

GAHC010022002020



2026:GAU-AS:4253

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

Case No. : CrI.A./49/2020

SRI BASIR UDDIN
S/O- SHRI ALA UDDIN, R/O- PECHAWALA, GAMARIA, P.S. RAM KRISHNA
NAGAR, DIST.- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY P.P., ASSAM

2:SRI PILMAN SURONG
S/O- HOLI ROSMAT
R/O- SONICHERRA KHASIA PUNJI
P.S. R.K. NAGAR
DIST.- KARIMGANJ
ASSAM

Advocate for the Petitioner : MR. B K MAHAJAN, MR. A CHAUDHURY, MD R ALI, MR. P K
DAS, MR. N MAHAJAN

Advocate for the Respondent : PP, ASSAM,

Linked Case : CrI.A./45/2020

ROMJUL HUSSAIN
S/O- MD. ANCHAR ALI
VILL.- GAMARIA
P.S. R.K. NAGAR
DIST.- KARIMGANJ.

VERSUS

THE STATE OF ASSAM AND ANR
TO BE REP. BY THE PUBLIC PROSECUTOR

ASSAM

2:PILMAN SURONG
S/O- HOLI ROSMAT
VILL.- SONAICHERRA PUNJI
P.O. GAMARIA
P.S. R.K. MAGAR
DIST.- KARIMGANJ
ASSAM
PIN- 788156.

Advocate for : MR H R A CHOUDHURY
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MR. JUSTICE PRANJAL DAS

For the Appellants : Mr. A. Ahmed and Mr. N. Mahajan

For the Respondent(s) : Ms. A. Begum, learned
Senior Advocate and Additional Public Prosecutor,
Assam and Ms. J. Saikia and Ms. S. Sharma,
learned Legal Aid Counsel, respondent No. 2.

Date on which judgment was reserved : **09.03.2026**

Date of pronouncement of judgment : **24.03.2026**

Whether the pronouncement is of the
Operative part of the judgment? : **No**

Whether the full judgment has been
pronounced? : **NA**

JUDGEMENT AND ORDER (CAV)

(Pranjal Das, J)

Heard Mr. Mr. A. Ahmed and Mr. N. Mahajan, learned counsels for the appellants. Also heard Ms. A. Begum, learned Senior Advocate and Additional Public Prosecutor, Assam and

Ms. J. Saikia and Ms. S. Sharma, learned Legal Aid counsels, respondent No. 2.

2. The *instant criminal appeal* has been preferred under section 374(2) of the Criminal Procedure Code 1973 (as it existed then) by the appellant Basir Uddin against the judgment and order dated 09-12-2019, passed by the learned Sessions Judge, Karimganj, in Special Sessions Case No. 2/2015, whereby the appellant has been convicted under section 376 D IPC r/w section 6 of the POCSO Act 2012, and for such conviction sentenced to undergo imprisonment for life, meaning imprisonment for remainder of his natural life. He was also imposed with a fine of Rs.50,000/- and in default of fine to undergo rigorous imprisonment for 1(one) year.

3. In Criminal Appeal No. 45/2020, the appellant Ramjul Hussain has assailed the same judgment, whereby he was also convicted and sentenced on identical lines. Both these criminal appeals are being disposed of by this common judgment.

4. Before proceeding further, the factual matrix of the prosecution case as revealed before the learned trial court may be narrated as follows –

On 09-03-2015, telephonic information was received at Kalibari outpost under RK Nagar police station in the district of Karimganj, whereby ASI Mihir Malakar informed over phone that three boys had committed rape on a girl at Sunaicherra and large number of people had gathered at the outpost in connection with the matter.

5. On the basis of the information, GD No. 207 dated 09-03-2015 was made. On the same day, i.e. on 09-03-2015, at night, an FIR was lodged at the Kalibari outpost by informant Pilimon Surang with the allegation that on the same day in the evening around 5.30 p.m., his daughter (referred to her as X) and her cousin sister, June, were coming back to their house from a Fair Price Shop and when they reached near the Hanuman Asthan situated at Sunaichara garden, the accused persons caught his daughter, took her to the jungle forcibly and repeatedly committed rape on her at knife point. It was further stated in the FIR that her

cousin sister who was with the victim, came running and informed the matter, whereupon the informant along with his relatives recovered his daughter in an unconscious state at the place of occurrence and her footwear was also found at that place.

6. It was further alleged that his daughter was in critical condition and struggling for her life. On the basis of the FIR, Kalibari outpost GD No. 115 dated 09-03-2015 was made and the FIR forwarded to the RK Nagar police station, whereupon RK Nagar PS case No. 33 of 2015 was registered on 10-03-2025 under section 6 of the POCSO Act, 2012. The case was investigated and upon completion of investigation, the I/O upon finding sufficient materials laid charge-sheet being C.S. No. 31 dated 16-5-2015.

7. Four persons were charge-sheeted, namely the present two appellants and two other accused who were, however, forwarded to the JJB for being a CICL. The charge-sheet was filed against the appellants under section 120(B) IPC r/w section 6 of the POCSO Act 2012. Subsequently, after completion of the usual formalities, the learned trial court vide order dated 11-11-2019, framed charges against both the appellants under section 376D IPC r/w section 6 of the POCSO Act 2012.

8. The charge upon being read over was denied by the appellants as accused and accordingly, the trial commenced. During the trial, the prosecution examined 13(thirteen) witnesses, including the informant, victim, MO and I/O. Two court witnesses were also examined.

9. After closure of the prosecution evidence, the appellants were examined under section 313 CrPC. The defence did not adduce any evidence. After completion of the trial, the learned trial court convicted and sentenced the appellants as already narrated earlier. Aggrieved by the same, the instant appeals have been filed.

10. It is submitted by the learned counsel for the appellants that Test Identification Parade (herein after TIP) in the instant case was done after 25 days and that the identification of the

appellant, especially Ramjul Hussain, is highly defective. It is submitted that the appellants have been falsely implicated.

11. It is submitted that before conducting the TIP, appellant Ramjul was already exposed to the victim girl. It is submitted that in the initial information regarding the incident received at the outpost based on which GD No. 207 was dated 09-03-2015 was made, the appellants were not named. It is submitted that the testimony of the I/O has revealed that the appellants as accused were not masked.

12. It is submitted in this context that as a result of the same, the victim girl had seen them before the TIP. It is submitted that from the evidence, it can be said that the victim girl along with her father has visited the court and seen the appellants before the TIP. It is submitted and reiterated that due to enmity, the appellants have been falsely implicated in this case.

13. In support of his submissions, the learned counsel for the appellants has placed reliance on the following case laws –

(i) *Gireesan Nair & Ors. Vs. State of Kerala, reported in (2023) 1 SCC 180.*

(ii) *Reena Hazarika vs. state of Assam, reported in (2019) 13 SCC 289*

(iii) *Ganesh Gogoi vs. state of Assam, reported in (2009) 7 SCC 404.*

14. On the other hand, the learned Additional Public Prosecutor submits that the appellants have not been falsely implicated in the case and that PW-3/victim has denied in her cross-examination that she had falsely implicated the appellants. The prosecution submits that no cross-examination was conducted on the point of revealing the identity of the appellants to the victim before her TIP. It is submitted that the present case has been successfully proved before the learned trial court.

15. In support of her submissions, the learned Additional Public Prosecutor for the State has placed reliance on the following case laws –

(i) *State of Uttar Pradesh vs. Krishna Master & Ors. Reported in (2010) 12 SCC 324.*

(ii) *Mulla and Anr. vs. State of Uttar Pradesh, reported in (2010) 2 SCC 508.*

16. Supporting the contentions of the prosecution, Ms. Sarma, the learned Legal Aid counsel for the informant, submits that the testimony of PW-3/victim receives full support from the medical evidence and the testimony of the MO. It is submitted that the medical evidence clearly proves the commission of rape upon the victim girl. It is submitted that the evidence clearly shows that the victim knew the appellant Basir from before. With regard to the aspect of false implication, the learned Legal Aid counsel submits that no defence evidence has been adduced in support of the story of false implication.

17. The learned counsel further submits that during all the three rounds of the TIP, the appellants were identified by the victim girl. Summing up her submissions, the learned Legal Aid counsel contends that the testimony of the victim is reliable in this case and along with the other parts of the prosecution evidence, the learned trial court rightly convicted and sentenced the appellants.

18. In support of her submissions, the learned Legal Aid counsel for the respondent No. 2/informant has placed reliance on the following case laws –

(i) *P. Sasikumar vs. State represent by the Inspector of police, reported in (2024) 8 SCC 600.*

(ii) *Motilal vs. state of Madhya Pradesh, reported in (2008) 11 SCC 20.*

(iii) *Bhupen Kalita vs. State of Assam, reported in 2020 Supreme (Gau) 300.*

DISCUSSION AND DECISION

19. PW- 12, *Dilip Kumar Chanda* is one of the investigating officers of the case and in his cross-examination stated that during the investigation he had not collected any document of age or of date of birth of the victim. The medical officer, Dr. Ranobijoy Malakar, who had examined the victim after the incident adduced evidence as PW-10 and after such medical examination, he opined that her age was between 13 to 14 years. In his testimony, he has stated about her radiological examination and in cross-examination, he denied the suggestion that his opinion regarding the victim being aged between 13 to 14 years was not correct. In her statement recorded before the learned JMFC during the investigation, which has been exhibited as Exhibit-4 during the trial, she has stated her age to be 13 years. The said statement was recorded on 11-03-2015. The date of the alleged incident is 09.03.2015.

20. In the FIR lodged by the father of the victim girl, he has mentioned her to be aged 13 years and a student of Class VII. The examination-in-chief of the victim who adduced evidence as PW-3 was taken in two phases. In the first phase recorded on 07.12.2016, she indicated her age as 14 years and in the second phase recorded on 01.12.2018, she indicated her age at the time of deposition as 16 years. In her examination-in-chief, though she has not mentioned about her age, she has stated about studying in Class VII at the time of the incident. However, she denied the suggestion that she was above 18 years of age at the time of the incident.

21. *Pilman Surong*, the father of the victim, adduced evidence as PW-5 and he is also the informant of the case. We also find that in the cross-examination of PW-5, the informant and father of the victim, no suggestion or question was put on the question of the victim girl being a minor or otherwise. *Thus, on the basis of the aforesaid evidence, it is clear that the victim girl was a minor aged below 18 years at the time of the incident.*

22. Before proceeding further, the statement of the victim girl recorded under section 164 CrPC during the investigation may be seen. As mentioned above, the said statement was exhibited and proved by her during the trial as Exhibit-4 and she also proved her signatures thereon as Exhibit 4(1), 4(2), 4(3) and 4(4).

23. In her statement, she stated that on the day of the incident at around 5.30 PM, she along with her little sister June went to a shop situated half a kilometer away from their house. Then on the way back, they took a shortcut route where there was a forest and fewer passersby. She further stated that while they were going on that route, three boys, one of them being Basir, son of Ala Uddin, who used to serve them on a daily basis, came out from the jungle and saw them. Upon seeing them, her sister ran away. The victim further stated that when she tried to run away, the three boys pushed her from behind and she fell down. Thereafter, one of them pressed her mouth and another caught hold of her legs and they committed bad acts upon her, one after the other removing her clothes. She lost her consciousness and regained her senses when her father took her home. She stated that the three boys took her to the jungle from the road and committed the heinous act. She also stated that the accused persons committed the heinous act by tying her mouth by means of a hanky and keeping hold of her hands and legs.

24. As mentioned above, during the trial, the victim adduced evidence as PW-3. She stated in her deposition that on 09.03.2015, in the afternoon, she was returning from the ration shop along with her younger sister named above through a shorter route to the house, whereupon three boys came out of the jungle and held her and at that time, her sister ran home to inform her parents. PW-3 further testified that the boys then forcefully took her inside the jungle and one held her by her legs and one gagged her, while the other committed rape upon her and that in this manner, one by one, all the boys committed rape upon her. She stated that she could recognize one of the miscreants as Basir and that the said Basir used to work in their *Khasia Punji* as labour. During her deposition, she identified the said Basir in the dock. She stated that she became unconscious after the incident and when she regained her senses, her father had already arrived.

25. PW-3 further stated in her examination-in-chief that she could identify the other accused Ramjul, if she saw him and that she came to know his name after the incident and after he was arrested in the case. She stated that she identified him as one of the persons involved in the incident and that she used to notice him prior to the incident when he used to go to college, but did not know his name. PW-3 further stated that the incident took place on 09-03-2015 and that she had gone to the ration shop with her mother's sister's daughter named June, for purchasing rice and was coming back by the shortcut after purchasing rice and the said route passed through a jungle. While on the way, three persons came and stopped in front of them. One was accused Basir Uddin and the other was Ramjul. She could not identify the third miscreant. She stated that they pushed her from behind, whereupon she fell down and her sister fled. She further testified that the three persons dragged her inside the jungle, removed her clothes and Ramjul grabbed both her hands and spread the two hands on both sides and the third unidentified miscreant grabbed her legs by spreading them apart. Thereafter, Basir raped her. She further stated that thereafter the other two also committed rape upon her. She testified that the accused persons also scratched her breast and chest. She specifically testified that all the three accused persons had inserted their private parts into her private part, leading to bleeding. She stated that she had resisted them but they overcame her. She stated that after committing rape, they threw her and escaped from the place and she became senseless. She proved her statement before Magistrate as Exhibit-4 and her signature thereon as Exhibit-4(1), 4(2), 4(3) and 4(4). She stated about police seizing her clothes that she was wearing at the time of the incident. She proved her signature on the seizure list as Exhibit-2(2). She proved as Material Exhibit-1 the frock she was wearing and as Material Exhibit-2, the shorts she was wearing at the time of the incident.

The testimony of PW-3 regarding the commission of rape and the nature of the incident remained unshaken in cross-examination and her testimony regarding the nature of the incident has not been demolished in cross-examination. She denied the suggestion that no incident as alleged by her had taken place. She specifically denied that there was any quarrel between her and Basir regarding detaining of Basir's cow.

26. The sister mentioned by the victim in her testimony and who was stated to be with her at the time of the incident is a crucial witness and she testified as PW-4.

27. At the time of PW-4's deposition, her age was stated to be 12 years and therefore, the learned trial court conducted preliminary questioning regarding her name, father's name, the Class in which she was studying and during this preliminary questioning, she also stated that she would speak the truth. Upon being satisfied, the learned trial court proceeded to examine her. The said PW-4 child witness and cousin sister of the victim has lent support to the testimony of the victim.

28. PW-4 stated that on the fateful day, she and the victim girl had gone to ration shop to get rice and on the way back at around 5.30 PM, three miscreants held her sister while one other person did not do anything against the victim. She stated that she got scared and ran to inform the victim's father about the incident. PW-4 also stated about recognizing accused Basir Uddin at that time. She denied in cross-examination that she had given false evidence and she has also denied that she could not identify the miscreants. She has also reiterated that upon returning from the ration shop, the four miscreants pounced upon her sister and three of them held her and then she ran towards her sister's house to inform her father about the incident. The testimony of PW-4 lends vital corroboration to the nature of the incident and the evidence adduced by the victim.

29. We next go to the medical evidence and the testimony of PW-10, *Dr. Ranobijoy Malakar*, who examined the victim after the incident as mentioned earlier. In his testimony, he has stated about examining her on 09-03-2015 at S.K. Roy Civil Hospital, Hailakandi in connection with R.K. Nagar P.S. Case No. 33/2015. He stated that the victim was identified by WPC *Anjana Dey*. PW-10 stated that marks of violence was found on her body and private parts; that, vulva was reddish and swollen; there was laceration over labia minora. He also testified that the victim gave a history of rape. He further stated in his testimony that vaginal swab gave positive results for presence of spermatozoa under microscopic examination. He opined that there were signs of recent sexual intercourse; marks of violence present on her private

parts and that she was found to be having difficulty walking during the time of examination. He proved the medical report as Exhibit-10 and his signature thereon as Exhibit- 10(1). He proved the vaginal swab report as Exhibit-12, and x-ray report as Exhibit-13.

30. In cross-examination, he reiterated that he had examined the victim in connection with R.K. Nagar P.S. Case No. 33 of 2015 by denying the suggestion in this regard. Therefore, we find that apart from the testimony of the victim as PW-3, which finds corroboration from the testimony of her sister(PW-4) – the medical evidence clearly reveals that there was sexual assault in the nature of rape upon the victim girl. The injuries on her private parts, the tenderness and swelling on her private parts, and laceration on her labia minora/private parts clearly indicate sexual assault. The MO has specifically opined about signs of recent sexual intercourse and marks of violence on her private parts. Another very important aspect is finding of spermatozoa on the vaginal swab, which fortifies the medical opinion regarding penetrative sexual assault.

31. PW-1 *Nur Uddin* is the writer of the FIR and he has proved the ejahar as Exhibit 1 and his signature thereon as Exhibit 1(1). He stated about taking thumb impression of the informant on the ejahar.

32. In cross-examination, he stated that it was mentioned in the FIR that it was according to the narration of the informant. PW-2 *Samar Das* also lends an important corroboration to the testimony of the victim and her sister as he has stated that at the relevant time around 4 PM, the victim had come to his shop to purchase ration articles and she was accompanied by a younger girl and that after purchasing, they left his shop. As already mentioned, both PW-3 victim and her minor sister PW-4 have stated about the incident taking place while they were returning from the ration shop after purchasing rice.

33. PW-5 *Pilman Surong*, the informant and father of the victim, corroborating the testimony of PW-4 child witness has stated about the child coming to his house and informing that some miscreants had restrained and caught hold of the victim. He stated that he

immediately, accompanied by some other people, went to the place of occurrence and found his daughter in a senseless condition and that upon being asked, when she regained her senses, she stated about being raped by the three miscreants. In this context, the victim has stated in her testimony that after the incident, she had become senseless and she reiterated the same in cross-examination by denying the suggestion to the contrary that when her father reached there, she was conscious. Therefore, this part of the testimony of the informant PW-5 has been corroborated by the testimony of his daughter.

34. PW-6 *Mathius Sutnga* testified that on the day of the incident, he was informed by the victim's father that he was informed by the child June, who came rushing to him and telling him about three men committing rape on the victim. He also accompanied the informant to the place of occurrence and found the victim in a very exhausted condition and she was not in a position to speak and he stated about bringing the victim back to her residence, giving massage to her body and when she felt better, she told him that accused Basir Uddin and two others had committed rape on her.

35. In cross-examination, he stated *inter alia* that at the place of occurrence, he had found a slipper.

36. PW-7 *Gabriel Namba* stated that he was also told by the informant about his daughter being raped. He stated about the nature of the incident on similar lines and the victim telling about the incident after regaining senses, thereby lending support to the testimony of the victim about losing consciousness after the incident.

37. It is important to note that PW-7 revealed in his testimony that while the informant was carrying the victim back, her pants were removed and her upper garments were torn and he had seen blood coming out of her breast. He stated that it appeared to him that the miscreants had bitten or scratched her breast. In this context, PW-3, the victim had stated that during the incident, the miscreants had scratched her breast and chest.

38. This is also in harmony with the findings of the medical examination about marks of violence on her body, including private parts. In her testimony, the victim had stated about the police seizing clothes which she was wearing at the time of the incident, while exhibiting two seizure lists. In this regard, investigating officers PW-11 Mihir Malakar and PW-12 Dilip Kumar Chanda stated about seizing male hawai slippers, leather sandals and nylon female slipper upon being produced by the informant and others. These were stated to have been seized by I/O as Material Exhibit- 3, 4 and 5. The recovery of the female slipper from the place of occurrence is significant. It may be mentioned here that the initial information was given by ASI Mihir Malakar of Kalibari outpost under RK Nagar police station over phone that three boys had committed rape on a girl and large number of people had gathered before the outpost. The pertinent GD No. 207 dated 09-03-2015, extract copy of which was exhibited during the trial as Exhibit-15.

39. Subsequently, the formal FIR was lodged by the father of the victim whereupon Kalibari out post GD No. 115 dated 09-03-2015 was made and forwarded to the police station for registering a case. PW-12, the second investigating officer testified that upon completion of investigation, he submitted charge-sheet which he exhibited as Exhibit-19 during the trial and proved his signature there on as Exhibit-19(1).

40. Thus, from the prosecution evidence narrated and discussed above, it is proved that the victim girl was a minor aged below 18 years at the time of the incident and that she was also subjected to sexual assault in the nature of rape by several miscreants.

41. As stated at the outset, 4(four) accused persons were sent up for trial out of which 2(two) were found to be CIJL and were forwarded to the Juvenile Justice Board. The present convict appellants namely Basir Uddin and Ramjul were found to be adults and they faced trial before the learned trial court and after their conviction and sentence, they are before this Court with this appeal.

42. Now, we are confronted with the most important question as to whether the identity of

the present convict appellants as two of the assailants involved in the gang rape of the minor child has been proved by the prosecution during the trial.

43. It may be mentioned here that in the telephonic information mentioned above (GD No. 207), there is reference to 3(three) boys. However, in the FIR lodged by the father of the victim, against the miscreants, Basir Uddin S/o Ala Uddin, is mentioned and two others are mentioned without taking the names. Thus, in the FIR Exhibit-1, the name of appellant Basir is mentioned. In her statement under section 164 CrPC also, the victim has mentioned about Basir being one of the assailants. In her testimony as PW-3, the victim has clearly stated about one of the miscreants being Basir and that he used to work as a labour in their *Khasiya Punji* and she identified the said accused in the dock during deposition. In cross-examination on behalf of the said Basir, the victim has stated about his father's name as well and also testified about seeing him on the day of the incident while she was going to the shop.

44. As already mentioned earlier, she specifically denied about any quarrel between her and Basir with regard to any cow. Even the child witness PW-4, the younger sister of the victim, has stated about recognizing accused Basir out of the three appellants in her examination-in-chief. Such testimony of PW-4 identifying the accused Basir has remained unshaken in cross-examination.

45. PW-5, the informant has stated about being told by the informant that she could recognize one of the miscreants at the time of the incident. From the testimony of PW-6 also, it has emerged that upon regaining her consciousness when she was asked about the incident, she narrated the same and also mentioned accused Basir Uddin and two others. In cross-examination of PW-6, Mathius Sutnga also, he has reiterated that the victim told him about Basir committing rape on her.

46. It may be mentioned here that during the investigation, TIP was done regarding identification of assailants. The TIP report has been exhibited during the trial and the learned Magistrate who conducted the TIP has also adduced evidence as PW-9. In his deposition, PW-

9 *Tarun Dey*, the then learned JMFC, stated that upon order of the learned CJM, Karimganj, the conducted TIP on 07.04.2015 in the district jail at Karimganj. He stated that upon reaching there in the late afternoon, he directed positioning of nine persons and one accused, in one row and in the said manner formed four rows consisting of nine individuals and one accused each. He stated that the accused persons were Ramjul Hussain, Basir Uddin and there were two CICLs. The witness was the victim of the case and three rounds of identification were carried out.

47. In the first round, she identified Ramjul Hussain, Basir Uddin and one CICL. In the second round, she identified Ramjul Hussain, Basir Uddin and the same CICL. In the third round, she identified Ramjul Hussain, Basir Uddin, the aforementioned CICL and another CICL.

48. PW-9 stated in his deposition that each of the rows consisted of persons of similar looks and heights and before each round, the witness was sent to a room separate from the accused and dresses of the persons were changed and police personnel were excluded from jail premises. The victim was also in a room where police personnel were not there. He further testified that TIP was conducted in the presence of head warden *Kajal Chakraborty* and assistant jailor *Sudip Banerjee*. PW-9 proved the TIP report as Exhibit-5 and his signatures there on Exhibit-5(3) & 5(4) and the signature of the witness as Exhibit-5(5), 5(6), 5(7) and 5(8). He stated that after the TIP, he passed a detailed order which he exhibited as Exhibit-9 and Exhibit-9(1) being his signature.

49. We have perused the Exhibit-5 being the TIP report and in the heading under serial No. 8, it has been stated that the witness identified Ramjul Hussain and Basir Uddin and one other in the first and second round and another person in the third round. It may be mentioned here in that in the testimony of the victim also, she has stated about participating in the TIP. She stated that police took her to the jail where number of persons were lined up and she identified the accused persons and she stated that she had identified two accused persons. She had identified both the present appellants during such TIP. During her

deposition also, she identified the accused Basir Uddin in the dock. Thus, on the basis of the identification evidence; three rounds of TIP; mentioning of the name of Basir in the statement before Magistrate during investigation; mentioning of his name in FIR; implicating Basir Uddin by name in her testimony during the trial – the identity of appellant Basiruddin is sufficiently proved.

50. Further, from the TIP evidence rendered by the learned JMFC and also, the testimony of the victim during the trial – there is no manner of doubt that the identity of the appellant Basir Uddin as one of the assailants committing the gang rape upon the minor girl has been proved sufficiently by the prosecution.

51. As regards the identity of Ramjul, it is true that initially, his name did not come into the picture. In the FIR, he was not named and in the statement before learned JMFC also, there is no mention of his name. However, the TIP was conducted on 07.04.2015 and the incident had taken place on 09.03.2015. During TIP, the victim identified appellant Ramjul Hussain during all the three rounds of the TIP. This has also been testified by the learned JMFC who had conducted the TIP, in his testimony as PW-9. It is also revealed from the TIP report exhibited as Exhibit-5.

52. Regarding her testimony during the trial, PW-3 victim in her examination-in-chief of the first phase did not mention about Ramjul. But in her second phase of examination-in-chief, conducted on 01-12-2018, she stated that she identifies the said Ramjul as one of the persons involved in the incident and that she came to know his name after the incident. However, the TIP was conducted within a month of the incident and in the said TIP, she clearly identified Ramjul as one of the assailants in all the three rounds as mentioned above.

53. The identification of Ramjul in court on 01-12-2018 during the second phase of her examination-in-chief by the victim was not identification of Ramjul for the first time and that such identification during her examination-in-chief on 01-12-2018 – would only fortify her TIP identification of assailant Ramjul on 07-04-2015. The appellant side has contended

that during the period between the date of the incident and the TIP, perhaps the identity of Ramjul might have been exposed. However, in view of the cogent testimony of the TIP as revealed from the TIP report, the testimony of the learned JMFC regarding the same and the clear testimony of PW-3, the victim – we are of the view that there is no infirmity in the identification of Ramjul as well and that the evidence clearly proves that he was one of the assailants involved in the heinous crime.

54. One aspect of the case that needs to be clarified is with regard to whether there were three or four accused persons involved in the sexual assault made on the victim. The evidence of the victim and her sister (PW-4) shows that three persons had stopped in front of them while they were passing through the jungle and those three persons who had stopped them had raped the victim. However, there was a fourth person in the jungle along with the three other persons who did not do anything against the victim. This is clearly spelt out in the evidence of the victim (PW-3), who stated that one of the persons was standing at some distance at the time of the incident and he had not done anything to her. The retract of the evidence of PW-3 is as follows –

“One of the persons was standing at some distance at the time of the incident and he had not done anything to me.”

55. PW-4 in her evidence has also stated in her cross-examination as follows –

“.....It is not a fact that I have falsely stated that while returning from the ration shop with Kuin, 4(four) miscreants pounced upon the victim Kuin and 3 (three) held her, while the other did not hold her and then I ran towards Kuin’s house and informed her father about the incident.

.....It is not a fact that I have not stated before the police that when we returned from the ration shop there were 4 people, and 3 pounced upon the

victim while the other did not hold the victim.”

56. Thus, it is clear that there were actually 4(four) persons at the scene of the crime besides the victim, at the time the victim was being raped. Just because the informant had not made a mention of there being a fourth person at the time of rape in the FIR, does not mean that there was no fourth person besides the victim, at the time the victim was being raped. An FIR is not an encyclopedia. Besides the above, when rape had been committed by three of the four accused persons and the fourth one had not done anything against the victim, it is possible that the victim did not say anything about a fourth person to the informant, as the fourth person did not do anything against her. This non-disclosure of the fourth person in the FIR does not take away the fact that the rape of the victim had been committed by three persons and the non-disclosure of the fourth person does not vitiate the testimony of the informant or the contents of the FIR.

57. Another important aspect of the materials with regard to appellant Ramjul is his clear statement in examination under Section 313 CrPC with regard to question No. 35 – that he/they do not have any dispute with the victim and her father. He had only mentioned about one dispute between him and Gabriel who was one of the prosecution witnesses. Therefore, in view of his clear statement, as well as other materials, we do not find any basis indicating the possibility of false implication of the appellant Ramjul. As regards the other appellant Basir Uddin, in view of the overwhelming evidence, including identification evidence with regard to him, the feeble attempt in his section 313 CrPC examination to make out a story of false implication due to some dispute over grazing of cows is not found to be convincing to make any significant dent on the prosecution case.

58. In the case of **Gireesan Nair (supra)** relied upon by the appellant side, it was held *inter alia* that the TIP would not have a legal value if witnesses had opportunity to see the accused before such TIP.

59. However, in the instant case, TIP was conducted within a month of the incident and in

all the three rounds the victim has identified the accused persons, including assailant Ramjul. This was further fortified by her clear identification in court during her deposition. The victim has admitted in her testimony that earlier she did not know his name and later she came to know his name after the incident and that she clearly identified him as one of the assailants who committed the gang-rape.

60. Therefore, in our view, this decision does not help the case of the appellants. The decision in **Ganesh Gogoi (supra)** was in the context of TADA and also dealt into circumstantial evidence and some aspects of defective investigation. In the instant case, we have not found any significant infirmities in the investigation. And the instant case is not solely based on circumstantial evidence as the victim girl is an eyewitness herself and her little sister is a vital eyewitness to part of the incident. The decision in **Reena Hazarika (supra)** also does not help the appellants' side as we have found the defence story of false implication to be unconvincing and rather a faint attempt at denting the prosecution case. It also has to be noted that the defence has not adduced any evidence during the trial.

61. In the case of **Mulla and Anr. (supra)** relied upon by the prosecution, the Hon'ble Supreme Court has discussed the law regarding TIP and its evidentiary value. The relevant para 41, 42, 43 and 44 may be reproduced herein below –

“41. Now, let us consider the arguments of the learned amicus curiae on the delay in conducting the test identification parade. The evidence of test identification is admissible under Section 9 of the Evidence Act, 1872. The identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in court. There is no provision in CrPC entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact

that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court.

42. *Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, Where identification of an accused by a witness is made for the first time in court, it should not form the basis of conviction.*

43. *As was observed by this Court in Matru v. State of U.P. identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroboration of the statement in court. (Vide Santokh Singh v. Izhar Hussain.)*

44. *The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime."*

62. In the case of **State of Uttar Pradesh vs. Krishna Master & Ors. (supra)** relied upon by the prosecution, the Hon'ble Apex Court has emphasised the importance of reading

the evidence as a whole and that minor discrepancies or inconsistencies not touching the core of the case should not justify rejecting the evidence as a whole. The Hon'ble Apex Court has also stated the well-settled principle that FIR does not have to be an encyclopaedia of all the facts and circumstances on which the prosecution relies. Para 66 and 67 may be reproduced herein below –

“66. As far as this aspect is concerned, this Court notices that the FIR need not be an encyclopaedia of all the facts and circumstances on which the prosecution relies. The main purpose of the FIR is to enable a police officer to satisfy himself as to whether commission of cognizable offences is indicated so that further investigation can be undertaken by him. The purpose of the FIR is to set the criminal law in motion and it is not customary to mention every minute detail of the prosecution case in the FIR. FIR is never treated as a substantive piece of evidence and has a limited use i.e. it can be used for corroborating or contradicting the maker of it.

67. Law requires FIR to contain basic prosecution case and not minute details. The law developed on the subject is that even if an accused is not named in the FIR he can be held guilty if prosecution leads reliable and satisfactory evidence which proves his participation in crime. Similarly, the witnesses whose names are not mentioned in the FIR but examined during the course of trial can be relied upon for the purpose of basing conviction against the accused. Non-mentioning of motive in the FIR cannot be regarded as omission to state important and material fact. As a principle, it has been ruled by this Court that omission to give details in the FIR as to manner in which weapon was used by the accused is not a material omission amounting to contradiction. Further, this is a case wherein FIR was filed by a rustic man and, therefore, non-mentioning of motive in the FIR cannot be attached much importance.”

63. In **P. Sasikumar (supra)** relied upon by the learned counsel for the Informant, the Hon'ble Supreme Court has discussed about TIP. The relevant para 21 and 22 are reproduced herein below –

“21. It is well settled that TIP is only a part of police investigation. The identification in TIP of an accused is not a substantive piece of evidence. The substantive piece of evidence, or what can be called evidence is only dock identification that is identification made by witness in court during trial. This identification has been made in court by PW I and PW 5. The High Court rightly dismisses the identification made by PW I for the reason that the appellant i.e. Accused 2 was a stranger to PW 1 and PW I had seen the appellant for the first time when he was wearing a monkey cap, and in the absence of TIP to admit the identification by PW I made for the first time in the court was not proper.

22. However, the High Court has believed the testimony of PW 5 who has identified Accused 2 under similar circumstances! The appellant was also stranger to PW 5 and PW 5 had also seen the accused i.e. the present appellant for the first time on that fateful day i.e. on 13-11-2014 while he was wearing a green-coloured monkey cap. The only reason assigned for believing the testimony of PW 5 is that he is after all an independent witness and has no grudge to falsely implicate the appellant. This is the entire reasoning.”

64. **Moti Lal (supra)** relied upon by the informant also touches upon the well-settled principle that in a rape case, the conviction can be based on the sole testimony of the prosecutrix. However, in the instant case, we have not only found the testimony of the prosecutrix to be cogent and satisfying, but it finds significant corroboration from other parts of the prosecution evidence such as testimony of the minor sister, the medical evidence, the seizure evidence, the testimony of the father of the victim and another person.

65. In the leading case of **Bhupen Kalita (supra)** relied upon by the informant side, this Court had summarized certain legal principles under the POCSO Act and held that the prosecution has to prove the foundational facts by preponderance of probability, where after the burden shifts to the accused to dispel the absence of the statutorily presumed culpable mental state upon proof of certain such foundational facts. The relevant Para 71 will be reproduced herein below –

“71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under section 29 of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through

cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt.”

66. Now, coming back to the facts of the instant case, upon appreciating the evidence on record as narrated and discussed above, we come to the considered finding that during the trial, the prosecution successfully proved that on the day of the incident, three out of the four assailants including the present two convict appellants, accosted the minor victim girl, dragged her to the jungle and committed rape upon her. The fourth person did not do anything physical against the victim. The evidence on record – including the testimony of the victim of her little sister, the medical evidence, the testimony of the other witnesses and materials – convincingly proves that both the convict appellants were involved in the heinous crime of committing gang rape upon the minor girl.

67. As regards identification, the identity of appellant Basir Uddin as one of the convict appellants is convincingly proved by the evidence on record, including the TIP evidence and identification evidence. With regard to the other appellant Ramjul Hussain also, though his name did not emerge initially, but the evidence and materials regarding the subsequent emergence of his name, including his identification by the TIP evidence along with the identification in court by the victim, also leaves no room for doubt that he was one of the partner perpetrators of the heinous crime.

68. Consequently, we do not find any infirmity in the conviction recorded by the learned trial court under section 376 D IPC r/w Section 6 of the POCSO Act and the said conviction is hereby **upheld and confirmed**. Section 6 of the POCSO Act pertaining to aggravated penetrative sexual assault is punishable with imprisonment not less than 20(twenty) years, but which could extend to non-remittable life imprisonment and also liable to fine.

69. In the instant case, the learned trial court has imposed stringent and maximum

punishment of life imprisonment without remission. Sexual abuse upon children leaves them traumatized and such emotional scars can remain lifelong sometimes. To mitigate and remove such trauma and emotional scars, significant effort at counselling and rehabilitation would be necessary. For victims hailing from poor families, such an effort and process would be that much more difficult. The stringent punishment provided under the penal provision – section 6 of the POCSO Act – are meant to indicate zero tolerance for child rape and designed to send a chilling message to offenders of such heinous crimes.

70. In the instant case, considering the heinous nature of the crime of committing gang rape on a minor girl hailing from a poor family and the trauma that she underwent as revealed by the evidence – we are not persuaded to make any modification in the sentence on the lower side. Accordingly, the sentence imposed by the learned trial court on the convict appellants for their conviction under section 376 D r/w Section 6 of the POCSO Act is also **upheld and confirmed**. Consequently, the judgment and order dated 09.12.2019 passed by the learned Sessions Judge, Karimganj in Special Sessions Case No. 02/2015 is hereby **upheld and confirmed**. Resultantly, the appeals stand **dismissed**.

71. In paragraph 48 of the impugned judgment and order, the learned trial court already directed the jurisdictional DLSA to process victim compensation for the victim. Therefore, no additional directions are necessary from this appellate court. However, it is hoped that suitable and adequate victim compensation would be awarded to the victim girl to help her in the process of rehabilitation.

72. The criminal appeals stand disposed of accordingly.

JUDGE

JUDGE

Comparing Assistant