

GAHC010138622017



IN THE GAUHATI HIGH COURT

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

CRL.A(J) No. 62 OF 2017

Sri Doman Mardi,
S/o- Sri Chapal Mardi,
R/o- No. 1, Kadabil, P.S.- Mazbat,
Dist- Udalguri, BTAD (Assam)

.....Appellant

-Versus-

- 1.** The State of Assam
- 2.** XXX (*Name of the victim not disclosed*),
W/o- XXX,
R/o- XXX,
P.S. XXX, Dist- Udalguri.

.....Respondents

:: BEFORE ::

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**

For the Appellant : Mr. D. Talukdar, Advocate

For the Respondent : Ms. B. Bhuyan, Addl. P.P.
(for respondent No. 1)

: Ms. K. Phukan, Advocate
(for informant)

Date of Hearing : 07.06.2023

Date of Judgment : 20.06.2023

JUDGMENT & ORDER (CAV)

(Mridul Kumar Kalita, J)

1. This criminal appeal has been registered on receipt of an appeal petition from the appellant, namely, Doman Mardi, who has been detained in District Jail, Udalguri, through the Superintendent District Jail, Udalguri. In this appeal, the judgment delivered by the learned Sessions Judge, Udalguri in Sessions Case No. 116(U)/2014, on 30.06.2017, has been impugned. By the said judgment, the present appellant along with one Sona Besra @ Mandal were convicted under Section, 302/34 of the Indian Penal Code and also under Sections 376/34 of the Indian Penal Code and they were sentenced to undergo rigorous imprisonment for seven years under Section 376/34 of Indian Penal Code and also sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/- and in default of payment of fine to undergo rigorous imprisonment for one month under Section 302/34 of the Indian Penal Code. Both the sentences were directed to run concurrently.

2. The facts relevant for adjudication for this jail appeal, in brief, are as follows:-

(i) That on 14.10.2023, the first informant "X" (*real name not disclosed*) had lodged an FIR before the Officer-in-charge of

Mazbat Police Station, *inter alia*, stating that on 13.10.2013, at about 7.30 P.M. she along with her mother "Y" (*real name not disclosed*) and her minor son were on the way back to the home from Udalguri. At that time, the appellant along with one Sona Besra @ Mandal attempted to commit rape on both the first informant and her mother in secluded place at Kadabeel Kahijungle on the bank of river Bhutiamari. It is stated in the FIR that somehow the informant could escape with her son from that place, however, the accused persons raped her mother and thereafter killed her and left her dead body there. It is also stated in the FIR that as it was night and the people of her village were busy in Durga Puja, no search was made on that night and on the following morning, the dead body was found at the said place of occurrence and injuries were found on the dead body.

(ii) On receipt of the said FIR, the Mazbat P.S Case No. 47/13 under Sections 376/302/34 of IPC was registered and investigation was initiated. On completion of the investigation, the charge-sheet was laid against the present appellant, namely, Doman Mardi and one Sona Besra @ Mandal under Sections 376/302/34 of IPC. The present appellant as well as Sri Sona Besra @ Mandal faced the trial remaining in custody. During trial, the prosecution side examined twenty prosecution witnesses and sixteen documents were exhibited as Ext. 1 to Ext. 16. The present appellant was examined under Section 313 Cr.P.C. during which he denied his

involvement in the alleged offences and pleaded his innocence. However, by the judgment which is impugned in this appeal, learned Sessions Judge, Udalguri convicted and sentenced the present appellant as well as co-accused, namely, Sona Besra @ Mandal in the manner as described in paragraph No. 2 herein above.

(iii) It is pertinent to mention herein that the co-accused, namely, Sona Besra @ Mandal had also filed one jail appeal which was registered as Criminal Appeal (Jail) No. 63/2017 wherein it was found that the accused Sona Besra was minor at the time of commission of the alleged offence hence, his conviction under Sections 376/302 of IPC was set aside and the matter was remitted back to the jurisdictional Juvenile Justice Board through the learned Sessions Judge, Udalguri for doing needful in accordance with law.

3. We have heard Mr. D. Talukdar, learned counsel for the petitioner as well as Ms. B. Bhuyan, learned Additional Public Prosecutor and Ms. K. Phukan, learned counsel appearing for the informant. Before considering the submissions of learned counsel for both sides, let us go through the relevant evidence on record.

4. PW-1, "X" who is the first informant of this case, has deposed that the appellant is known to her and the incident took place, at about 6 to 7 p.m., when she was returning home after enjoying Puja with her mother

"Y". She has deposed that when they reached the bank of Kadabil River both the accused persons caught hold of her and she saw both of them including the present appellant in the light of moon. She has further deposed that she tried to free herself from their clutches and, since, she had a child with her, she requested the accused persons to let her go and, thereafter the accused persons caught hold of her mother. She has deposed that she saw the present appellant committing bad act (*rape*) on her mother. She has further stated that in the light of the moon, she saw both the accused persons committing bad act, thereafter, she came back and narrated the incident to her brother, namely, Swapal Murmu in detail and she lodged the *ejahar* on the next day. She has also stated that the Police got her statement recorded by a Magistrate. She has also stated that she herself saw the accused persons throttling her mother after committing bad act on her.

5. During cross-examination, PW-1 has stated that her mother was of about 72-80 years of age. She has also stated that after catching hold of her, the present appellant lifted her wearing apparels and she raised alarm. She has also stated that she recognized the present appellant who was clad in a sporting and other accused was clad in a pair of shorts. She has denied the suggestion put to her by the defence side that she did not state to the Police that the present appellant had pulled her on the bank of Gadabil River and that the accused duo had throttled her mother.

6. PW-2, Sri Sagen Murmu, who is the younger brother of the informant, has deposed that he did not witness the incident. However, he

has deposed that the complainant had told him that while she and her mother were coming back from Udalguri, the present appellant and another accused stopped them and both of them killed her mother after committing bad act on her. He has further deposed that on being informed, he along with his brother Swapal Murmu went to the bank of the river and saw the dead body of his mother there. He has also stated that dead body was in nude state. He has also deposed that the present appellant along with other accused Sona Besra @ Mandal confessed before the Police that they had committed the murder.

During cross-examination, PW-2 has stated that he knows both the accused persons. He was put some suggestive questions by learned counsel for the defence which were all answered in negative by him.

7. PW-3, Sri Sarkar Mardi, who is the elder brother of the informant, has stated that he came to know about the incident from the informant only who told him that when she and her mother were returning home from Udalguri after enjoying Puja, the accused persons grabbed her and since she had a child, they released her, however, they caught hold of her mother and killed her mother after committing bad act on her. PW-3 has also stated that when he went to the place of occurrence, he saw the dead body of the mother of the first informant and after that Sagen Mardhi, Lakhan Mardhi, Raju Soren, Siru Soren and other villagers apprehended the present appellant, who told them that he along with Sona Besra had killed the mother of the first informant after committing rape. Later on, they were arrested by the Police. PW-3 has also deposed that the accused

persons also stated before the Police that they had killed the mother of the first informant by striking her with stone after committing rape on her and on being shown by the accused persons, the Police had seized the said stone.

During cross-examination, PW-3 has deposed that the deceased was his neighbour. He has also deposed that the public apprehended the present appellant in morning after recovery of the dead body of the mother of the first informant. He has also deposed that the present appellant confessed his guilt before the public.

8. PW-4, Sri Sapal Murmu, who is the younger brother of the first informant, has deposed that he knows both the accused persons. He has also deposed that he did not witness the incident himself. However, first informant i.e. his sister narrated about the incident to him at night. He has stated that he went to the place of occurrence on the following day where he saw the dead body of his mother lying nude at the place of occurrence. He has also stated that the public later on apprehended the appellant and the other co-accused and both of them confessed before the public that they had killed his mother.

During cross-examination, PW-4 has stated that after getting information about the incident he did not go to the place of occurrence at night. He had also stated that he informed the public in the morning, he did not inform the public at night because almost all of the public were at the Durga Puja Pandal. He also denied a suggestion put to him by the

learned defence counsel that his mother died by falling down after consuming liquor.

9. PW-5, Sri Sonaram Gowala, has deposed in his evidence that he was informed, over telephone, about the incident of murder by one Mandal Kandurai, the VDP Secretary of the Village to which the complainant belongs and after getting information he went to the place of occurrence where he saw the dead body of the first informant's mother was lying. He has also noticed the injuries on the face of the dead body. He has also deposed that public apprehended the present appellant.

During cross-examination, PW-5 has stated that he only came to know about the incident from VDP Secretary Mandal Khandalai, however, he does not have any personal knowledge about the incident.

10. PW-6, Sri Lakhi Ram Hembram has deposed that he was informed about the incident by brother of the first informant and after knowing about the incident he went to the place of occurrence.

During cross-examination, he has stated that the public apprehended the present appellant and had confessed that he had killed her. He did not saw the other accused persons in the place of occurrence.

11. PW-7, Sri Bishu Hembram, has also stated that he came to know about the incident from the first informant that the appellant and other accused had killed the mother of the first informant after committing bad act on her. He has also deposed that public apprehended them and in his presence the accused persons confessed about committing bad act on the

mother of the first informant and thereafter killing her by striking with a stone.

During cross-examination, PW-7 has deposed that he came to know about the incident in the morning only. He has also deposed that when public apprehended the appellant he was also present there and the appellant was also beaten up a bit. However, he had confessed his guilt before a being beaten up.

12. PW-8, Sri Laxman Sahu, has deposed that he did not witnessed the incident himself. He has stated that after the incident he went to Mazbat Police Station for some personal work he saw both the accused persons before Officer-in-charge of the Police Station. He has also stated that both the accused persons confessed their guilt before the Officer-in-charge of Police Station in his presence. When they were confessing before the Officer-in-charge of the Police Station, one Nilamani Sarma did the recording of the said confession in DVD which was exhibited as Ext. 2.

During cross-examination, PW-8 has stated that he had not seen the DVD and the memory card which were seized through Ext. Nos. 2 and 3 in the Court on the day when he deposed as PW-8. He has answered in negative to the suggestion given to him that the deceased died after falling down on a stone in a drunken condition.

13. PW-9, Sri Nilomoni Sarmah, who is a part-time Freelance Journalist, has deposed that he saw both the accused persons in the Police Station on the following day of the incident when the Officer-in-charge of the Mazbat

Police Station requested him to do the video recording of the confession made by two accused persons who killed the mother of informant after committing rape. He has further stated that both the accused persons confessed their guilt in front of the camera and he made the video recording of the same. He has also stated that the Police seized the DVD and the memory card. He has further deposed that after making confession in his presence, both the accused show the places where they had committed rape and had killed the victim.

During cross-examination, PW-9 has deposed that he does not have any personal knowledge about the incident and he has not seen the memory card or the DVD used for recording, in the Court on the date of his deposing as PW-9 before the Court. PW-9 was re-examined on 11.12.2014, during which he exhibited the DVD as M.Ext- 1. During re-examination, PW-9 has stated that at the time of recording the Police were there and the Police went to the place of occurrence as led by the accused persons.

14. PW-10, Sri Robin Murmu, has deposed that the first informant is his elder sister and on the day of incident, he was at Hugrajuli and on his return on the following day, he was informed by the first informant about the incident of murder of his mother by the two accused persons. He has also stated that the Police seized two half pants worn by the accused persons and he put his thumb impression on the seizure list.

15. PW-11, Sri Mangal Soren, has deposed that he had not seen the incident himself, however, when the public apprehended both the accused

persons he went there and he saw that both of them confessed their guilt before public. He has also stated that Police seized two half pants and he has put his thumb impression on the seizure list.

During cross-examination also, he reiterated that both the accused confessed before public in his presence that they had killed the mother of the first informant after committing rape on her. He has also stated that the public did not assault the accused persons.

16. PW-12, who is the Constable at Mazbat Police Station has deposed that on 18.10.2013 when he was in duty, SI Dipak Das has seized a DVD RO 4.7 GB cassette from Nilamani Sarma and prepare one seizure list on which he put his signature. He exhibited the said seizure list as Ext. 2 and his signatures thereon as Ext. 2(2).

During cross-examination, he has deposed that he is not aware if any recording was done in the Police Station on that day.

17. PW-13, Sri Bhuban Kalita, has deposed that both the accused persons confessed that they are maternal uncle and nephew by relation and both of them had raped the old woman and apprehending that she might tell others about it, they had killed her by striking with a flat stone. He has also deposed that the video recording of their confession was also made and he was present at that time.

During cross-examination, he has stated that video recording was done in the Police Station itself.

18. PW-14, who is the Senior Scientific Officer, Serology Division, Directorate of Forensic Science Laboratory, Assam, Kahilipara, Guwahati, has deposed that on 13.12.2013 he was advised to examine one parcel which was received in their office on 19.10.2013 in connection with Mazbat P.S. Case No. 47/13 under Sections 376/302/34 IPC. The said parcel consisted of three exhibits enclosed with cloth cover which was sealed. The description of the articles received by PW-14 is as follows:-

"DESCRIPTION OF ARTICLES:-

- 1. One white coloured dirty petticoat contains stain of suspected blood and semen. Marked as "A". Sero No.3236/A.*
- 2. One grey and blue coloured half pant contains stain of suspected blood and semen. Market as "B". Sero No.3236/B.*
- 3. One parrot green coloured underwear contains stain of suspected blood and semen. Marked as "C". Sero No.3236/C."*

The result of examination is as follows:-

"RESULT OF EXAMINATION:-

The exhibit No. Sero No.3236/A, Sero No.3236/B and Sero Sero No.3236/C gave positive test for human blood and negative test for spermatozoa (semen)."

During cross-examination, PW-14 has deposed that he has not tested the blood stains, hence, he is not in a position to say as to whom the said blood stain belongs to.

19. PW-15 who was posted as Chief Judicial Magistrate on 12.03.2014 has deposed that he has record the statement of witness of Sonaram Gowala under Section 164 Cr.P.C. which he exhibited as Ext. 2.

20. PW-16, Sri O. Mize, who was posted as Judicial Magistrate, First Class, Udalguri on 15.10.2013 has deposed that he has recorded the statement of "X", informant of this case, in connection with Mazbat P.S. Case No. 47/13, under Section 164 Cr.P.C, He was not cross examined by the defence side.

21. PW-17- Smt. Gorathi Tigga, who was working as Women Home Guard in Mazbat Police Station on 14.10.2013 has deposed that as per instruction of the Investigating Officer, she brought the witness "X" (the informant) to get her statement recorded under Section 164 Cr.P.C.

During cross-examination, she has also deposed that she has to be her signature on the seizure list through which white petticoat was seized.

22. PW-18, Sri Sontan Karmakar, has deposed that he was called by the Police when they took the accused persons to the place of occurrence from where the Police had seized a stone with which the accused had killed the deceased. He exhibited the seizure list as Ext. 1.

23. PW-19, Dr. Arpan Mazumdar, who is the Demonstrator in the Department of Forensic Medicine, GMCH, has deposed that on 17.10.2013 while he was working as Demonstrator, GMCH, he performed post-mortem upon the dead body of "Y", 50 years old female and dead body was brought and identified by UBC/349, Unish Ali, Swapla Murmu, in connection

with Mazbat P.S. Case No. 47/13 under Section 376/302/34 of IPC. He has further deposed that on examination, he found following:-

"EXTERNAL APPEARANCE:-

A female dead body found in decomposed state wearing white petticoat (present over the lower parts of legs) and blouse (which is open from front) Peeling of skin present at places. Maggots at varying stages of development are present all over the body. Mouth are easily blockade. Eyes and mouth are eaten by the maggot. Rigor-mortis is passed of.

Injuries:-

- (1) *On dissection the chest wall muscles are contused on both sides.*
- (2) *Clavicle is fracture on right side.*
- (3) *Sternum is fracture (middle 1/3rd)*
- (4) *Fracture of ribs present on both sides (3rd to 6th ribs)*

No ligature mark is detected around the neck. On dissection the neck tissues are found contused on both sides. Thyroid cartilage and hyoid Bones are found intact.

N.B.:- Two slides taken, which shows negative results for the presence of spermatozoa."

He has further deposed that in his opinion, the death was due to asphyxia as a result of combined effect of traumatic asphyxia and ante-

mortem compression of neck which is homicidal in nature and caused by blunt force impact and approximate time since death 3 to 5 days.

During cross-examination, by defence side, PW-19 has stated that two slides were taken from the posterior phoenix of the vagina which shows negative results for the presence of spermatozoa.

24. PW-20, Sri Dipak Das, who is the Investigating Officer of this case, has deposed that on 14.10.2013 while he was working as a Second Officer in Mazbat Police Station, one Kushal Bhengra, a resident of village Gosenpur under Mazbat P.S. given information that a dead body was lying on the bank of river Bhutiamari at Kadabeel Jungle basti. Accordingly, a GD Entry No. 226 dated 14.10.2013 was made in the Police Station and he was entrusted with the investigation and accordingly he accompanied with Police staff rushed to the place of occurrence. He has further deposed that by arrival at the place of occurrence i.e. Bhutiamari river, he found a dead body of women lying in a little deep drain and the people present there had apprehended the present appellant and kept him there. He has further deposed that he drew sketch map of the place of occurrence and examined the witness and Executive Magistrate, Bhaskarjyoti Mahanta arrived there and held inquest on the dead body, thereafter, the accused was taken to Police Station. In the Police Station, an FIR was also lodged by the present informant.

PW-20 has further deposed that he also questioned the first informant as well as some of her companions in the Police Station and later

on the other accused, namely, Sona Besera was also arrested for Mazbat town. He has also stated that he took other usual steps for investigation like sending the dead body for post-mortem examination and seizing of the available incriminating materials. He has also stated that he recorded the statements of both the accused persons using electronic device. It is also stated that in their statement, the accused persons confessed the commission of crime. He has also stated that he forwarded both the accused persons for recording their statement under Section 164 Cr.P.C., however, in the Court they declined to make any confessional statement. He has also stated that at the time of re-construction of crime scene, the accused persons showed the place where they had committed the crime and the manner in which they committed the crime. They also showed the stone with which they killed the deceased and accordingly the said stone was seized from the place of occurrence. He had exhibited the FIR which was lodged by the first informant of this case as Ext. 10. He has also exhibited the certified copy of the GD Entry No. 226 dated 14.10.2013 as Ext. 11. He has also exhibited the seizure list of the stone which was used for commission for killing of the mother of the first informant as Ext.1. He had exhibited the seizure list of memory card in which the confessional statement of accused persons kept recorded as Ext. 3 and seizure list of Cassette in which re-construction of crime scene was recorded as Ext. 4, Seizure list of petticoat of the deceased as Ext.6, seizure list of the pair of shorts of the present appellant as Ext. 12, seizure list of the pair of parrot (Green) coloured which was worn by Sona Besra as Ext. 13, the statement

of present appellant made before the Investigating Officer as Ext. 14, statement of Sona Besra @ Mondol Besera made before the Investigating Officer as Ext. 15 and the charge-sheet as Ext. 16.

During cross-examination, he has stated that though the date of incident as mentioned in the *ejahar* as 13.10.2013 but he received the same on 14.10.2013. He has also stated that he did not get the DNA test of the two accused persons done. He has also deposed that the first informant had stated before him that the accused person caught hold of her and she could identify the accused. She has also stated before him that she could see the face of the accused by the light of the moon. He has denied the suggestion that the investigation was not properly done by him.

25. During his examination under section 313 of the Code of Criminal Procedure, 1973 the appellant gave no explanation apart from squarely denying the testimony of prosecution witnesses which were incriminating in nature against him. He pleaded his innocence. Though, during his examination under section 313 of the Code of Criminal Procedure, 1973, he had stated that he would adduce defence evidence, however, no defence evidence was adduced by the present appellant.

26. Mr. D. Talukdar, learned counsel for the appellant has submitted that learned trial court has based its finding of conviction against the present appellant mainly on the testimony of sole eye witness i.e. PW-1, who is also the informant in this case, who has deposed during trial that she saw the accused persons committing bad act (rape) of her mother and

she identified both the accused in the moonlight, however, in her statement recorded under Section 164 Cr.P.C. she has not stated that she saw the accused persons committing bad act (rape) on her mother. Learned Counsel for the appellant has submitted that as the sole eye witness, who is also the daughter of the deceased, has made exaggerations and embellishments while deposing as PW-1, hence, her testimony ought not to have been relied upon for arriving at a finding of guilt of the present appellant. He has also submitted that all other prosecution witnesses are reported witnesses and the appellant, during his examination under section 313 Cr.P.C, has denied making any extrajudicial confessional statement before said witnesses, hence learned trial court erred in arriving at the finding of guilt the present appellant basing on said evidence.

27. On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor has submitted that testimony of PW-1 to the effect that the present appellant caught hold of her near the bank of Kadabeel river has remained uncontroverted. She has further submitted that the place of occurrence in the instant case is a secluded place and the presence of the present appellant in the said place has been proved by the testimony of PW1, however, the appellant has failed to explain what he was doing there at that time. The learned Additional Public Prosecutor has further submitted that merely because of the fact that the PW-1 happens to be the daughter of the deceased, her testimony may not be discarded. In support of her contention, she has cited a ruling of Hon'ble Supreme Court of India

in "***Bijoy Singh v. State of Bihar***" reported in **(2002) 9 SCC 147** wherein it was observed that for merely being relatives of the deceased or the injured is no ground to reject the testimony of the witnesses who are otherwise found to be trustworthy and reliable. Learned Additional Public Prosecutor also submitted that the appellant, along with co-accused, had showed the stone, which was used for killing the mother of first informant, to the police and this evidence also lends credence to the prosecution story. She has submitted that learned trial court has rightly convicted the present appellant under section 376/34 of Indian penal code and 302/34 of Indian Penal Code and no interference should be made in the finding of conviction as well as in the sentence imposed by the learned trial court.

28. We have considered the rival submissions made by learned counsels for both the sides. On perusal of the impugned judgment, it appears that learned trial court mainly relied upon the testimony of PW-1 ('X', the first informant) coupled with testimony of PW-3, PW-4, PW-6 & PW-11 before whom the appellant had made extrajudicial confession. It also appears that learned trial court also relied on testimony of PW- 20 (*the Investigating Officer*), wherein he deposed that the accused persons led him to the place of occurrence from where he seized one stone, on being shown by the accused persons, which was used for commission of the offence. Learned trial court treated the evidence regarding recovery of the stone used for commission of offence as admissible under section 27 of the Indian Evidence Act. Though, there is also evidence on record regarding confession of guilt by the present appellant before police, the

learned trial court has correctly discarded the said evidence as inadmissible.

29. As regards conviction of the present appellant under section 376/34 of the Indian Penal Code is concerned, it appears that though PW-1 has deposed before the learned trial court that she saw the present appellant committing bad act (rape) on her mother, however, she has not stated so either in her statement recorded under section 161 of Cr.P.C before the Investigating Officer in her statement recorded under section 164 of Cr.P.C before Judicial Magistrate. In both her previous statements, she has only stated that present appellant had caught hold of her and she could identify the present appellant and she somehow escaped but her mother was detained by the accused persons. Thus there appears to be an exaggeration made by the informant while deposing as PW-1 during trial. Though, PW-1 made some exaggerations, while deposing as a prosecution witness during the trial, we are of the considered opinion that if we ignore the exaggerated part of her testimony, the remaining part of her testimony still inspire confidence as it remained uncontroverted. However, we are of the considered opinion that her testimony to the effect that she saw the present appellant committing bad act on her mother is not believable as the omission on her part to state so in her statements recorded under section 161 and 164 of the Code of Criminal Procedure, 1973 amounts to contradiction and makes that portion of her testimony unreliable where she has stated that she saw the appellant committing bad act on her mother.

30. Further, though the confession made before police is inadmissible and has been correctly not relied upon by the learned trial court, however, even if we peruse the said confessional statement, which is exhibited as Exhibit 14, it appears that the present appellant did not confess that he committed rape on the old woman(deceased), he had only stated that co accused 'Mandal' had committed rape on old woman and the present appellant only stated that he caught hold of the daughter of the deceased and later on let her go and that he and the co accused had killed the mother of the first informant.

31. The forensic evidence, on record, i.e., the testimony of PW-14 (*Senior Scientific Officer, Serology Division, Directorate of Forensic Science Laboratory, Kahilipara, Assam*) as well as Forensic Laboratory Report shows that no traces of semen were found on the seized clothes of either the deceased or the appellant. Further, the testimony of PW-19, i.e., the doctor who conducted the post-mortem examination of the deceased, also shows that the slides taken from posterior phoenix of the vagina of the deceased shows negative result for the presence of spermatozoa. Thus, the forensic evidence does not suggest that the deceased was also raped before being killed.

32. As regards extrajudicial confession made by the present appellant before PW-3, PW-4, PW-6, PW-7, and PW-11, it appears that PW-3 has deposed that on being apprehended by villagers, the present appellant confessed that he along with Sona Bersa killed the mother of the first informant to committing rape on her. Whereas PW-4 has stated that both

the accused persons confessed killing of the mother of the first informant. PW-4's testimony is silent regarding confession by the present appellant of committing rape on the deceased before killing her. Similarly PW-6 also deposed only regarding confession by the accused persons that they committed murder without indicating anything regarding confession of the rape by the present appellant. PW-7 was deposed that both the accused persons confessed before the public that after committing bad act on the informant's mother, they kill her by striking with stone. PW-11 has deposed that both the accused persons had confessed their guilt before the public without specifying as to which accused confessed what. Thus, we have seen from the testimonies of PW-3, PW-4, PW-6, PW-7, and PW-11 that said oral testimonies are not uniform as regards extrajudicial confession by the present appellant regarding commission of rape by him, though there is uniformity as regards confession regarding killing of the deceased. We have to also remember that during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has denied making any such extrajudicial confessional statement. Otherwise also, an extrajudicial confession is a weak evidence in itself unless corroborated by other cogent evidence. In the instant case, in view of discussion made and reasons stated in foregoing paragraphs, we are of the considered opinion that the available material, on record, is not sufficient to come to a finding that the present appellant also committed rape on the deceased before she was killed. Thus, we are constrained to hold that the prosecution side has failed to prove the charge under section 376/34 of the Indian Penal Code

against the present appellant beyond reasonable doubt and under the circumstances of this case the appellant is entitled to get benefit of doubt, which we hereby give to him. The appellant is accordingly acquitted of charge under section 376/34 of the Indian Penal Code.

33. As regards the finding of conviction of the present appellant under section 302/34 of the Indian Penal Code is concerned, the testimony of PW-19, i.e., the doctor who conducted the post-mortem examination of the deceased as well as the Post-Mortem Examination Report shows that the deceased suffered from following injuries:-

- (1) *On dissection the chest wall muscles are contused on both sides.*
- (2) *Clavicle is fracture on right side.*
- (3) *Sternum is fracture (middle 1/3rd)*
- (4) *Fracture of ribs present on both sides (3rd to 6th ribs)*

PW-19 also opined that the death was due to asphyxia as a result of combined effect of traumatic asphyxia and ante-mortem compression of neck which is homicidal in nature and caused by blunt force impact. The testimony of PW-19, as regards his findings in the post-mortem examination report could not be contradicted by the defence side, thus the homicidal nature of the cause of death of the deceased is not disputed and remained uncontroverted. The testimony of PW-1 that while she was coming along with her mother and her child, after enjoying Puja at Udalguri, when they reached the bank of river Kadabeel, the present appellant and the co-accused accosted them and that the appellant caught

hold of PW-1 and thereafter allowed her to go as she had the child and that her mother was detained by the appellant and the other co-accused has also remained uncontroverted.

34. On perusal of testimony of PW-20 (the Investigating Officer) as well as Exhibit 11, which is the certified copy of GD Entry No. 226 dated, it appears that the dead body of the mother of the first informant was found lying on the bank of river at *kadabeel jungle basti* on the morning of 14.10.2013, that is, on the next day of when the mother of the first informant was detained by the appellant and the co-accused. Thus, though there is evidence to show that on previous evening, when the mother of the PW-1 was last seen alive, she was detained by the appellant and the co-accused, however, the appellant has offered no explanation regarding as to when and under what circumstances he had parted the company of the deceased.

35. Moreover, though we have seen earlier that the extrajudicial confession of the appellant as regards offence under section 376/34 of the Indian Penal Code was found to be of no use for the prosecution side, however, testimonies of PW-3, PW-4, PW-6, PW-7, and PW-11, as regards extra judicial confession made by the present appellant before the public that he and the co-accused had killed the mother of the informant appears to be relevant and under the facts and circumstances of the present case it inspires confidence and may be regarded as a corroborative evidence as regards allegation against the present appellant under section 302/34 of the Indian Penal Code.

36. As regards the evidence regarding the seizure of stone, which was allegedly used for killing the deceased, we are of the considered opinion that in absence of a proper disclosure statement of the appellant to show that the said weapon of offence (*stone*) was discovered in consequence of the information received from the appellant, in custody of police, same is not admissible under section 27 of the Indian Evidence Act. However, the other evidence on record namely the medical evidence showing the homicidal nature and extent of injuries found on the deceased, the testimony of PW-1 discussed in foregoing paragraphs more particularly her evidence regarding the fact that the first informant (PW-1) and her mother (deceased) were caught hold of by the present appellant and the co accused and that the PW-1 somehow escaped from their clutches, however, her mother was detained by the present appellant and the co accused and that on the next day morning dead body of the mother of the informant was found from the same place with multiple injuries and failure on the part of the present appellant to give explanation regarding as to when and under what circumstances he had parted the company of the deceased, lead only to the inference that the present appellant along with co accused intentionally caused death of "Y" i.e., the mother of the first informant. We are thus, of the considered opinion that the conviction of the present appellant under section 302/34 of the Indian Penal Code by the learned trial court needs no interference by this court.

37. In view of discussions made in the foregoing paragraphs and for reasons stated therein, the conviction of the present appellant under

section 376/34 of the Indian Penal Code and the sentence imposed there for is hereby set aside. However, the conviction of the present appellant under section 302/34 of the Indian Penal Code and the sentence imposed there for, by the learned trial court, is thereby upheld.

38. Let the case record of Sessions case No 116(U)/2014 along with connected files be sent back In the Court of learned Sessions Judge, Udalguri along with a copy of this judgment.

39. This appeal is accordingly disposed of.

JUDGE

JUDGE

Comparing Assistant