim as per medical evidence is below 18 years, where as per school certificate her age was 16 years, this Court finds that the victim in her evidence categorically stated that the accused committed the offence against her will. And as such, her age is immaterial. Moreover, the presumption u/s 114-A of the Evidence Act is also available here in this case, which provides that –

> **"If the victim states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."**

15. It is true that the Doctor has not found any mark of injury and any sign of recent sexual intercourse on the person of the victim. But, on this count alone the cogent and clear evidence of the victim

cannot be discarded. In this context, we may refer to a decision of the Hon'ble Supreme Court in **Guru Charan Singh vs. State of Hariyana,** reported in **AIR 1972 SC 2661,** where it has been held that absence of mark of violence on private parts, or elsewhere, may mere suggest want of violent resistance on the part of the victim. Besides, the victim herein this case was examined by Doctor (P.W.3), after two days of the incident and he had clarified that meaning of the term 'recent'- is within 24 hours. Since the victim was examined after 48 hours, on 04.09.2007, it is natural that the PW-3 had found no mark of injury.

16. This Court has also gone through the decisions referred by Mr. Borah, learned counsel for the petitioner and finds that the said decisions relate to jurisdiction of Court. But, no ground for lack of jurisdiction by any of the Courts below, is taken by the petitioner in this petition. Further, an Assistant Sessions Judge has jurisdiction to try the cases under Section 376 of the erstwhile IPC (rape), provided the case is properly made over to him/her.

16.1. The Legal Position under the CrPC was :-

(i) The offences under Section 376 IPC are exclusively triable by a Court of Session (First Schedule to the Cr.P.C.).

(ii) Under Section 9 Cr.P.C., the High Court may appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction of a Court of Session. They form part of the Court of Session and do not constitute a separate court.

(iii) Under Section 194 Cr.P.C., an Additional or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial (or as the High Court may specially direct).

(iv) Under Section 28(3) CrPC, an Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death, imprisonment for life, or imprisonment for a term exceeding ten years.

16.2. Thus, once a case under Section 376 is made over under Section 194, the Assistant Sessions Judge is competent to conduct the trial and record a finding of guilt/acquittal.

16.3. Further, **In Xxx Xxx Xxx vs. In Re – The State of Assam (Criminal Reference No. 1 of 2016,** decided on 29 August 2016, a Division Bench of this Court, while answering a reference under Section 395(2) Cr.P.C., in respect of jurisdiction of Assistant Sessions Judge, has held that:

(i) An Assistant Sessions Judge is competent to try a Sessions case made over to him/her, under Section 194 Cr.P.C.

(ii) This competence exists irrespective of whether the Assistant Sessions Judge can impose the minimum sentence authorised by law.

(iii) The Assistant Sessions Judge can deliver the judgment of conviction.

(iv) If the required sentence exceeds 10 years (or involves life imprisonment), the case record is to be placed before the Sessions Judge for hearing on the question of sentence and for passing the appropriate sentence.

16.4. The Division Bench also emphasised that Section 28 is a procedural provision and must be liberally interpreted. Jurisdiction to *try* the case is distinct from the power to *sentence*.

16.5. The specific question referred in the said reference was:-

> **Whether the restriction on an Assistant Sessions Judge from passing a sentence of imprisonment exceeding 10 years under Section 28(3) of the Cr.P.C. would act as an impediment to conduct the trial, or would vitiate the trial conducted by the Assistant Sessions Judge, in respect of a case relating to an offence punishable with imprisonment above 10 years?**

16.6. The case that led to the reference involved charges under Section 376D IPC (gang rape), which carries a mandatory minimum sentence of 20 years.

16.7. Thus, this Court is of the considered opinion that the decision referred by Mr. Borah would not advance his argument.

17. Thus, having examined the impugned judgment and order in the light of the facts and circumstances on the record, and also in the light of the arguments, so advanced by the learned counsel for both the parties, this Court finds no merit in this petition and accordingly the same stands dismissed, leaving the parties to bear their own costs.

18. The Registry shall return the relevant case file with a copy of this judgment forthwith.

JUDGE

Comparing Assistant