# **CAUSE TITLE** POCSO Case No. 39/15

Informant: 'Y'.

Sri Sunil Murari, Accused:

S/o- Sri Chutu Murari,

R/o- Gojalbasti, PS- Duliajan, District- Dibrugarh.

# **ADVOCATES:-**

For the State: Mrs. Runumi Devi, learned Public Prosecutor. For the Defence: Sri Uttam Rough, learned Legal Aid Counsel.

#### IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 39/15 G.R. Case No. 22/15

> > State of Assam

-Vs-

Sri Sunil Murari

Charges: Under Sections 366/302 IPC Read with Section 4 POCSO Act.

Date of evidence on : 12-10-15, 30-11-15, 17-03-16, 20-04-17, 19-06-17,

30-11-17 and 31-10-19.

Date of argument : 21-11-19. Date of Judgment : 07-12-19.

#### **JUDGMENT**

1) The prosecution case in a narrow compass is that on 01-01-15, at about 5:00 pm, Thursday, the six year old minor victim of No. 1 Gojalbasti Gaon, suddenly went missing while she was watching the New Year's celebration in the local area. There was a frantic search for the victim throughout the night, but she could not be traced out. On the following day, at about 10:00 am, a boy named Biki Tanti noticed the victim's body lying on the backside of one abandoned house. The public and the victim's father received information and immediately, rushed to the spot. Then Biki Tanti informed them that on the afternoon on 01-01-13, Sri Sunil Murari (hereinafter the accused) was seen with the victim. Strongly suspecting that the accused committed rape and murder of the victim, FIR was lodged by the victim's father 'Y' with the police at Duliajan Police Station which was registered as Duliajan PS Case No. 5/15 under Section 302 of the Indian Penal Code (IPC for short), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act

- for short) and SI Jiten Gogoi was endorsed with the investigation.
- 2) The investigating officer (IO in short) swung into action. He registered the GD Entry. He embarked upon the investigation and made preparations for inquest. He seized several articles and prepared the Sketch-Map of the place of occurrence and recorded the statements of the witnesses. After inquest, the body was forwarded for post mortem. Certain articles were forwarded for forensic examination. On finding prima facie materials, the IO submitted Charge-Sheet against the accused under Section 302 IPC, read with Section 4 POCSO Act.
- 3) On appearance of the accused, copies were furnished and after hearing both the sides, my learned predecessor was pleased to frame charges under Sections 366/302 IPC, read with Section 4 POCSO Act. The accused abjured his guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced the evidence of thirteen witnesses including the medial officer (MO in short), Judicial Magistrate, 1<sup>st</sup> Class (JMFC in short) and the IO. Various documents were exhibited by the prosecution. The accused person cross-examined the witnesses in extenso to refute the charges. On the inculpatory circumstances arising against him, the tone and tenor of the answers of the accused to the questions under Section 313(1)(b) of the Code of Criminal Procedure (CrPC for short) depicts a plea of total denial.

#### **Submissions:**

5) The learned Public Prosecutor Smt. Runumi Devi emphasized through her argument that this is an open and shut case and considering the extremely inhuman nature of the offence, stringent punishment of the highest order is to be imposed upon the accused. On the contrary, the learned defence

counsel laid stress in his argument that the entire case rests squarely on the plank of circumstantial evidence. The investigation commenced on GD Entry entered, but the official who registered the GD Entry was not examined as a witness. The investigation was completed even before the FIR was lodged. There are several contradictions under Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short). The victim was allegedly last seen with the accused person which is not reliable. Moreover, the duration when she was last seen vis a vis recovery of the dead body is too wide to fasten the guilt on the accused. The Executive Magistrate who recorded the extrajudicial confession of the accused did not testify regarding the confession of the accused. The remaining part of the argument submitted by the learned defence counsel will be discussed at the appropriate stage.

#### **Points for determination:**

- 6) To decide this case in its proper perspective, the following points are apposite for proper adjudication of this case:
  - i. Whether on 01-01-15, the accused kidnapped the victim 'X' by deceitful means in order that she may be forced or seduced to illicit intercourse?
  - ii. Whether the accaused committed murder of the victim 'X' by intentionally causing the fatal injuries?
  - iii. Whether the accused committed penetrative sexual assault on the minor victim 'X'?

#### **Decision thereon and the reasons for the decision:**

7) To decide this case, it its proper perspective, it is necessary to delve into the evidence and scrutinise the same.

- 8) The victim's father 'Y' testified as PW-1 that his daughter was around six years of age at the time of incident. His wife died several years ago. On the afternoon of the incident, he returned home and found his daughter missing. He frantically searched for his daughter at all possible places. The date was 1<sup>st</sup> January and people were celebrating the occasion. He could not trace out his daughter and he asked Biki, his nephew, son of his younger brother about his daughter and Biki informed him that he saw the accused taking away his daughter by offering her a packet of biscuits. On the next day, at about 11:00 am, while 'Y' was searching for his daughter, he noticed a gathering near his house. He went towards the gathering and the people told him that the body of a girl was lying inside a vacant kutchha house which is near his house and he went towards the house and saw his daughter's body. Her face was tied with a piece of cloth and a piece of biscuit was sticking on her face. The neighbouring people informed the police and the police arrived at the spot. The police brought sniffer dog and the dog led to the accused person's house and the police arrested the accused. During interrogation, the accused confessed before the police that he raped and thereafter, killed the victim.
- 9) The evidence of PW-1 further proceeds that he lodged an ejahar which was written by his neighbour Sri Prakash Kumar Sahu. Ext. 1 is the ejahar and Ext. 1(1) is his signature. The police forwarded the body for post mortem. On the day of occurrence, his daughter was alone at home. He used to stay with his daughter in the house and his wife expired several years ago.
- 10) For the sake of brevity, his cross-examination will be discussed while analyzing the evidence. However, it is clear from his evidence that his evidence lends corroboration to the FIR Ext. 1.
- 11) Sri Biki Tanti was a student of Class-V and he was only ten years when his

- evidence was recorded on 12-10-15. After testing his intelligence, his evidence was recorded without administering oath.
- 12) Sri Biki Tanti testified as PW-2 that the accused person is his neighbour and the victim was his uncle's daughter, his cousin. On the afternoon of the incident, he and Suraj were playing in their house. The victim was with them. Then the accused came towards them and took away the victim with him, asking her to play in his house. That day, the victim did not return to her house. When the victim did not return at night, her father and the other people set out searching for the victim. He also searched for the victim. On the next day, he along with Suraj found the victim 'X' lying dead in a vacant house situated near their house. Then they informed the matter to their elders. The police was also informed and the police brought sniffer dogs and the dogs led the police party to the accused person's house. The accused was arrested in connection with the death of the victim.
- 13) After ascertaining the intelligence of Sri Suraj Tanti, oath was not administered and his evidence was also recorded. Sri Suraj Tanti was a student of Class-IV. Sri Suraj Tanti stated as PW-3 that on the day of the incident, he along with Biki and 'X' were playing in their house. At that time, the accused who was carrying Marie Gold biscuits, asked 'X' to go with him to his house for food. Accordingly, 'X' went with the accused. He saw 'X' going with the accused to some place. On the next day, 'X' did not return to their house. On the day of occurrence, 'Y' had gone out for work. On the next day, while he and Biki were searching for 'X', they found her in the verandah of a deserted house. She was lying in the verandah. Thereafter, they went to Biki's mother and the victim's father and informed them about the dead body. The police came to the place of occurrence along with Dog Squad. The police

- then apprehended the accused and took him to the police station.
- 14) Thus, the evidence of PW-1 is corroborated by the evidence of PWs-2 and 3.

  Their evidence also corroborates the contents of Ext. 1. To avoid prolixity, the cross-examination of PWs-2 and 3 will be discussed at the appropriate stage.
- 15) Sri Himanshu Sharma testified as PW-4 that the accused as well as the complainant are known to him. On 02-01-15, at about 1:30 pm, when he came back to his house from his shop, he noticed a gathering in front of his house. The police was also present. He came to know that in the verandah of the dilapidated house, the body of the deceased was found and he identified the body as the informant's daughter's body. The police brought Sniffer Dog to the place of occurrence and to the accused person's house, but at that time, the accused was not present in his house. He heard from Biki Tanti and Suraj Tanti that the accused lured the victim by offering her biscuits and took her with him from the place where she was playing. The police took the body for post mortem examination. The police also recorded his statement. His cross-examination will be discussed at the appropriate stage.
- 16) Sri Jiten Garh testified as PW-5 that the accused as well as the informant is known to him. In the afternoon of 01-01-15, the informant's daughter went missing and he was frantically searching for his daughter at every possible place. In the morning, the body of the deceased was found in a dilapidated house situated near the complainant's house. Biki Tanti and his friend found the body of the deceased in the house situated near the informant's house. Hearing about the incident, the parents and the villagers rushed to the spot. Police brought sniffer dog which went to Sunil's house. Inquest-Report Ext. 2 was prepared, wherein Ext. 2(1) is his signature.
- 17) Paradoxes play out in the cross-examination of P.W.5. In his examination in

chief he testified that the Police recorded his statement, while in his cross-examination he denied that the Police recorded his statement. He has denied that he affixed his signature on Inquest Report when he stated that the Police asked him to affix his signature on a piece of paper which he did. The evidence of Ram Sharma as P.W.6 also clearly depicts that a body of a minor girl was recovered on the relevant day.

18) The evidence of P.W.7 clearly reveals that the accused was last seen with the victim. Prakash Kumar Sahu has testified as P.W.7 that the accused was known to him and the 6 year old deceased was also known to him. The incident occurred on 01.01.2015. On 02.01.2015, the villagers from No.1 Bordubi Gaon, Gajal Basti informed him over phone that the body of a minor girl was found lying in an abandoned house in their village. Then, he and Boro Patra came to the place of occurrence and noticed a gathering in the area. He noticed the body of the minor girl lying on the floor and the mouth of the victim was wrapped with a piece of cloth. The villagers gathered there and he learnt that two minor girls informed the parents of the deceased that they saw the accused taking away the deceased by offering her biscuits. He also learnt that the deceased was the victim 'X'. The Police brought sniffer dogs and went to the accused person's house and then the Police apprehended him. Sunil Murari admitted in his presence that he took the victim 'X' to the abandoned house of Rajmoni Hatibaruah and committed rape on her. When the victim screamed, he put a piece of cloth in her mouth and after committing rape, he killed the victim by strangulating her. Ashish Ghasi, Barun Patra and several villagers and the Police were also present when the accused confessed. The Police forwarded the body for post-mortem and took the accused person to the Police Station. The Police seized the garments of the victim girl and the accused person vide Exhibit 2 wherein Exhibit 2(1) is his signature. Exhibit 3 is the Extra Judicial Confessional statement of Sri Sunil Murari @ Bitna before the Executive Magistrate Moon Gogoi and Exhibit 3(1) is his signature affixed on the Extra Judicial Confession as he was present at the time when the Executive Magistrate recorded the confession of Sunil Murari.

- 19) There is not an iota of doubt that the accused took away the victim while she was playing with her friends by offering her biscuits. The evidence of P.W.1, P.W.2, P.W. 3 and P.W.7 clearly depicts that the accused was last seen with the victim 'X'. No contradiction regarding the accused taking away 'X' could be elicited through his (P.W.7's) cross-examination. For the sake of brevity the remaining part of the cross-examination of PW-7 will be discussed at the appropriate stage.
- 20) Ashish Ghasi testified as P.W.8 that the informant is a distant relative. The accused is also known to him. On 01.01.2015, at about 10.30 a.m., he was in Duliajan Town when his aunt Urmila Tanti informed him over phone that the victim 'X' was lying dead in an abandoned house situated near his aunt's house. He immediately rushed to the spot and noticed a gathering. He also noticed the dead body in the veranda of the abandoned house. Thereafter, the Police arrived along with a sniffer dog. The dog directly went from the place of occurrence to the accused person's house and the Police apprehended him. When they confronted the accused, the accused admitted that he killed the victim on the previous evening. He also confessed that he met the victim, at around 5.30 p.m, on the road and he took her to the spot after offering her biscuits. The accused confessed in his presence and in the presence of the Police, Prakash Kumar Sahu and Barun Patra about his

complicity. Then the Police took him to the Police Station and on the next day, the Police brought him to the place of occurrence and he showed the place where he committed the offence. The accused made an Extra Judicial Confession before the Executive Magistrate Moon Gogoi, C/O- Tengakhat Circle, and he was present at that time. Exhibit 3 is the confessional statement and Exhibit 3(2) is his signature.

- 21) No contradictions relating to the extra judicial confession could be elicited through his cross-examination. He is a witness of the Extra Judicial Confession. The irony is that the Police was also present when the accused made his Extra Judicial Confession.
- 22) Barun Patra testified as P.W.9 that he came across the accused person after the alleged incident. The informant and the deceased are known to him. The incident occurred on 01.01.2015. On the day of the incident, at about 10.45 p.m, he received a phone call from the Gaonburah of the Gajal Basti village who informed him that the body of a small girl, aged about 5 / 6 years, was lying in an abandoned house of Hati Boruah. Immediately he rushed to the place of occurrence and noticed a gathering. He called the Police over phone. He saw the dead body lying in the verandah on the backside of the abandoned house. At that time, a small boy who was around 7 / 8 years and who is the son of Bijoy Tanti informed him, Niranjan Mahili, Ashish Ghasi and Bijoy Tanti that on the previous day he (the small boy) saw the victim 'X' with the accused who took her away by offering her biscuits. The accused was also present at the place of occurrence and when they confronted him, the accused confessed in his presence and in the presence of Niranjan, Ashish and Bijoy. The Police then brought sniffer dog and the dog proceeded towards the accused person's house from the place of occurrence and the

Police apprehended the accused. The accused confessed before the arrival of Police in his presence and in the presence of Niranjan, Ahish and Bijoy, that he committed rape on the victim and when the victim tried to scream, he gagged her by her mouth with a piece of cloth and then strangulated her and killed her. After his confession the Police arrived. The Police took the accused to the Police Station and in the Police Station the accused also confessed before the Executive Magistrate Moon Gogoi and he was present when the accused confessed. Exhibit 3 is the confessional statement and Exhibit 3(3) is his signature. The Police seized some articles vide Exhibit 4. He is aware that the articles are the victim girl's garments. Exhibit 4(1) is his signature.

- 23) No contradictions could be elicited through his cross-examination. His contradiction regarding omissions under Section 161 Cr.P.C. will be discussed at the appropriate stage, in order to avoid prolixity.
- 24) It is apparent from the evidence of P.W.1, P.W.2, P.W.3, P.W.7, P.W.8 and P.W.9 that the accused was last seen with the victim. There is not an iota of doubt that the accused lured the victim by offering her biscuits and took her with him. There is evidence of Extra Judicial Confession before the Police and also in the absence of the Police. Whether the circumstantial evidence proves that the accused is complicit?
- 25) At this juncture, I would like to divert the attention towards the evidence of the official witnesses. Dr. Hemanta Kumar Mahanta stated as P.W.10 that on 03.01.15, he was on duty as Professor and Head of the Department of Forensic Medicine, A.M.C.H, Dibrugarh. On that day, at around 2:45 pm, he performed Post-mortem examination on the body of 'X' who was about 6 years of age, daughter of 'Y', in connection with this case. On examination,

# he found the following:

**External Appearance:** An average built female dead body of dark brown complexion, wearing a yellow green frock and top covered with a blanket, face was congested, dried grass and mud particles present all over the body and clothes. Rigor mortis passed off from whole body and the limbs. Post-mortem hypothesis present on back.

#### **Injuries:**

- i. Contusion 4 cm X 3 cm present over the both eyelids of the left eye;
- ii. Abrasion 2 cm X 0.5 cm present over the left angle of mouth, 3in number and 2 cm left of the mid line in a horizontal plain;
- iii. Contusion 1 cm X 0.5 cm present over inner aspect of upper limb in the middle;
- iv. Contusion 2 cm X 1 cm present over the right side of the face,1 cm below the right eye and 3 cm right to the mid line;
- v. Abrasion 2 cm X 1 cm present over the left side of neck, 2 cm left of mid line and 4 cm above the sternal notch. Four crescentic abrasion of size 0.5 cm X 0.1 cm present on the left side of the neck placed in a vertical plane;
- vi. Abrasion (scratch) 5 cm long present on back of right shoulder;
- vii. Abrasion of size 1 cm X 0.3 cm present over back of abdomen over the 9<sup>th</sup> thoracic vertebrae in the mid line;
- viii. Abrasion of size 0.5 cm X0.5 cm present over back of pelvis in the mid line;

- ix. Contusion 2 cm X 1 cm present over midpoint of right inguinal area;
- x. Contusion 2 cm X 0.5 cm present over the midpoint of left inguinal area;
- xi. Vulva and perineum found blood stain. One laceration (TRO) of the posterior fornix, perineum of size 2 cm X 1 cm X 2 cm up to the posterior vaginal wall with hymen tear at 6 O'clock;

**Neck:** No ligature mark detected externally. On dissection, fracture of the hyoid bone present over the right cornu bone with surrounding area. All internal organs were found congested.

Vaginal Swab and nail scrapping were packed, sealed and handed over to the escorting police constable for analysis at DFS at Kahilipara

**Organs of generation:** Injuries: External injuries are described under injury No.11.

**<u>Uterus:</u>** Healthy. **<u>Vaginal swab:</u>** Smear taken from posterior vaginal fornix shows presence of index spermatozoa.

### **Opinion:-**

- Death was due to asphyxia as a result of smothering and manual strangulation. All the injuries were ante-mortem and caused by blunt weapon and homicidal in nature.
- ii. Evidence of recent forceful sexual intercourse present in her body.
- iii. Time since death 36 to 48 hours.

Exhibit 5 is the Post-mortem Report wherein Exhibit 5(1) and Exhibit 5(2) are his signatures. Exhibit 2 is the inquest report wherein Exhibit 2(3) is his

- signature. Exhibit 6 is the Dead Body Challan wherein Exhibit 6(1) is his signature.
- 28) Thus, the MO's evidence clearly depicts that the victim was sexually assaulted and thereafter, she was strangulated and smothered.
- 29) The Circle Officer Sri Moon Gogoi testified as P.W.12 that on 02.01.15, he was working as Circle Officer at Tengakhat Revenue Circle. On that day, he received information from Duliajan P.S to conduct inquest on the dead body of 'X', 6 years approximately, daughter of 'Y' of No.1 Gajal Basti Gaon. The body was lying on the floor on the backside of a kutcha house in Gajal Basti belonging to one Sri Rajmoni Hatibaruah. Both the hands of the deceased were spread out and legs were folded. Head was tilted towards the right side. Traces of saliva and blood was noticed on the face and nose of the victim. Injuries were noticed on the vagina, i.e. private part with traces of blood. The following clothing were found on the body of the deceased:
  - Blue and red coloured sweater;
  - ii. A multi coloured frock;
  - iii. Pinkish coloured long garments.
- 29) After inquest, the body of the victim was forwarded for autopsy. The inquest was done in presence of witnesses. Exhibit 2 is the inquest report and Exhibit 2(5) is his signature.
- 30) The Scientific Officer Smt. Renu Bora Handique testified as P.W.13 that on 02.02.15, she received a parcel from Duliajan P.S in connection with Duliajan P.S Case No. 5/15, under Section 302 IPC read with Section 4 of the POCSO Act by special messenger. The parcel consisted of 8 exhibits, sealed in big sized paper envelope with sealed impression S.P. Dibrugarh. When she

opened the parcel the following articles were found:

- i. One big sized paper packet contains vaginal swab marked as 'A'
   Sero No.3443/A
- ii. One airtight EDTA vial contains nail scrapping from right hand marked as 'B' Sero No. 3443/B
- iii. One EDTA vial (airtight) contains nail scrapping from left hand marked as 'C' Sero No. 3443/C
- iv. One black coloured underwear contains stain of suspected blood and Semen marked as 'D' Sero No. 3443/D
- v. One multi-coloured sweater contains stain of suspected blood and Semen marked as 'E' Sero No. 3443/E
  - vi. One multi-coloured frock contains stain of suspected blood and Semen marked as 'F' Sero No. 3443/F
  - vii. One multi-coloured sporting contains stain of suspected blood and Semen marked as 'G' Sero No. 3443/G
- viii. One green and blue coloured long pant contains stain of suspected blood and Semen marked as 'G' Sero No. 3443/H

#### **Result of Examination:**

- Exhibit No. Sero 3443/A, Sero 3443/D and Sero 3443/F gave positive test for human semen.
- ii. Exhibit No. Sero 3443/B, Sero 3443/C, Sero 3443/D and Sero 3443/F gave positive test for human blood.

- iii. Exhibit No. Sero 3443/E, Sero 3443/G and Sero 3443/H gave negative test for human blood and semen.
- 31) Exhibit 6 is the forensic report and Exhibit 6(1) is her signature. Exhibit 7 is the forwarding report along with a parcel. Exhibit 7(1) is the signature of M.N Bora, Director cum Chemical Examiner of DFS, Kahilipara and she is acquainted with his signature.
- 32) The I.O. Sri Jiten Gogoi testified as P.W.11 that on 02.01.2015, he was on duty as Attached Officer at Duliajan P.S. On that day, Sri Nalini Kanta Sharma informed over phone to the Police Station that at around 1.15 p.m., the dead body of a little girl of 6 years was found lying near their house, at No.1 Duliajan Gaon. A General Diary Entry No. 54/15, dated 02.01.15 was registered and he was endorsed with the investigation by the In-charge of Duliajan P.S. Exhibit 6 is the Extract Copy of the G.D. Entry, certified to be true copy by S.I. Prafulla Kumar Das and Exhibit 6(1) is the signature of S.I. Prafulla Kumar Das. He embarked upon the investigation and went to the place of occurrence along with Second Officer Prafulla Kumar Das. He prepared the sketch map Exhibit 7, wherein Exhibit 7(1) is his signature. Thereafter, the Circle Officer of Tengakhat Circle was informed and he held inquest over the dead body. Exhibit 2 is the inquest report wherein Exhibit 2(4) is his signature. He recorded the statements of the witnesses found at the place of occurrence. Thereafter, the FIR was lodged by S.I. Chandan Tanti. Exhibit 1 is the FIR which was also registered as Duliajan P.S. Case No. 5/15, under Section 302 IPC read with Section 4 of the POCSO Act and he was endorsed to continue the investigation as he had already commenced investigation. On the basis of the G.D. Entry No. 54/15. Exhibit 1(2) is the signature of S.I. Sanjeev Kumar Baruah, O.C of Duliajan P.S. He recorded the

statement of the informant at the place of occurrence. He seized the garments of the deceased vide Exhibit 4 wherein Exhibit 4(2) is his signature. He also seized the under garments of the accused person vide Exhibit 2 wherein Exhibit 2 (2) is his signature. He found the accused person in his residence and apprehended him and took him to the Police Station and arrested him after interrogation. He recorded the confessional statement of the accused in presence of the Executive Magistrate Moon Gogoi. Exhibit 3 is the confessional statement of the accused and Exhibit 3(4) is his signature. He forwarded the body for Post-mortem. He forwarded the accused to judicial custody. He collected the Post-mortem Report from the AMCH at Dibrugarh. He sent the seized materials for forensic examination and he also collected the forensic report. On finding materials against the accused, he submitted charge-sheet against Sunil Murari, under Section 302 IPC read with Section 4 of the POCSO Act. Exhibit 8 is the charge-sheet and Exhibit 8(1) is his signature. M. Exhibit 1 is green and yellow coloured printed frock. M. Exhibit 2 is one red and black coloured sweater. M. Exhibit 3 is one pink coloured sporting. M. Exhibit 4 is a pair of green and blue coloured trousers, seized vide Exhibit 4 in presence of the witnesses. Exhibit 4(2) is his signature. M. Exhibit 2 is one black coloured underwear seized in presence of the witnesses from the possession of the accused person vide Exhibit 2 wherein Exhibit 2(2) is his signature.

33) It is apt to mention that while marking the exhibits, the inquest report and one seizure list were marked as Exhibit 2, the Dead Body Challan, Forensic Report and the Extract Copy of G.D. Entry were marked as Exhibit 6 and the Forwarding Report and the sketch map were marked as Exhibit 7. Dual

numbering exists on the exhibits as some exhibits were marked with similar numbers.

### **Extra Judicial Confession:-**

- 34) The evidence of P.W.9 clearly depicts that the accused confessed in the presence of individual witnesses and he also confessed when the Police apprehended him. Although, the Extra Judicial Confession in presence of the Police cannot be accepted as evidence, the confession of the accused in the absence of the Police can be accepted as strong evidence against the accused. The P.W.9 has categorically testified that when he confronted the accused, he confessed in presence of Niranjan, Ashish and Bijoy that he committed rape on the victim and when she tried to scream, he gagged her by her mouth with a piece of cloth and strangulated her and killed her and after his confession the Police arrived. The accused again confessed before the Police. That part of the Extra Judicial Confession can be accepted as evidence when the accused confessed in presence of PW-9, before the arrival of police.
- 35) The learned defence counsel laid stress in his argument that the witnesses Ashish Ghasi and Prakash Kumar Sahu testified that the Extra Judicial Confession was made in the presence of the Police and this cannot be accepted as evidence. The Extra Judicial Confession made before the Police is indeed not accepted as evidence, but the Extra Judicial Confession before the Police arrived is accepted as evidence. Ashish Ghashi has not testified regarding the Extra Judicial Confession which was made in absence of the Police, but this does not exonerate the accused person.

- 36) The Exhibit 3 was recorded by the I.O. Sri Jiten Gogoi. This Exhibit 3 is not required to be proved as per Section 25 of the Indian Evidence Act, 1872 (hereinafter the Evidence Act for short). Exhibit 3 can be taken into consideration under Section 26 of the Evidence Act without considering it as a conclusive proof. The Exhibit 3 can be taken as a substantiating evidence, bolstering the evidence elicited through the prosecution witnesses.
- 37) It is true that the Executive Magistrate Moon Gogoi was not asked to identify the Exhibit 3, but at the same time it is also true that the dictum of Section 26 of the Evidence Act has been complied with when the extrajudicial confession was recorded by the Magistrate. Without considering it as a conclusive proof, the Exhibit 3 can be taken into account. The Extra Judicial Confession has been proved by P.W.9 because his evidence clearly depicts that the accused confessed before him regarding his complicity even in absence of the Police.
- 38) At this juncture, it is apt to discuss the cross-examination of PW-9. The IO has affirmed that PW-9 Barun Patra has not stated under Section 161 CrPC that: "On the day of the occurrence, at around 10:45 am, he received the phone call from the village of the deceased and the phone call was from the Gaonburah of Gojalbasti who informed him that the body of a small girl, aged about 5-6 years was lying in an abandoned house belonging to some Hatibora. Immediately, they went to the place of occurrence and saw the village people gathered and the he called the police over phone. He saw the dead body lying in the verandah on the backside of the abandoned house. Then in the place of occurrence, a small boy named Biki Tanti, aged about 7-8 years, informed him in the presence of Niranjan Mahali, Asish Ghasi, Bijoy Tanti and father of the little boy that on the previous day, he had seen 'X'

with the accused who had taken her away by offering her biscuit. At that time, the accused was also present in the place of occurrence. Then they interrogated him and he confessed in presence of Niranjan, Ashish and Bijoy. The police came and brought sniffer dog and the sniffer dog proceeded towards the house of the accused from the place of occurrence and the police apprehended the accused. Before the arrival of police, the accused confessed before him, Niranjan, Ashish and Bijoy that he committed rape on the victim girl and when she screamed, he gagged her by her mouth with a piece of cloth and strangulated her and killed her and after his confession, the police arrived." However, Barun Patra (PW-9) stated under Section 161 CrPC that the accused confessed before the Circle Officer that he killed the victim by gagging her with a piece of cloth and after committing rape on her.

39) The IO conducted the investigation in an apathetic manner. He did not record the statements of the witnesses with responsibility. Too many contradictions could be elicited through the cross-examination of the witnesses. Now the duty cast upon this Court is to separate the grain from the chaff. Barun Patra is the only witness who testified that the accused confessed in the absence of police. Sequel of events clearly depicts that as soon as the body was recovered, the two little boys PWs-2 and 3 immediately informed the public that the accused took away the victim on the previous evening by luring her with Marie biscuits. This part of the evidence remained uncontradicted. The body was recovered, and before her death, the victim was last seen with the accused. The FIR clearly depicts that when Biki Tanti informed the victim's father and other people present at the place of occurrence that the accused took away the victim by offering her biscuit, the accused was confronted and he came out with the truth. Not a single witness was cross-examined

regarding threat or coercion on the accused to confess. The evidence does not depict any pressure exercised on the accused to confess. It can be culled out from the evidence that the accused confessed not once, but several times. Instantaneously as soon as the accused was confronted at the place of occurrence, he confessed in presence of the public and thereafter, on the arrival of the police, the accused confessed in presence of the public as well in presence of the police and finally, his confessional statement was recorded by the Executive Magistrate which is marked as Ext. 3 by the prosecution. The prosecution failed to examine the Executive Magistrate regarding the confessional statement recorded by him despite the fact that the Executive Magistrate Sri Moon Gogoi was examined as PW-12.

- 40) It has to be borne in mind that the public was in a state of shock when the body of a little child was discovered with injuries of sexual assault. In such a situation, the witnesses may not be in such a mental state to properly narrate the incident. They will be grief stricken. I firmly believe that the omission of PW-9 projected by the defence is not a major contradiction to dispel his evidence relating to extra judicial confession.
- 41) Regarding the extrajudicial confession, I would like to rely on the decision of Hon'ble the Supreme Court in *Ramlal vs. State of Himachal Pradesh in Criminal Appeal No. 576 of 2010 and decided on 03-10-18*, wherein the Hon'ble Supreme Court considering the admissibility and evidentiary value of extrajudicial confession referred to the judgment in Sahadevan and another vs. State of Tamil Nadu (2012) 6 SCC 403, wherein it was held that:

"15.1. In Balwinder Singh v. State of Punjab 1995 Supp(4) SCC 259 this Court stated the principle that:

10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in *State of Rajasthan v. Raja Ram* (2003) 8 SCC 180 stated the principle that:

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made."

The Court further expressed the view that:

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to

indicate that he may have a motive of attributing an untruthful statement to the accused...."

15.6. Accepting the admissibility of the extra-judicial confession, the Court in Sansar Chand v. State of Rajasthan (2010) 10 SCC 604 held that:

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore (1970) 2 SCC 105, Mulk Raj v. State of U.P. AIR 1959 SC 902, Sivakumar v. State By Inspector of Police (2006) 1 SCC 714 (SCC paras 40 and 41: AIR paras 41 and 42), Shiva Karam Payaswami Tewari v. State of Maharashtra (2009) 11 SCC 262 and Mohd. Azad alias Shamin v. State of W.B. (2008) 15 SCC 449]

42) It was further held in Ram Lal's case (Supra) that:

"14. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In *Madan Gopal Kakkad v. Naval Dubey and Another* (1992) 3 SCC 204, this court after referring to *Piara Singh and Others v. State of Punjab* (1977) 4 SCC 452 held

that the law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.

- 15. As discussed above, if the court is satisfied that if the confession is voluntary, the conviction can be based upon the same. Rule of Prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused must be separately and independently corroborated."
- 43) The appeal of Ram Lal was thereafter dismissed and his conviction based also on extrajudicial confession was upheld.
- 44) Reverting back to this case, it is held that no threat or coercion could be elicited through the cross-examination of the witnesses. The extrajudicial confession of the accused was voluntary. However, this case is not based only on the extrajudicial confession. Other circumstance against the accused is the proximity of his being last seen with the victim and his mens rea. It has been held that the accused had mens rea when he pursued the victim and lured her to go with him. Although no corroboration is required if the extrajudicial confession is found to be voluntary and reliable, yet, I am looking for corroboration in this instant case and in this case, the extra judicial confession has been corroborated. The extrajudicial confession is also found to be voluntary. The evidence of PW-9 stood firm regarding the extra judicial concession of the accused sans the presence of police. The PW-9 is found to

be a reliable witness who is unbiased, and not remotely inimical to the accused.

45) The poignant point is that there is no contradiction that the accused confessed about his complicity in the presence of police. No contradiction could be elicited through the cross-examination of the witnesses regarding the fact that the accused confessed before the Magistrate that he lured away the victim with biscuit and took her to the place of occurrence and committed rape on her and when she tried to scream, he strangulated her and killed her. The witnesses have categorically testified that the incident occurred on 01-01-15.

# **Circumstantial Evidence**

#### Last seen:-

46) This case rests squarely on the plank of circumstantial evidence. The Evidence of P.W.1, 2, 3, 7, 8 and 9 clearly depicts that the victim was last seen with the accused. There is clinching evidence that the accused offered biscuits to the victim on 01.01.15. At that time, the victim was playing with P.W.2 and P.W.3. They have categorically testified that the accused offered Marie biscuits and took the victim with him. Their evidence depicts that they were playing in the afternoon, when the accused lured away the victim with Marie biscuits. The victim's body was recovered and sent for Post-mortem. The autopsy was conducted on 03.01.15 and the time since death was opined to be 36 to 48 hours by the doctor who performed Post-mortem examination. If the time is stretched to 36 hours, it is clear that the victim died after 2:45 pm of 01-01-15. Thus, the time when the victim was last seen with the accused vis. a vis. her death is too narrow.

- 47) Thus, it is clear that the victim died on 01.01.15 and not on 02.01.15. The contradiction elicited by the defence through the cross-examination of the witnesses and the I.O. does not thwart the evidence. The I.O. has affirmed that the victim's father has not stated under Section 161 Cr.P.C that Biky saw the accused offering a packet of biscuits to his younger daughter. This witness was ingeniously cross-examined by the learned defence counsel. He may have not stated that Biki saw the accused offering a packet of biscuit to his victim daughter, but at the same time it has to be borne in mind that he was not cross-examined that the victim was last seen with the accused who took away the victim somewhere. The fact that the accused was last seen with the victim, remained uncontradicted. The extra judicial confession also remained uncontradicted.
- 48) After scrutinizing the evidence of P.W.1 and P.W.11, it is held that no contradiction could be elicited through his cross-examination. This witness as well as P.W.2 did not state under Section 161 Cr.P.C regarding the sniffer dog brought by the Police, but this does not cause a dent in the evidence
- 49) The I.O. has affirmed that Biki Tanti (PW-2) has not stated under Section 161

  Cr.P.C that "He and Suraj were playing in the afternoon in their house. The victim was also near them. Then the accused came and took the victim with him asking her to play in his house. The victim did not come to her house on that day. When the victim did not come home on the said night, on the next day, all the persons including her father were searching for her and he also searched for her. On the next day, he along with Suraj found the deceased lying dead in the vacant house situated near their house. Thereafter, they informed the matter to their elders. The Police was also informed and the Police brought sniffer dogs and the dogs led the Police party to the house of

the accused and thereafter the Police arrested the accused regarding the death of the victim." The I.O. has also affirmed that Biki Tanti stated under Section 161 Cr.P.C that "He and his other friends were playing on the previous date, at about 3.30/ 4.00 p.m. He also saw the accused Bitna taking the victim with him towards his house and on the next day, he saw the victim's dead body in one house." Thus the fact that the accused was last seen with the victim, remained uncontradicted.

- 50) It is clear that the evidence of Biki Tanti remains uncontradicted and uncontroverted. He has indeed stated under Section 161 Cr.P.C that he saw the accused taking the victim away when she was with them, while they were playing, at about 3.30/ 4.00 p.m.
- 51) The I.O. has also further affirmed that Suraj Tanti (PW-3) stated under Section 161 Cr.P.C that "On the previous date, he was playing along with his friends and at that time, at about 4.00 p.m., he saw the victim going with Bitna to his house and on the next day he saw the victim's body in a house."
- 52) It is true both P.W.2 and P.W.3 did not mention about the dog squad and they did not mention about informing their elders about the accused taking away the victim, but their evidence that the accused took the victim away with him while she was with them stood firm. It has been proved beyond a reasonable doubt that in the afternoon of 01.01.15, at about 3.00 p.m., while the victim was with Biki and Suraj who were playing, the accused came and took the victim with him by offering her biscuits and also by luring her that he would allow her to play in his house. No contradiction could be culled out through the cross-examination of PW-3 that the accused took away the victim while she was playing with PW-3. It has to be borne in mind that immediately after

- the victim went away with the accused, she was done to death. The Post-mortem Report Ext. 5 clearly reveals the fact.
- 53) The additional link is that the MO's evidence bolsters the extra judicial confession. The extra judicial confession of the accused depicts that he committed rape n the victim 'X' and when she screamed, he strangulated her and gagged her. The opinion of the MO as PW-10 is that death was result of strangulation and smothering. The MO also detected injuries of recent sexual assault including hymenal tear. Forensic Report, one circumstance.
- 54) The conduct of the accused is also one circumstance against him which clearly depicts his mens-rea. He had no business to offer biscuits and take away the girl who was playing with her friends. It has already been held in my foregoing discussions that the victim died on 01.01.15. The duration when she was last seen with the accused vis-a-vis the time of her death is too narrow to exonerate the accused. Moreover, the last seen theory is substantiated by the Extra Judicial Confession which has been proved. The chain of circumstances is complete and the evidence closes in on the accused person.
- 55) I would like to rely on the decision of Hon'ble the Supreme Court in the case of *State of Goa v Sanjay Thakran, (2007) 3 SCC 755*, wherein it was held that:
  - "34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time

when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the accused and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no

possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused person were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

56) Reverting back to this case, it is held that the witnesses PWs-2 and 3 stated that they were playing with the victim in the afternoon at about 3 or 4 pm. They have given an approximate time. The MO's evidence clearly reveals that the victim died sometime around 2:45 pm to 3:00 pm. It is clear from the MO's evidence that the victim died on 01-01-15. There is close proximity of the time when the victim was last seen with the accused and the time of her death. There is no probability of any other person being with the deceased. There is no intervening period when the victim was last seen vis. a vis. the time of her death. Relying on the decision of Sanjay Thakran's case (Supra), the accused can be solely held guilty on the circumstances of being last seen with the victim. However, this case is also fortified by other circumstances as well. There is a chain of circumstances commencing from the last seen together instance, followed by the extrajudicial confession of the accused. The extra judicial confession is supported by the MO's evidence which clearly

depicts that the victim was smoothed and strangulated to death. The accused had indeed confessed that he strangulated the victim after committing rape on her. The evidence of rape has also been proved by the MO. Thus the mens rea of the accused forms an additional link. The mens rea is apparent, because the accused lured the victim away from her friends by offering her biscuits. The other circumstance against the accused is his denial in a blanket manner when his statement was recorded under Section 313 CrPC. The total denial of the accused on his examination under Section 313 CrPC is a strong circumstance against him. Moreover, the onus was on the accused to explain and exculpate himself, when the last seen theory was established. In the absence of any satisfactory explanation, the presumption would suggest the guilt of the accused. Adverse inference can thus be drawn against the accused. Thus, the circumstances which have been proved against the accused, forms a complete chain.

57) It has been held by Hon'ble the Supreme Court in Anjan Kumar Sarma & Ors. vs. State of Assam in Criminal Appeal No. 560/2014 decided on 23-05-17 that:

"Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) The circumstances should be of a conclusive nature and tendency;
- (4) They should exclude every possible hypothesis except the one to be proved; and
- (5) There must be a chain of evidence so complete as to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The decision in **Sharad Birdhichand Sarada v. State of Maharashtra (1984) 4 SCC** was referred to in Anjan Kumar Sarma's case (Supra) while the guidelines to be followed in case of circumstantial evidence was discussed.

58) It has been held in my foregoing discussions that the circumstances form a complete chain. The circumstances are all conclusive in nature and tendency. The chain is so complete that there is no reasonable ground for the conclusion consistent with the innocence of the accused and it is as clear as crystal that in all human probability, the accused and only the accused is the author of the crime.

### **Contradictions:**

- 59) The learned defence counsel kept harping on the contradictions elicited through the cross-examination of the I.O. Are these contradictions sufficient to exonerate the accused or is the evidence strong enough to refute the contradictions?
- 60) At this juncture, I would like to divert the attention towards the contradictions affirmed by the I.O. in his cross-examination. The I.O. has affirmed that Jiten Garh has not stated under Section 161 Cr.P.C that "In the afternoon of 01.01.15, the complainant's daughter was missing and he was searching for her at every possible place. On the next morning, the victim's body was found in a dilapidated house, near the complainant's house. Biky Tanti and his friends found the body of the deceased in the said house. Learning about the occurrence, the parents and villagers rushed to the spot and the Police also arrived. The Police brought sniffer dogs and the dogs went to the accused person's house, and thereafter the Police apprehended the accused."
- 61) The I.O. has also affirmed that Prakash Kumar Sahu has not stated under Section 161 Cr.P.C. that " On 02.01.15, the village people from No.1 Bordubi Gaon, Gajal Basti, informed him over phone that a body of a minor girl was found lying in an abandoned house in their village. Thereafter, he and Boro Patra came to the place of occurrence and he noticed a gathering in the area. He also saw the dead body of the minor girl was lying on the floor and the mouth was wrapped with a piece of cloth. He came to know from two minor girls who told the parents of the deceased that they saw the accused taking the deceased with him by offering her biscuits, and he also came to know that the name of the victim was 'X'. After a while, the Police arrived along

with sniffer dog and the dog went to the accused person's house and the Police apprehended the accused. Sunil Murari stated before them that he took 'X' to the abandoned house of Rajmoni Hatibaruah and committed rape on her and when the victim screamed, he gagged her with a piece of cloth and after committing rape, he killed the victim 'X' by strangulating her. The accused confessed before him, in presence of Ashish Ghasi, Barun Patra, several villagers and the Police. The Police took the body for Post-mortem examination and also took the accused to the Police Station and seized victim's garments and the accused person's garments."

- 62) The I.O. has also affirmed that P.W.7 stated under Section 161 Cr.P.C that X's body was found and he heard that Satu Murari's son Sunil Murari committed rape on 'X' and killed her and the accused confessed before the Circle Officer that he had killed the victim after committing rape on her.
- 63) Thus, it can be safely held that the evidence of P.W.7 remains uncontradicted regarding the fact that the victim's body was found in the abandoned house of Rajmoni Hatibaruah and the accused confessed that he committed rape on the victim 'X' and killed her, and the accused also confessed before the Circle Officer.
- 64) Thus, the Extra Judicial Confession of the accused in presence of Prakash Kumar Sahu remains uncontradicted.
- 65) The P.W.11 i.e. the I.O. has also affirmed that Ahsih Ghashi (P.W.8) has not stated under Section 161 Cr.P.C that " *On 01.01.15, at about 10.30 a.m, he was in Duliajan Town, when his aunt Urmila Tanti informed him over phone that 'X' was lying dead in an abandoned house, near his aunt's house. He immediately went to the place of occurrence and noticed the villagers and*

saw the dead body lying in the verandah of the abandoned house. After his arrival, the Police also arrived along with sniffer dog which went directly from the place of occurrence to the accused person's house and the Police apprehended the accused. Then, they confronted the accused and he confessed that on the previous evening, at around 5.30 p.m., he met 'X' on the road and he offered her biscuits stating that he would take her to his house. The Police was also present when the accused confessed. At that time when the accused confessed, he, Prakash Kumar Sahu and Barun Patra were also present. The Police took the accused to the Police Station, and on the next day, the Police brought him to the place of occurrence where he showed the place where he committed the crime." The I.O. also affirmed that the accused admitted and confessed before the Circle Officer that he killed the victim by gagging her with a piece of cloth and after committing rape on her.

- 66) I have also discussed about the contradictions elicited by the defence through the cross-examination of P.W.9 and affirmed by the cross-examination of P.W.11. It is true that there are contradictions galore, but at the same time it is also true that two witnesses are minor witnesses and the contradictions elicited by the defence does not refute the charges. The contradictions are minor contradictions. The fact remains that the body was found in the abandoned house of Rajmoni Hatibaruah. The fact also remains that the victim was raped and killed. The "corpus-delecti" is also evident. The Postmortem Report has affirmed the brutal manner in which the victim was done to death after she was sexually assaulted.
- 67) All the witnesses have admitted about the Extra Judicial Confession of the accused person. The technicalities regarding the decision on the Extra Judicial Confession has been discussed in my foregoing discussions. The Last Seen

Theory has also been discussed while discussing the aspect of circumstantial evidence. Regarding the contradictions I would like to rely on the decision of Hon'ble the Supreme Court, in Anil Sharma and others Vs. State of **Jharkhand, 2004(5) SCC 679**. The Hon'ble Apex Court made observation relating to appreciation of evidence and the duties expected of a judge presiding over a criminal trial. It observed as under "In a great majority of cases, the prosecution version is rejected either for want of corroboration by independent witness or for some falsehood stated or embroidery added by witnesses. In come cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of the crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by falsehood or exaggeration version. It is also experienced, invariably the witnesses add embroidery to the prosecution story, perhaps for the fear of being disbelieved, but that is no ground to throw the case over board, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is a duty of the Court to cull out the

nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform."

58) The learned defence counsel also emphasized through his argument that the prosecution failed to produce the person who gave first information and based on whose information, the IO registered the GD Entry 54/15 dtd. 02-01-15. The extract copy of the GD Entry was exhibited as Ext. 6. It is clear from the Ext. 6 that Nilakanata Sharma's son Sri Prafulla Sharma informed over phone regarding the recovery of the victim's body in the abandoned house. The argument of the learned defence counsel that the investigation was concluded by the IO before the FIR was lodged and the FIR is a scripted and fabricated FIR, holds no water. The non-examination of Prafulla Kumar Sharma does not thwart the evidence. This cannot be regarded as a discrepancy. As soon as the body was recovered, investigation commenced and the investigation was conducted meticulously. The investigation was not an easy investigation, because the investigation commenced after the body was recovered. The investigation agency swung into action and the clues were assessed and the pieces fell into places and the accused was apprehended. Although there is no conclusive evidence regarding the leading of the sniffer dog, yet the fact that the investigation was conducted painstakingly and instantaneously, cannot be ignored. The informant was examined as PW-1 and the extract copy of the GD Entry was exhibited as

Ext. 6 and the FIR was exhibited as Ext. 1. The First Information Report (FIR for short) registered vide Ext. 6 is similar to Ext. 1 and the informant was examined. Thus, it can be safely held that there are no laches in the investigation and prosecution, even if Prafulla Kumar Sharma who gave the verbal information was not examined.

- 59) Recapitulating the entire evidence, it is thereby held that the circumstances form a complete chain. The contradiction does not thwart the evidence. The scientific officer's evidence clearly depicts that the seized articles, i.e., one black coloured underwear tested positive for semen and human blood. This underwear belongs to the accused. The seizure has been proved by the witness PW-11. The nail scrapings of the victim, the frock and sweater of the victim tested positive for human blood and semen. The victim's articles were seized vide Ext. 4 and the seizure was proved by the evidence of PWs- 9 and 11.
- 60) It has already been held in my foregoing discussions, that the chain of circumstances closes in on the accused person and the accused was last seen with the victim. The accused confessed that he committed penetrative sexual assault on the victim and killed her by strangulating her and when she tried to scream, he gagged her by her mouth. When the accused lured the victim and took her away with him, he committed the offence of kidnapping the victim 'X'. The direct evidence of PWs-2 and 3 proves beyond reasonable doubt that the accused kidnapped the victim in order that she may be forced to illicit intercourse. The ocular evidence of PWs-2 and 3 is substantiated by the evidence of PWs-1, 4, 5, 7, 8 and 9. The Sketch-Map Ext. 7 clearly depicts the place where the victim was taken away after inducement. 'E' is the place of occurrence on the Sketch-Map. 'D' is the

paddy field and open space. 'C' is the residence of Himanshu Sharma and 'B' is the resident of Ram Sharma. It is clear that the place of occurrence was in a secluded spot and in case of any perilous situation, the public cannot immediately rescue the victim. In addition to the offence under Section 302 IPC, the accused is also held guilty of offence under Section 366 IPC and Section 4 POCSO Act.

- leveled against the accused. In view of my foregoing discussions, it is held that the accused committed penetrative sexual assault on the minor victim 'X' and he is held guilty of offence under Section 4 POCSO Act. The age of the victim was six years at the time of the incident. It is held that the prosecution could prove beyond a reasonable doubt that the accused kidnapped the minor victim 'X' with intent that she will be forced to illicit intercourse. It is held that the accused kidnapped the victim, because he lured her away from the custody of her parents without their permission. The accused is guilty of offence under Section 366 IPC. It is held that the accused committed the murder of the minor victim 'X' after assaulting her. The prosecution could prove beyond a reasonable doubt that the accused committed culpable homicide amounting to murder. There is clinching evidence that the accused intentionally caused the death of the victim by strangulating her to death and also by smothering her after gagging her, when she tried to scream.
- 62) Murder under Section 300 IPC is punishable under Section 302 IPC. The punishment starts with the sentence whoever commits murder shall be punished with death and thereafter, the sentence continues that the author of the crime may also be punished with imprisonment for life and shall also be liable to fine.

### **Sentencing**

- 63) The victim was killed in a very brutal manner and so brutality is apparent in the instant case. Once again, I would like to reiterate that in view of my foregoing discussions, it is held that the prosecution could bring home the charges leveled against the accused beyond a reasonable doubt.
  - i. Whether the accused deserve death sentence?
  - ii. Will the accused to be a menace to the society?
  - iii. Is there any scope of reformation or rehabilitation?
- 64) It is true that the accused has no criminal history or antecedent. The Hon'ble Supreme Court has laid down in *Bachan Singh vs. State of Punjab, 1980*(2) SCC 684 that death sentence should be awarded only when the option of awarding the sentence of life imprisonment is questionably foreclosed. After considering such questions, the accused was given a day's time to submit his answers on mitigation. He was heard on the point of sentence. His answers were not convincing. In view of the decision of Hon'ble the Supreme Court in Sukhlal vs State of Madhya Pradesh in Criminal Appeal Nos. 1563/1564 of 2018 decided on 20-11-18, it was held that:

"Time and again, this Court has categorically held that life imprisonment is the rule and death penalty is the exception and even when the crime is heinous or brutal, it may not still fall under the category of rarest of rare. The decision to impose the highest punishment of death sentence in this case does not fulfil the test of "rarest of rare case where the alternative option is unquestionably foreclosed."

65) Reverting back to this case, it is held that this case is based on circumstantial

evidence. The accused is not a history sheeter. Speculating repentance and reformation on the part of the accused, death sentence is not imposed. It is held that this case does not fall within the category of "Rarest of Rare Cases". Considering the ameliorating and mitigating circumstances, I deem it proper to impose life imprisonment for the entire life of the accused for the offence under Section 302 IPC. The accused is also held guilty of offence under Section 4 POCSO Act and also of offence under Section 366 IPC. It is held that the prosecution could prove this case beyond a reasonable doubt.

66) I have heard the accused on the point of sentence and I have considered his answers. He submitted that he had nothing more to say.

### Sentence:

- 67) The accused Sri Sunil Murari is convicted under Section 302 IPC and he is sentenced to undergo Imprisonment for Life which means Imprisonment for his Entire Life and a fine of Rs. 1,000/- (Rupees One Thousand) and in default of payment of fine, to undergo rigorous imprisonment (RI for short) for 1 (one) month. The accused is also convicted under Section 4 POCSO Act and is sentenced to Imprisonment for Life and a fine of Rs. 1,000/- (Rupees One Thousand) and in default of payment of fine, to undergo RI for 1 (one) month. The accused is also convicted under Section 366 IPC and is sentenced to undergo Rigorous Imprisonment (RI for short) for 10 (ten) years and a fine of Rs. Rs. 1,000/- (Rupees One Thousand) and in default of payment of fine, to undergo RI for 1 (one) month. All the sentences will run concurrently.
- 68) Destroy the seized articles as per law.
- 69) Furnish free copies of judgment to the accused and to the District Magistrate.
- 70) The father of the victim 'X' who has undergone such an ordeal, deserves compensation. This case is thereby recommended for compensation to the

District Legal Services Authority, Dibrugarh to decide the quantum of compensation to be awarded to the victim from the 'Nirbhaya Fund".

- 71) Send a copy of this order to the DLSA, Dibrugarh, to assess the compensation to be the father of the victim 'X'.
- 72) Judgment is signed, sealed and delivered in the open Court on the 7<sup>th</sup> day of December, 2019.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

> > Contd.

## APPENDIX POCSO Case No. 39/15

## List of witnesses for prosecution:

- 1. PW-1 Informant 'Y';
- 2. PW-2 Sri Biki Tanti;
- 3. PW-3 Sri Suraj Tanti;
- 4. PW-4 Sri Himanshu Sharma;
- 5. PW-5 Sri Jiten Garh;
- 6. PW-6 Sri Ram Sharma;
- 7. PW-7 Sri Prakash Kumar Sahu;
- 8. PW-8 Sri Ashish Ghasi;
- 9. PW-9 Sri Barun Patra;
- 10. PW-10 Dr. Hemanta Kumar Mahanta;
- 11. PW-11 Sri Jiten Gogoi;
- 12. PW-12 Sri Moon Gogoi;
- 13. PW-13 Smt. Renu Bora Handique.

### List of exhibits for prosecution:

- 1. Ext. 1 Ejahar;
- 2. Ext. 2 Seizure-List;
- 3. Ext. 3 Extra Judicial Confessional statement of accused Sri Sunil Murari.
- 4. Ext. 4 Seizure-List;
- 5. Ext. 5 Post-mortem Report;
- 6. Ext. 6 Extract copy of Duliajan PS GD Entry No. 54 dtd. 02-01-15;
- 7. Ext. 7 Sketch-Map;
- 8. Ext. 8 Charge-Sheet.

#### List of material exhibits for prosecution:

- 1. Ext. 1 One green and yellow colour frock;
- 2. Ext. 2 One red and black colour printed sweater;
- 3. Ext. 3 One pink colour sporting;
- 4. Ext. 4 One green and blue colour long pant;
- 5. Ext. 5 One black colour underwear.

List of witnesses for defence: Nil.

List of exhibits for defence: Nil.