IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

Death Reference No. 2 of 2016

STATE OF WEST BENGAL

...APPELLANT

Vs.

SAIFUL ALI & ORS.

...RESPONDENTS

C.R.A. No. 108 of 2016

BHOLA NASKAR @ BHOLANATH NASKAR

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 109 of 2016

SK EMAMUL ISLAM

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 110 of 2016

AMIN ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 111 of 2016

ANSAR ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 133 of 2016

WITH

CRAN 1 of 2023

WITH

CRAN 2 of 2023

WITH

CRAN 3 of 2023

SAIFUL ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 240 of 2016

AMINUR ISLAM @ BHUTTO

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.R. No. 2789 of 2014

ANSAR ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.R. No. 3828 of 2014

WITH

CRAN 1 of 2014 (Old No. CRAN 4521 of 2014)

ANSAR ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

G.A. 1 of 2016

STATE OF WEST BENGAL

...APPELLANT

Vs.

NOOR ALI @ NURO & ANR.

...RESPONDENT

For the Appellant : Mr. Y.J. Dastoor, Sr. Adv.
Mr. Phiroze Edulji, Adv.
Mr. Sanjib Kumar Das, Adv.
[in CRA 108 of 2016,
CRA 109 of 2016 and
CRA 111 of 2016]

Mr. Sabyasachi Banerjee, Adv.
Mr. Arindam Dey, Adv.
Ms. Shreya Rastogi, Adv.
Mr. Smarajit Basu, Adv.
Mr. Amartya Kanjilal, Adv.
Mr. Amitayu Kundu, Adv.
Ms. Stuti Rai, Adv.
[in CRA 133 of 2016]

Mr. Satadru Lahiri, Adv.
[in CRA 110 of 2016]

Mr. Kaushik Gupta, Adv.
[in CRA 240 of 2016]

Mr. Jayanta Narayan Chatterjee, Adv.
Mr. Shirsendu Sinha Roy, Adv.
Ms. Moumita Pandit, Adv.
Mr. Supreem Naskar, Adv.
Ms. Jayashree patra, Adv.
Ms. Ritushree Banerjee, Adv.
Ms. Pritha Sinha
[For the de-facto complainant]

For the State : Mr. Ranabir Roy Chowdhury, Adv.
Md. Sabir Ahmed, Adv.
Mr. Sanjay Banerjee, Adv.
Mr. D.R. Ghosh, Adv.

Heard on : 16.01.2023, 17.01.2023, 24.01.2023, 10.02.2023, 22.02.2023, 20.03.2023, 21.03.2023, 27.03.2023, 29.03.2023, 04.04.2023, 11.04.2023, 12.04.2023, 13.04.2023, 17.04.2023, 18.04.2023, 19.04.2023, 26.04.2023, 02.05.2023, 03.05.2023, 10.05.2023, 18.05.2023, 06.06.2023, 08.06.2023, 12.07.2023, 17.07.2023, 19.07.2023, 28.07.2023

Judgment on : 06.10.2023

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Joymalya Bagchi, J.:-

1. Appeals and death references are directed against the judgment and order dated 28.01.2016, 29.01.2016 and 30.01.2016 passed by learned Additional District & Sessions Judge, Bench – II, City Sessions Court, Bichar Bhawan, Calcutta in Sessions Case No. 88 of 2013 (Sessions Trial No. 1(09) of 2013) convicting the appellants Saiful Ali for commission of offences punishable under sections 376A/376D/302/ 120B/201/109/342 of the Indian Penal Code, appellants Ansar Ali and Amin Ali for commission of offences punishable under sections 376A/376D/302/120B/201 of the Indian Penal Code, appellants Sk. Emamul Islam, Bhola Naskar, Aminur Islam @ Bhutto for commission of offences punishable under sections 376D/120B/201 of the Indian Penal Code, sentencing appellants Saiful Ali, Ansar Ali and Amin Ali to death and appellants Emamul Islam,

Bhola Naskar and Aminur Islam @ Bhutto to suffer imprisonment for life which shall mean imprisonment for remaining portion of their life.

A. <u>Prosecution case</u>:-

2. On 7th June, 2013 the victim aged around 20 years, a student of Derozio College had left her residence at 7:30 a.m. to appear for an examination at the said college. She was accompanied by her brother (P.W. 1) to Kamduni More where she took a bus to go to the college. Victim was to return by noon and P.W. 1 was supposed to receive her at Kamduni More. As it was raining, P.W. 1 was late in reaching Kamduni More. When he reached the spot, he could not find the victim. Upon enquiry, he was told by his uncle Bimal Ghosh (since deceased), a *Sattu* vendor at the bus stop that the victim had alighted from the bus around 2:00 p.m. and had proceeded towards home on foot. Hearing this, P.W. 1 returned home. To his utter consternation he found that the victim had not come back. He again proceeded towards Kamduni More. He did not find the victim. While proceeding towards home, he saw Ansar Ali (caretaker of 8 Bigha plot) closing the gate of the said plot. Saiful was beside Ansar and was telling the latter that they had a great time and should go home. Upon returning home, he and his mother informed other relations that the victim was missing. A search ensued but the victim could not be traced. During search, some of the members of the search party saw Saiful, Ansar, Emamul, Bhutto, Bhola and Gopal near the 8 Bigha plot. They were behaving suspiciously and one of them saw

they were showing something to Gopal behind the boundary wall of 8 Bigha plot.

3. It is the prosecution case that the 8 Bigha plot was a notorious area and womenfolk in the locality used to be teased while crossing the area. This was the reason why the victim was always accompanied by one of her brothers while she went to college crossing the area. As the victim could not be found in the locality, the search party wanted to search the 8 Bigha plot which was bounded by a wall. The gate of the plot was locked. Ansar was the caretaker of the plot and the key was with him. A hutment namely '*Alaghor*' situated beside the plot used to be occupied by Ansar and his associates. When Ansar was asked to open the property, initially he refused. Subsequently, he relented.

4. Inside the plot there was a structure with three rooms. Relations of the victim and others entered the plot and noticed blood on the floor of the room. While searching, one of them, namely, Pratap Ghosh (P.W. 6) discovered the body of the girl lying on a high ground which was adjoining the 8 Bigha plot surrounded by water bodies. He raised alarm. Others arrived at the spot and identified the victim. The girl was found in a semi naked condition. A commotion ensued in the locality. Local people started protesting against the heinous crime.

5. Information was received by P.W. 29, SI Soumen Pal, officer-in-charge, Aminpur IC, Barasat Police Station. He rushed to the spot. Due to commotion he was unable to take immediate steps. A

photographer (P.W. 17) took photographs of the body. With the help of force, the body was removed to Barasat Hospital where inquest was held. Post mortem was conducted by a medical board comprising of P.Ws. 23 and 24. They opined that the victim had been raped and had died due to effects of smothering which were ante mortem and homicidal in nature.

6. In the course of investigation, P.W. 29 arrested Amin, Ansar and Noor @ Nuro on 08.06.2013. Thereafter, Saiful, Bhola and Gopal were arrested. Subsequently, investigation was transferred to CID and taken over by SI Anandamay Chattopadhayay (PW 31). During investigation on 14.06.2013, Saiful admitted his guilt before police. On his showing, his blood-stained lungi was seized. He was produced before the Magistrate on 18.06.2013 and sent for reflection. On 19.06.2013 his judicial confession was recorded. Similarly, Bhola Naskar was produced before the Magistrate for making judicial confession. On 19.06.2013 he made an exculpatory statement. It may also be pertinent to note after arrest the appellants were medically examined and nail scratch marks were found on Ansar Ali and scratch abrasions on Amin Ali. Blood samples were drawn from the appellants and sent for FSL examination along with samples collected at the spot and the biological materials including blood vaginal swab and pubic hair collected by post mortem doctor. Deoxyribonucleic Acid ('DNA' for short) profiling report (Exhibit – 29a) showed the semen of Saiful on the pubic hair of the deceased. During further investigation on 06.07.2013,

P.W. 31 posted notices at conspicuous places requesting people to provide information regarding the crime. In response to the notice, P.Ws. 14 and 15 came to the police station on 08.07.2013 and stated on 2nd or 3rd June, 2013 they had seen the appellants, one Nuro, Rafiqul, Saiful, Ansar, Emamul, Aminur, Bhola and Gopal sitting at a tea stall and discussing the womenfolk of Kamduni. Ansar stated that the victim did not pay attention to them to which Saiful had replied she would be taken inside the 8 Bigha plot and taught a lesson.

7. Initial charge-sheet was submitted against Saiful, Ansar, Emamul, Aminur @ Bhutto, Gopal and Bhola. Case was committed to the Court of Sessions at Barasat. Pursuant to a direction of this Court, the case was transferred to the file of Bench – II, City Sessions Court, Bichar Bhawan, Calcutta for trial.

8. Subsequently, supplementary charge-sheet was submitted against Amin Ali, Nuro @ Nur Ali, Rafiqul Islam (as an absconder along with others).

9. Charges were framed against the appellants including Noor Ali @ Nuro under the following heads:-

i) Criminal conspiracy to commit gang rape punishable under section 120B IPC;
ii) Criminal conspiracy to commit rape and murder punishable under section 120B IPC;
iii) Criminal conspiracy for disappearance of evidence to search the offender punishable under section 120B IPC;
iv) Gang rape punishable under section 376D IPC;
v) Murder punishable under section 302 IPC;

vi) Rape and commission of bodily injuries in the course of such act which caused death of the victim punishable under section 376A IPC;

vii) Disappearance of evidence punishable under section 201 IPC;

viii) Abetment of the aforesaid offences punishable under section 109 IPC.

Additionally the following charges were framed against Saiful:-

i) Wrongful confinement of the victim punishable under section 342 IPC;

ii) Rape and infliction of bodily injuries in the course of such act resulting in death punishable under section 376A IPC;

iii) Murder of the victim punishable under section 302 IPC and

iv) Abetment of the aforesaid offences punishable under section109 IPC.

10. During trial, Gopal Naskar died and the case was abated against him. Rafiqul Islam was absconding and was arrested in the midst of trial. Charges were framed against him and he was put on trial after framing of similar charges.

11. Prosecution examined 31 witnesses and exhibited a number of documents to prove its case. Defence of the appellants was one of innocence and false implication. Saiful Islam and Bhola Naskar retracted their confessions. Ansar, Aminur Islam @Bhutto, Emamul Islam, Noor Ali, Rafiqul and Amin Ali took the plea of alibi. To prove their alibi they examined defence witnesses. Amin Ali examined D.W. 1 to show that he was working at a marble shop at the time of occurrence. During his examination under section 313 Cr.P.C. he claimed that he

had suffered the injuries while working at the marble shop. Emamul Islam examined his son (D.W. 8) and a mason working in his house (D.W. 9) to show that he was present at his residence at the time of occurrence. Aminur Islam @ Bhutto examined D.W. 10, his sister-in-law who claimed that the said accused had come to her house for lunch and had left in the evening. D.Ws. 11, 12 and 13 were examined by Ansar Ali to prove his alibi. During his examination under section 313 Cr.P.C. Ansar Ali stated that he suffered injuries due to assault in police custody. Similarly, Noor Ali examined D.Ws. 2, 3, 4 and 5 to show that he was working at his place of work and as his daughter fell ill, he had taken her for treatment to the doctor (D.W. 5). Rafiqul examined D.Ws. 6 and 7 to prove his alibi.

12. Upon analysis of the evidence on record, the trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid. By the self-same judgment and order, she acquitted Noor Ali @ Nuro and Rafiqul Islam Gazi of the charges levelled against them.

13. As Saiful, Ansar and Amin were sentenced to death, reference was made to this Court to confirm the sentence. All the convicted appellants had appealed while the State has preferred appeal against the acquittal of Noor Ali @ Nuro and Rafiqul Islam Gazi.

14. All the appeals and death references were heard together.

B. Evidence on record:-
B.(a) Prosecution Evidence:-
i) Related Witnesses:-

15. P.Ws. 1, 2, 3, 4, 7, 8, 9, 12 and 13 are relations of the deceased.

16. P.W. 1 is the brother of the victim. He deposed victim was a student of Derozio College. He deposed his sister had to cross a notorious area in the way while going to college. Hence, he used to accompany her. Ansar, Saiful, Gopal and others used to harass women at the spot. Accused used to sit there, take liquor, play cards and tease girls. It was unsafe for the girls to cross the area without an escort. On 7th June, 2013 in the morning he accompanied his sister to Kamduni More. At 2:00 p.m. he left his residence to bring her back. As it was raining he was delayed. He did not find his sister at Kamduni More. He enquired from his uncle one Bimal Ghosh, a vendor at Kamduni More about her whereabouts. Bimal stated that she had proceeded towards her residence. 8 bigha plot was situated beside the road which joins Kamduni More to their residence. He returned home and found she had not come back. He again went to Kamduni More and while proceeding back towards home he saw Ansar locking the gate of 8 bigha plot. Saiful was talking with Ansar and was stating that they had a great time and should go home. Ansar had driven away the security guards deployed by the owner of 8 bigha plot and was acting as its caretaker. He was in possession of the lock and key to the said plot. After returning home, he

found there was no information regarding the whereabouts of his sister. Accordingly, he called up relatives and friends to find her whereabouts.

17. A search commenced in the locality but the victim could not be traced. They asked Ansar to open the gate of 8 bigha plot. But he refused. On the contrary, he stated the girl may have eloped. Upon pressure he opened the gate. There were three rooms inside the boundary. Ansar was compelled to open the rooms. In the meanwhile, some people shouted from behind the boundary wall that the dead body of the victim had been recovered. The victim was found in semi naked condition. Her inner garment was on breast. Her private parts were torn apart and bleeding. Initially, he identified Ansar, Saiful, Gopal and Bhola in Court. On subsequent day, he identified Emamul Islam, Nuro, Amin Ali and Rafiqul.

18. P.W. 2 is the elder brother of the victim. He deposed he received call from his brother, P.W. 3 that their sister had not returned home. He also received call from P.W. 1. He returned home and joined the search. He deposed Ansar refused to open the gate but subsequently was compelled to do so. They found blood stains on the floor of the rooms inside 8 bigha plot. Subsequently, body of the victim was found in semi naked condition. After 3/4 hours police came to the spot and sent the body for post mortem examination. He lodged written complaint (Exhibit 1) naming Ansar Ali, Amin Ali, Nuro @ Nur Ali and Rafiqul Islam Gazi as the suspects.

19. P.W. 3 is the scribe of the written complaint. He deposed his paternal aunt (P.W. 12) that is the mother of the victim had informed that the latter had not returned home. Hearing the news he came and joined the search. Body was recovered from a road adjacent to the boundary of 8 bigha plot. Police took the dead body for post mortem examination.

20. P.W. 4 is a cousin of the deceased. He came to know that the victim was missing from her mother, P.W. 12. He went to Kamduni More and was told by Bimal that the victim had proceeded towards her residence. Body of the victim was found behind the 8 bigha plot boundary. Ansar used to act as caretaker of the plot. Key of the plot was with him. Police came to the spot and seized controlled earth, wearing apparels and bag of the deceased containing a clipboard having a passport photo, ID card, etc. He signed on the seizure list.

21. P.W. 7 is another cousin of the victim. He has corroborated the other witnesses. He deposed body was recovered by Pratap Ghosh (PW 6). He is a signatory to the seizure list.

22. P.W. 8 is the uncle of the deceased. He deposed initially Ansar refused to open the gate but subsequently was compelled to do so. Thereafter, the body of the victim was recovered. He identified Ansar in Court.

23. P.W. 9 is a cousin of the deceased. He deposed he came to know that the victim had gone to take an examination but had not returned home. He joined the search party. Around 5:00 p.m. he saw

Saiful, Ansar, Emamul and Bhutto going to the main road from 8 bigha boundary. Gopal was standing a little away from the *ala* room. The aforesaid persons were showing Gopal something behind the boundary wall. Initially, Ansar refused to open the gate of 8 bigha plot but subsequently agreed to do so. They entered the plot and found blood stains in the rooms inside the plot. Pratap went behind the boundary wall and discovered the body of the victim. He identified Bhutto, Gopal and Saiful in Court. He incorrectly identified Amin Ali as Ansar.

24. P.Ws. 12 and 13 are the parents of the deceased.

25. P.W. 12 is the mother of the victim. She deposed victim used to complain that she was teased by Ansar Ali, Amin Ali, Noor Ali, Rafique, Bhola and Gopal. P.W. 1 used to escort her when she passed Kamduni More. On the fateful day, P.W. 1 had accompanied her to Kamduni More. In the afternoon when he went to bring her back, the victim was not found. Bimal told P.W. 1 that she had proceeded towards her home. But the victim did not return. P.W. 1 again went to Kamduni more to search the victim but could not find her. Relatives and friends were informed. Subsequently, she came to know that body of her daughter was traced out behind the boundary of 8 bigha plot. She identified the accused in Court. She stated that a month ago while she was accompanying her daughter, accused had passed lewd remarks. She disclosed the incident to her husband but had not reported the matter to police.

26. P.W. 13 is the father of the victim. He stated that he had gone to work on the fateful day. Upon returning around 6:00 p.m. he found his wife crying. Upon query he came to know that their daughter was missing. He corroborated his wife that the victim used to be teased by the accused. During search Ansar was compelled to open the gate of 8 bigha plot. They found blood stains inside 8 bigha plot. Suddenly, Pratap went behind the boundary wall and discovered the dead body of his daughter.

ii) <u>Local witnesses</u>:-

27. P.Ws. 5, 6 and 10 are local villagers who had joined the search.

28. P.W. 5, Lakhmikanta Ghosh deposed upon hearing the incident he came to the 8 bigha plot. He deposed Ansar, Gopal, Bhola used to sit near the plot and drink. Body of the victim was found behind the boundary of the plot. He was a signatory to the seizures made by the police.

29. P.W. 6, Pratap Ghosh stated upon returning home from work he heard the victim was missing. He joined the search. He went inside the 8 bigha plot. When he approached the end of the boundary wall, he found the body of the victim in semi naked condition. Police was informed. He was a signatory to the seizures made by the police. Police took the victim to hospital. He accompanied the victim and signed on

the inquest report. He deposed Gopal, Ansar, Bhola and Rafique used to remain in and around the 8 bigha plot. He identified the accused.

30. P.W. 10, Sona Ghosh deposed on the fateful day around 1:00 p.m. he got down at Kamduni More and was proceeding towards his home. Near 8 bigha boundary he saw Ansar, Saiful, Emamul and Bhutto in front of Ala Room of Ansar. Bhola and Gopal were also standing there. They were in drunken condition. In the evening he came to know the victim was missing. He went to the 8 bigha plot and joined the search. He saw Ansar, Saiful, Emamul, Bhutto were standing along with Gopal and Bhola discussing something. On seeing him, they stopped talking. On their insistence Ansar opened the gate. The dead body was found behind the boundary wall in semi naked condition. 2-3 days after the incident investigating officer came to the spot and seized broken door, broken wood pieces from the room in his presence. He signed on the seizure list. He identified the broken door and wood piece with hatch bolt. Police also seized controlled earth and grass from the spot. He signed on the seizure list.

31. P.W. 11, Yazuddin Mollah is a local grocery shop owner. He stated that on 7th June, 2013 Ansar had purchased groceries from his shop.

iii) <u>Witnesses regarding ownership and control of 8 bigha plot</u>:-

32. P.W. 18, Nirmal Kumar Mondal is an employee of the trust which owns the 8 bigha plot. He deposed that the trust had purchased

the plot in 2008. A boundary wall was constructed around the plot. There was an entry gate on the boundary wall. There were three rooms inside the plot. Construction of the wall was done by one Rahan Ali Mallick @ Jhantu, (P.W. 20). Security guards were posted but local miscreants threatened them and forced them to leave. Key of the gate was with Jhantu. Later he informed Ansar had taken the key from him. Written complaint had been lodged in November, 2010 with regard to the threat held out to the security guards.

33. P.W. 20, Rahan Ali Mallick @ Jhantu corroborated P.W. 18 and stated that Ansar had taken the key of the gate of the plot from him. He had informed the trustees with regard to such incident.

iv) <u>Witnesses to the conspiracy</u>:-

34. P.Ws. 14 and 15 deposed on 2/3rd June, 2013 they had gone to a tea stall near Langalpota. They heard accused were discussing about the womenfolk of Kamduni not giving attention to them. Ansar said that the daughter of P.W. 13 scoffed at them. Saiful said that she would be taken inside the 8 bigha plot and taught a lesson at the right time.

35. P.W. 14 stated that he was a distant relation of P.W. 13. He further stated that he had gone out for work and met the police on 8th July, 2013. He admitted that he had been arrested in a criminal case earlier.

36. P.W. 15 also admitted that he and P.W. 14 had been arrested in various cases earlier. They had seen the news on television and reported the matter to the police.

v) <u>Medical witnesses</u>:-

37. P.W. 23, Dr. Abhijit Ghosal is the member of the medical board which conducted post mortem examination of the victim on 08.06.2013. Froth was coming out from right nostril. He found evidence of sand and mud stains on all four limbs and other parts of the body. Few pieces of grass were found, recovered and preserved from scalp hair and medial aspect of upper part of left thigh. Mud present in scalp hair was also recovered and preserved. He found the following injuries:-

> "*Bluish discoloration of lips, tongue, nail beds of all extremities found. Evidence of ant bite marks ranging from (1/4" X 1/4") to (1/2" X 1/4") found on different parts of all four limbs without any signs of vital reaction and hence post mortem in nature.*
> *INJURIES: 1) Bruise 1/2" X 1/4" on the inner aspect of the upper lip 1/2" to the right of anterior midline.*
> *2) Bruise 1/2" X 1/4" on the inner aspect of the lower lip 1/2" to the right of anterior midline.*
> *3) Contused lacerated wound 1/2" X 1/4" into vaginal tissues at 5 o' clock and 6 o' clock position at posterior vaginal wall along with evidence of tear of posterior fouchette.*
> *4) Contused lacerated wound 2" X 1/2" into the vaginal tissue on upper part of left side of vagina extending up to the vault.*
> *ON DISSECTION: 1) Extravasation of blood 5" X 3" involving right front to- parieto- temporal region of scalp.*
> *2) Extravasion of blood 2" X 1" on right parieto -occipital region of scalp.*
> *3) Extravasion of blood 2" X 1" on the left parieto-occipital region of scalp.*"

38. He opined death was due to smothering, ante-mortem and homicidal in nature. There were also features of sexual assault. He further opined congestion in organs may have been caused by severe

asphyxia. Bruises on upper and lower lip can be caused by force on the mouth. He proved post mortem report (Exhibit 15). He deposed that the pubic hair of the victim was plucked by forceps. He also examined accused Ansar Ali and Rafiqul Islam Gazi. He found nail scratch abrasions on left anterior chest wall, a pair of continued nail scratch abrasion on the left arm below the shoulder joint and above right elbow joint on the right forearm of Ansar Ali. All the injuries showed features of vital reaction. He proved the report (Exhibit 14).

39. P.W. 24, Dr. Supriti Ghoroi was also a member of the Board who conducted post mortem examination. She examined the other accused. She found scratch abrasions on the left arm of Amin Ali.

vi) <u>Forensic experts</u>:-

40. P.W. 26, Sipra Ray, Assistant Director, Biology Division, FSL conducted forensic examination of the seized items. She detected traces of semen on A3 (pubic hair), A12 (jangia), A13 (salwar). She detected blood on the following items:-

> "*Ala(Dark brown stains on the paper) , Alb(scalp hair), Alc(nail cuttings), A2(foreign bodies/ mud, hair, grass), A3(pubic hair), A4(dark brown liquid contained in the glass bottle), A5(Dried grass), A6(Kamiz, ganji-tape, cloth piece, gamcha), A7(earth and died gas), A8(Earth and dried grass), A9(T-shirt, lungi), A10(Ganji, lungi, jangia), A11(Tshirt, A12(Jangia), A13(Salwar), A14(Hatch-bolt and wooden panel), A15(wooden panel/wooden shutter), A16(Wooden panel/wooden shutter).*"

She proved the FSL report marked as Exhibit 30.

41. P.W. 27, Gopeswar Mukherjee collected blood samples from the appellants including Saiful for CFSL examination.

42. P.W. 25, Dr. Anil Kumar Sharma, Deputy Director, Biology and CFSL at Calcutta deposed he received samples for FSL examination and DNA analysis. He detected human blood on the lungi worn by Saiful and wooden panel seized from the place of occurrence and adherent material on the scalp hair of the deceased. Human semen was detected on the pubic hair of the deceased. DNA profile of the blood sample found on the lungi and the semen found on the pubic hair matched with DNA profile of Saiful.

43. P.W. 30, Dr. Chitrakshya Sarkar, Senior Scientific Officer, State Forensic Laboratory, Physical Division analysed the sample containing soil particles and opined the dry soil along with dry grass collected from the scalp hair of the deceased that is 'A2' matched with the dry soil with dry grass collected at the place of occurrence 'A17'.

vii) <u>Judicial confession of Saiful and Bhola</u>:-

44. P.W. 19 is the Judicial Magistrate. On 18.06.2013, she remanded Saiful to judicial custody for segregation and reflection. On 19.06.2013, he was again produced before her. She recorded his confession (Exhibit – 7). On the same day, she recorded the statement of Bhola Nasker (Exhibit – 8).

viii) <u>Police witnesses</u>:-

45. P.W. 21, ASI Biswanath Kar was posted at Barasat P.S. He drew up the formal FIR upon receipt of written complaint from P.W. 2.

46. P.W. 22, SI Rakesh Chatterjee was posted at Barasat Police Station. On 08.06.2013 he held inquest over the body of the deceased at Barasat District Hospital (Exhibit 4/2). After post mortem the doctor handed over sealed packets and jars to him. He handed over the said items to SI Soumen Pal, the first investigating officer. He proved his signature on the seizure list (Exhibit 11).

47. P.W. 29, SI Soumen Pal deposed on 07.06.2013 he received a phone call that an unknown female body was found at Kamduni More. Reaching Kamduni More he was obstructed by an unruly mob. He informed his superior and called for further force. He found the body inside 8 bigha boundary land covered with dry grass and marsh. Body was in semi naked condition. A photographer (P.W.17) was summoned. He took photographs of the dead body. Thereafter, the body was carried in an ambulance driven by P.W. 28 to Barasat Hospital. P.W. 29 entered the 8 bigha plot. He found three rooms inside the plot. He seized various articles of the deceased including original admit card, student ID card kept inside a black coloured school bag from the spot. He also seized blood stained earth with grass, salwar and a ladies undergarment from the place of occurrence. He arrested Ansar, Amin Ali and Nuro and brought them to Barasat Police Station. Subsequently, he arrested Saiful, Bhola and Gopal as their names transpired in the course of investigation. He seized biological samples handed over by the post mortem doctor from P.W. 22. Upon the investigation being

transferred to Detective Department, the same was handed over to P.W. 31, Anandamay Chattopadhyay, DDI Barasat.

48. P.W. 31 took up the investigation on 09.06.2013. Thereafter, he arrested Emamul and Aminur Islam @ Bhutto. On 14.06.2013 Saiful confessed his guilt. On his showing, his blood stained lungi was seized. On 18.06.2013 Saiful and Bhola were produced before Magistrate for recording confessional statement. Learned Magistrate (P.W. 19) remanded them for segregation and reflection. On the next day, P.W. 19 recorded the judicial confession of Saiful (Exhibit 7). Bhola made an exculpatory statement (Exhibit 8). In the meantime, FSL expert inspected the spot. P.W. 26, FSL expert (Dr. Shipra Roy) pointed out some blood stains on the wooden shutter of the middle room. Parts of the shutter and controlled earth were seized for FSL examination. Seized samples were sent for examination at FSL, Kolkata. Blood samples of the appellants for DNA profiling were also collected. He forwarded the blood samples and other articles for examination and DNA analysis to CFSL. He examined witnesses and submitted charge-sheet against Ansar, Saiful, Emamul, Aminur Islam, Gopal and Bhola. On 06.07.2013 he affixed notices in Kamduni area requesting people to disclose fact regarding the incident. On 07.07.2013 notices were published in newspaper. On 08.07.2013 he examined Somnath Ghosh (P.W. 14) and Md. Sariful Islam (P.W. 15). Complicity of Amin Ali, Noor Ali, Rafiqul Gazi conspired from their statements. He submitted supplementary charge sheet on 10.07.2013 against them. Upon cross-

examination, he clarified SI Apurba Mondal had gone to the Court on 19.06.2013 only for the purpose of identifying the confessing accused.

B.(b)<u>Defence witnesses</u>:-

49. Some of the appellants took plea of alibi. Amin Ali claimed that he had gone for work in marble shop on the day of occurrence. He examined Md. Samsulla Morol, a co-worker as D.W. 1 to probabilise his defence. During his examination under section 313 Cr.P.C. he claimed that the injuries on his body had occurred in the course of his work in the marble shop.

50. Emamul Islam examined his son Sk Alimul (D.W. 8) and a mason Abdul Hai (D.W. 9) to prove that construction work was being undertaken at his house on 6th and 7th June, 2013.

51. Aminur Islam @ Bhutto examined his sister-in-law Saida Bibi (D.W. 10) who deposed that the said accused had come to her residence on 07.06.2013 around 11.30 a.m. Thereafter, they went out to purchase ornaments for her child and returned around 12:30 p.m. Aminur had lunch in her house and left her house around 06:30/ 7:00 p.m.

52. Ansar Ali examined Ashad Ali Mollah, his brother (D.W. 13) to establish his alibi. He also examined D.Ws. 11 and 12, reporter and staff photographer of *"Ei Samay Sangbad Patra"* in support of his case. During his examination under section 313 Cr.P.C., he stated that he had been physically assaulted in police custody not knowing how the injuries occurred.

53. The acquitted accused, namely, Noor Ali and Rafiqul also examined witnesses to establish their alibi.

54. Noor Ali examined D.Ws. 2, 3, 4 and 5 to prove that he was employed at a meat shop on the day of occurrence. He examined Safikul Islam, owner of the meat shop and an employee Atiar Rahaman as D.Ws. 2 and 3 in support of his plea. His wife Azmira Bibi (D.W. 4) deposed around 2:30/2:45 p.m. their daughter had fallen ill and was taken by them to a doctor (D.W. 5). Dr. Subir Halder (D.W. 5) deposed he had examined one M. Sultana on 07.06.2013 in the morning session.

55. Rafiqul Islam examined one Ohidul Sha (D.W. 7) who claimed that Rafiqul worked in his house as a mason on the fateful day. D.W. 6, Mekail Mallick corroborated his statement.

C. <u>Rape and murder of the victim</u>:-

56. It is the prosecution case that on 07.06.2013 between 2:30-7:30 p.m., the victim was raped and murdered. P.W. 23, Dr. Abhijit Ghosal was a member of the medical board, who conducted post mortem over the body of the victim. He found frothing at the nostril of the victim. He noticed traces of sand, mud stains and pieces of grass on the limbs, scalp hair and other parts of the body. He noted the following injuries:-

> "*Bluish discoloration of lips, tongue, nail beds of all extremities found. Evidence of ant bite marks ranging from (1/4" X 1/4") to (1/2" X 1/4") found on different parts of all four limbs without any signs of vital reaction and hence post mortem in nature.*
> *INJURIES: 1) Bruise 1/2" X 1/4" on the inner aspect of the upper lip 1/2" to the right of anterior midline.*

2) Bruise 1/2" X 1/4" on the inner aspect of the lower lip 1/2" to the right of anterior midline.
3) Contused lacerated wound 1/2" X 1/4" into vaginal tissues at 5 o' clock and 6 o' clock position at posterior vaginal wall along with evidence of tear of posterior fouchette.
4) Contused lacerated wound 2" X 1/2" into the vaginal tissue on upper part of left side of vagina extending up to the vault.
ON DISSECTION: 1) Extravasation of blood 5" X 3" involving right front to- parieto- temporal region of scalp.
2) Extravasion of blood 2" X 1" on right parieto -occipital region of scalp.
3) Extravasion of blood 2" X 1" on the left parieto-occipital region of scalp."

He stated congested organs may be caused due to severe asphyxia. Bruise on upper and lower lips may be caused by force on mouth. He opined death was due to smothering, ante-mortem and homicidal in nature. He also opined victim had been subjected to sexual assault. The aforesaid evidence leaves no doubt in one's mind that the victim had been raped and murdered.

D. <u>Place of occurrence</u>:-

57. Prosecution has sought to establish the place of occurrence on the basis of the confession of Saiful Ali and other evidence on record. P.W. 6, Pratap Ghosh was a member of the search party. He deposed they had entered the 8 Bigha plot to search the victim. Victim was not found inside the plot. He then started searching the ground behind the boundary wall. When he reached behind the boundary wall, he noticed the semi naked body of the victim at the end of the boundary wall. He cried out loudly. Others including father of the victim, P.W. 13 came to the spot and identified the victim at the end of the boundary wall. P.Ws. 1, 2, 3, 4, 5, 7, 9, 10 and 13 were present and have corroborated P.W. 6

with regard to the recovery of the dead body. Police was informed and came to the spot. P.W. 29, SI Soumen Pal was the first investigating officer, who came to the spot and found the body. P.W. 17, Md. Ariful Islam, a photographer took photographs of the body of the victim. Thereafter, the body was removed in an ambulance driven by P.W. 28, Babla Mitra. P.W. 22, Rakesh Chatterjee conducted inquest over the dead body at Barasat Hospital.

58. In the course of investigation, P.W. 29 prepared rough sketch map of the place of occurrence, i.e., 8 Bigha plot and the adjoining dry land behind the boundary where dead body was found. Perusal of the sketch map shows that the dry land where the body was recovered is behind the boundary wall and is surrounded by water bodies on all sides. There is a small hole on the rear side of the boundary wall in the south west corner. The said dry land can be accessed through the said hole in the boundary wall by wading through the water bodies and not otherwise.

59. Mr. Dastoor argued that the place of recovery of the body has not been proved. He referred to a stray observation in the deposition of P.W. 10 who stated body was found lying at a distance of little less than half kilometre from 8 bigha plot to substantiate his submission. P.W. 29 stated that the body was lying 50 meters away from the gate of 8 bigha plot. He is an experienced police officer whose estimation regarding distance must be given credence over the vague assumption of a local villager, namely, Sona Ghosh (P.W. 10). Moreover, estimate regarding

distance by P.W. 29 and his sketch map corroborates the deposition of P.W. 6 who had discovered the body. Evidence with regard to the topography of the area including the sketch map prepared by P.W. 29 clearly shows that the pipe factory and construction factory are situated on the opposite side of the road from the spot 8 Bigha plot. North Point School is also situated at a considerable distance. The topography clearly establishes that there was little or no possibility of the body of the victim being kept on the dry land behind the boundary wall of 8 Bigha plot save and except traversing through the hole in the south west corner of the boundary wall and wading through the water body adjacent thereto.

60. Evidence on record further shows there were three rooms inside the 8 bigha plot. Second investigating officer (P.W. 31) deposed forensic experts visited the spot and identified blood stains on the shutter of the door in one of the rooms. P.W. 31 removed a part of the shutter. He also collected grass and mud from the place where the body was recovered. Report of CFSL expert, Dr. Anil Kumar Sharma (P.W. 25) (Exhibit – 29a) shows presence of human blood on the shutter (A 16). P.W. 23, Dr. Abhijit Ghosal, post mortem doctor found mud and grass on the scalp hair of the victim. He collected and preserved the samples marked as A2. P.W. 30, Chitrakshya Sarkar, senior scientific expert of State Forensic Laboratory deposed the mud and grass found from the place of occurrence (A17) matched with that found on the scalp hair of the victim. These pieces of evidence support the prosecution case that

the victim had been raped in the rooms inside the 8 Bigha plot and her body had been removed through the hole in the south west corner of the boundary wall and dumped on the high ground behind the boundary wall. Confession of Saiful Ali corroborates the aforesaid circumstances and proves the place of occurrence beyond doubt.

E. <u>Time of occurrence</u>:-

61. P.Ws. 1 and 12 stated that the victim had left her residence and gone towards Kamduni More to board a bus to go to Derozio College. She was to take an examination in the college. P.W. 1 had accompanied the victim in the morning to Kamduni More. He was to escort the victim back from Kamduni More in the afternoon. Around 2:00 p.m. he proceeded towards Kamduni More but was delayed due to rains. When he reached Kamduni More, his uncle Bimal Ghosh, a vendor of *sattu*, stated that the victim had proceeded towards her residence. P.W. 1 returned home but found the victim had not returned. He again proceeded towards Kamduni More but could not trace the victim. As the victim had not returned, they informed the relations and friends. A search ensued. Finally in the evening around 7:30 p.m. P.W. 6 found the semi naked body of the victim lying on a dry ground behind the boundary wall of 8 Bigha plot.

62. Evidence of P.Ws. 1 and 12 show that the victim had been escorted to Kamduni More in the morning of 07.06.2013 and had left for her college to take an examination. Learned Counsels for the appellants argue no one was examined from the college to show that the

victim had actually taken an examination. I find little substance in such submission. P.W. 1 deposed he had accompanied the victim to Kamduni More wherefrom she left for the college. He explained that this was a common practice as the victim and other womenfolk were regularly teased by the appellants when they crossed 8 Bigha plot. His version is corroborated by the mother of the victim, P.W. 12. Their deposition remained unshaken inspite of extensive cross-examination. Thereafter, victim went missing. Her dead body in semi naked condition was recovered in the evening from behind the 8 Bigha plot.

63. After the recovery of the dead body, P.W. 29, first investigating officer seized various articles from the spot, namely, one black coloured school bag on which ADIDAS was written, with belt for carrying on the back, one original Admit Card of the victim having roll number written as 213211712903 of Part – II examination of 2013 issued by West Bengal State University, one original students I.D. card of Derozio Memorial College in the name of the victim having student I.D. card No. 10012011723, one ID card in the name of the victim of the sessions 2011 to 2012 of State of West Bengal University, one student concession card issued by North Eastern Bus Syndicate for route No. 211/211A in the name of the victim, one torn piece of student fee card issued by Derozio Memorial College in her name, one Additional Bengali Parikrama Book, second paper by Professor M. Chowdhury and one wooden clip board. These articles clearly indicate the fact that the

victim had gone to the college for the purpose of taking the examination and corroborate the version of P.Ws. 1 and 12.

64. Deposition of other witnesses shows it had rained intermittently in Kamduni area on that day. These circumstances establish the fact that on the fateful day, i.e. 07.06.2013 the victim being escorted by P.W. 1 had gone to Kamduni More and proceeded to take the examination. Thereafter, she went missing and finally her body was recovered from a spot behind the 8 Bigha plot. Recovery of her belongings corroborates the prosecution case that she had gone to college to take the examination.

65. In this backdrop, non-examination of any witness from the college does not affect the unfolding of the prosecution case. On the other hand, these circumstances stand squarely corroborated by the confession of Saiful Ali with regard to the time when the victim was raped and murdered. Hence, the time of occurrence is established beyond doubt.

F. <u>Perpetrators of crime:-</u>

F.(a) <u>Role of Saiful in the crime</u>:-

(i) <u>Judicial confession</u>:-

66. Prosecution has primarily relied on the judicial confession of Saiful Ali to prove his guilt. P.W. 29, first investigating officer deposed complicity of Saiful transpired during investigation. He was arrested on 08.06.2013. He was remanded to police custody till 18.06.2013. On 14.06.2013 he made confessional statement to police. Pursuant thereto

on 18.06.2013 he was produced before the Magistrate who remanded him to judicial custody for segregation and reflection. On 19.06.2013 he was again produced before the said Magistrate, P.W. 19. She put questions to him to test the voluntariness of his statement. Being satisfied she recorded his confession. Saiful stated as follows:-

> *"At about 08:00 a.m. I left my home and went to 'Kamduni More' in search of job. As nobody came, there (for job), so I went to the 'Ala' (sic) house of Ansar. I was already familiar with Ansar as he used to provide jobs in his fishery. 'Ansar Bhai' told me that there was a job for me, but he wouldn't pay money for that, instead he would give me food for that day. I was there alongwith Gopal, Emamul, Ansar, Bhutto and Bhola. Bhola joined (us) later. Other people were with me since morning when I went to Kamduni More'.*
>
> *Ansar asked me whether I will consume liquor or not. I told that I will consume a little amount or may not consume, let them bring (it) first. Emamul gave Gopal Rs. 110 (One Hundred Ten Rupees) and at about 11:30 a.m. Gopal brought 'Bangla Mal' (country spirit) from Rajarhat. I, Gopal and Emamul jointly consumed the liquor. I took 1 glass of liquor, they consumed more. Later Bhutto came and consumed (liquor). Then I and Gopal were cleaning the hyacinth from Ansar's 'Bheri' (large water body). Later I and Gopal went to 'Alagher'. Then Anser told that Gopal will knot the hyacinth and asked me to place the 'Basna' (a dried bark or spathe of the bananas and other plants) in the 'Bheri' (an embanked low land used as a fishery). After the job was over, we all ate meat & rice prepared by Ansar. After having food at 'Alaghor', at about 02:30 p.m. Gopal and Bhola went home and 5 min. later Bhutto, Ansar and Enarul also left riding the bike of Ansar. Then I alone lay down in that 'Alaghor'. After 10-15 minutes I had a feeling of nausea. I woke up and saw that the said girl was going along the road. Then, with what intention I don't know I followed the girl with the keys of the boundary and at about 5 feet distance from the entrance of the gate I hold her hand and dragged that girl in front of the gate. When she started shouting I pushed her and she became senseless after she fell down. Then I picked her up in my lap and took her inside the gate and laid her down on the floor. Then I went to lock the door and she gained her consciousness and started screaming, I gagged her mouth and removed her pyjamas from her lower part of the body and then outraged her modesty. As she was not speaking any words. So I went towards the gate and waited beside the gate for 20 minutes. When I went towards her again, she started screaming. So I pressed her cheeks. Then she became lifeless. So I understand that due to pressing her mouth & nose by me she died. Accused shows with his hands pressed on his cheeks and nose together, to indicate how he held the victim girl).*

Then I picked her up in my lap and went outwards. But I fell down inside the boundary. Then I saw that blood was coming out from her forehead. Later, from a gap present in the corner of the boundary I dragged her through the water holding her hand and placed her upon a 'Danga' (high land) and after wading through waist deep water reached the road. Seeing nobody there, I ran towards the gate and entered there. I was completely naked till that time. Then I hurriedly wore my 'Lungi' (a loin cloth worn by men). Later I reached 'Alaghor' walking along the road. Then I lay down (over there). At about 04:30 p.m. Ansar came and woke me up. He asked me to bring tea. I went to 'Kamduni More' for tea and then we two took the tea. Then I went to that tea stall. 10 minutes later I saw that Emamul and Bhutto were coming riding a bike. So I again went towards 'Alaghor'. Emamul and Bhutto sat down upon the empty place (beside) the road. When Bhutto went to pass urine, I told about everything to Emamul. I told him that I had committed a mistake and (due to that) the girl died and I threw away the dead body outside of the boundary. Emamul told me that after talking with Ansar he will inform me. Emamul went to discuss with Ansar and after 20 minutes he came back and told me that I have nothing to worry about and the fate of the dead body will be decided after dusk. At about 06:30 p.m. the family members of the girl found her (dead) body. I was present there. I was frightened and Ansar asked me to go home. So I went to home."

61. Thereafter, Saiful was remanded to judicial custody. On 12.07.2013 he retracted his statement claiming that the statement was procured through torture. Learned defence counsel has assailed the judicial confession on various grounds. Firstly, it was contended Saiful did not have the assistance of a lawyer at the time he made the confession. Subsequently, he was provided legal assistance. Upon being made aware of his rights, he promptly retracted the confession on 12.07.2013.

62. Secondly, it was argued even during segregation Saiful was under the influence of police. P.W. 31, second investigating officer admitted on 18.06.2013 at 3:00 p.m. Saiful and others had been taken out for drawing blood samples at Barasat Hospital. P.W. 19, Judicial Magistrate who recorded confession stated Saiful was produced by SI

Apurba Mondal. SI Apurba Mondal was actively involved in collection of blood samples and seizure of various articles during investigation. His presence prior to recording confession casts severe doubt with regard to its voluntariness.

63. Thirdly, it was contended the Magistrate mechanically put questions to Saiful and no real effort was made to find out why he intended to make the confession or whether the same was procured through coercion.

64. Fourthly, it was argued on 14.06.2013 *lungi* of Saiful was seized. Forensic report shows presence of blood on the *lungi*. This probabilises physical assault on Saiful during police custody.

65. Finally, it was argued that the confession was not truthful and is inconsistent with the prosecution case of gang rape. It is not supported by other circumstances.

66. With regard to the issue of absence of legal representation of Saiful at the time of recording confession, it may be profitable to refer to the ratio in ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid vs. State of Maharashtra***[1]. In the said report, the Apex Court, inter alia, held though right to a lawyer of one's own choice is a fundamental right under Article 22 of the Constitution, absence of legal representation per se would not render a confession inadmissible. The ratio to arrive at such conclusion was drawn from the scheme of the Code of Criminal Procedure which entrusts the duty upon a judicial officer to satisfy

[1] (2012) 9 SCC 1

himself with regard to the voluntariness of a confession by putting questions to the accused and prior to recording the same. The satisfaction of the judicial officer is an immunity against the vice of involuntariness and coercion on an accused who makes the confession. This safeguard is of a high order and guarantees the voluntariness of a confession coming from an accused who may not have legal representation at the material point of time. Reference may be made to the observations of the Apex Court in ***Kasab*** (supra) is as follows:-

> "*467. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the constitutional and legal acceptability of a confession recorded under Section 164 CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.*"

67. No doubt in such cases a heavy duty is put on the Magistrate who records the confession. It is his duty to put questions to the accused and satisfy himself with regard to the voluntariness of the confession. This Court has carefully gone through the evidence of P.W. 19, Judicial Magistrate who recorded the confession. On 18.06.2013, Saiful was produced before the Magistrate. She remanded him for segregation in judicial custody. On the next day she put questions to Saiful to satisfy herself whether he had been subjected to tutoring, intimidation or inducement to make the confession. She also informed

the accused that he was not bound to make the confessional statement and if he made it, the same would be used against him. She assured the accused that he shall not be remanded to police custody if he did not make the confession. The manner of enquiry undertaken by P.W. 19 clearly shows that she had made all efforts to ensure that the accused was kept in segregation and that he had not been subjected to coercion, inducement or tutoring to make the confession. She had also assured the accused that he was not required to make the statement, which if made would be used against him and in the event he made the statement he would not be remanded to police custody. This shows that the Magistrate had undertaken necessary enquiries and, thereafter, recorded her satisfaction with regard to the voluntariness of the confessional statement.

68. It is also argued that the Magistrate had not enquired of Saiful why he was making the statement. Hence, the statement cannot be said to be voluntary. P.W. 19 had put a number of questions to Saiful to test the voluntariness of his confession. Purpose of enquiry why an accused is making the statement is to lend credence to his voluntariness. This can be discerned not only from the question put by the Magistrate but on a wholesome reading of the confessional statement itself. Perusal of the confession shows that on the day of the incident Saiful and other appellants were merry making in the *Alaghor*. Thereafter, according to him, the others left. At that time, he saw the victim walking down the road. He stated 'something happened in his mind' and he followed the

victim, dragged her inside the 8 bigha plot and raped and murdered her. The tenor of the confessional statement and the reference to an impromptu act of indiscretion leads to the irresistible inference of remorse which had prompted him to make the statement. The manner and circumstances in which Saiful committed the crime shows a sudden lapse of discretion and impulsiveness on his part which in all probability bore heavily on his mind and prompted him to confess.

69. Confession has also been seriously assailed on the ground that there was police surveillance on Saiful during segregation. On 18.06.2013 Saiful was produced before the Magistrate and remanded to segregation. As per P.W. 31, at 3:00 p.m. on that day he had been taken to Barasat Hospital to draw blood samples. Thereafter, he was in judicial custody till produced before the Magistrate. This exercise by itself cannot be a ground to hold that Saiful had not been in segregation from 3:00 p.m. on 18.06.2013 till he made the confession on the next day. To rebut this contention, it is argued that SI Apurba Mondal had produced Saiful at the time of recording confession. He had played role in seizure of articles and drawing of biological samples during investigation and his presence had impacted the voluntariness of the confession. I am unable to subscribe to such theory. Investigation officer, P.W. 31 clarified the role of SI Apurba Mondal. He stated that the accused had been produced before Court from judicial custody. SI Apurba Mondal was present in Court when he was produced and identified the accused before the Magistrate. Identification of an

accused by a police officer before a Magistrate prior to recording of judicial confession is a routine act. This would not lead to any inference of inducement on the accused. I am persuaded to come to such conclusion as the Magistrate herself during deposition succinctly stated that she had put questions to the accused with regard to any threat or inducement coming from police and had clarified no police officer was present during recording the statement. It is also relevant to note that the Magistrate had assured the accused that he would not be put in custody of police if he did not make the confession. These safeguards and assurances by the Magistrate clearly rule out the possibility of influence on the accused during segregation or at the time of making the confession.

70. Finally the tenor of the confession is not wholly in consonance with the prosecution case. While Saiful claimed that he had committed the crime himself, the prosecution case is one of gang rape. Had Saiful been tutored to make a confession to fit the prosecution case he would not have in all probability come out with a statement which is wholly self-inculpatory and exculpatory qua others. The substance and tenor of the confession clearly militates against the defence version of a tailor made confession procured through tutoring, coercion or inducement.

71. On 12.07.2013 Saiful retracted his confession. This belated retraction appears to be an afterthought prompted through legal advice. On none of the dates before or at the time of recording of his confession did Saiful complain to the Magistrate that he was subjected to physical

assault in police custody. He categorically responded that he had not been coerced or induced by police to make the confession. Even during his examination under section 313 Cr.P.C. while mechanically retracting his confession, Saiful was silent with regard to physical assault on him in police custody. These circumstances wholly improbabilise the belated retraction. It also rules out the possibility of physical assault on Saiful in police custody which would justify the presence of blood on his wearing apparels. Voluntariness of the confession is clearly established.

(ii) <u>Truthfulness of confession – inculpatory part corroborated</u>:-

72. Inculpatory part of his confession is corroborated by circumstantial evidence. P.W. 23, post mortem doctor deposed the victim died due to ante mortem smothering. He found bruises on the nose and lips of the victim which were due to force. These findings of the medical officer corroborate the manner and circumstance in which the victim was murdered after being raped as per the confession. Forensic report shows the presence of grass and mud collected from the spot on the hair of the victim. This also corresponds to the manner in which the body was kept on the high ground behind the 8 Bigha plot.

73. P.W. 10 saw Saiful and other appellants in an inebriated condition in front of *Alaghor* around 1:00 p.m. After the occurrence, P.W. 1 saw Saiful with Ansar while the latter was locking the door of 8 bigha plot, Saiful was telling Ansar they had a great time and should go

home. During search P.W. 9 saw the appellants along with Saiful talking to each other and pointing to a spot behind the boundary wall to Gopal. P.W. 10 saw they were talking and then became silent as soon as he approached them. Versions of these witnesses also corroborate the post- occurrence circumstances as coming out from the confession. Inculpatory aspects of the confession of Saiful are wholly corroborated by the aforesaid circumstances and clearly lend credence to its truthfulness.

74. In ***Rabindra Kumar Pal alias Dara Singh vs. Republic of India***[2] the Court declined to rely on the confession under the following circumstances:-

> *"67. It is seen from the evidence of PW 29, who recorded the confession of Rabi Soren, that at the relevant time the accused was in the custody of CBI and from that custody he was produced before the Additional Chief Judicial Magistrate on 18-5-1999. Though PW 29 had asked the accused many things about the voluntariness, the High Court, on analysis of his entire evidence, came to a conclusion that only a routine statutory certificate as required under Section 164 CrPC was given by him. The High Court also pointed out that he did not caution that if the accused Rabi Soren refused to make any confession, he would not be remanded to CBI or police custody. He was not informed that if he confessed, such confession may be used in evidence against him and on that basis there was the possibility of his being sentenced to death or life imprisonment. It was also pointed out that his body was not checked to find out as to whether he was subjected to torture when he was in police custody. It was also pointed out by the High Court that five hours' time was given for reflection during which period he was in the custody of his Bench Clerk in his chamber. PW 29, after recording the confessional statement of Rabi Soren on 18-5-1999, again remanded him to the custody of police i.e. CBI till 20-5-1999. This is clear from the evidence of PW 55 (IO)."*

[2](2011) 2 SCC 490

Present case is clearly distinguishable. Appellant had been remanded to judicial custody and it appears since 3:00 p.m. of 18.06.2013 he remained in judicial custody till he made the confession on the next day. Accused was produced from judicial custody and Magistrate had assured him that he shall not be remanded to police custody if he did not make the confession. The substance and tenor of the confession also rules out a case of tutoring.

75. In ***Parmananda Pegu vs. State of Assam***[3] it was held that the Court must look for corroboration before relying on a retracted confession. The Court held as follows:-

> *"19. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true."*

In the present case, medical evidence and other circumstances clearly corroborate the truthfulness of the retracted confession unlike the cited case where the medical evidence contradicted the confession itself.

76. In ***Sarwan Singh vs. State of Punjab***[4] the Apex Court, inter alia, held it would be reasonable to give an accused at least 24 hours to decide whether or not he should make a confession. In ***Babubhai Udesinh Parmar vs. State of Gujarat***[5] only 15 minutes was given to the

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[3] (2004) 7 SCC 779
[4] AIR 1957 SCR 953
[5] (2006) 12 SCC 268

accused prior to recording of confession. In the present case the accused had been sent for segregation on 18.06.2013 and his confession was recorded on the next day. Fact that the accused had been taken out for drawing of blood at 3:00 p.m. on 18.06.2013 cannot be a ground to hold that substantial time for reflection had not been given to him. Even if the segregation period is calculated from the time when the appellant was taken out to collect the blood, the confession was recorded on the next day at 02:30 p.m., that is, after expiry of sufficient period for reflection of almost 24 hours.

77. ***Davendra Prasad Tiwari vs. State of U.P.***[6] is also distinguishable on facts. In the present case, the Magistrate had assured the accused that he would not be remanded to police lockup if he did not make the confession. Reason for the appellant making the confession is also evident from the tenor of his confession. In his confession he stated that 'something got into him' and he committed the crime. Naturally he felt remorse and confessed. Materials on record show the appellant had been remanded to judicial custody and was sent for reflection till the next day. Mere identification by a police officer prior to recording of confession cannot be a ground to hold that the judicial remand had not been followed in practice. Non-examination of SI Apurba Mondal who identified Saiful before Magistrate also does not affect the prosecution case. P.W. 31 during cross-examination clarified the role of the said police officer. His examination is not necessary for

[6] (1978) 4 SCC 474

unfolding of the prosecution case. However, it was open to the defence to make a prayer before the trial Court to summon the said police officer under section 311 Cr.P.C. if it thought fit and proper. The defence did not take recourse to such action. Under such circumstances, it cannot be argued that non-examination of the said police officer would lead to an adverse inference against the prosecution case.

78. In ***Aloke Nath Dutta and Others vs. State of West Bengal***[7] the retracted confession was not believed due to suspicious circumstances. Though the jail premises was adjoining the Court, accused had been brought out from jail two and half hours earlier. It was his specific defence that he had been taken to police station and threatened. He made prayers for production of records which was not allowed. No plea was raised by Saiful during his examination under section 313 Cr.P.C. that during segregation he had been threatened by SI Apurba Mondal or any other police officer. No prayer had also been made to summon the said SI Apurba Mondal under section 311 Cr.P.C. before the trial Court. Role of the said police officer has been clarified by P.W. 31 as one who had merely identified the accused before the Magistrate. This is a routine practice. P.W. 19, Judicial Magistrate clarified no police officer was present when she recorded the confession. Prior to recording the confession she put questions to the confessing accused who did not come up with any plea of threat or coercion during segregation or

[7] (2007) 12 SCC 230

earlier. These facts clearly distinguish the present case from the circumstances vitiating in ***Aloke Nath Dutta*** (supra).

(iii) <u>DNA evidence</u>:-

79. Prosecution has relied on the DNA profiling report (Exhibit 29a) to corroborate the judicial confession and other evidence against Saiful.

80. P.W. 25, Dr. Anil Kumar Sharma is the Deputy Director. He conducted serological and DNA examination on the following items:-

> Samples in the first batch were: Vaginal and urethral swabs of deceased (Exhibit A1), vaginal smear (Exhibit A2), Blood sample of the deceased (Exhibit B), lungi (Exhibit S), blood sample of Saiful (Exhibit T).
>
> Samples received in second batch: blood samples of deceased (Exhibit A1a), scalp hair of the deceased (Exhibit A1b), nail clipping of deceased (Exhibit A1c), pubic hair (Exhibit A3), jangia of deceased (Exhibit A12), salwar of deceased (Exhibit A13) and wooden panels from the crime scene (Exhibits A14, A15 and A16).

81. As per his report, DNA in the semen stains found on pubic hair, blood stains on the lungi (Exhibit S) and blood profile of Saiful (Exhibit T) belonged to one and the same person. Relying on the report prosecution argued Saiful had raped the victim. On the other hand, the DNA report has been challenged by the defence on various scores.

(iii-a) <u>Identity of pubic hair and chain of custody</u>:-

82. Identity of the pubic hair is doubtful. No DNA examination was undertaken to ascertain whether pubic hair on which semen stains was found belonged to the victim. Post mortem doctor (P.W. 23) deposed he had collected the hair by using forceps which would ensure that the root hair was intact. However, the pubic hair received at FSL was root end cut. Post mortem doctor also did not state he found semen stains on the pubic hair. Hence, identity of the hair examined by CFSL expert is doubtful.

83. It is also contended chain of custody has not been established. The envelope containing the pubic hair was not sealed. As per seizure list Exhibit – 11/1 the package is described as "one envelope containing pubic hair of the deceased." In most of the other articles it is stated they are either sealed or packed. FSL also notes the pubic hair was in an unsealed envelope inside a sealed envelope containing seal of 'Barasat District Hospital'. There is a difference in the seal borne on the post mortem report and the sealed item. In the post mortem report the seal reads "Autopsy Surgeon, North-24 Pgs. Dist. Hospital, BARASAT" whereas the seal on other articles reads "Barasat District Hospital".

84. Post mortem doctor (P.W. 23) handed over the samples including the pubic hair to P.W. 22. No seizure list was prepared and after five hours P.W. 22 handed over the articles to the investigating officer, P.W. 29. It is further argued there was a delay of 6 days in sending items to FSL and CFSL.

85. With regard to the aforesaid objections, it may be noted post mortem doctor (P.W. 23) deposed he had plucked the pubic hair with forceps during autopsy. Defence argued if the pubic hair had been so plucked it would have the root end attached to it. But the hair examined at CFSL department was root end cut. Post mortem report shows rigor mortis had set in. It is possible due to rigor mortis the hair when plucked from the body had broken. Similarly, failure of post mortem doctor to notice semen stains on clinical examination may be due to small quantity of semen stains on the hair. Its presence was noted both at the State Laboratory and at CFSL during microscopic examination which would override the clinical findings of the post mortem doctor.

86. Post mortem examination had continued for a considerable period of time and thereafter, the articles including the pubic hair had been handed over to P.W. 22 who in turn handed it over to P.W. 29. It is common knowledge that investigation in our country proceeds at a lethargic pace. There may have been some loss of time in collecting the pubic hair and handing over the articles to the investigating officer, P.W. 29. The time gap is not so stark so as to break the chain of custody.

87. The samples had been seized on 08.06.2013. Upon transfer of investigation to CID, Kolkata on 09.06.2013 second investigating officer (P.W. 31) took custody of the samples including the pubic hair on 13.06.2013. Thereafter, the articles were promptly sent on 14.06.2013

to FSL and CFSL. The time gap between the seizure and the dispatch of articles for forensic examination has been explained and there is no undue delay which would adversely reflect on the forensic report.

88. It has been strenuously argued the pubic hair was kept in an open envelope which does not rule out the possibility of substitution. Evidence on record as well as CFSL report (Exhibit 29a) shows the envelope containing the pubic hair and other forensic articles were put inside a bigger envelope which was duly sealed with the stamp of the hospital. Other articles also bore the same seal, namely, 'Barasat District Hospital'. A different seal was affixed to the post mortem report, namely, 'Autopsy Surgeon, North-24 Pgs. Dist. Hospital, BARASAT' as the document was signed by him. These circumstances reinforce the prosecution case that the big envelope was sealed with the seal of 'Barasat District Hospital' and there is no possibility of substitution by the investigating agency. Chain of custody is therefore proved beyond doubt.

(iii-b) <u>Malkhana storage conditions</u>:-

89. It is argued the storage conditions in the Malkhana were far from conducive. Most of the samples were not fit for DNA profiling as they were of "very low amount and were highly degraded". P.W. 25 admitted, passage of time, environment in which samples are kept, packaged and preserved causes degradation. Hence, it is possible that the samples were contaminated and degraded. Thus, forensic opinion is highly unreliable.

90. P.W. 25 did not state that the DNA sample extracted from the semen stains on the pubic hair was degraded. This obviates any doubt with regard to the quality of DNA sample for the pubic hair used for analysis.

(iii-c) <u>Probative value of DNA profiling report</u>:-

91. Defence assailed the findings in the CFSL report on technical grounds too. It is argued the underlying basis of the report i.e. worksheets for extraction, quantification, amplification, genotyping of exhibits, copies of electropherograms and equipment logs had not been placed. Statistical analysis showing frequency of occurrence of DNA genotyping had also not been brought on record.

92. During pendency of the appeal Saiful took out an application under the Right to Information Act ('RTI' for short) calling upon the authorities to supply all records i.e. copies of worksheets for extraction, quantification, amplification, genotyping, electropherograms, equipment logs and chain of custody. Pursuant to the application, relevant documents including electropherograms were supplied to the appellant. In light of the said documents, appellant took opinion of a researcher regarding correctness of the CFSL report. An application being CRAN 1 of 2023 was filed praying that the said documents and the report of the researcher be taken on record while considering the correctness of the CFSL report.

93. State has strongly opposed the application. Public Prosecutor as well as the learned Counsel for the de-facto complainant contended

CFSL expert (P.W. 25) was examined in Court. He was cross-examined at length. No prayer was made to produce the worksheets including copy of electropherograms, etc. to confront the expert during trial. During appeal documents have been obtained pursuant to a query under the RTI Act. These documents cannot be relied upon. Opinion of the researcher cannot be read into evidence as she was not examined in Court. In CRAN 1 of 2023 no prayer to lead additional evidence by examining defence witnesses has been made.

94. It is true appellant did not pray for production of the worksheets including copies of electropherogram before the trial Court. However, P.W. 25 during cross stated report could not have been prepared without sequencer chart. He also admitted without worksheets it is not possible for a layman to decide the correctness of the report. In such view of the matter it becomes necessary to examine the foundation of the DNA report in the backdrop of the worksheets, electropherograms and other documents.

95. No doubt these documents have not been formally proved but it is not disputed that they were supplied by an authority which in ordinary course of business was duty bound to maintain them and were obtained in accordance with a process recognized by law. This is not disputed by the State or the complainant. These documents can be treated as ‘matters on record’ which may be considered to determine whether a fact in issue i.e. findings of the DNA report are proved or not. In this regard, it may be apposite to refer to the definition of ‘proved’ in

the Evidence Act. Section 3 of the Act states a fact is said to be proved if after considering the matters on record the Court believes or considers it probable that it exists. The section uses the word "matters before it" which may include matters which are not evidence e.g. report of local inspection or answer to questions under section 313 CrPC[8]. Likewise, opinion of the researcher though not opinion evidence may be considered as persuasive argument by the defence to be tested against the 'matters on record'.

96. Let me consider the correctness of the findings in the DNA report (Exhibit 29a) in the light of the matters before the Court.

97. DNA molecule comprises the genome of an individual and is found in the nucleus and mitochondria of human cell. DNA of each individual is unique. It is a thread like structure comprising of 23 pairs of chromosomes, each arranged in a linear sequence. One chromosome of each pair is inherited from either parent. They carry genetic information inherited from parents. Each pair of chromosome is a twisted ladder like structure connected to each other through base pairs (hydrogen bonds) in a sequence. The twisted ladder like structure is called the double helix. The base pairs connecting the chromosomes are adenine (A), cytosine (C), guanine (G) or thymine (T). Each base pair connects to the other base i.e. A-T and G-C. Each person has a unique sequence of bases in the genome. He can be identified solely on the sequence of his/her genome.

[8] S. P. Sen Gupta, 'Sen Gupta On Evidence' (1988 edn, Kamal Law House 1988)

98. Scientists have developed methods like Short Tandem Repeats ('STR' for short) where a small number of repeat sequences of base pairs on specific physical locations on the chromosomes that are known to vary in every individual are analysed. These physical locations on the chromosomes are fixed and known as loci ('locus' for singular).

99. A gene is the genetic information stored at a particular locus on a pair of chromosomes. A person has two pairs of gene at a locus, one from the maternal and another from paternal side. An allele is one of a pair of gene at a particular locus. A pair of alleles at a particular locus of an individual is called genotype. A pair of alleles may be identical if the same allele is inherited from each of the parents at a particular locus. A set of genotypes in two or more loci forms the DNA profile of the individual.

100. Genome in an individual contains approximately 6,600,000,000 base pairs of DNA. For DNA profiling through STR the number of repeats of a small set of base pairs e.g. 4/5 in number at specified locus/loci are measured. To do so, sequence of base pairs at the locus is copied and amplified in vitro through a technique called Polymerase Chain Reaction ('PCR' for short). Each sequence of base pairs at a locus is separated by size (based on number of repeats) through a process known as electrophoresis. The number of repeats of the sequence sets in each allele is mapped as a peak against a horizontal base line representing a particular locus. The chart is defined as an electropherogram. Each allele peak at a locus is assigned a

number equivalent to the number of repeats at that locus. For example, if the number of repeats on each allele at a locus is 5 and 10 respectively then the genotype would be 5:10. If the repeats are same for both the alleles the electropherogram would show a single peak and would be assigned a number equivalent to the common number of peaks in each allele.[9]

101. A DNA profile is a series of numbers that represents all the genotypes detected for each locus in a particular series. Number of repeats in each allele at a particular locus is unique to an individual. So if the genotypes at different loci in two samples matches it can be said the DNA material in both the samples is the same and it is said to be a match or inclusion. If they do not match it is said to be an exclusion which proves the DNA material in the two samples is not the same. But a match or inclusion does not establish with certainty that the DNA material in the samples belong to the same person. It creates a probability which increases with the number of loci analysed. Since 2014 in the UK, 16 loci are examined and in Scotland, 23 loci are examined to establish a match[10]. Then the result must be statistically analysed against the recurrence of the same genotype in the population defined as 'random occurrence ratio' to come to a conclusion with regard to the identity of the source of DNA material.

[9] Sandile Bokolo vs. S, (483/12)[2013] ZASCA 115 (18 September 2013)
[10] The Royal Society of Edinburgh, Forensic DNA analysis – A Primer for Courts, [2017] PL 10

102. In the present case, Exhibit 29a shows STR analysis was made with regard to 21 loci and the samples, namely, blood on Saiful's lungi (Exhibit S), pubic hair (Exhibit A3) and blood samples of Saiful (Exhibit T) showed an allelic match at 20 out of 21 loci. Result at one locus was inconclusive.

103. Copies of electropherograms have been produced in Court. On examining the said copies it appears the allelic peak numbers marked in electropherogram of each of the samples has been correctly reflected in the STR. Hence, findings in STR report are in consonance with the allele peaks in the electropherograms in respect of blood sample of Saiful (Exhibit T), blood on lungi (Exhibit S) and pubic hair (Exhibit A3). Effect of inconclusive result in 1 out of 21 loci was explained by P.W. 25. During cross, P.W. 25 clarified if the STR report is inconclusive in 1 out of 21 loci, the conclusion may be of reduced probability but cannot be treated to be forensically incorrect.

104. The conclusion is assailed on behalf of defence on the following issues:-

i. ***Unsuitable allelic ladders used for genotyping:*** *As the genotyping software settings are adjusted for every run based on the sample type and the sample run, for proper genotyping, at least one allelic ladder is required to be run along with the sample. However, the peak structure of the allelic ladder appear similar on both sets of EPGs, indicating that the same allelic ladder was used for genotyping all the samples despite not running alongside the sample. Also, laboratory documentation show that the evidence and reference samples in this case were run on multiple days in two batches but it does not specify whether an allelic ladder was*

included in every run. Further, 17 out of 21 loci in the allelic ladder showed OL peaks including Penta E (locus with all OL peaks). The above findings manifest that the allelic ladder used for the interpretation of the samples in this case is unsuitable, hence the reliability of the DNA results cannot be established.

ii. ***Unsuitable reference sample of Saiful Ali:*** *Exhibit T: Blood Sample (Source: Saiful Ali) shows unmarked peaks on 6 loci indicating the presence of a mixture or the possibility of contamination. Reference profiles are collected from known individuals, hence is a single contributor sample that should have a maximum of two alleles at each locus. Since the negative control was not run alongside the samples, it is not possible to ascertain the cause of the anomaly highlighting the lack of quality control/validation. Further, the DNA profile shows that the locus D7S820 on Exhibit T: Blood Sample (Source: Saiful Ali) was not amplified properly. Using a partial profile for comparison purposes has a higher chance of matching another individual by chance and resulting in false positive identification.*

iii. ***Unmarked peaks in Exhibit A3: Hair and Exhibit S: Lungi:*** *During the interpretation of an EPG, the analyst must analyse all the peaks in the EPG to determine the genotype of the sample. Multiple unmarked peaks were observed in 8 loci in Exhibit A3: Hair and 6 loci in Exhibit S: Lungi indicating the presence of a DNA mixture or contamination. However, the CFSL report concluded both these samples as a single-source DNA profile with the source as Exhibit T: Blood Sample (Saiful Ali). It appears that the unmarked peaks have not been considered during interpretation calling to question the reliability of the attribution of the profile to Saiful Ali.*

iv. ***Failed to report the statistical analysis:*** *Based on the laboratory documentation, Exhibit A3: Hair and Exhibit S: Lungi were statistically analysed. To state the statistical relevance of a*

match correctly, all the loci where the genotypes were identified must be included in the interpretation as well as in the statistical calculation. However, the calculations did not include 6 out of 21 loci. Also, the CFSL report did not report the calculated statistics as part of the DNA match result. Therefore, it is not possible to evaluate the evidentiary value of the Exhibit A3 and Exhibit S as without the statistical analysis of the relevant DNA profile, the weight of the match cannot be determined.

105. With regard to the first issue, i.e.,

- Same allelic ladder being used:–

This does not prejudice the STR Report regarding Exhibits S, T and A3. The allele table in electropherogram of these samples do not show off ladder peaks.

Hence, allele ladder used was not inadequate. No question was put to P.W. 25 that same allele ladder was used on different dates. Accordingly, the inference is speculative and does not impact the STR Report.

106. With regard to the second and third issues, i.e.,

- Reference material, i.e. blood sample, lungi and hair have additional peaks:-

Additional peaks at a locus may be either due to contamination or noise artefacts like “Stutters”, “A peaks” and “Pull-ups”. Stutters are low peaks caused by slippage of the enzyme DNA Polymerase used to copy and amplify the DNA. These appear as one or more repeat unit shorter than the main allele peak in the eletrcopherogram and are not considered for inferring the genotype at

that locus. Similarly, a peak is a 'shoulder' peak in which the left of the main peak is one base smaller and 'pull-ups' are small peaks of same size appearing during detection[11]. All such artefacts have to be excluded during comparison of evidence sample and known sample. It is possible additional peaks in the loci analysed and appearing in the electropherogram were due to 'stutters' or other artefacts and would not lead to an inference of contamination and rejection of STR Report.

107. With regard to the fourth issue, i.e.,

- No statistical analysis –

Report itself shows there was a statistical analysis but 5 out of 21 loci were not included. This view shows statistical analysis on 'random occurrence ratio' was done in 15 out of 21 loci. This is almost on par with UK standards where comparison of 16 out of 21 loci is considered sufficient[12]. Hence, report ought not to be rejected outright on this score.

108. In the present case, DNA profile report is not the sole basis of conviction. Prosecution case against Saiful is primarily based on judicial confession which is corroborated by other circumstances. DNA profile report is another piece of corroborative evidence which lends assurance to the judicial confession and other evidence on record.

109. In ***Rahul vs. State of Delhi, Ministry of Home Affairs and Another***[13] the Apex Court held the underlying basis of the findings of

[11] The Royal Society of Edinburgh, Forensic DNA analysis – a primer for courts, [2017] PL 29,30
[12] The Royal Society of Edinburgh (n 3), 5
[13] (2023) 1 SCC 83

DNA report must be gone into. It also discarded the report as there was delay in dispatch of samples for CFSL examination. Exhibit 29a clearly sets out the process of DNA profiling through DNA isolation by organic extraction method and amplification by multiplex PCR method for Short Tandem Reports (STRs) and amelogenin loci the amplified products along with controls were run on automated sequencer and analysed using GeneMapper ID software with respect to Standard Ladder. STR report findings match the allelic peaks against the respective loci in the electropherograms for the relevant samples. Objections raised are ambivalent and may be explained away. They may impact probability of the conclusions but do not render them wholly unacceptable. Moreover, the hair and other articles were kept inside a large packet which bore the seal of the hospital improbabilising substitution.

110. In ***Manoj and Others vs. State of Madhya Pradesh***[14] the Apex Court held DNA evidence, being in the nature of opinion evidence, its probative value is to be tested on a case to case basis. It can be used to corroborate the prosecution case. In the facts of the cited case, it discarded the evidence as seizure of most of the samples subjected to DNA analysis was doubtful.

111. In ***Premjibhai Bachubhai Khasiya vs. State of Gujarat***[15] the Gujarat High Court held a positive DNA report can be used to corroborate supporting evidence on record.

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[14] 2022 SCC OnLine SC 677
[15] 2009 SCC OnLine Guj 12076

112. The concept of proof in law of evidence is not one of certainty but of reasonable probability which a man of ordinary prudence would believe. Like other evidence, probative value of an expert opinion is to be tested on the anvil of reasonable probability within margins of error. Development of science and fidelity to test protocols are important parameters to assess the reliability of expert opinion. The threshold of satisfaction of the Court is much higher when the opinion evidence is the main bulwark of the prosecution case. However, when other evidence on record e.g. judicial confession and other incriminating circumstances establish the prosecution case, the opinion evidence of PW 25 and Exhibit 29a (which for reasons recorded above are not wholly unreliable) may be used to corroborate such evidence and lend assurance to the finding of guilt against Saiful.

113. Hence, the evidence on record establishes beyond doubt the role of Saiful in the rape and murder of the victim.

G. <u>Criminal conspiracy to commit rape – whether proved</u>:-

(i) <u>P.Ws. 14 and 15 whether reliable</u>:-

114. Prosecution has relied on P.Ws. 14 and 15 to prove there was prior concert between the appellants to commit the rape and murder. P.W. 14 is a daily labourer. He stated he used to reside at Kalikapur, Barasat. He is a distant relation of P.W. 13. He knew P.W. 15 who hailed from his native village '*Bahira*'. Both of them knew one Rahim who used to reside at '*Par Kharibari*'. Both of them deposed on 2nd/3rd June, 2013 they had gone on the motorcycle belonging to P.W. 15 to

visit one Rahim. Enroute, they stopped at a tea stall at Langalpota. There they saw the appellants sitting and having tea. Appellants were stating womenfolk of Kamduni do not give them attention. Ansar stated daughter of P.W. 13 scoffed at him. Thereupon, Saiful stated that she would be taken to 8 Bigha plot and taught a lesson.

115. Thereafter, they left the place. P.W. 14 during cross-examination stated in the first week of July he had gone to Hooghly for work. On 08.07.2013 he went to DDI Office and made statement. He was extensively cross-examined. During further cross-examination, he stated a different version that he had gone to Hooghly in the month of June. P.W. 15 deposed on 2nd /3rd June, 2013 he was proceeding to the house of Rahim with P.W. 14. They stopped at a tea stall at Langalpota and heard the discussion among the appellants regarding the victim. P.W. 14 stated that he would inform the uncle of the victim Bimal Ghosh, a *sattu* vendor at Kamduni More but they could not find him. They left the place. In cross-examination, P.W. 15 admitted that he had never gone to residence of P.W. 14, though he claimed that he had been regularly visiting the house of Rahim. He admitted he had not visited his house after the incident. He further stated that he saw on television that CID had published notice inviting individuals to share information regarding the incident. He saw this on television on 5th, 6th, 7th July, 2013 P.W. 14 rang him up and informed him about the said news on television and he saw it. Apart from that he had not seen that

information anywhere. Therefore, they went to the police station and made statement.

116. He stated that he had sold his motorcycle a month ago but could not produce any documents. Both of the witnesses admitted they had criminal cases pending against them and had been arrested.

117. Learned Counsel for the appellants assailed the credibility of the aforesaid witnesses on a number of scores. It was contended that the said witnesses are chance witnesses and have been belatedly examined. Explanations of the witnesses that they were present at the tea stall while they were going to the residence of their friend Rahim is not corroborated by examining Rahim. P.W. 15 admitted police had not taken them to the tea stall for identification but P.W. 31 claimed that the so-called tea stall owner, Sagbat Molla, was examined during investigation. The said Sagbat Molla however was not examined in Court. There are also serious contradictions in the depositions of the witnesses with regard to the manner and circumstances in which they heard the discussion between the appellants and their subsequent conduct. It is also argued the explanation for their delayed examination has not been proved. P.W. 31 claimed notices had been put up in the locality inviting individuals to share information regarding the incident. But neither did he produce the notice nor did he state that the information regarding the notices had been telecast. On the other hand, P.W. 15 claimed that he had received information about the notices

through television bulletin. He had been informed about the matter by P.W. 14. P.W. 14 does not corroborate him on this score.

118. I have given anxious consideration to the rival submissions of the parties with regard to the credibility of P.Ws. 14 and 15. Admittedly, P.Ws. 14 and 15 are chance witnesses. One of them resides at Barasat while the other resided at Baguihati. Though they claimed they hailed from the village '*Bahira*', P.W. 15 admitted he had never gone to the residence of P.W. 14. How and where they met each other to proceed to the residence of Rahim is also unclear. They claimed they had travelled on a motorcycle belonging to P.W. 15 but the latter during cross-examination was unable to provide the registration mark or even the papers relating to the sale of the said motorcycle. Most importantly, the said common friend Rahim has not been examined to corroborate their version. When the prosecution rests on chance witnesses, corroboration with regard to the circumstances which lead to their presence at the relevant place is essential. Non-examination of Rahim affects the unfolding of the prosecution case on this score.

119. It is also relevant to note that Sagbat Molla, owner of the tea stall though examined by police had not been produced before the Court. This leads to an adverse inference with regard to the deposition of the said witnesses regarding the incident. This is further compounded by the belated examination of the said witnesses. They had not been cited as witnesses in the initial charge-sheet. P.W. 31 deposed during further investigation he put up notices inviting

individuals to share information regarding the incident. These notices were put up in and around Kamduni area. He was silent with regard to the said notices being telecast. P.Ws. 14 and 15 were not the residents of Kamduni area. P.W. 15 claimed he received a phone call from P.W. 14 that news about notices being published regarding the case was shown on television. P.W. 15 also saw such information and then they proceeded to make statement to police. Version of P.W. 15 that P.W. 14 had informed him about the incident is not corroborated by the latter. Even P.W. 31 is silent with regard to any news being telecast regarding the aforesaid notices. Conduct of the witnesses after hearing the information is also contradictory. While P.W. 14 who is a distant relation of the father of the victim, P.W. 13 merely claimed that he left the place, P.W. 15 stated that they had gone to Kamduni More to inform the incident to Bimal Ghosh, uncle of the deceased. P.W. 14 tried to cover up his unnatural conduct of not informing the relations of the victim about the incident even after her death by claiming that he had gone to Hooghly for work but his deposition in this regard is contradictory. In cross, he claimed that he had gone for work to Hooghly in the month of July between 1st to 7th July. Subsequently, during further cross-examination he stated he had left for work before or immediately after 07.06.2013. This prevaricating stance does not inspire confidence and is too flimsy to explain the unnatural conduct of P.W. 14 in failing to inform the incident at least to the relations of the victim after her death. If P.W. 14 was known to the father of the victim,

it is unnatural that he would wait for publication of notice through the television or otherwise to come out with such vital information regarding the sinister discussion overheard by him regarding the victim.

120. Finally evidence has come on record that P.Ws. 14 and 15 had been arrested in criminal cases earlier, P.W. 15 admitted such fact during cross-examination. Defence produced charge-sheets and claimed P.W. 14 was named as an accused therein. There was confusion with regard to the identity of the accused and prayer was made for recalling P.Ws. 14 and 15 for cross-examination. This was turned down by the trial Court and is the subject matter of a Criminal Revision being CRR No. 2789/2014. Be that as it may, the witnesses admitted that they were arrested in criminal cases earlier. It is true deposition of a witness who is an accused in another criminal case (unconnected with the present one) cannot be thrown out on such score alone but the fact that the witness is an accused in another criminal case increases the possibility of police influence on him. Under such circumstances, it is the duty of the Court to test his evidence with circumspection and seek corroboration. Non-examination of vital witnesses like the tea stall owner, Sagbat Molla or the friend Rahim to whose house the witnesses claimed to have been going assumes importance. In this backdrop, I do not consider it prudent to rely on the versions of P.Ws. 14 and 15 which are riddled with various contradictions and improbabilities to come to the conclusion that the prosecution case with regard to the discussion

between the appellants regarding the victim at a tea stall in Langalpota on 2nd/3rd June, 2013 has been proved.

(ii) <u>Conduct of the appellants</u>:-

121. Prosecution has also relied on evidence of the relations of the victim i.e. P.Ws. 1, 2, 7 12 and 13 to show that the appellants used to drink and taunt girls in the locality. P.W.12, the mother stated victim told her the appellants used to taunt her and she narrated this fact to her husband. P.W. 13 corroborated her. The aforesaid evidence even if believed to be true shows the appellants used to drink and misbehave with girls in the locality including the victim. This may give rise to a general impression of their propensity to harass women but the same by no stretch of imagination can be treated as a proof of meeting of minds to commit rape of the victim.

122. In support of such appreciation of evidence one may profitably refer to Illustration (p) to section 14 of Evidence Act[16].

123. Even if the conspiracy angle is not proved, one is required to sift the evidence on record to test whether other appellants apart from Saiful shared common intention with the latter to commit the rape and murder of the victim.

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[16] Illustration (p): A is tried for a crime.
The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

H. <u>Role of Ansar in the crime</u>:-

(i) <u>Control of 8 bigha plot</u>:-

124. Ansar was the leader of the party. He wielded power and influence in the locality. His influence was of such degree that even the owners of the trust of 8 Bigha plot had to succumb to his strong arm tactics.

125. P.Ws. 18 and 20, manager of the trust and the contractor who built the boundary wall have succinctly described the state of affairs. P.W. 20 corroborated P.W. 18 that the security guard put up by the trust were driven away and he was compelled to hand over the key to Ansar. Thereafter, Ansar was in charge of the property. In this backdrop, it is natural that the local people were overwhelmed and fearful to raise any protest or approach the police regarding the nefarious activities of Ansar and his associates. Inability of the family members of the victim or any other womenfolk in lodging complaint to the police is to be attributed to the fear prevailing in the locality and cannot be a ground, as argued on behalf of the defence to improbabilise their version in Court. Only after the dead body of the victim was recovered did the people gather courage and raised protest in the area. Thus, Ansar appears to be the leader of the group. He was in control of the 8 bigha plot and the key of the plot was also kept with him.

(ii) <u>Presence at the place of occurrence</u>:-

126. Prior to the incident around 1:00 p.m. Ansar, Saiful and other appellants were noticed in a drunken condition in front of *Alaghor* by P.W. 10. Soon after the incident, P.W. 1 on his way back from Kamduni More saw Ansar locking the gate of 8 bigha plot. Saiful was standing beside him and stating that they had a good time and should go home. It has been argued that this fact is not stated in the FIR. Saiful is not even named in therein. This omission in my estimation is of little consequence. P.W. 1 was not the author of the FIR. It was lodged by P.W. 2 and scribed by P.W. 3. They are the family members of the victim. They were in a state of shock after discovering the semi naked mutilated body of their sister. Over this issue a commotion ensued. Initially, P.W. 29, first investigating officer who arrived at the spot was unable to control the mob. He called for additional forces and removed the dead body to the hospital where inquest was conducted. Under such stressful conditions FIR came to be lodged by P.W. 2. Omission on his part to record the fact that his brother (P.W. 1) had seen Ansar and Saiful together while returning from Kamduni More does not affect the credibility or truthfulness of P.W. 1. As per confession of Saiful he had disclosed the incident to Emamul and the latter disclosed it to others including Ansar. Thereafter, Ansar told him to leave the spot. Hence, Saiful left the spot and in the FIR which was registered on the basis of mere suspicion P.W. 2 did not disclose the name of Saiful. Such

omission is clearly explained away from attending circumstances and does not affect the credibility of the prosecution case.

(iii) Nail scratches on body:-

127. Ansar was arrested on 08.06.2013 and was medically examined by P.W. 23 at Barasat District Hospital. P.W. 23 found the following injuries on the body of Ansar:-

> *"1. A nail scratch abrasion the left anterior chest wall 1" medical to the left nipple;*
> *2. A pair of contused nail scratch abrasion on the left arm below the should joint;*
> *3. A nail scratch abrasion above right elbow joint in the night forearm. All the injuries showed feature of vital reaction. The injuries were non-scabbed. The nail cuttings and pubic hair are preserved for chemical examination."*

128. Prosecution relied on the aforesaid circumstances and the false explanation of Ansar with regard to the injuries on his body to come to a finding that he shared common intention with Saiful to commit the rape. On the other hand, learned Counsel for Ansar submits that the prosecution case with regard to gang rape suffers a death blow from the confessional statement of Saiful. It is also argued arrest memo did not disclose any bodily injury on Ansar and he claimed that he had suffered the injuries due to assault in police custody.

129. Immediately after his arrest P.W. 23 examined Ansar and found nail scratch injuries on his chest and left arm. Evidence of a medical officer regarding presence of injuries would override the notings in the arrest memo which is made by a police officer who may not have examined the body of the appellant with sufficient attention. Absence of injuries in arrest memo would be of little consequence to come to a

conclusion that there were no injuries on the body of Ansar at the time of arrest. Moreover, Ansar did not raise any plea of physical assault at the earliest opportunity, i.e. during his production before the Magistrate. Only during trial bald questions were put to the investigating officer with regard to the physical assault. Moreover, during cross-examination P.W. 23 denied that such injuries on Ansar could be caused by finger ring as suggested by the defence. It is also pertinent to note that the plea of injury due to physical assault was not raised at the earliest point of time. At no time during his production before Magistrate did Ansar raise any plea of physical assault. Belatedly during trial he put questions to the doctor (P.W. 23) and investigating officer that the injuries could be caused by a finger ring during assault. This was also denied by the doctor.

130. Hence, I find little substance in the explanation offered by Ansar with regard to the injuries on his body. On the other hand, the injuries in the form of nail scratch marks on his chest and left hand given an impression that he had participated in overpowering the victim in the course of the incident.

(iv) <u>Exculpatory portion of Saiful's confession – inherently improbable</u>:-

131. Another aspect highlighted by the defence is the confession of Saiful. Saiful's confession exculpates the other appellants including Ansar. Section 24 of the Evidence Act makes a confession of an accused admissible so far as he is concerned provided the confession is not

procured through threat, coercion or inducement. Section 30 of the Evidence Act makes the confession of a co-accused admissible against another in same trial as corroborative evidence. The word 'against another' in section 30 makes it evident that the said provision of law refers to an inculpatory part of the confession and not exculpatory portion of confession by a co-accused. The rationale behind such statutory scheme is obvious. The maker of a confession that is an accused cannot be subjected to cross-examination by the prosecutor. Hence, an exculpatory portion in the confession of a co-accused cannot be utilized by another to the prejudice of the prosecutor who is unable to cross-examine the maker.

132. But as per section 11 of the Evidence Act a fact which is otherwise not relevant may become relevant if it is inconsistent with any fact in issue or relevant fact. Exculpatory portion of a confession by a co-accused may be relevant under section 11 of the Evidence Act if it is inconsistent with a fact in issue or relevant fact.

133. In the present case, prosecution proposes to prove that Saiful was present with Ansar and others when the victim was raped. The exculpatory portion of Saiful's confession is inconsistent with the aforesaid fact in issue and if true would improbabilise its existence. However, before drawing such conclusion, the Court must examine the truthfulness or reliability of the exculpatory portion of confession. Ordinarily a man would not inculpate himself while exonerating others. In such cases a heavy duty is cast on the prosecution to rebut this

normal human conduct and show strong and weighty reasons exist which had prompted the confessor while admitting his guilt to shield the others.

134. Do such facts exist in the present case? A deeper scrutiny of Saiful's confession would give the answer. Saiful admits in his confession that Ansar was the source of his economic sustenance. He used to work under him and gain his livelihood. Evidence on record also shows that Ansar had control over Saiful and other appellants. Even on the fateful day as per Saiful's confession, Saiful had worked under Ansar and he had provided him and others with food and drinks. Under such circumstances, it may not be improbable that Saiful who had confessed his own guilt was trying to protect his master from the rigors of law. He may have been prompted to do so on the expectation that the more resourceful Ansar (if exonerated) would continue to support him and his family.

135. It is argued that a confession must be read as a whole and the exculpatory part of the confession may not be excluded. This proposition is not of universal application. In cases where exculpatory portions of the confession are inherently improbable and inconsistent with other compelling circumstances the said portions may be ignored while relying on the inculpatory part.[17]

136. Let me examine the exculpatory aspect of Saiful's confession qua Ansar in this perspective. Evidence on record shows Ansar had the

[17] Nishi Kant Jha vs. State of Bihar, (1969) 1 SCC 347 (para 14 to 23)

key to the 8 bigha plot. In his confession, Saiful claimed that he followed the victim with the key of the boundary and proceeded to commit the crime. This evasive statement that 'he collected the key' is inconsistent with the evidence on record that the keys were kept with Ansar. On the fateful day, they worked in the bherries i.e., water bodies. After the work was complete it is claimed that Ansar had left the spot.

137. In this backdrop, claim of Saiful that Ansar had left is improbable in as much as he would not otherwise have access to the 8 Bigha plot. Assessed from this background, it would show that Saiful had made an evasive claim of collecting keys instead of admitting that Ansar was present and had helped him to open the gate and commit the crime. This is in consonance with the bodily injuries on Ansar which were suffered by him within 24 hours of the examination, i.e. on the day of incident and remains unexplained by him. In fact, the circumstances become clinching as he belatedly offered a false explanation regarding such injuries caused in police custody. The following incriminating circumstances clearly stand established against Ansar. Ansar was the leader of the group and Saiful was wholly dependent on him for his livelihood. He had the keys to 8 bigha plot. On the fateful day Ansar had employed Saiful and Bhutto to work in the bherry adjoining 8 bigha plot. Thereafter, he entertained them and other appellants at his *Alaghor* with wine and food. Thereafter, Saiful committed the crime.

138. Saiful's exclusion of presence of Ansar during commission of crime is inherently improbable and inconsistent with other

circumstances and does not inspire confidence for the reasons summarised hereinbelow:-

(a) In his confession Saiful was silent wherefrom he got access to the key. Ansar was in control of the plot and key used to remain with him. Unless Ansar was present to hand over the key to Saiful it would not be possible for the latter to take the victim inside the 8 bigha plot and rape her;

(b) Presence of Ansar at the time of attack on the victim is supported by the retaliatory nail mark injuries found on his chest and left arm;

(c) False explanation given by Ansar that the injuries were due to assault in police custody is a belated one and also improbabilised by the evidence of the doctor, P.W. 23;

(d) Presence of Ansar soon after the incident as noted by P.W. 1 and his discussion with Saiful also indicates to his participation in the crime;

(e) Subsequently, P.Ws. 9 and 10 deposed they saw Ansar plotting with other appellants with regard to removal of the body.

139. These circumstances clearly establish the role of Ansar as one who shared common intention with Saiful to commit rape and murder of the victim.

I. <u>Role of Bhutto, Emamul, Bhola and Amin</u>:-

140. P.W. 1 stated on 07.06.2013 he had escorted his sister to the bus stand. Her sister had gone to take an examination. In the afternoon he went to the bus stand to bring her back. He could not find her. His uncle who had a shop at the bus stand told him that his sister had left the place. He returned home. His mother informed that his sister had not returned home. He again went to the bus stand to enquire into the matter. On his returning he found Ansar locking the gate of 8 bigha plot. Saiful was standing beside him. Saiful was telling Ansar that they had a good time and should go home. When P.W. 1 was examined on 27.09.2013 he made a generic statement that other accused persons were sitting and playing cards when he saw Ansar and Saiful in front of the gate. Witness does not state with regard to any overt act or conversation between the other appellants and Ansar and Saiful which would give an impression they shared common intention with the latter to commit the crime. Even the identity of the persons whom the witness had seen apart from Ansar and Saiful is doubtful. On 27.09.2013 the witness could identify only Gopal and Bhola by name. After four months on 28.01.2014 he was further examined. He identified Emamul, Nuro, Gopal, Bhola, Amin and Rafiqul. Appellants used to remain in the same locality as P.W. 1. He was well acquainted with their identities and behaviour. In this backdrop, failure of the witness to name Emamul and Amin Ali during his examination on 27.09.2013 and thereafter naming them after four months is a clear case of embellishment and ought not

to be given credence. Even with regard to Bhola, statement of the witness is most generic and non-specific. He does not attribute any overt act or comment by Bhola which would give an impression of participation or sharing of common intention with Ansar and Saiful in the rape and murder.

141. Apart from P.W. 1, the other relevant witnesses are P.Ws. 9 and 10. P.W. 10 stated he had seen Ansar, Saiful, Emamul and Bhutto in front of the Alaghor in drunken condition around 1 p.m. He had also seen Bhola and Gopal.

142. Bhola made an exculpatory statement before Magistrate (Exhibit – 8). He stated he went to the Alaghor where Saiful, Ansar, Emamul, Bhutto and Gopal were drinking. He drank with them. Then he left the place with Gopal. In the evening he came to Kamduni More and saw Emamul, Bhutto and Ansar discussing how to bury the corpse at night. Ansar stated Saiful had raped and murdered an unmarried girl. Bhutto threatened him not to disclose the incident to anyone. He also came to know the identity of the victim.

143. Confessional statement of Saiful and exculpatory statement of Bhola before Magistrate corroborates P.W. 10's evidence. But Saiful stated in his confession these appellants and Ansar had left the spot. For reasons recorded above, I have not relied on this part of Saiful's statement vis-à-vis Ansar.

144. Ansar had the control and possession of the 8 bigha plot, that is, the place of occurrence. The plot was locked and the key was with

Ansar. In his confession Saiful does not clarify how he got hold of the key. This could not be possible except for the active connivance and support of Ansar to commit the crime. Saiful was wholly dependent on Ansar for his livelihood and the latter had overwhelming influence over the former. This had compelled Saiful to tailor his statement to protect Ansar. These inculpatory factors do not apply to the other appellants, namely, Emamul, Bhutto, Amin and Bhola. Accordingly, confession of Saiful that these appellants had left the spot prior to the occurrence can be taken to be truthful and relied upon. Presence of these appellants at the time of occurrence and their sharing of common intention with Saiful and Ansar to commit rape and murder is not established.

145. Prosecution has argued scratch abrasions on the arm and shoulder of Amin Ali are incriminating circumstances which have not been explained by the said appellant. This gives rise to an adverse inference against the appellant in the crime. I am unable to accept such proposition. It is true scratch abrasions on the arm and shoulder of Amin Ali were noted by the doctor. Amin Ali claimed he was working in a marble shop and had suffered injuries in course of his work. He examined D.W. 1 to probabilise his defence. Trial Judge has not believed the said defence witness. Relying on this, prosecution would submit false explanation of Amin Ali would bolster its case.

146. In a case based on circumstantial evidence, prosecution may rely on false explanation by an accused as an additional link only after marshalling other incriminating circumstances a reasonable inference

of guilt is made out.[18] Prosecution must stand on its own leg and not on the weakness of the defence. Unlike Ansar there is no convincing evidence with regard to the presence and participation of Amin Ali in the crime. P.W. 1 did not name Amin Ali for the first time as one of the persons present when he had seen Ansar locking the gate of 8 bigha plot and Saiful standing beside him. After four months he embellished his version and named Amin Ali. Belated inclusion of Amin Ali as one of the persons present at the spot while Ansar was locking the gate ought to be taken with a pinch of salt. Moreover, P.W. 10 did not see Amin Ali at 1:00 pm in front of the Alaghor with other appellants. P.Ws. 9 and 10 were also silent with regard to presence of Amin Ali in the evening when other appellants were seen secretly discussing and pointing to the spot wherefrom dead body was recovered. Unlike Ansar the injuries on Amin Ali have not been described as 'nail scratches' but as 'scratch abrasions'. This also improbabilises the prosecution case that Amin Ali suffered such injuries from nail scratches of the victim when she struggled during rape.

147. Prosecution case that Emamul, Bhutto, Bhola and Amin Ali shared common intention with Saiful and Ansar to rape and murder the victim stands on a shaky foundation and cannot be said to have been proved.

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[18] Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116 (para 151,159 and 160)

J. <u>Conspiracy to cause disappearance of evidence</u>:-

148. In the course of search, P.Ws. 9 and 10 found that the appellants (apart from Amin Ali, Nuro and Rafiqul) were standing near the 8 bigha plot and behaving in a suspicious manner. P.W. 9 stated that the appellants were talking amongst themselves and showing Gopal something behind the boundary wall. P.W. 10 claimed that they were talking amongst themselves and became silent as soon as he approached them. These circumstances show there was meeting of minds between the appellants apart from Amin Ali, Nuro and Rafiqul. After the incident they were secretively discussing amongst themselves and pointing to a spot behind the 8 bigha boundary wall wherefrom the body of the victim was recovered. The aforesaid evidence is corroborated by the confession of Saiful that the other appellants had assured him that the dead body would be disposed of later on.

149. Confession of a co-accused is not a substantive evidence. However, it may be used to corroborate other evidence on record which prima facie establishes the ingredients of the offence. Evidence on record shows that the victim had been raped and murdered in the 8 bigha plot and her body had been dumped behind the said plot. The perpetrator of the crime i.e. Saiful was seen discussing some matter with the other appellants and pointing to the place from where the body was subsequently recovered. The appellants apart from Amin Ali, Nuro and Rafiqul fell silent when P.W. 10 came near them.

150. The aforesaid evidence, therefore, establishes the prosecution case that the appellants Saiful, Ansar, Emamul, Bhutto and Bhola were secretively discussing amongst themselves after the occurrence regarding the manner of disposal of the dead body which is substantiated by the confessional statement of co-appellant Saiful. Even if one discounts the evidence of P.Ws. 14 and 15, the evidence on record corroborated by the confession of Saiful proves beyond doubt that Saiful, Ansar, Emamul, Bhutto and Bhola had entered into a criminal conspiracy to cause disappearance of evidence to screen the real offender. But the evidence does not implicate Amin Ali, Nuro and Rafiqul even on this score. Accordingly, I hold prosecution has been able to prove after Saiful was aided and abetted by Ansar, committed the murder and gang rape of the victim. They entered into conspiracy with Emamul, Bhutto and Bhola to cause disappearance of evidence to screen themselves. However, no evidence is forthcoming with regard to role of Amin, Nuro, Rafiqul in that regard.

K. <u>State appeal – whether acquittal of Nuro and Rafiqul is justified</u>:-

151. Apart from the evidence of P.W. 1 none of the witnesses have mentioned the presence of Nuro and Rafiqul either at the Alaghor or near the 8 bigha plot on the fateful day. Even P.W. 1 did not name either of these appellants during his deposition on 27.09.2013 as the persons who were sitting and playing cards when Ansar was locking the gate of 8 bigha plot and Saiful was standing beside. After a lapse of four

months he named these appellants. He embellished his version and named these appellants. No other witness disclosed the role of the appellants in the crime. General statement that these accuseds used to taunt women including the victim cannot be a ground to come to an inference they entered into conspiracy or shared common intention with others to commit rape and murder of the victim. Appreciation of evidence by the trial Judge on this score is a reasonable one and cannot be said to be perverse. If findings of the trial Court in support of acquittal are reasonable and not perverse and backed by evidence on record, the Court would be loath to interfere with the order of acquittal. In addition thereto, I have independently appreciated the evidence on record and I am convinced that the acquittal recorded by the trial Court in favour of Nuro and Rafique does not call for interference.

L. <u>Conclusion:-</u>

i. <u>Conviction</u>:-

152. In light of the aforesaid discussion, I convict Saiful Ali for commission of offences punishable under sections 376A, 376D, 302 and 120B/201 IPC and Ansar Ali for commission of offences punishable under sections 376A/120B, 376D, 302/120B and 120B/201 IPC.

153. I convict Sk. Emamul Islam, Aminur Islam @ Bhutto and Bhola Naskar @ Bholanath Naskar for commission of offence punishable under section 120B/201 IPC. I acquit Sk. Emamul Islam, Aminur Islam @ Bhutto and Bhola Naskar @ Bholanath Naskar of the

charge under section 376D IPC. I acquit Amin Ali of all the charges levelled against him. I uphold the acquittal of Noor Ali @ Nuro and Rafiqul Islam Gazi @ Rafique Gazi

ii. <u>Sentence</u>:-

154. Trial Judge had sentenced Ansar Ali, Amin Ali and Saiful Ali to death and Sk. Emamul Islam, Aminur Islam @ Bhutto and Bhola Naskar @ Bholanath Naskar to suffer life imprisonment till the end of their natural life. Emamul, Bhutto and Bhola have been acquitted of the offence under section 376D IPC. They have been found guilty for commission of offence under section 120B read with section 201 IPC. Maximum sentence for the said offence is imprisonment for seven years.

155. Sk. Emamul Islam, Aminur Islam @ Bhutto and Bhola Naskar @ Bholanath Naskar have already suffered incarceration for more than 10 years. As they have suffered incarceration for a period more than the substantive sentence, they are directed to pay a fine of Rs.10,000/- each, in default, to suffer simple imprisonment for three months more. Upon deposit of fine they shall be released from custody if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

156. Trial Court held the murder and rape was a pre-planned one. Victim had scoffed at the appellants. Hence, they brutally raped and murdered her. The Court noted the brutality of the offence by referring to the injuries in the private parts of the victim.

157. With regard to the first issue I have disbelieved P.Ws. 14 and 15 who deposed with regard to the motive and conspiracy to commit the crime. Hence, prior concert of the appellants to avenge on the purported snub by the victim has not been proved.

158. With regard to the second issue the post-mortem doctor noted two injuries in the vagina as follows:-

> *"(i) Contused lacerated wound ½" X ¼" vaginal tissue at 5'o clock and 6'o clock position at posterior vaginal wall alongwith evidence of tear of posterior fourchette;*
> *(ii) Contused lacerated wound 2" X 1 ½" vaginal tissue on upper part of left side of vagina extending upto the vault."*

He opined that the injuries may be caused by forcible introduction of penis. During cross-examination he clarified the post-mortem report does not mention any internal injury on the abdominal part of the victim. No injury on the external pelvic part was noted and depth of the tear in the posterior fourchette, hymen and vaginal tissues is not noted.

159. Learned Lawyer for the complainant relied upon ***Mukesh and Anr. vs. State (NCT of Delhi) and Ors.***[19] to argue the brutality of the crime deserved death penalty. In ***Mukesh*** (supra) the victim and her boyfriend had been assaulted with iron rods and kicks. Thereafter, she was gang raped. She sustained bite marks on her face, lips, breasts and genitalia and other parts of the body. Her entire intestine was perforated and splayed. Her internal organs had been pulled out to murder her. Though in the present case bruises on lips, injury in vagina and extravasation of blood in the brain were noted, doctor opined death was

[19] (2017) 6 SCC 1

due to smothering and injuries in the vagina were due to forcible sexual intercourse. He did not mention the depth of the injury in the vagina nor any injury in the abdominal or pelvic parts of the victim. This shows the injuries on the victim cannot be compared with the extensive and brutal injuries noted in ***Mukesh*** (supra) which was one of the prime consideration for upholding death sentence in that case. This does not mean that the offence of rape and murder on a defenceless girl is not a grave and heinous one. The Court is called upon to make this macabre comparison with regard to the nature of injuries to test the proposition advanced on behalf of the State and the complainant that the brutality of the crime deserved death penalty as in ***Mukesh*** (supra).

160. Since ***Bachan Singh vs. State of Punjab***[20] it is a settled proposition in law that the gruesome nature of offence cannot be the sole criteria to justify death penalty. A balance sheet must be drawn between the aggravating and mitigating factors and after giving due weightage to both, if the Court comes to a conclusion that there is no possibility of reformation and rehabilitation of the convict and the alternate sentence of life imprisonment is wholly foreclosed, death penalty may be imposed. While discussing the mitigating factors, ***Bachan Singh*** (supra) imposed a duty upon the State to lead evidence to rule out the possibility of reformation and rehabilitation of the convict as follows:-

> *"206. Mitigating circumstances.—*** *** ****
> *(1) *** *** ****

[20] (1980) 2 SCC 684

> *(2) *** *** ****
> *(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*
> *(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above."*
> [Emphasis supplied]

161. In ***Machhi Singh vs. State of Punjab***[21] the Apex Court held before awarding death sentence the Court must answer the following questions:-

> *"39. In order to apply these guidelines inter alia the following questions may be asked and answered:*
> *a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
> *(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"*

162. In ***Santosh Kumar Satishbhushan Barriyar vs. State of Maharashtra***[22] the Apex Court warned against the propensity of imposing death penalty by merely referring to the brutal and heinous nature of crime and ignoring relevant mitigating factors. It held as follows:-

> *"71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded."*

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[21] (1983) 3 SCC 470
[22] (2009) 6 SCC 498

163. Elaborating the duty of a Court to satisfy itself with regard to the mitigating circumstances, the Apex Court in ***Manoj And Others vs. State of Madhya Pradesh***[23] laid down the following procedure:-

> *"Practical guidelines to collect mitigating circumstances*
> *248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.*
> *249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684. Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.*
> *250. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:*
>
> *(a) Age*
> *(b) Early family background (siblings, protection of parents, any history of violence or neglect)*
> *(c) Present family background (surviving family members, whether married, has children, etc.)*
> *(d) Type and level of education*

[23] (2023) 2 SCC 353

> *(e) Socio-economic background (including conditions of poverty or deprivation, if any)*
>
> *(f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)*
>
> *(g) Income and the kind of employment (whether none, or temporary or permanent, etc.);*
>
> *(h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.*
>
> *This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.*
>
> *251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any."*

164. In deference to the aforesaid procedure report with regard to the conduct of the appellants was directed to be produced by the correctional home authorities before the Court. Report submitted by the said authorities show conduct of Saiful and Ansar in the correctional home is satisfactory. Report has also been filed on behalf of the defence elaborating their family background, level of education and other

relevant factors which show that there is high possibility of reformation and rehabilitation. Inspite of opportunity State has not submitted any rebuttal material regarding these aspects. It has only argued that appellants are anti-social elements who used to drink and tease girls including the victim. As per evidence on record no criminal case far less a conviction has been recorded against Saiful and Ansar.

165. In ***Mohd. Farooq Abdul Gafur v. State of Maharashtra***[24] the Apex Court differing from the view expressed in ***Gurmukh Singh vs. State of Haryana***[25] emphasizing on the wholesome principle of presumption of innocence held criminal history of an accused in the matter of sentencing ought to relate to conviction and not to mere pendency of a criminal case. Thus, assumption of criminal history on general statement of bad conduct without referring to pendency of prior cases and conviction in respect thereof would run counter to the very essence of presumption of innocence and fair procedure.

166. Other authorities cited by the State are factually distinguishable. In ***Purushottam Dashrath Borate v. State of Maharashtrathe***[26] victim had been gang raped and murdered by a cab driver and his assistant who had been appointed by the victim's company. It was held the offence was committed by persons in trust and the same was a pre-meditated one. In the present case, these

[24] (2010) 14 SCC 641
[25] (2009) 15 SCC 635
[26] (2015) 6 SCC 652

aggravating circumstances are absent. Saiful and Ansar cannot be said to be persons in trust nor has the prosecution case of conspiracy and prior planning have been proved beyond doubt.

167. Similarly, in ***Dhananjoy Chatterjee vs. State of West Bengal***[27] the convict was a person in trust, namely, the security guard of the building where the victim resided. No such relationship between the appellants and the victim has been demonstrated in the present case.

168. In the light of the aforesaid circumstances, I am of the opinion the trial Court erred in awarding death penalty with reference to the gravity of the offence alone. State has failed to prove conspiracy and prior concert in the crime beyond reasonable doubt. It has also not led evidence to rebut the possibility of reformation and rehabilitation. On the other hand, conduct of the appellants in the correctional home is satisfactory and other unrebutted materials before this Court gives rise to a reasonable belief that there is high possibility of reformation and rehabilitation of the appellants. Alternative punishment of life imprisonment for the remainder of natural life is a more humane substitute that adequately addresses societal concerns of recidivism.

169. In light of the aforesaid discussion, I am of the opinion awarding death penalty to Saiful Ali and Ansar Ali is unwarranted and the same is not confirmed.

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[27] (1994) 2 SCC 220

170. It is directed:-

Saiful Ali shall suffer:-

(i) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life for the offence under section 376A IPC;*

(ii) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life and fine of Rs. 20,000/-, in default, imprisonment for two months more for the offence punishable under section 376D IPC;*

(iii) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life for the offence and fine of Rs. 20,000/-, in default, imprisonment for two months more under section 302 IPC;*

(iv) *Rigorous imprisonment for seven years and fine of Rs.20,000/-, in default, imprisonment for two months more for the offence punishable under section 120B read with 201 IPC.*

Ansar Ali shall suffer:-

(i) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life for the offence under section 376A read with 120B IPC;*

(ii) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life and fine of*

Rs.20,000/-, in default, imprisonment for two months more for the offence punishable under section 376D IPC;

(iii) *Rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life for the offence and fine of Rs. 20,000/-, in default, imprisonment for two months more under section 302 read with 120B IPC;*

(iv) *Rigorous imprisonment for seven years and fine of Rs.20,000/-, in default, imprisonment for two months more for the offence punishable under section 120B read with 201 IPC.*

171. Sentences imposed on Saiful Ali and Ansar Ali shall run concurrently.

172. Death Reference No. 2 of 2016 and CRA 108 of 2016, CRA 109 of 2016, CRA 110 of 2016, CRA 111 of 2016, CRA 133 of 2016 (CRAN 1 of 2023, CRAN 2 of 2023 and CRAN 3 of 2023), CRA 240 of 2016, CRR 2789 of 2014, CRR 3828 of 2014 [CRAN 1 of 2014 (Old No. CRAN 4521 of 2014)] and GA 1 of 2016 are, accordingly, disposed of.

173. Period of detention suffered by the Saiful Ali, Bhola Naskar @ Bholanath Naskar, Sk. Emamul Islam, Ansar Ali and Aminur Islam @ Bhutto during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

174. Appellant Amin Ali shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the

satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

175. A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

176. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.) **(Joymalya Bagchi, J.)**

PA