MANU/SC/1868/2007

**Equivalent Citation:** AIR2007SC1239, 2007CriLJ1667, JT2007(3)SC373, 2007(3)SCALE198, (2007)9SCC129, 2007(1)UJ595(SC)

**IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 214 of 2007 (Arising out of SLP (Crl.) No. 4284 of 2006) Decided On: 15.02.2007

Appellants: **Abbas Ali Vs.**

Respondent: **State of Rajasthan**

**Hon'ble Judges:** Arijit Pasayat and S. H. Kapadia, JJ.

**Counsels:**

For Appellant/Petitioner/Plaintiff: Kiran Bhardwaj, Adv. (A.C.

For Respondents/Defendant: Aruneshwar Gupta, Naveen Kumar Singh, Mukul Sood and Shashwat Gupta, Advs.

**Subject: Criminal**

**Acts/Rules/Orders:**

Indian Penal Code, 1860 - Sections 299, 300, 302 and 304

**Case Note: Criminal - Murder - Section 302 of Indian Penal Code, 1860 - Appellant stabbed deceased and was convicted under Section 302 - Matter pertaining to classification of offence for determining quantum of punishment - Held, for fixing punishment proportionate to gravity of the generic offence IPC recognises three degrees of culpable homicide - Gravest form of culpable homicide which is defined in Section 300 as ‗murder‘ is the ‗culpable homicide of the first degree - And what is punishable under first part of Section 304 is termed as culpable homicide of the second degree - Culpable homicide of third degree is the lowest type of culpable homicide and punishment provided for it is also lowest among punishments provided for three grades and falls under second part of Section 304 - Applying law into facts of present case conviction under Section 302 was altered to one under Section 304 Part 1 - Appeal allowed**

**Criminal - Distinction between ‗murder‘ and ‗culpable homicide not amounting to murder‘ - Interpretation and application of - Sections 299 and 300 of Indian Penal Code, 1860 - Held, Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300 - Mens rea requisite under clause (2) is knowledge possessed by offender regarding particular victim being in such a peculiar condition or state of health that internal harm caused to him is likely to be fatal, notwithstanding fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition - In clause (3) of Section 300, instead of the words ‗likely to cause death‘ occurring in the**

**corresponding clause (b) of Section 299, the words ―sufficient in the ordinary course of nature to cause death‖ have been used - Distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death - Distinction is fine but real and if overlooked, may result in miscarriage of justice - Difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury - Degree of probability of death determines whether a culpable homicide is of the gravest, medium or the lowest degree - Word ‗likely‘ in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility - Words ―bodily injury...sufficient in the ordinary course of nature to cause death‖ means that death will be ―most probable‖ result of injury having regard to ordinary course of nature**

**Criminal - Culpable Homicide amounting to murder - Section 300 of Indian Penal Code, 1860 - Application of ratio laid down in Virsa Singh v. State of Punjab - Under clause thirdly of Section 300 IPC, culpable homicide is murder, if the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury and injury intended to be inflicted is sufficient in ordinary course of nature to cause death - It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted - Offence would be murder even if intention of accused was limited to infliction of a bodily injury sufficient to cause death in ordinary course of nature, and did not extend to intention of causing death**

**Criminal - Degree of knowledge - Offence of murder - Clause (4) of Section 300 of Indian Penal Code, 1860 - Similarity of Clause (c) of Section 299 and Clause (4) of Section 300 - Held, both require knowledge of the probability of the act causing death - But Clause (4) of Section 300 would be applicable where knowledge of offender as to probability of death of person as distinguished from particular person or persons being caused from his imminently dangerous act, approximates to practical certainty - Such knowledge on part of offender must be of highest degree of probability - Act having been committed by offender without any excuse for incurring risk of causing death or such injury**

**Ratio Decidendi: *―Difference between clause (b) of Section 299 and clause (3) of Section 300 of the Indian Penal Code, 1860 is one of the degree of probability of death resulting from the intended bodily injury.‖***

***―Offence would be murder even if intention of accused was limited to infliction of a bodily injury sufficient to cause death in ordinary course of nature, and did not extend to intention of causing death.‖***

***―Clause (4) of Section 300 of the Indian Penal Code would be applicable where knowledge of offender as to probability of death of person as distinguished from particular person or persons being caused from his imminently dangerous act, approximates to practical certainty.‖***

**JUDGMENT**

**Arijit Pasayat, J.**

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Rajasthan High Court at Jodhpur. By the impugned judgment the High Court upheld the judgment of Learned Additional Sessions Judge, Bhilwara holding the appellant guilty of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentencing him to undergo imprisonment for life.

3. Prosecution version as unfolded during trial is essentially as follows:

First information report (in short the 'FIR') was lodged by Duda Ram (PW-5) on 15.11.2001. According to the FIR, the informant was a Chowkidar for Chirag Travel Agency. At about 12 midnight, he saw a body on the railway overbridge. A bearded man was pelting stones, he closed the doors of the office and went inside. After sometime, when he opened the door, he saw that there was a dead body lying. Seeing this, a report was lodged with Police Station Pratap Nagar, Bhilwara where a Case No. 501/2001 was registered. Recovery was made of the knife on the basis of disclosure made by the accused. After registration of the case, investigation was conducted and after investigation, charge sheet was filed against the accused. The case was committed to the trial court. The trial court framed the charges against the accused persons for offence punishable under Section 302 IPC. The accused denied the charge and claimed trial. Placing reliance on evidence of Neela Bai (PW-9), the wife of the deceased, the trial court held the accused guilty. The High Court also found the evidence of this eye witness to be reliable and dismissed the appeal by impugned judgment. With reference to certain observations made by the trial court learned Counsel for the appellant submitted that the trial court found that it was

impossible that the accused who himself is lame and travels on a tricycle could take PW9 to his jhuggi a place far from place of incident and therefore the evidence of PW-9 cannot be believed. She had herself accepted that earlier she was married to the accused and later on stated living with the deceased. The informant (PW-5) resiled from his statement recorded during investigation. Ultimately it was submitted that only one blow was given and therefore Section 302 IPC has no application.

Per contra learned Counsel for the State supported the impugned judgment.

4. Evidence of PW-9 is to the effect that in the night she and the deceased were sleeping under a neem tree by the side of the railway track. Suddenly the accused came there, stabbed the deceased and forcibly took her to his jhuggi. She accepted that the distance was considerable. She had lost her senses after seeing the accused stab the deceased. She accepted that the accused was physically disabled and normally moved in a tricycle. She clarified that since deceased was sleeping he could not escape from the stab blow.

5. The crucial question is as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is the genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest

type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

6. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

INTENTION

**Section 299 Section 300**

A person commits culpable homicide Subject to certain exceptions if the act by which the death is culpable homicide is murder

caused is done- if the act by which the

death is caused is done -

(a) with the intention of causing (1) with the intention of

death; or causing death; or

(b) with the intention of causing (2) with the intention of

such bodily injury as is likely causing such bodily injury

to cause death; or as the offender knows to be

likely to cause the death of the person to whom the harm is caused; or

(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the

ordinary course of nature to cause death; or

KNOWLEDGE

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(c) with the knowledge that the act (4) with the knowledge that is likely to cause death. the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

7. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

8. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature to cause death" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of

justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299

conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury...sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant and Anr. v. State of Kerala AIR 1966 SC 1874 is an apt illustration of this point.

9. In Virsa Singh v. State of Punjab MANU/SC/0041/1958 : 1958CriLJ818 , Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. The ingredients

of clause "Thirdly" of Section 300, IPC were brought out by the illustrious Judge in his terse language as follows:

To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

The learned Judge explained the third ingredient in the following words (at page 468):

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the

appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

10. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4)

of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

11. The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

12. The position was illuminatingly highlighted by this Court in State of Andhra Pradesh v. Rayavarapu Punnayya and Anr. MANU/SC/0180/1976 : 1977CriLJ1 , Abdul Waheed Khan @ Waheed and Ors. v. State of Andhra Pradesh MANU/SC/0708/2002 : [2002]SUPP1SCR703 , Augustine Saldanha v. State of Karnataka MANU/SC/0638/2003 : 2003CriLJ4458 , Shanker Narayan Bhadolkar v. State of Maharashtra MANU/SC/0199/2004 : 2004CriLJ1778 , Thangiya

v. State of T.N. MANU/SC/1046/2004 : 2005CriLJ684 , Rajinder v. State of Haryana MANU/SC/8197/2006 : 2006CriLJ2926 and in Raj Pal v. State of Haryana MANU/SC/8105/2006 : (2006)9SCC678 .

13. In view of the factual position as noted in the background of the principles set up above it is clear that the appropriate conviction is under Section 304 Part I, IPC which is accordingly altered. Custodial sentence of 10 years would meet the ends of justice. The appeal is allowed to the aforesaid extent.

MANU/SC/7224/2007

**Equivalent Citation:** 2007CriLJ2277, JT2007(5)SC170, 2007(4)SCALE506 **IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 372 of 2007 (Arising out of S.L.P. (Crl.) No. 4772 of 2003) Decided On: 19.03.2007

Appellants: **Akhlaq Vs.**

Respondent: **State of U.P.**

**Hon'ble Judges:** S. H. Kapadia and B. Sudershan Reddy, JJ.

**Acts/Rules/Orders:**

Evidence Act - Sections 8 and 30; Indian Penal Code - Sections 34, 302 and 376

**Prior History:** From the Judgment and Order dated 14.07.2006 of the High Court of Judicature at Allahabad in Crl. A. No. 1783 of 1981

**Disposition:**

Appeal dismissed

**Case Note: Criminal — Conviction — Common intention — Extra judicial confession — Circumstantial evidence — Sections 34, 302 of the Indian Penal Code, 1860 and Section 8 of the Evidence Act — Accused was seen by the prosecution witness, which was corroborated by another witness following the deceased and also saw other accused in turn following the appellant — Position of the dead body indicated rape and strangulation and injuries indicated that the deceased was assaulted and that she was forcibly raped — High Court confirmed the conviction and sentence awarded by the Trial Court — Appellant submitted that impugned judgments were mainly based on the extra judicial confession made by the coaccused to a prosecution witness ands that extra judicial confession is no evidence and is corroborative in nature — Held, each of the circumstances finds place in the contents of the extra judicial confession — When a criminal act is committed by several persons in furtherance of the common intention, each of such several persons is liable — It is a general rule that statements made in the presence of the accused, which he might have contracted, if untrue, are evidence against him — Each and every statement made in the extra judicial confession corroborates the evidence of prosecution witnesses — Appeal dismissed.**

**Ratio Decidendi: *―Rape and Murder — Common intention—Extra judicial confession — When a criminal act***

***is committed by several persons in furtherance of the common intention, each of such several persons is liable. ‖***

**JUDGMENT**

**S.H. Kapadia, J.**

1. Leave granted.

2. This criminal appeal is directed against the impugned judgment and order dated 14.7.06 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 1783 of 1981 against the judgment and order dated 10.8.81 passed by the Additional Sessions Judge, Bulandshahr in Sessions Trial No. 143 of 1980 convicting Akhlaq (accused No. 1 - appellant herein) under Section 302 read with Section 34 Indian Penal Code (IPC' for short). Appellant has been sentenced to undergo rigorous imprisonment for life.

3. In short, the prosecution case was as under. A written report (Exhibit Ka. 1) was submitted at the Police Station Kotwali. This was on 31.7.79 at 6.10 pm. The written report was submitted by the complainant, Samay Singh (PW. 1). In the report it was stated that when the complainant returned home in village Tatarpur from his duty, he enquired from his younger daughter about the whereabouts of his elder daughter Asha (since deceased). The complainant was informed that Asha had gone to answer nature's call. The complainant also enquired from his wife, Brahma Devi (PW.2), about Asha. He was told by his wife that Asha had gone to answer nature's call. However, Asha did not return for considerable time. The complainant became suspicious. He proceeded to search out his daughter Asha at 5 pm. When the complainant reached the maize field of Kanchi he saw a *chappal* belonging to Asha lying near the boundary of the field. The

complainant entered into the field. He found the dead body of his daughter Asha inside the field. A Dhoti was tied around her neck and another *chappal* was found lying near the dead body of Asha. Her clothes were blood stained. The complainant further found that the golden ear-rings of Asha were missing from her body. Asha was around 20 years old. On the basis of Ex. Ka.1 the Head Constable prepared the F.I.R. The case was registered. The entry was made in G.D. report. The I.O. recorded the statement of the complainant at the police station. He then proceeded to the site of occurrence. On reaching the field of Kanchi the I.O. found the dead body of Asha lying in the field with a Dhoti tied around her neck. The I.O. prepared the inquest report (Ex. Ka.5). He prepared the *naqsha* (Ex.Ka.7). The I.O., after completing the formalities, handed over the dead body of Asha to constables Bhojvir Singh and Rajvir Singh for post mortem at the district hospital, Bulandshahr. The possession of the *chappal* was also taken vide Ex.Ka.9. The I.O. inspected the spot on 1.8.79. He prepared the site plan. On 21.8.79 on interrogation Jamil (accused No. 2) confessed his guilt. He also promised to get the golden ear-rings recovered from the shop of sarraf. He took the I.O. to the shop of the sarraf. The ear-rings were mortgaged with the sarraf. The name of sarraf was Ram Kishan (PW. 9). After going through the register Ram Kishan took the ear-rings. The ear-rings were taken into custody vide Ex.Ka.4. They were sealed in the presence of Jai Prakash Sharma (PW.10). The necessary formalities were thereafter completed. The ear-rings recovered from the shop were identified on 28.9.79. On 1.8.79 the post mortem was conducted. According to Dr. Surendra Pal Singh, Medical Superintendent (PW.14), the death was caused by strangulation. The doctor found whitish substance near vulva of the deceased. He prepared a slide and forwarded it to the pathologist. The doctor opined that Asha was possibly raped. After completing due investigation, the I.O. submitted the charge-sheet. The

three accused - Akhlaq (Accused-1), Jamil (Accused-2) and Imtiyaz (Accused-3) denied the charges. They pleaded non-guilty. The prosecution examined 19 witnesses.

4. In the present case the complainant (PW. 1) has proved that he was the father of Asha. He was an employee in the Civil Hospital Bulandhshahr. His duty hours were between 8 a.m. and 3 pm. This witness has established that on the fateful day he returned from the Civil Hospital at 3.30 pm; he enquired about Asha when he was told that Asha had gone to answer nature's call around 1.30 pm. This led PW. 1 to search out the deceased. The evidence of PW. 1 has established that around 5 pm he reached the field of Kanchi, he entered the field and found the dead body of Asha with the golden ear-rings missing and her *chappel* lying near her body. He also identified the ear-rings later on. The evidence of PW. 1 is corroborated by his wife Brahma Devi (PW.2). Bal Kishan (PW.4) stated that he was from the same village that he was in his field on the fateful day. At 1.30 pm he was returning from his field when he saw Asha going towards a pond (pokhar). He saw Asha being followed by Akhlaq (appellant herein). PW.4 further deposed that in fact Akhlaq (A-1) greeted PW.4. According to PW.4, Asha was followed by Akhlaq (A-1) and Akhlaq was in turn followed by Babu (Accused-4), Jamil (A-2) and Imtiyaz (A-3). At 5.30 pm, Bal Kishan (PW.4) was told about the demise of Asha. Mahesh Chandra (PW.6) deposed that on the fateful day at 8.30 pm when he was near a *chabutra* he saw Babu and Akhlaq. Babu was also an accused (since deceased). Mahesh Chandra was a friend of Babu. By 8.30 pm the entire village had known that the body of Asha was found in the field of Kanchi. PW.6 was told by Babu in presence of Akhlaq (appellant herein) that about three months prior to the incident Asha had abused him. Babu stated that Asha and Akhlaq had illicit relationship. Babu told PW.6, in presence of Akhlaq, that on the date when Asha was murdered Jamil (A-2) had gone to borrow some money from Babu (A-4). Imtiyaz (A-3) was present at the house of Babu at that time.

Babu, Imtiyaz and Jamil saw Asha going towards the field of Kanchi followed by Akhlaq. They followed Akhlaq. Akhlaq and Asha entered into the maize field. Babu, Imtiyaz and Jamil followed Akhlaq. They saw Akhlaq having sexual intercourse with Asha. Babu, Jamil and Imtiyaz demanded sexual intercourse which Asha refused. Thereafter, Babu and Jamil forcibly had sexual intercourse with Asha. Asha threatened to expose the misdeeds of Babu and Jamil. Babu, therefore, took the *Dhoti* of Asha tied it around her neck. The three accused - Jamil, Imtiyaz and Akhlaq caught hold of Asha. She was strangulated. She died. Jamil removed the earrings. Akhlaq was present. This was the extra judicial confession made by Babu (A-4), one of the accused, to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant herein). This extra judicial confession is the subject-matter of controversy.

5. Jairam Singh (PW. 11) deposed that on the fateful day he saw Asha going towards the field of Kanchi. She was followed by Akhlaq (appellant herein). The distance between the two was about 25 steps. He further deposed that Akhlaq was in turn followed by Imtiyaz (A-3), Jamil (A-2) and Babu (A-4). Dr. Surendra Pal Singh (PW.14), Medical Superintendent at the Civil Hospital Bulandshahr has deposed that he did a post mortem on 1.8.79. There were 18 injuries on the body of Asha. These injuries consisted of abrasions and contusions on the chin, lips, cheek, nose, forehead, elbows, chest and neck. He also found a whitish substance in the form of discharge on the vagina. He also found blood on the thighs. He prepared a slide and forwarded it to Dr. P.C. Agarwal, Pathologist. According to PW.14 the cause of death of Asha was asphyxia owing to strangulation. Injury Nos. 12 and 13 on the body of Asha was on account of strangulation by Dhoti.

6. On the above evidence, the trial court observed that the present case was based on circumstantial evidence. It was also based on extra judicial confession made by Babu (A-4), one of the accused, in presence of Akhlaq (appellant herein). The trial court observed that in the present case the recovery of the ear-rings at the instance of Jamil (A-2) from the shop of Ram Kishan (PW.9) were put for test identification parade when they were correctly identified by the witnesses. On the evidence of doctor (PW.14), the trial court held that Asha was raped and strangulated. On the basis of the following circumstances which was duly proved, the trial court found Akhlaq (appellant herein) guilty of offence punishable under Section 302 read with Section 34 IPC. In this connection, trial court relied upon the statement of PW.1 and PW.2 that Asha had gone to answer nature's call at 1.30 pm. In this connection, the trial court also relied upon the evidence of PW.4, Bal Kishan who, as stated above, deposed that he had seen Asha going towards pokhar (pond). Therefore, the trial court came to the conclusion that Asha was last seen at 1.30 pm when she had gone to answer nature's call in the field of Kanchi. This was the first circumstance which took proved before the trial court. The second circumstance proved before the trial court was that Asha was followed by Akhlaq (appellant herein) who in turn was followed by Babu (A-4), Jamil (A-2) and Imtiyaz (A-3). The trial court relied upon the evidence of PW.11 in this connection. Both PW.11 and PW.4 had deposed that they had seen the accused going towards the field of Kanchi. It was contended before the trial court that the evidence of PW.11 was not reliable since he had denied of having gone to the police station. In this connection, the trial court observed that PW.13 had proved the G.D. entry about the registration of the case in which it is mentioned that PW.11 had come to the police station and, therefore, the trial court saw no reason to discard the evidence of PW.11. The next circumstance on which the trial court placed reliance was the finding of the dead body of Asha in the field of Kanchi.

Moreover, the trial court also relied on the recovery of the golden ear-rings at the instance of Jamil (A-2). On the evidence of extra judicial confession, the trial court held the evidence of Mahesh Chandra (PW.6) was fully reliable as far as Akhlaq (appellant herein) is concerned. According to the trial court, Babu (A-4) had confessed of having committed the offence. He implicated Akhlaq. According to the trial court, the extra judicial confession was made by Babu (A-4) in the presence of Akhlaq (A-1) and which extra judicial confession indicated that Babu had confessed his guilt, he had given a detailed narration of the facts as to how he reached into the field of Kanchi, as to how he followed Akhlaq and Asha and he also referred to illicit relationship between Akhlaq and Asha. In the said confession, on which reliance has been placed by the trial court, Babu has stated in the presence of Akhlaq that initially Akhlaq had sexual intercourse with Asha which was seen by Babu, Jamil and Imtiyaz who showed their intention to have sexual intercourse with Asha which Asha refused and then thereafter Jamil and Babu had intercourse with Asha against her consent. When Asha threatened to expose them in the village, Babu tied her Dhoti around her neck and others caught hold of her hands and feet. This was the confession made by Babu (A-4) to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant herein). The trial court found that PW.6, Mahesh Chandra, was a close friend of Babu. One of the arguments advanced before the trial court was that the evidence of the extra judicial confession cannot be said to be reliable; that it was highly unnatural for Babu (A-4) to disclose the above story in confidence to Mahesh Chandra (PW.6). The trial court found that there was no merit in this argument. According to the trial court, Babu was a good friend of Mahesh Chandra (PW.6); the confession was made after three days. It was immediately recorded on the next day, that is, on 4.8.79. The trial court observed that although PW.6 was cross-examined at length all suggestions made to PW.6 were denied. According to the trial court, the extra judicial confession

was made by Babu (A-4) in presence of Akhlaq (appellant herein) and Akhlaq did not object. The trial court, further found that the extra judicial confession made by accused Babu stood corroborated by the medical report. The injuries noted by Dr. Surendra Pal Singh (PW.14) also corroborated the statements contained in the extra judicial confession. The various injuries on the lips, nose, cheek, forehead and elbows indicated that the sexual intercourse was without the consent of Asha. The contents of the extra judicial confession, therefore, stood corroborated. Similarly, the physical evidence of the recovery of the dead body from the field of Kanchi, the recovery of *chappal* of Asha (deceased) lying near her body and scattering of the maize plants near her body - all corroborated the extra judicial confession made by Babu (A-4) to Mahesh Chandra (PW.6). In the circumstances, the trial court came to the conclusion that Jamil (A-2), Imtiaz (A-3) and Babu (A-4) had seen Akhlaq (appellant herein) following Asha into the field of Kanchi. They followed Akhlaq. They saw Akhlaq having sex with Asha in the field. They expressed their desire to have sexual intercourse. Asha refused. Babu and Jamil had sexual intercourse against her consent. Asha threatened to expose them. In the circumstances, the accused committed murder of Asha, as described above. In the circumstances, the trial court held that the prosecution had proved its case. The trial court held that the evidence of extra judicial confession was reliable. The evidence of Dr. Surendra Pal Singh (PW.14) corroborated the version of the prosecution to the effect that Asha was strangulated after sexual intercourse. In the circumstances, the trial court held that Jamil (A-2) and Babu (A-4) were guilty of offence under Section 376 IPC; that Akhlaq had illicit relationship with Asha and he had sexual intercourse with her by her consent hence no offence under Section 376 IPC stood made out against Akhlaq (appellant herein). However, the trial court held that Babu (A-4) was guilty of offence punishable under Section 302 and 376 IPC; that Jamil (A-2) was guilty of offences under Section 302 read

with Section 34 and also under Section 376 IPC; that Akhlaq (A-1), appellant herein, and Imtiyaz (A-3) were found guilty of offences punishable under Section 302 read with Section 34 IPC.

7. At this stage, we may point that Babu (Accused-4) since died. Akhlaq (Accused-1), Jamil (Accused-2) and Imtiyaz (Accused-3) carried the matter in appeal to the High Court. By the impugned judgment the High Court has confirmed the conviction, referred to above. Hence this criminal appeal. However, the criminal appeal is preferred only by Akhlaq (A-1), appellant herein, and not by other two co-accused.

8. At this stage, we may clarify that we are concerned in this criminal appeal only with the case of Accused No. 1 (appellant). Shri P.S. Mishra, learned senior counsel appearing on behalf of appellant (A-1), submitted that the judgments of the courts below were mainly based on the extra judicial confession made by the co-accused Babu (since deceased) to Mahesh Chandra (PW.6). He submitted that extra judicial confession is no evidence. It is corroborative in nature. It was urged that there was no evidence except extra judicial confession to show that Akhlaq (appellant) had followed Asha into the field of Kanchi. It was urged that except the extra judicial confession there was no evidence to implicate the Akhlaq (appellant) in the murder of Asha. It was further submitted that the judgment of this Court in **Kashmira Singh v. State of M.P.** MANU/SC/0031/1952 : 1952CriLJ839 , has no application to the present case. It was urged that in the present case there was no evidence against Akhlaq (appellant). He urged that whatever evidence is on record is only against Babu (A-4) and Jamil (A-2). Learned Counsel urged that merely because Akhlaq (appellant) followed Asha into the field of Kanchi, he cannot be implicated for murder of Asha. Learned Counsel also submitted that there was no evidence of

Akhlaq (appellant) attacking Asha or causing any injury to her. Learned Counsel urged that there was no evidence of Akhlaq (appellant) coming back from the field of Kanchi. He submitted that the High Court has disbelieved Kallo (PW.3) in that regard. In the circumstances, learned Counsel submitted that the conviction of Akhlaq (appellant) needs to be set aside.

9. We do not find any merit in the above contention. Akhlaq (appellant) stands convicted with the aid of Section 34. This case concerns circumstantial evidence. PW.1 and PW.2 have proved beyond shadow of doubt that Asha had gone to answer nature's call on the fateful day at 1.30 pm. On return from duty her father went in search of his daughter, Asha. On the boundary of the field of Kanchi he detected one of the *chappals* of Asha. Thereupon, he entered the field of Kanchi. Inside the field he found the dead body of Asha. Near the dead body the other *chappal* was recovered. The second circumstance which is relevant is that Akhlaq (appellant) was seen by Jairam Singh (PW.11). Jairam Singh (PW.11) saw Akhlaq (appellant) following Asha. He also saw Babu (A-4), Jamil (A-2) and Imtiyaz (A-3) in turn following Akhlaq (appellant). There is no reason to disbelieve PW.11. Further the evidence of PW.11 is further corroborated by PW.4. Both these witnesses had seen Akhlaq (appellant) following Asha into the field of Kanchi. The third circumstance was the recovery of the dead body of Asha in the field of Kanchi. The position of the dead body indicated rape and strangulation. The fourth important circumstance is the injuries noted by Dr. Surendra Pal Singh (PW.14). The said injuries were present on the lips, cheek, nose, forehead and elbows of Asha. These injuries show that Asha was assaulted and that she was forcibly raped. Lastly, each of the above circumstances finds place in the contents of the extra judicial confession made by Babu (A-4) to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant).

10. As stated above Akhlaq (appellant) has been convicted with the aid of Section 34 IPC. Section 34 gives statutory recognition to the principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. When a criminal act is committed by several persons in furtherance of the common intention, each of such several persons is liable. The crucial test as to applicability of constructive liability is found in the phrase "in furtherance of the common intention of all". The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; that criminal act must be while executing or carrying out the common intention. To apply Section 34 IPC, two factors must be established - (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but if no overt act is attributed to the individual accused, Section 34 will be attracted as it involves vicarious liability. It is not possible to have direct evidence of common intention in every matter. It has to be inferred in appropriate cases from the facts and circumstances of each case [**See: Jai Bhagwan and Ors. v. State of Haryana** MANU/SC/0087/1999 : 1999CriLJ1634 ]. In the present case, the evidence of PW.11 and PW.4, apart from extra judicial confession, indicates presence of Akhlaq (appellant) in the field of Kanchi. Akhlaq (appellant) was seen following Asha. In turn, the other co-accused followed Akhlaq (appellant). The circumstance of Asha being followed by Akhlaq (appellant) and Akhlaq (appellant) being followed by the co-accused into the field, is corroborated by the contents of the extra judicial confession made by the Babu (A-4) to Mahesh Chandra (PW.6) in presence of Akhlaq (appellant).

11. In the case of **Sivarajan v. State** 1959 KLT 167, it has been held that under Explanation 2 to Section 8 of the Evidence Act if a man is accused of a crime and he remains silent, his conduct

is, coupled with the statement, in the nature of an admission and, therefore, it will constitute evidence against himself.

12. In the case of **Haroom Haji Abdulla v. State of Maharashtra** MANU/SC/0060/1967 : [1968]2SCR641 , this Court held that a confession intended to be used against a co-accused stands on a lower level than the evidence of accomplice because the latter is tested by cross examination whilst the former is not. The confession of a co-accused is not an evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending assurance to the verdict. It was further held that although the confession may be taken into consideration against a co-accused by virtue of Section 30 of the Evidence Act its value is extremely weak and there could be no conviction without corroboration on material particulars. In the present case, the extra judicial confession was made in the presence of Akhlaq (appellant). The conduct of Akhlaq (appellant) comes within Explanation 2 to Section 8 of the Evidence Act. Under that Explanation, statements made in the presence of Akhlaq (appellant) are admissible as the ground work of his conduct. It is a general rule that statements made in the presence of the

accused, which he might have contracted, if untrue, are evidence against him. This is illustrated by Illustration (f) and (g) to Section 8 of the Evidence Act. In the present case, the extra judicial confession made by the co-accused Babu clearly indicates that Asha was followed by Akhlaq (appellant) who in turn was followed by the other co-accused. The said extra judicial confession indicates the entry of all accused including Akhlaq (appellant) into the field of Kanchi. They were seen by Jairam Singh (PW. 11). The evidence of PW.11 stood corroborated by the evidence of PW.4 to that extent. The extra judicial confession shows that Asha was raped forcibly and then strangulated. The injuries on the different parts of her body indicates that she was raped forcibly. This is clear from the testimony of Dr. Surendra Pal Singh (PW.14). The location of the

body in the scattered field also shows that she was forcibly raped. The strangulation by Dhoti is also, one more circumstance showing how she was murdered. Therefore, each and every statement made in the extra judicial confession corroborates the evidence of PW. 1, PW. 11, PW.4 and PW.14. Moreover, Akhlaq (appellant) remained silent when confession was made by co-accused Babu to Mahesh Chandra (PW.6). In the said confession, Babu implicated himself. This conduct of Akhlaq (appellant) has been noticed by the trial court. The trial court has correctly invoked Section 8 of the Evidence Act while evaluating the extra judicial confession.

13. Before concluding we may point out that in the present case the courts below have not relied only upon extra judicial confession as submitted on behalf of the appellant. In the present case, the extra judicial confession is made in the presence of Akhlaq (appellant). In the present case the confession is not behind Akhlaq (appellant). Therefore, the judgments cited on behalf of the appellant has no application to the facts of the present case.

14. For the above reasons, we do not find any merit in this criminal appeal and the same is accordingly dismissed.

**Equivalent Citation:** AIR2007SC848, 2007CriLJ1145, 2008(2)GLT1, JT2007(2)SC428, RLW2007(3)SC1861, 2007(2)SCALE42

**IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 453 of 2006

Decided On: 16.01.2007

Appellants: **Bishnu Prasad Sinha and Anr. Vs.**

Respondent: **State of Assam**

**Hon'ble Judges:** S.B. Sinha and Markandey Katju, JJ.

**Acts/Rules/Orders:**

Evidence Act, 1872 - Sections 3, 8 and 24 to 30; Indian Penal Code, 1860 - Sections 34, 149, 201, 302 and 376(2); Criminal Procedure Code (CrPC), 1973 - Sections 164 and 313; Constitution of India - Articles 20(3) and 21

**Prior History:** From the Judgment and Order dated 31-8-2005 of the High Court of Gauhati in Criminal Death Reference No. 1/2005 with Crl. A. No. 20(J) of 2005

**Disposition:**

Appeal dismissed

**Case Note: Criminal – Confessional statement – Effect – Circumstantial evidences – Sections 302 and 376(2)(g) of the Indian Penal Code, 1860 and Section 8 of the Indian Evidence Act – Appellant convicted for the offence punishable under Sections 302 and 376 – Appeal filed**

**for challenging the conviction dismissed by High court – Hence, present appeal – Appellant contended that Investigation done in slipshod manner – Held, truthfulness of confession not in dispute – Confession not retracted even at later stage of trial and accepted by accused in his examination, thus, fully reliable – In absence of substantive evidence, accused can not be convicted on the basis of confession of a coaccused – Conduct of appellant admissible under Section 8 of Act – Not a case where extreme death penalty should be imposed – Imposition of punishment of rigorous imprisonment for life shall meet the ends of justice –**

**Sentence modified – Appeal dismissed.**

**Ratio Decidendi: *―Confessional statement – Effect – In absence of substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a coaccused, be it extra judicial confession or a judicial confession and least of all on the basis of retracted confession. ‖***

**JUDGMENT**

**S.B. Sinha, J.**

1. Appellants were charged with and convicted for commission of offences under Sections 376(2)(g), 302 and 201 read with Section 34 of the Indian Penal Code, 1860 for rape and murder of one Barnali Deb @ Poppy (the deceased), a 7-8 year old girl. She was travelling with her parents Bishnu Deb (father-P.W.23), Anima Deb (mother- P.W.22) and younger brother in a private transport service known as Net Work Travels from Dharmanagar (Tripura). They were on their way to Dimapur in the State of Nagaland. They reached Net Work Travels' Complex at Paltan Bazar, Guwahati at around 10.30 p.m. on 12.7.2002. There was no connecting bus to

Dimapur at that time. They were advised to stay over for the night at Guwahati. Appellant No.1 was a night chawkidar of the waiting room of the said Net Work Travels. He represented that they could stay there for the night and therefore should not have any apprehension in regard to their safety. Their luggage was carried by the appellant No.1 to the waiting room. The waiting room had two openings. It was covered by grills. Only the front gate was open, which was kept under lock and key, the key whereof was with the appellant No.1.

2. The family of P.W.23 went out for dinner and came back to the said waiting room. He and both his children slept. Anima Deb (P.W.22), mother of the deceased, however, kept on sitting. Appellant No. 1 insisted on her repeatedly that she should go to sleep stating that as the waiting room would be locked, there was nothing for her to worry about. As she had not been sleeping, the appellant No. 1, allegedly, scolded her to do so. At that time, a bus bearing No. AS-25-C

1476 arrived at the said bus stop. Putul Bora - Appellant No. 2 was the 'handyman' of the said bus. While the Manager, Driver and the Conductor slept in the said bus, he did not. He was seen talking with the appellant No. 1.

3. Anima Deb-P.W.22 slept for a while. As her son had cried out, she woke up at about 3 p.m. She did not find Barnali. A hue and cry was raised by her. Being attracted by her alarm, Bishnu Deb-P.W.23 also woke up. They requested the appellant No. 1 to open the gates of the waiting room. He showed his reluctance at the first instance. He was thereafter told about the missing of the girl. On being so informed, he opined that she might be somewhere else within the room. A search was carried out in the three buses, which were at the bus stop belonging to the travel agency. Near- about places as also the railway station were searched. The bathroom situated in the said premises was also searched.

4. Shri Kapil Kumar Paul-P.W.2, the Cashier of the Net Work Travels was informed about the missing of Barnali Deb. As the girl could not be found despite vigorous search, Bishnu Deb, the father of the girl was advised to inform the police. A missing entry was lodged before the Officer-in- Charge of Paltan Bazar Police Station. At about 8.30 a.m. on 14.7.2002, a complaint was made that the flush in the toilet was not working. P.W.7- Amar Deep Basfore (sweeper) was asked by P.W.2-Shri Kapil Kumar Paul to find out the reason therefore. He later on opened the septic tank and saw the head of a small child. He immediately reported the matter to P.W.1-Shri Bidhu Kinkar Goswami as well as P.W.2-Shri Kapil Kumar Paul.

5. A First Information Report was lodged thereafter by Shri Bidhu Kinkar Goswami, the Manager of Net Work Travels. In the said First Information Report, apart from the appellant No. 1, suspicion was raised about the involvement of driver-Krishna Hazarika (P.W.26), conductor Rama Hazarika (P.W.25) and the 'handyman-Putul Bora (Appellant No. 2 herein) of the bus bearing No. AS-25-C-1476. The said bus had already left for its destination at about 6.30 in the morning. Even prior thereto, P.W.2 was persuaded that the said bus be permitted to leave early for Jorhat, which was declined.

6. Pursuant to the said First Information Report, a case under Sections 376(2)(g) and 302 read with Section 34 of the Indian Penal Code, 1860 was registered. A Magistrate was called. An inquest of the dead body was made. The said bus was intercepted and the driver-P.W.26, conductor- P.W.25 and Appellant No. 2-Putul Bora were arrested. They were brought to the police station. During the course of investigation, the appellant No. 1 made a confessional statement before the Magistrate under Section 164 of the Code of Criminal Procedure, 1973 ('the Code' for short). He gave a vivid description as to how the offence was committed by him and

the appellant No. 2. On completion of investigation, a charge-sheet was filed against the appellants. They were convicted by the learned Sessions Judge, Kamrup and sentenced to death. An appeal preferred by them, by reason of the impugned judgment, has been dismissed by the High Court. The appellants are, thus before us. At our request, Ms. Vibha Datta Makhija, learned Counsel assisted us as Amicus Curiae in the matter.

7. Evidently, there was no eye-witness to the occurrence in this case. Nobody had seen the appellants lifting the girl, committing rape and murdering her. The entire prosecution case is based on circumstantial evidences. The circumstances, which found favour with the learned Sessions Judge as also the High Court, are:

**As against Appellant No. 1:**

i) The confession of the appellant No. 1 recorded by Smt. Nirupama Rajkumari, Judicial Magistrate, 1st Class at Guwahati (P.W.8).

ii) Appellant No. 1 was the night chawkidar of the Net Work Travel Agency and the parents of the deceased girl along with their children were persuaded to stay at the waiting room in the night.

iii) P.Ws. 22 and 23 (mother and father of the deceased) were prevailed upon by the appellant No. 1 to spend the night in the waiting room. He had also carried their luggage assuring them full security and safety.

iv) The key of the waiting room was with him. Appellant No. 1 alone, thus, had the access to the waiting room. He only had access to the entire premises.

v) P.W.22-Anima Deb saw both the appellants held discussion in suspicious circumstances.

vi) Despite the information that Barnali was missing, the appellant No. 1 showed his reluctance to open the door. On the contrary, P.Ws.22 and 23 were told that she might be somewhere else in the room.

vii) The evidences brought on records go to show that the appellant No. 1 had a nefarious plan.

viii) A black coloured half pant belonging to the appellant No. 1 was seized by the police (Exhibit 3).

ix) No explanation was offered by him as to how the said half pant could be found there. It was admitted it belonged to him.

**As against Appellant No. 2:**

i) He was the 'handyman of the bus bearing No. AS-25-C-1476.

ii) The evidences of P.Ws. 22, 23 and 26 clearly point out that he held some discussions with the appellant No. 1.

iii) Although, he had made preparations to sleep in the bus, in which he was travelling, but, in fact, slept in different bus bearing No. AS-1- G-5990. No satisfactory explanation was offered by him to a question put in that behalf by P.W.4-Shri Jams Brown, conductor of said bus.

iv) P.W.3-Shri Kamal Goswami, Manager of the Travel Agency, at about 2/2.30 p.m. had suddenly felt some touch on his leg. He found the appellant No. 2 climbing the upper bunker of

the vehicle. He was wearing a long pant, although during his journey he was wearing only a jangia.

v) While the missing girl was searched, the appellant No. 2 was found to have sustained some injuries on his face, although, no such injury/stain was noticed by P.W.3 while they were coming from Nagaon to Guwahati, which showed that the girl offered resistance before being raped.

vi) A brown coloured jangia belonging to him was recovered, which was having some white stains.

vii) He made constant pressure on P.W.2-Shri Kapil Kumar Paul to allow him to leave Paltan Bazar bus stand with his vehicle.

8. Ms. Vibha Datta Makhija, learned Amicus Curiae, in support of the appellants would submit:

a) There are many missing links in the chain which have not been appreciated by the courts below in their proper perspective.

b) Seizure of the under garments of the appellants is not free from doubt as the seizure witnesses clearly stated that they had visited police station at different points of time and thus, they could not be witnesses to seizure;

c) The under garments, which were purported to have seized, had not been sent for chemical examination and thus, inference drawn by the courts below that white stains were semen stains, had not been established.

d) Although, urine and blood samples of the appellants were taken, the same having not been sent for chemical analysis, an adverse inference in this behalf should be drawn against the prosecution.

e) In the vaginal swap obtained by the doctor, no semen was found. The Forensic Science Laboratory Report was not brought on record and thus, deliberate withholding of material must be held to have weakened the prosecution case.

f) Although, the appellant No. 1 had the key of the lock, the possibility of some co-passengers committing the said offence cannot be ruled out.

g) The testimony of mother of the deceased is not reliable as she had omitted to make statements as regards the purport conduct of the appellants before the police.

h) No reliance can be placed on the confession of the appellant No. 1 as he had remained in police custody for a long time.

i) Evidence of Smt. Nirupama Rajkumari, the Judicial Magistrate (P.W.8) does not show that all statutory requirements in recording the said confession had been carried out.

9. Mr. Ng. Junior Luwang, learned Counsel appearing on behalf of the respondent, on the other hand, would submit:

(i) Confession of the appellant No. 1 itself was sufficient to uphold the judgment of conviction and sentence of both the appellants;

(ii) The depositions of the prosecution witnesses clearly suggest that offence had been committed between 1 p.m. to 3 p.m.;

(iii) The conduct of Appellant No. 1 clearly goes to show that he had committed the offence;

(iv) Appellant No. 2's admitted presence at the spot, his absence from the bus for some time, coupled with the injuries on his face, clearly point out that he had also taken part in commission of the said offence.

10. We may, at the outset, place on record that this is one of the rare cases where the witnesses examined on behalf of the prosecution, inter alia, were the employees of the company where the appellants had also been working. The presence of the appellants at the place of occurrence on the said night is not in dispute.

11. Appellant No. 1 was the chawkidar of the waiting room of Net Work Travels and he was the only person who had the key, and without his knowledge nobody could have entered into the waiting room. The waiting room was otherwise secure, having grills and collapsible gates. The second collapsible gate was also closed. The bathroom as also the latrine were situated within the said premises. The family came back to the waiting room after 10.30 p.m. The girl was found missing at about 3 O'clock. A search of the deceased was commenced. She was not found not only within the premises of the waiting room but also other nearby places. The buses belonging to other travel agencies were also searched. A search was carried out even at the railway station. The bus bearing No. AS-25-C-1476, in which the appellant No. 2 was working as a 'handyman, left at about 6.30 a.m. for Jorhat. The dead body was detected at about 9 a.m. The Manager of the Net Work Travels himself lodged the First Information Report suspecting the appellant No. 1

as also the driver, conductor and the 'handyman of the bus bearing No. AS-25-C-1476, as having committed the offence. The said bus was intercepted at about 10 a.m. and they were brought to the police station. P.W.22-the mother of the victim saw the appellants herein talking to each other. According to her she was goaded to go to sleep; she was even threatened.

12. Appellant No. 2 did not have any injury on his face earlier. Shri Kamal Goswami, the Manager of the Net Work Travels, who had travelled with the appellant No. 2 in the same bus, in no uncertain terms stated that while he went to sleep, at about 2/2.30 p.m. he suddenly felt a touch on his leg and found the appellant No. 2 moving to the upper bunker of the said vehicle. He had been wearing a long pant, although he had been wearing only a jangia while traveling from Nagaon to Guwahati. He had heard that the couple and the children were staying in the waiting room having missed their bus to Dimapur as also in regard to the searches carried out for tracing the missing girl. He also deposed to the effect that although the appellant No. 2 had some injuries on his face, he had not offered any explanation therefore. He is also a witness to the seizure of the under pants. Apparently, there is no reason to disbelieve his statement, particularly when both the appellants in their examination under Section 313 of the Code have accepted their presence. Appellant No. 2 at no point of time, even during his examination under Section 313 of the Code, could offer any suitable explanation in regard to the stains/injuries on his face.

13. Shri Krishna Hazarika, the driver of the bus, examined himself as P.W.26. He proved that the appellant No. 2 was seen to be gossiping with the appellant No. 1 inside the complex of Net Work Travels. He proved the fact that a search was carried out in regard to the missing of Barnali. He also spoke about the seizure of the under pants containing some stains. This witness

categorically stated that when they had gone to sleep, the appellant No. 2 was not seen. On the aforementioned aspects he was not even cross- examined.

14. P.W.4-Shri Jams Brown was the conductor of bus bearing No. AS-1- G-5990. Apart from corroborating the prosecution case in regard to the commotion emanating from the missing of the deceased, he had stated that after the missing girl was searched, the appellant No. 2 came into his bus. On being questioned, he had reported that he came from bus bearing No. AS- 25-C-1476 for sleeping.

15. We have noticed hereinbefore that the parents of the deceased girl (P.Ws.22 and 23) stated in details as to under what circumstances they had to stay in the waiting room. The Cashier of the Net Work Travels Shri Kapil Kumar Paul, who examined himself as P.W.2, apart from his statements which have been noticed hereinbefore, categorically stated that the appellant No. 2, together with the driver and conductor of the bus bearing No. AS-25-C-1476 persuaded pressed him to allow the bus to leave for Jorhat earlier than the scheduled time, and he refused to accede to their request. It is only because of their conduct he suspected their involvement in the crime. This witness also categorically stated that lock and key of the waiting room would always be with the chawkidar.

16. We may now consider the manner in which the confessional statement made by the appellant No. 1 was recorded. He was admittedly brought to the Court of Smt. Nirupama Rajkumari, the Judicial Magistrate, 1st Class at Guwahati (P.W.8), for getting his statement recorded on 24.7.2002. The voluntariness and truthfulness of the confession is not in dispute. Appellant No. 1 was produced before P.W.8 in her official Chamber at about 4.45 p.m. He was warned that the confession made by him might be used in evidence against him. She recorded the confessional

statement of the appellant No. 1 being satisfied as regards the voluntariness thereof. The said confessional statement reads as follows:

I am the night watchman of the Paltan Bazar counter of Network travels. On 13/7/02 I was on duty at the counter. Around 10.30 that night a bus arrived from Dharmanagar. Some passengers : from that bus came and requested me to allow them to stay at the counter for the night. The group comprised a man, two women a girl of about 8 or 9 and a child of about 3 or 4. I allowed them to sleep at the counter. Around 1.30 am one 'NR Super' bus (No. 1476) arrived from Jorhat and its staff slept in the bus itself. Around 2 a.m. Putul Bora, handyman of the N.R. Super bus got down from the bus and came to me. Then I proposed to Putul Bora rape of the said 8 or 9 year old girl sleeping at the counter. According to my plan I and Putul Bora lifted the said 8 or 9 year girl in her sleep and in the bathroom at the counter, we raped her, first me and then Putul Bora. As the girl was asleep, she did not shout. After having raped her, we found the girl still. Then I and Putul Bora opened the lid of the septic tank of the lavatory at the counter, put the girl inside the septic tank and closed the lid. Then I left for my duty and Putul Bora went back to the bus and slept there.

A bare perusal of the aforementioned statement clearly shows that a detailed statement had been made by him in regard to commission of the offence.

A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, where for the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even

at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, in our considered opinion, can be fully relied upon.

17. In this case, not only the confession had not been retracted, the appellant No. 1 in his examination under Section 313 of the Code accepted the same, as would be evident from the following questions and answers:

Q. No. 41: It is also in her evidence that on your production, the Magistrate asked you whether you were willing to give a confessional statement of guilt. What is your say?

Ans: The Magistrate asked me whether I was willing to make confessional statement. I wanted to give my confessional statement as I committed the offence.

Q.No. 42 : It is also in her evidence that she made you understand that you are not bound to make confessional statement, the confession so to be made would go against you, that she was not a police man but a magistrate. What is your say?

Ans : The Magistrate did explain me the above fact to me and consulted the same carefully about the result of such confession.

Q.No. 43 : It is also in her evidence that you were put in the charge in the office peon in her chamber (office) at 1.30 PM you were produced and then again at 4.45 PM for recording your statement.

Ans : Yes, I was produced before her.

Q.No. 44 : It is also in her evidence that at your production again she again explained to you the import of confession and you expressed your willingness to give confessional statement. What is your say?

Ans : Yes I, expressed my willingness to give confessional statement. I understand her all questions (sic) put to me.

Q.No. 45 : It is also in her evidence that inspite of repeated caution you were sanguine to give a confessional statement about your guilt. What is your say?

Ans : I was sanguine to given confessional statement because I was repenting to my misdeed that I did.

Q.No. 46 : It is also in her evidence that you voluntarily gave confessional statement, what is your say?

Ans. : Yes, I voluntarily gave my confessional statement because I committed the offence. I am guilty of the offence.

Q.No. 47 : It is also in her evidence that she recorded your confessional statement and the statement was read over to you and put your signatures having found the same as correct. What is your say?

Ans : Yes, my confessional statement was recorded by the Magistrate. The confessional statement so recorded was not read over to me. I put my signature in the confessional statement.

Q.No. 48 : It is also in her evidence that Ext.10 is the confessional statement recorded by her wherein Ext.10(7) to 10(8) and 10(9) are my signatures and Ext.10(1) to 10(6) are her signatures. What is your say?

Ans : Yes. Ext.10(7) to 10(9) are my signatures.

18. We are not oblivious of the general proposition of law that confession would not ordinarily be considered the basis for a conviction. We must, however, at this stage, notice that this is one of those rare cases where an appellant had stuck to his own confessional statements. He did not make any attempt to retract. He even did not state that it was not truthful or involuntary.

19. It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record. {See **Mohan Singh v. Prem Singh** MANU/SC/0849/2002 : 2003CriLJ11 , **State of U.P. v. Lakhmi** MANU/SC/0126/1998 : 1998CriLJ1411 , and **Rattan Singh v. State of HP.** MANU/SC/0177/1997 : 1997CriLJ833 .}

20. In **Aloke Nath Dutta and Ors. v. State of West Bengal** MANU/SC/8774/2006 : 2006(13)SCALE467 , this Court noticed the law in regard to the effect of a confessional statement of the accused in the following terms:

Sections 24 to 30 deal with confession. Section 24 speaks of the effect of a confession made by an accused through inducement, threat or promise proceeding from a *'person in authority'*. Whereas Section 25 and Section 26 deal with situations where such *'person in authority'* is police. It is an institutionalized presumption against confession extracted by police or in police custody. In that frame of reference, Section 24 is the genus and Sections 25 and 26 are its

species. In other words, Section 25 and Section 26 are simple corollaries flowing out of the axiomatic and generalized proposition (confession caused by inducement where inducement proceeds from a person in authority, is bad in law) contained in Section 24. They are directed towards assessing the value of a confession made to a police officer or in police custody.

The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act.

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law. [See Babubhai Udesinh Parmar v. State of Gujarat MANU/SC/8722/2006 : 2007CriLJ786 ].

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the

learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

Judicial confession must be recorded in strict compliance of the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture.

It was further opined:

In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be referable in nature. Such corroboration must be independent and conclusive in nature.

21. In **State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru** MANU/SC/0465/2005 : 2005CriLJ3950 , this Court stated:

As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in Bharat v. State of U.P. MANU/SC/0096/1970 : (1971)3SCC950 Hidayatullah, C.J., speaking for a three Judge Bench observed thus: (SCC p. 953, para 7)

Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat,

inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true

22. We may also notice that in **Sidharth and Ors. v. State of Bihar** MANU/SC/0949/2005 : 2005CriLJ4499 , this Court opined:

The confession made by the appellant Arnit Das is voluntary and is fully corroborated by the above items of evidence. The Sessions Judge was perfectly justified in relying on the confession made by the appellant Arnit Das.

23. In a case where sufficient materials are brought on records to lend assurance to the Court in regard to the truthfulness of the confession made, which is corroborated by several independent circumstances lending assurance thereto, even a retracted confession may be acted upon. {**See State of Tamil Nadu v. Kutty @ Lakshmi Narsimhan** MANU/SC/0443/2001 : 2001CriLJ4168 ; **Bhagwan Singh v. State of M.P.** MANU/SC/0040/2003 : 2003CriLJ1262 ; and **Sarwan Singh Rattan Singh v. State of Punjab** MANU/SC/0148/1957.}

24. We have analysed at some length the corroborative nature of evidences brought on records by the prosecution. The fact that the appellants were seen talking to each other, absence of the appellant No. 2 from the bus in question, his effort to sleep in another bus leaving his own bus, his absence for about 1 to 1= hour, injury/stains on his face and change of his garments during that period, all stand well proved. They, in our considered view, lend corroboration to prosecution case as also the judicial confession made by the appellant No. 1. Indeed corroboration to the said confession and the circumstantial evidences as noticed hereinbefore can also be judged from the statements made by the appellant No. 2 in his examination under Section 313 of the Code of Criminal Procedure.

The relevant questions and answers thereunder are as follows:

Q.14: Was the other accused, the watchman, present that night?

Ans : It is true the other accused, the watchman, was there.

Q.19 : Did your bus, i.e. bus No. AS-25-C-1476, start from Jorhat in the morning? Ans : That is true.

Q.25 : Where you there in the Network travels compound that night with the vehicle? Ans : That is true.

Q.32 : The witness say stains on your face and when he asked you about, you could not say anything. You had no stains in your face when you had come from Nagaon?

Ans : That is true.

Q.33 : By ext.6 the police seized the underpants you were wearing which had white stains on it. Ext 6(1) is the signature of the witness. What is your statement?

Ans : That is true.

Q.34 : Witness No. 4 has stated that on the night of occurrence he was the Conductor of bus No. AS-106- 5996 and that you were on the campus. Is that true?

Ans : That is true.

Q.36 : Witness No. 5 has stated that he is the owner of bus No. AS-25-C-1476; that the manager informed him over telephone that a girl had gone missing from the waiting room of Network travels; that he then came and went to Paltan Bazar police station; and that the police seized your undergarments. Is that true?

Ans : That is true.

Q.42 : Witness No. 9 he stated that in his presence Paltan Bazar Police seized, by ext.6, your undergarments containing white stains. What is your statement?

Ans : That is true.

Q.84 : The following morning you and the driver and the conductor started from Jorhat by that bus, and the police seized the bus at Kahara with you all. Is that true?

Ans : That is true.

Q.96 : Did the police seized your undergarments that had white stains on it? Ans : That is true.

25. Indisputably, Section 30 of the Indian Evidence Act, 1872, in a situation of the present nature, can be taken aid of. The courts below did take into consideration the confessional effect of the statements made by the appellant No. 1 as against the appellant No. 2 for arriving at an opinion that by reason thereof involvement of both of them amply stand proved.

The expression 'the court may take into consideration such confession' is significant. It signifies that such confession by the maker as against the co-accused himself should be treated as a piece of corroborative evidence. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a co-accused, be it extra judicial confession or a judicial confession and least of all on the basis of retracted confession.

26. The question has been considered in **State of M.P. through CBI and Ors. v. Paltan Mallah and Ors.** MANU/SC/0050/2005 : 2005CriLJ918 , stating:

...Under Section 30 of the Evidence Act, the extra- judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any

substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession.

33. In **Sidhartha** (supra), this Court held:

It is true that the confession made by a co-accused shall not be the sole basis for a conviction. This Court in *Kashmira Singh* v. *State of M.P.* MANU/SC/0031/1952 : 1952CriLJ839 held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

In **Ram Parkash v. The State of Punjab** MANU/SC/0051/1958 : 1959CriLJ90 , it was held:

That a voluntary and true confession made by an accused though it was subsequently retracted by him, can be taken into consideration against a co-accused by virtue of Section 30 of the Indian Evidence Act, but as a matter of prudence and practice the court should not act upon it to sustain

a conviction of the co-accused without full and strong corroboration in material particulars both as to the crime and as to his connection with that crime.

The amount of credibility to be attached to a retracted confession would depend upon the circumstances of each particular case.

It was further opined:

On the evidence in the case the confession of P was voluntary and true and was strongly corroborated in material particulars both concerning the general story told in the confession concerning the crime and the appellant's connection with crime.

{See also **Navjot Sandhu** (supra) and **Jaswant Gir v. State of Punjab** (2005) 12 SCC 438

35. Both the appellants had accepted their presence at the place of occurrence. Appellant No. 2 had accepted that there were injuries on his face. He also accepted that there were stains in his seized undergarment.

27. Ms. Makhija may be correct in saying that all the witnesses to the seizure are not truthful, but, apart from the Investigating Officer, seizure has been proved by P.W.4 and P.W.26. They were themselves suspects; they were brought to the police station. They must have been interrogated and if they were witnesses to the seizure, we do not find any reason as to why we should completely ignore the seizure of the said undergarments, particularly in regard to its relevance, vis-à-vis, the statement of the manager of the bus that he had changed his dress within the probable time of commission of the offence.

28. Indisputably, the investigation was done in a slipshod manner. The undergarments should have been sent for chemical analysis. Even the urine and blood samples, which were taken, allegedly, have been sent for their analysis in the Forensic Laboratory. According to the Investigating Officer, the report was placed on records. It, however, was not marked as exhibit. Apart from the Investigating Officer, indeed the Public Prosecutor was remiss in performing his duties.

29. Submission of Ms. Makhija, that the possibility of the other passenger committing the crime cannot be ruled out, in our opinion, is wholly misplaced. Some more passengers may be there in the waiting room, but, they were found present at the time of search of the deceased girl. Evidently, they must have been found sleeping. If they had committed the offence, some suspicious circumstances could have been found. They were not suspected even by the parents of the deceased girl. Evidently, they could not have gone out as the lock and key was with the appellant No. 1. Even no outsider would come in to commit the offence. The bathroom, where the offence had been committed, measures 5 ft. x 5 ft. It was within the locked premises. Only the septic tank was outside the premises, wherefrom the dead body of Barnali was recovered. There were two other small rooms. One was urinal for the passengers. Another was the place of drinking water. Both were on the two sides of the said bathroom. Even the office room and the store room of the Net Work Travels were within the enclosed premises. There was an office room of Air India. There were three buses, which were parked outside. Only because six other persons were there in the bus, suspicion cannot be pointed out to them.

30. It is settled that the conviction can be based solely on circumstantial evidence, but it should be tested by the touchstone of law relating thereto as laid down by this Court in **Hanumant**

**Govind Nargundkar v. State of M.P.** MANU/SC/0037/1952 : 1953CriLJ129 . {See **Sharad Birdhichand Sarda v. State of Maharashtra** MANU/SC/0111/1984 : 1984CriLJ1738 .}

31. In **Hodge's case** 168 ER 1136, it was held:

Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

He then pointed out to them the proneness of the human mind to look for and often slightly to distort the facts in order to establish such a proposition forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.

32. Appellant No. 1's involvement in the offence stands proved beyond all reasonable doubt. Apart from his conduct, his confessional statement, which is admissible in evidence under Section 164 of the Code of Criminal Procedure, is clear pointer to his guilt. Appellant No. 2's involvement is also proved. Their conduct, in particular the conduct of the appellant No. 1, as has been disclosed by the prosecution witnesses is admissible under Section 8 of the Indian Evidence Act. We are, therefore, satisfied that the appellants had rightly been found guilty of committing the offence.

33. The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the

learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, the appellant No. 1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt.

34. In **State of Rajasthan v. Kheraj Ram** MANU/SC/0618/2003 : (2003)8SCC224 , this Court has stated the law thus:

In *Machhi Singh* v. *State of Punjab* MANU/SC/0211/1983 : 1983CriLJ1457 it was observed:

The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:

(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? (SCC p.489, para 39)

The following guidelines which emerge from Bachan Singh case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. (SCC p.489, para 38)

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. (SCC pp. 487-88, paras 32-33)

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person

vis-à-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland. (SCC p.488, para 34)

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (SCC p.488, para 35)

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. (SCC p.488, para 36)

(5) When the victim of murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community. (SCC pp.488-89, para 37)

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so. (SCC p.489, para 40)

35. In **State of M.P. v. Munna Choubey and Anr.** MANU/SC/0055/2005 : 2005CriLJ913 , it was observed as under:

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu MANU/SC/0338/1991 : 1991CriLJ1845 .

36. In **Sahdeo and Ors. v. State of U.P.** MANU/SC/0423/2004 : AIR2004SC3508 , this Court opined:

As regards the sentence of death imposed on five accused persons by the sessions court, which was confirmed by the appellate court, the counsel for the appellants, Shri Sushil Kumar submitted that in the absence of clear and convincing evidence regarding the complicity of the accused, these appellants could not be visited with the death penalty, while the counsel for the State submitted that this is a ghastly incident in which eight persons were done to death and the death penalty alone is the most appropriate punishment to be imposed. Though it is proved that there was an unlawful assembly and the common object of that unlawful assembly was to kill the deceased persons, there is another aspect of the matter inasmuch as there is no clear evidence by the use of whose fire-arm all the six deceased persons died as a result of firing in the bus. It is also pertinent to note that the investigating agency failed to produce clear and distinct evidence to prove the actual overt acts of each of the accused. The failure to examine the driver and conductor of the bus, the failure to seize the bus and the absence of a proper 'mahzar', are all lapses on the part of investigating agency. Moreover, the doctor who gave evidence before the court was not properly cross- examined regarding the nature of the injuries. Some more details

could have been collected as to how the incident might have happened inside the bus. These facts are pointed out to show that the firing may have been caused by the assailants even while they were still standing on the footboard of the bus and some of the appellants may not, in fact, have had an occasion to use the fire-arm, though they fully shared the common object of the unlawful assembly. Imposition of the death penalty on each of the five appellants may not be justified under such circumstances. We take this view in view of the peculiar circumstances of the case and it should not be understood to mean that the accused persons are not to be convicted under Section 302 read with Section 149 and the death penalty cannot be imposed in the absence of various overt acts by individual accused persons. In view of the nature and circumstances of the case, we commute the death sentence imposed on A-1 Sahdeo, A-4 Subhash, A-5 Chandraveer, A-7 Satyapal and A-10 Parvinder to imprisonment for life.

37. In **Raju v. State of Haryana** MANU/SC/0324/2001 : 2001CriLJ2580 , it has been opined by this Court:

However, the next question is whether this would be a rarest of rare cases where extreme punishment of death is required to be imposed. In the present case, from the confessional statement made by the accused, it would appear that there was no intention on the part of the accused to commit the murder of the deceased child. He caused injury to the deceased by giving two brick blows as she stated that she would disclose the incident at her house. It is true that learned Sessions Judge committed error in recording the evidence of SI Shakuntala, PW 15 with regard to the confessional statement made to her, but in any set of circumstances, the evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he

gave two brick blows which caused her death. There is nothing on record to indicate that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty.

38. Yet, recently in **Amrit Singh v. State of Punjab** MANU/SC/8642/2006 : 2007CriLJ298 , this Court, in a case where the death was not found to have been intended to be caused, was of the opinion that no case under Section 302 of the Indian Penal Code was made out stating:

Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of Appellant, seeing a lonely girl at a secluded place. He had no pre-meditation for commission of the offence. The offence may look a heinous, but under no circumstances, it can be said to be a rarest of rare cases.

{See also **Sheikh Ishaque and Ors. v. State of Bihar** MANU/SC/0681/1995 : 1995CriLJ2682 , **Rony v. State of Maharashtra** MANU/SC/0199/1998 : 1998CriLJ1638 , **Bachan Singh v. State of Punjab** MANU/SC/0111/1980 : 1980CriLJ636 and **Machhi Singh** (supra).}

This aspect of the matter has recently been considered at some length by this Court in **Aloke Nath Dutta** (supra).

39. There is another aspect of this matter which cannot be overlooked. Appellant No. 1 made a confession. He felt repentant not only while making the confessional statement before the

Judicial Magistrate, but also before the learned Sessions Judge in his statement under Section 313 of the Code of Criminal Procedure.

40. It is, therefore, in our opinion, not a case where extreme death penalty should be imposed. We, therefore, are of the opinion that imposition of punishment of rigorous imprisonment for life shall meet the ends of justice. It is directed accordingly. Both the appellants, therefore, are, instead of being awarded death penalty, are sentenced to undergo rigorous imprisonment for life, but other part of sentence imposed by the learned Sessions Judge are maintained. Subject to the modification in the sentence mentioned hereinbefore, this appeal is dismissed.

We must, before parting, however, express our appreciation for Ms. Makhija who had rendered valuable assistance to us.

**Equivalent Citation:** AIR2007SC848, 2007CriLJ1145, 2008(2)GLT1, JT2007(2)SC428, RLW2007(3)SC1861, 2007(2)SCALE42

**IN THE SUPREME COURT OF INDIA**

Criminal Appeal No. 453 of 2006

Decided On: 16.01.2007

Appellants: **Bishnu Prasad Sinha and Anr. Vs.**

Respondent: **State of Assam**

**Hon'ble Judges:** S.B. Sinha and Markandey Katju, JJ.

**Acts/Rules/Orders:**

Evidence Act, 1872 - Sections 3, 8 and 24 to 30; Indian Penal Code, 1860 - Sections 34, 149, 201, 302 and 376(2); Criminal Procedure Code (CrPC), 1973 - Sections 164 and 313; Constitution of India - Articles 20(3) and 21

**Prior History:** From the Judgment and Order dated 31-8-2005 of the High Court of Gauhati in Criminal Death Reference No. 1/2005 with Crl. A. No. 20(J) of 2005

**Disposition:**

Appeal dismissed

**Case Note: Criminal – Confessional statement – Effect – Circumstantial evidences – Sections 302 and 376(2)(g) of the Indian Penal Code, 1860 and Section 8 of the Indian Evidence Act – Appellant convicted for the offence punishable under Sections 302 and 376 – Appeal filed for challenging the conviction dismissed by High court – Hence, present appeal – Appellant**

**contended that Investigation done in slipshod manner – Held, truthfulness of confession not in dispute – Confession not retracted even at later stage of trial and accepted by accused in his examination, thus, fully reliable – In absence of substantive evidence, accused can not be convicted on the basis of confession of a coaccused – Conduct of appellant admissible under Section 8 of Act – Not a case where extreme death penalty should be imposed – Imposition of punishment of rigorous imprisonment for life shall meet the ends of justice –**

**Sentence modified – Appeal dismissed.**

**Ratio Decidendi: *―Confessional statement – Effect – In absence of substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a coaccused, be it extra judicial confession or a judicial confession and least of all on the basis of retracted confession. ‖***

**JUDGMENT**

**S.B. Sinha, J.**

1. Appellants were charged with and convicted for commission of offences under Sections 376(2)(g), 302 and 201 read with Section 34 of the Indian Penal Code, 1860 for rape and murder of one Barnali Deb @ Poppy (the deceased), a 7-8 year old girl. She was travelling with her parents Bishnu Deb (father-P.W.23), Anima Deb (mother- P.W.22) and younger brother in a private transport service known as Net Work Travels from Dharmanagar (Tripura). They were on their way to Dimapur in the State of Nagaland. They reached Net Work Travels' Complex at Paltan Bazar, Guwahati at around 10.30 p.m. on 12.7.2002. There was no connecting bus to Dimapur at that time. They were advised to stay over for the night at Guwahati. Appellant No.1

was a night chawkidar of the waiting room of the said Net Work Travels. He represented that they could stay there for the night and therefore should not have any apprehension in regard to their safety. Their luggage was carried by the appellant No.1 to the waiting room. The waiting room had two openings. It was covered by grills. Only the front gate was open, which was kept under lock and key, the key whereof was with the appellant No.1.

2. The family of P.W.23 went out for dinner and came back to the said waiting room. He and both his children slept. Anima Deb (P.W.22), mother of the deceased, however, kept on sitting. Appellant No. 1 insisted on her repeatedly that she should go to sleep stating that as the waiting room would be locked, there was nothing for her to worry about. As she had not been sleeping, the appellant No. 1, allegedly, scolded her to do so. At that time, a bus bearing No. AS-25-C

1476 arrived at the said bus stop. Putul Bora - Appellant No. 2 was the 'handyman' of the said bus. While the Manager, Driver and the Conductor slept in the said bus, he did not. He was seen talking with the appellant No. 1.

3. Anima Deb-P.W.22 slept for a while. As her son had cried out, she woke up at about 3 p.m. She did not find Barnali. A hue and cry was raised by her. Being attracted by her alarm, Bishnu Deb-P.W.23 also woke up. They requested the appellant No. 1 to open the gates of the waiting room. He showed his reluctance at the first instance. He was thereafter told about the missing of the girl. On being so informed, he opined that she might be somewhere else within the room. A search was carried out in the three buses, which were at the bus stop belonging to the travel agency. Near- about places as also the railway station were searched. The bathroom situated in the said premises was also searched.

4. Shri Kapil Kumar Paul-P.W.2, the Cashier of the Net Work Travels was informed about the missing of Barnali Deb. As the girl could not be found despite vigorous search, Bishnu Deb, the father of the girl was advised to inform the police. A missing entry was lodged before the Officer-in- Charge of Paltan Bazar Police Station. At about 8.30 a.m. on 14.7.2002, a complaint was made that the flush in the toilet was not working. P.W.7- Amar Deep Basfore (sweeper) was asked by P.W.2-Shri Kapil Kumar Paul to find out the reason therefore. He later on opened the septic tank and saw the head of a small child. He immediately reported the matter to P.W.1-Shri Bidhu Kinkar Goswami as well as P.W.2-Shri Kapil Kumar Paul.

5. A First Information Report was lodged thereafter by Shri Bidhu Kinkar Goswami, the Manager of Net Work Travels. In the said First Information Report, apart from the appellant No. 1, suspicion was raised about the involvement of driver-Krishna Hazarika (P.W.26), conductor Rama Hazarika (P.W.25) and the 'handyman-Putul Bora (Appellant No. 2 herein) of the bus bearing No. AS-25-C-1476. The said bus had already left for its destination at about 6.30 in the morning. Even prior thereto, P.W.2 was persuaded that the said bus be permitted to leave early for Jorhat, which was declined.

6. Pursuant to the said First Information Report, a case under Sections 376(2)(g) and 302 read with Section 34 of the Indian Penal Code, 1860 was registered. A Magistrate was called. An inquest of the dead body was made. The said bus was intercepted and the driver-P.W.26, conductor- P.W.25 and Appellant No. 2-Putul Bora were arrested. They were brought to the police station. During the course of investigation, the appellant No. 1 made a confessional statement before the Magistrate under Section 164 of the Code of Criminal Procedure, 1973 ('the Code' for short). He gave a vivid description as to how the offence was committed by him and

the appellant No. 2. On completion of investigation, a charge-sheet was filed against the appellants. They were convicted by the learned Sessions Judge, Kamrup and sentenced to death. An appeal preferred by them, by reason of the impugned judgment, has been dismissed by the High Court. The appellants are, thus before us. At our request, Ms. Vibha Datta Makhija, learned Counsel assisted us as Amicus Curiae in the matter.

7. Evidently, there was no eye-witness to the occurrence in this case. Nobody had seen the appellants lifting the girl, committing rape and murdering her. The entire prosecution case is based on circumstantial evidences. The circumstances, which found favour with the learned Sessions Judge as also the High Court, are:

**As against Appellant No. 1:**

i) The confession of the appellant No. 1 recorded by Smt. Nirupama Rajkumari, Judicial Magistrate, 1st Class at Guwahati (P.W.8).

ii) Appellant No. 1 was the night chawkidar of the Net Work Travel Agency and the parents of the deceased girl along with their children were persuaded to stay at the waiting room in the night.

iii) P.Ws. 22 and 23 (mother and father of the deceased) were prevailed upon by the appellant No. 1 to spend the night in the waiting room. He had also carried their luggage assuring them full security and safety.

iv) The key of the waiting room was with him. Appellant No. 1 alone, thus, had the access to the waiting room. He only had access to the entire premises.

v) P.W.22-Anima Deb saw both the appellants held discussion in suspicious circumstances.

vi) Despite the information that Barnali was missing, the appellant No. 1 showed his reluctance to open the door. On the contrary, P.Ws.22 and 23 were told that she might be somewhere else in the room.

vii) The evidences brought on records go to show that the appellant No. 1 had a nefarious plan.

viii) A black coloured half pant belonging to the appellant No. 1 was seized by the police (Exhibit 3).

ix) No explanation was offered by him as to how the said half pant could be found there. It was admitted it belonged to him.

**As against Appellant No. 2:**

i) He was the 'handyman of the bus bearing No. AS-25-C-1476.

ii) The evidences of P.Ws. 22, 23 and 26 clearly point out that he held some discussions with the appellant No. 1.

iii) Although, he had made preparations to sleep in the bus, in which he was travelling, but, in fact, slept in different bus bearing No. AS-1- G-5990. No satisfactory explanation was offered by him to a question put in that behalf by P.W.4-Shri Jams Brown, conductor of said bus.

iv) P.W.3-Shri Kamal Goswami, Manager of the Travel Agency, at about 2/2.30 p.m. had suddenly felt some touch on his leg. He found the appellant No. 2 climbing the upper bunker of

the vehicle. He was wearing a long pant, although during his journey he was wearing only a jangia.

v) While the missing girl was searched, the appellant No. 2 was found to have sustained some injuries on his face, although, no such injury/stain was noticed by P.W.3 while they were coming from Nagaon to Guwahati, which showed that the girl offered resistance before being raped.

vi) A brown coloured jangia belonging to him was recovered, which was having some white stains.

vii) He made constant pressure on P.W.2-Shri Kapil Kumar Paul to allow him to leave Paltan Bazar bus stand with his vehicle.

8. Ms. Vibha Datta Makhija, learned Amicus Curiae, in support of the appellants would submit:

a) There are many missing links in the chain which have not been appreciated by the courts below in their proper perspective.

b) Seizure of the under garments of the appellants is not free from doubt as the seizure witnesses clearly stated that they had visited police station at different points of time and thus, they could not be witnesses to seizure;

c) The under garments, which were purported to have seized, had not been sent for chemical examination and thus, inference drawn by the courts below that white stains were semen stains, had not been established.

d) Although, urine and blood samples of the appellants were taken, the same having not been sent for chemical analysis, an adverse inference in this behalf should be drawn against the prosecution.

e) In the vaginal swap obtained by the doctor, no semen was found. The Forensic Science Laboratory Report was not brought on record and thus, deliberate withholding of material must be held to have weakened the prosecution case.

f) Although, the appellant No. 1 had the key of the lock, the possibility of some co-passengers committing the said offence cannot be ruled out.

g) The testimony of mother of the deceased is not reliable as she had omitted to make statements as regards the purport conduct of the appellants before the police.

h) No reliance can be placed on the confession of the appellant No. 1 as he had remained in police custody for a long time.

i) Evidence of Smt. Nirupama Rajkumari, the Judicial Magistrate (P.W.8) does not show that all statutory requirements in recording the said confession had been carried out.

9. Mr. Ng. Junior Luwang, learned Counsel appearing on behalf of the respondent, on the other hand, would submit:

(i) Confession of the appellant No. 1 itself was sufficient to uphold the judgment of conviction and sentence of both the appellants;

(ii) The depositions of the prosecution witnesses clearly suggest that offence had been committed between 1 p.m. to 3 p.m.;

(iii) The conduct of Appellant No. 1 clearly goes to show that he had committed the offence;

(iv) Appellant No. 2's admitted presence at the spot, his absence from the bus for some time, coupled with the injuries on his face, clearly point out that he had also taken part in commission of the said offence.

10. We may, at the outset, place on record that this is one of the rare cases where the witnesses examined on behalf of the prosecution, inter alia, were the employees of the company where the appellants had also been working. The presence of the appellants at the place of occurrence on the said night is not in dispute.

11. Appellant No. 1 was the chawkidar of the waiting room of Net Work Travels and he was the only person who had the key, and without his knowledge nobody could have entered into the waiting room. The waiting room was otherwise secure, having grills and collapsible gates. The second collapsible gate was also closed. The bathroom as also the latrine were situated within the said premises. The family came back to the waiting room after 10.30 p.m. The girl was found missing at about 3 O'clock. A search of the deceased was commenced. She was not found not only within the premises of the waiting room but also other nearby places. The buses belonging to other travel agencies were also searched. A search was carried out even at the railway station. The bus bearing No. AS-25-C-1476, in which the appellant No. 2 was working as a 'handyman, left at about 6.30 a.m. for Jorhat. The dead body was detected at about 9 a.m. The Manager of the Net Work Travels himself lodged the First Information Report suspecting the appellant No. 1

as also the driver, conductor and the 'handyman of the bus bearing No. AS-25-C-1476, as having committed the offence. The said bus was intercepted at about 10 a.m. and they were brought to the police station. P.W.22-the mother of the victim saw the appellants herein talking to each other. According to her she was goaded to go to sleep; she was even threatened.

12. Appellant No. 2 did not have any injury on his face earlier. Shri Kamal Goswami, the Manager of the Net Work Travels, who had travelled with the appellant No. 2 in the same bus, in no uncertain terms stated that while he went to sleep, at about 2/2.30 p.m. he suddenly felt a touch on his leg and found the appellant No. 2 moving to the upper bunker of the said vehicle. He had been wearing a long pant, although he had been wearing only a jangia while traveling from Nagaon to Guwahati. He had heard that the couple and the children were staying in the waiting room having missed their bus to Dimapur as also in regard to the searches carried out for tracing the missing girl. He also deposed to the effect that although the appellant No. 2 had some injuries on his face, he had not offered any explanation therefore. He is also a witness to the seizure of the under pants. Apparently, there is no reason to disbelieve his statement, particularly when both the appellants in their examination under Section 313 of the Code have accepted their presence. Appellant No. 2 at no point of time, even during his examination under Section 313 of the Code, could offer any suitable explanation in regard to the stains/injuries on his face.

13. Shri Krishna Hazarika, the driver of the bus, examined himself as P.W.26. He proved that the appellant No. 2 was seen to be gossiping with the appellant No. 1 inside the complex of Net Work Travels. He proved the fact that a search was carried out in regard to the missing of Barnali. He also spoke about the seizure of the under pants containing some stains. This witness

categorically stated that when they had gone to sleep, the appellant No. 2 was not seen. On the aforementioned aspects he was not even cross- examined.

14. P.W.4-Shri Jams Brown was the conductor of bus bearing No. AS-1- G-5990. Apart from corroborating the prosecution case in regard to the commotion emanating from the missing of the deceased, he had stated that after the missing girl was searched, the appellant No. 2 came into his bus. On being questioned, he had reported that he came from bus bearing No. AS- 25-C-1476 for sleeping.

15. We have noticed hereinbefore that the parents of the deceased girl (P.Ws.22 and 23) stated in details as to under what circumstances they had to stay in the waiting room. The Cashier of the Net Work Travels Shri Kapil Kumar Paul, who examined himself as P.W.2, apart from his statements which have been noticed hereinbefore, categorically stated that the appellant No. 2, together with the driver and conductor of the bus bearing No. AS-25-C-1476 persuaded pressed him to allow the bus to leave for Jorhat earlier than the scheduled time, and he refused to accede to their request. It is only because of their conduct he suspected their involvement in the crime. This witness also categorically stated that lock and key of the waiting room would always be with the chawkidar.

16. We may now consider the manner in which the confessional statement made by the appellant No. 1 was recorded. He was admittedly brought to the Court of Smt. Nirupama Rajkumari, the Judicial Magistrate, 1st Class at Guwahati (P.W.8), for getting his statement recorded on 24.7.2002. The voluntariness and truthfulness of the confession is not in dispute. Appellant No. 1 was produced before P.W.8 in her official Chamber at about 4.45 p.m. He was warned that the confession made by him might be used in evidence against him. She recorded the confessional

statement of the appellant No. 1 being satisfied as regards the voluntariness thereof. The said confessional statement reads as follows:

I am the night watchman of the Paltan Bazar counter of Network travels. On 13/7/02 I was on duty at the counter. Around 10.30 that night a bus arrived from Dharmanagar. Some passengers : from that bus came and requested me to allow them to stay at the counter for the night. The group comprised a man, two women a girl of about 8 or 9 and a child of about 3 or 4. I allowed them to sleep at the counter. Around 1.30 am one 'NR Super' bus (No. 1476) arrived from Jorhat and its staff slept in the bus itself. Around 2 a.m. Putul Bora, handyman of the N.R. Super bus got down from the bus and came to me. Then I proposed to Putul Bora rape of the said 8 or 9 year old girl sleeping at the counter. According to my plan I and Putul Bora lifted the said 8 or 9 year girl in her sleep and in the bathroom at the counter, we raped her, first me and then Putul Bora. As the girl was asleep, she did not shout. After having raped her, we found the girl still. Then I and Putul Bora opened the lid of the septic tank of the lavatory at the counter, put the girl inside the septic tank and closed the lid. Then I left for my duty and Putul Bora went back to the bus and slept there.

A bare perusal of the aforementioned statement clearly shows that a detailed statement had been made by him in regard to commission of the offence.

A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, where for the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even

at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, in our considered opinion, can be fully relied upon.

17. In this case, not only the confession had not been retracted, the appellant No. 1 in his examination under Section 313 of the Code accepted the same, as would be evident from the following questions and answers:

Q. No. 41: It is also in her evidence that on your production, the Magistrate asked you whether you were willing to give a confessional statement of guilt. What is your say?

Ans: The Magistrate asked me whether I was willing to make confessional statement. I wanted to give my confessional statement as I committed the offence.

Q.No. 42 : It is also in her evidence that she made you understand that you are not bound to make confessional statement, the confession so to be made would go against you, that she was not a police man but a magistrate. What is your say?

Ans : The Magistrate did explain me the above fact to me and consulted the same carefully about the result of such confession.

Q.No. 43 : It is also in her evidence that you were put in the charge in the office peon in her chamber (office) at 1.30 PM you were produced and then again at 4.45 PM for recording your statement.

Ans : Yes, I was produced before her.

Q.No. 44 : It is also in her evidence that at your production again she again explained to you the import of confession and you expressed your willingness to give confessional statement. What is your say?

Ans : Yes I, expressed my willingness to give confessional statement. I understand her all questions (sic) put to me.

Q.No. 45 : It is also in her evidence that inspite of repeated caution you were sanguine to give a confessional statement about your guilt. What is your say?

Ans : I was sanguine to given confessional statement because I was repenting to my misdeed that I did.

Q.No. 46 : It is also in her evidence that you voluntarily gave confessional statement, what is your say?

Ans. : Yes, I voluntarily gave my confessional statement because I committed the offence. I am guilty of the offence.

Q.No. 47 : It is also in her evidence that she recorded your confessional statement and the statement was read over to you and put your signatures having found the same as correct. What is your say?

Ans : Yes, my confessional statement was recorded by the Magistrate. The confessional statement so recorded was not read over to me. I put my signature in the confessional statement.

Q.No. 48 : It is also in her evidence that Ext.10 is the confessional statement recorded by her wherein Ext.10(7) to 10(8) and 10(9) are my signatures and Ext.10(1) to 10(6) are her signatures. What is your say?

Ans : Yes. Ext.10(7) to 10(9) are my signatures.

18. We are not oblivious of the general proposition of law that confession would not ordinarily be considered the basis for a conviction. We must, however, at this stage, notice that this is one of those rare cases where an appellant had stuck to his own confessional statements. He did not make any attempt to retract. He even did not state that it was not truthful or involuntary.

19. It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record. {See **Mohan Singh v. Prem Singh** MANU/SC/0849/2002 : 2003CriLJ11 , **State of U.P. v. Lakhmi** MANU/SC/0126/1998 : 1998CriLJ1411 , and **Rattan Singh v. State of HP.** MANU/SC/0177/1997 : 1997CriLJ833 .}

20. In **Aloke Nath Dutta and Ors. v. State of West Bengal** MANU/SC/8774/2006 : 2006(13)SCALE467 , this Court noticed the law in regard to the effect of a confessional statement of the accused in the following terms:

Sections 24 to 30 deal with confession. Section 24 speaks of the effect of a confession made by an accused through inducement, threat or promise proceeding from a *'person in authority'*. Whereas Section 25 and Section 26 deal with situations where such *'person in authority'* is police. It is an institutionalized presumption against confession extracted by police or in police custody. In that frame of reference, Section 24 is the genus and Sections 25 and 26 are its

species. In other words, Section 25 and Section 26 are simple corollaries flowing out of the axiomatic and generalized proposition (confession caused by inducement where inducement proceeds from a person in authority, is bad in law) contained in Section 24. They are directed towards assessing the value of a confession made to a police officer or in police custody.

The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police unless made in the immediate presence of a magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act.

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law. [See Babubhai Udesinh Parmar v. State of Gujarat MANU/SC/8722/2006 : 2007CriLJ786 ].

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the

learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

Judicial confession must be recorded in strict compliance of the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture.

It was further opined:

In a case of retracted confession, the courts while arriving at a finding of guilt would not ordinarily rely solely thereupon and would look forward for corroboration of material particulars. Such corroboration must not be referable in nature. Such corroboration must be independent and conclusive in nature.

21. In **State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru** MANU/SC/0465/2005 : 2005CriLJ3950 , this Court stated:

As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in Bharat v. State of U.P. MANU/SC/0096/1970 : (1971)3SCC950 Hidayatullah, C.J., speaking for a three Judge Bench observed thus: (SCC p. 953, para 7)

Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat,

inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true

22. We may also notice that in **Sidharth and Ors. v. State of Bihar** MANU/SC/0949/2005 : 2005CriLJ4499 , this Court opined:

The confession made by the appellant Arnit Das is voluntary and is fully corroborated by the above items of evidence. The Sessions Judge was perfectly justified in relying on the confession made by the appellant Arnit Das.

23. In a case where sufficient materials are brought on records to lend assurance to the Court in regard to the truthfulness of the confession made, which is corroborated by several independent circumstances lending assurance thereto, even a retracted confession may be acted upon. {**See State of Tamil Nadu v. Kutty @ Lakshmi Narsimhan** MANU/SC/0443/2001 : 2001CriLJ4168 ; **Bhagwan Singh v. State of M.P.** MANU/SC/0040/2003 : 2003CriLJ1262 ; and **Sarwan Singh Rattan Singh v. State of Punjab** MANU/SC/0148/1957.}

24. We have analysed at some length the corroborative nature of evidences brought on records by the prosecution. The fact that the appellants were seen talking to each other, absence of the appellant No. 2 from the bus in question, his effort to sleep in another bus leaving his own bus, his absence for about 1 to 1= hour, injury/stains on his face and change of his garments during that period, all stand well proved. They, in our considered view, lend corroboration to prosecution case as also the judicial confession made by the appellant No. 1. Indeed corroboration to the said confession and the circumstantial evidences as noticed hereinbefore can also be judged from the statements made by the appellant No. 2 in his examination under Section 313 of the Code of Criminal Procedure.

The relevant questions and answers thereunder are as follows:

Q.14: Was the other accused, the watchman, present that night?

Ans : It is true the other accused, the watchman, was there.

Q.19 : Did your bus, i.e. bus No. AS-25-C-1476, start from Jorhat in the morning? Ans : That is true.

Q.25 : Where you there in the Network travels compound that night with the vehicle? Ans : That is true.

Q.32 : The witness say stains on your face and when he asked you about, you could not say anything. You had no stains in your face when you had come from Nagaon?

Ans : That is true.

Q.33 : By ext.6 the police seized the underpants you were wearing which had white stains on it. Ext 6(1) is the signature of the witness. What is your statement?

Ans : That is true.

Q.34 : Witness No. 4 has stated that on the night of occurrence he was the Conductor of bus No. AS-106- 5996 and that you were on the campus. Is that true?

Ans : That is true.

Q.36 : Witness No. 5 has stated that he is the owner of bus No. AS-25-C-1476; that the manager informed him over telephone that a girl had gone missing from the waiting room of Network travels; that he then came and went to Paltan Bazar police station; and that the police seized your undergarments. Is that true?

Ans : That is true.

Q.42 : Witness No. 9 he stated that in his presence Paltan Bazar Police seized, by ext.6, your undergarments containing white stains. What is your statement?

Ans : That is true.

Q.84 : The following morning you and the driver and the conductor started from Jorhat by that bus, and the police seized the bus at Kahara with you all. Is that true?

Ans : That is true.

Q.96 : Did the police seized your undergarments that had white stains on it? Ans : That is true.

25. Indisputably, Section 30 of the Indian Evidence Act, 1872, in a situation of the present nature, can be taken aid of. The courts below did take into consideration the confessional effect of the statements made by the appellant No. 1 as against the appellant No. 2 for arriving at an opinion that by reason thereof involvement of both of them amply stand proved.

The expression 'the court may take into consideration such confession' is significant. It signifies that such confession by the maker as against the co-accused himself should be treated as a piece of corroborative evidence. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of a co-accused, be it extra judicial confession or a judicial confession and least of all on the basis of retracted confession.

26. The question has been considered in **State of M.P. through CBI and Ors. v. Paltan Mallah and Ors.** MANU/SC/0050/2005 : 2005CriLJ918 , stating:

...Under Section 30 of the Evidence Act, the extra- judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any