

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
Appellate Side**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 532 of 2013

**Sanjoy @ Ajay Pahan
-Vs-
State of West Bengal**

For the Appellant : Mr. Debabrata Acharyya, Adv.
Mr. Sital Samanta, Adv.

For the State : Mr. Swapan Banerjee, Adv.
Mr. Suman De, Adv.

Heard on : 06.07.2022, 12.07.2022,
18.07.2022 & 22.07.2022

Judgment on : 22.07.2022

Joymalya Bagchi, J. :-

Prosecution Case:-

On 4.9.2013 the victim a 11-year old girl had gone to take tuition from PW20, Amar Chowdhury. She returned home around 8.30. Thereafter she left to collect wooden sticks (khari) from the police line. She left home with a sack. She did not return home. Her parents PWs.1 and 27 became worried and started searching for her. Around 9.30 p.m. they went to the police station to lodge missing diary. Police officer informed

them to come on the next morning with a photograph of the child. On the next morning they lodged missing diary being GD Entry no. 274 dated 5.9.2012 marked Ext 11. On further search, they found the sack of her daughter near the temple. On the same day around 12 noon PW18, aunt of the victim informed her dead body had been recovered beside the petrol pump in the police line. PW1 rushed to the spot. She found her daughter lying dead with wounds on a banana leaf beside the petrol pump of police line. Her wearing apparels were torn. On suspicion that her daughter had been raped and murdered, she lodged written complaint which was scribed by PW17. On her written complaint Balurghat P.S case no. 548 dated 5.9.2012 under sections 376/302/201 IPC was registered against the unknown accused. PW24 conducted inquest over the body of the victim marked as Ext 15. The dead body was sent for post mortem examination. Initial post mortem examination was conducted by PW28. Over the issue commotion broke out in the locality and a further post mortem was held by a medical board under the leadership of PW23 which was marked as Ext 18.

PW4 had a eating house under the name and style '*Appayan Hotel*' beside the gate of the police line. Appellant was an employee of the hotel. It is alleged that the appellant used to pester the victim girl who had complained to PW4. PW4 had chastised the appellant. In the morning of 4.9.2012 (the day the victim went missing) PW4 had come to the hotel around 8 A.M. Appellant went out of the hotel stating that he was going to jungle to relieve himself. He left for market and returned by 9.30 a.m.

Appellant was standing in hotel. PW10, a NVF at the police lines had seen the appellant and the victim together. After his return, appellant behaved in an unnatural manner and did not participate in cooking activities. He also did not eat properly. In the evening PW16 (a neighbour of the victim) came to the hotel to buy 'roti'. He informed the victim was missing. Thereupon the appellant retorted "*thik hoyeche, amake dhoka dieche (serves her right, she had cheated me)*". When the dead body of the victim was recovered in the afternoon of 5.9.2012, appellant became nervous and admitted his guilt to PW4. Hearing this, PW4 felt sick and went to his residence and informed his brother (PW5). Appellant was brought to PW4's residence and again admitted his guilt before his brother PW5 and PW15, son of PW4. PW15 informed the police who arrested the appellant. On 6.9.2012, a dog tracking team was brought and the dog came and scratched the door of Appayan Hotel as per PW9, dog handler. On the next day pursuant to the leading statement of the appellant blood stained wearing apparels were recovered from a box inside the hotel. Chemical examiner's report showed presence of mud from the place of occurrence as well as blood on his wearing apparels.

In conclusion of investigation, charge-sheet was filed and charges were framed under sections 376/302 IPC against the appellant. Appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 30 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, learned Trial Judge, by impugned judgment and order dated 31st May 2013 and 3rd June 2013 convicted the appellant for commission of offence punishable under Section 376 and 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 2000/- in default to suffer rigorous imprisonment for six months for the offence punishable under section 376 IPC and to suffer rigorous imprisonment for life and to pay a fine of Rs. 5000/- in default to suffer rigorous imprisonment for one year more for the offence punishable under section 302 IPC. Both the sentences to run concurrently.

Prosecution evidence:-

PWs.1, 11, 13, 18 and 27 are the relations of the victim.

PW1 is her mother. She deposed on 18th Bhadra (04.09.2012) victim had gone to attend tuition class. After returning home, she went out with a sack to pick up dry leaves from the area adjoining a temple situated within the police line. When the victim did not return, she started searching for her but could not trace her out. Around 8.30 P.M. she along with her husband PW27 went to police station and informed her daughter was missing. Police informed her to come on the next day with a photograph of her daughter. On the next day at 10.30 A.M. she along with her husband and sister in law (PW18) went to police station and handed over a photograph of her daughter. They also found the sack near the temple.

PW7, Utpal Ghosh, police officer attached to Balurghat PS lodged a missing diary on the statement of PW 1 being GD Entry no 274 dated 5.9.2012 (Ext 11). In the afternoon, her sister in law (PW18) informed that dead body of her daughter was recovered near the petrol pump inside the police line. PW1 went to the police line and saw a commotion. She lodged written complaint which was scribed by Maloy Chowdhury, PW17 (Ext 1). She proved her signature Ext 1/1.

Her version is corroborated by her husband (PW27) as well as sister- in-law (PW18).

PWs. 11 and 13, maternal uncles of the victim are the signatories to the inquest report prepared by PW24 who is a police officer attached to Balurghat Police Station. PW24 forwarded the body of the victim to Balurghat hospital for post mortem examination. PW24 seized the banana leaf and blood stained brick, blood stained earth and controlled earth from the place of occurrence under a seizure list which is marked as Ext 2. PWs. 2 and 3 are the witnesses to the seizure. They proved their signatures on the seizure list.

PW28, Brijes Saha conducted Post mortem examination of the victim. He found multiple injuries on the body of the deceased. He found carunculae myratiforme present in vagina. White starchy materials was found inside vagina. He opined death was due to effect of injuries, ante mortem and homicidal in nature. Wearing apparels of the deceased as well as vaginal swab were collected and sent for FSL examination.

On public demand, a further post mortem of the deceased was conducted. PWs. 23, 25 and 28 were the members of medical board. Similar injuries were noted in the subsequent post mortem report which has been proved by PW28 as Ext 18.

PW4, Anil Das is the owner of the hotel named and styled as 'Appayan Hotel' which was situated beside the main gate of the police line. Appellant was an employee in the hotel. On the day of occurrence PW4 came to his hotel around 8 A.M. Appellant opened the gate and told him that he is going to the jungle to relieve himself. PW4 went for marketing. When he returned around 9.30 A.M., appellant was standing in front of the hotel. On that day, appellant did not participate in the cooking. He also ate sparingly. Around 9.30 P.M. PW16 viz. Dilip Mahato, a neighbour of the victim came to the hotel to buy 'roti'. He told victim was missing. Hearing this, appellant retorted "*thik hoyeche amake dhoka dieche (serves her right, she had cheated me)*". On the next day after lunch PW4 received information that dead body of a minor girl was found in the police line. He informed the appellant and asked him whether he would go to the spot. Thereupon the appellant replied in the negative and confessed he had murdered the victim. Hearing this, PW4 became unwell and returned home. He informed the matter to his brother viz. Sujal Das (PW5). PW5 went to the hotel and brought the appellant to his residence. In presence of PW.5 and PW15 (son of PW4) appellant again confessed his guilt. On 7.9.2012 appellant was brought to the hotel by police. Police asked PW4 to open the hotel. He opened the hotel in presence of a vegetable vendor

viz. Subodh Das (PW8) and his brother viz. Sujal Das (PW5). Appellant went inside and brought out a full pant and one tee shirt from the hotel. Pant had mud stains and shirt had blood stains. Police seized the pant and tee shirt of the appellant under a seizure list. He signed on the seizure list. He made statement before the Magistrate (PW22).

PW5, Sujal Das corroborated the evidence of his brother with regard to extra-judicial confession of the appellant as well as recovery of the mud stained pant and blood stained tee shirt on the showing of the appellant from the hotel. He also made statement before Magistrate.

PW15, Arup Das is the son of PW4. He stated he was called by his mother to come to her residence as her father was unwell. He went to the residence. His uncle Sujal Das (PW5) brought the appellant to their house and the appellant confessed to murder. He telephoned police. Police came and took away the appellant.

PW8, Subodh Das, vegetable vendor corroborated the evidence of PW4 with regard to recovery of wearing apparels of the appellant on 7.9.2012 from the hotel. He proved his signature on the seizure list.

PW9, Prakash Kumar Mandal is a dog handler whose service was requisitioned in the present case. On 6.9.2012 PW9 came to Balurghat Police Station with a tracker dog named Devil. He went with the dog to the place of occurrence. The dog sniffed the place of occurrence and thereafter he ran towards Raghunathpur Tank More. Suddenly, he returned towards police lines and ran towards the main gate of police lines. He stopped near the gate of 'Appayan Hotel'. The gate of the hotel was locked. The dog

scratched on the door of the hotel. PW9 also proved the certificate of training of the dog and its birth certificate.

PW12, Dilip Das corroborated the deposition of PW9.

PW30, Inspector Manoj Kr. Chakraborty is the Investigating Officer of the case. He deposed on 5.9.2012 PW1 had lodged a written complaint at the police station. Investigation of the case was handed over to him. He went to the place of occurrence and prepared rough sketch map. UD Case No.319 of 2012 dated 5.9.2012 had been registered over the death of the victim girl. It was investigated by PW24. He requisitioned a photographer (PW29) who took photographs of the dead body. Seizure of banana leaf, controlled earth and blood stained earth was made by PW24. On source information he arrested Sanjoy @ Ajay Pahan on 5.9.2012. He deployed tracker dog on 6.9.2012. The accused was medically examined. The tracker dog was taken to the place of occurrence and thereafter it went in front of 'Appayan Hotel' and pushed the locked door. On 5.9.2012 the appellant had stated as follows :-

“Amake Ghatanasthale Niye Gele Kothay Jamakapar Rekhechhi Dekhiye Dibo, Ber Kore Dibo.” (If you take me to the place of occurrence, I can show you where I have kept my wearing apparels.)
Statement was marked as Ext. 25.

On 7.9.2012 he took the appellant to the hotel and on his showing a full pant and tee shirt were recovered. Full pant was stained with mud and tee shirt had blood stains. On 9.9.2012 he examined one N.V.F. Sadhan Sarkar (PW10). He sent the seized articles along with vaginal swab for

examination and received the CFSL reports which have been marked as Ext.28. He submitted charge-sheet.

PW10, N.V.F. Sadhan Sarkar deposed on 4.9.2012 he was posted at Balurghat Police Lines. Around 8/8.30 a.m. he had seen the appellant and the victim in the garden within the premises of police lines.

Arguments at the Bar :-

Mr. Debabrata Acharya, learned Advocate for the appellant submits there is no direct evidence to prove that the appellant had committed the murder. Circumstances relied upon by the prosecution have not been proved beyond doubt. PW10 is an unreliable witness. Though he claimed that he had seen the victim along with the appellant on 4.9.2012, he kept mum for five days. Extra-judicial confession of the appellant to PWs.4, 5 and 15 is also shrouded in mystery. While PW15 claimed he had telephoned the police after hearing extra-judicial confession and police had taken away the appellant, PWs.4 and 5 are completely silent on such score. Investigating Officer (PW30) contradicted PW15 and stated appellant was arrested on source information. Ext.A i.e. arrest memo of the appellant shows that he was arrested near Uttamasha Club, Balurghat. Neither PW4 nor PW5 or PW15 are witnesses to the arrest. PWs.4 and 5 were examined belatedly after two days i.e. on 7.9.2012 while PW15 was examined on 15.9.2012. Recovery of the mud stained/blood stained wearing apparels of the appellant also does not inspire confidence. PW30 stated appellant made disclosure statement on 5.9.2012 but the recovery was made from the hotel on 7.9.2012 i.e. after

two days. Hotel was not sealed and the possibility of planting incriminating stains on the wearing apparels cannot be wholly ruled out. No *panchanama* with regard to the conduct of the tracker dog was prepared. Hence, oral evidence of dog handler PWs.9 and 12 cannot be relied upon. Time of death has not been established. Therefore, chain of circumstances is not complete and appellant is entitled to an order of acquittal.

On the other hand, Mr. Swapan Banerjee along with Mr. Suman Dey, learned Advocates for the State argued that the chain of circumstances is complete and have been proved beyond doubt. Conduct of the appellant on the date of occurrence and on the next day was unnatural. He did not participate in the cooking and did not eat properly. Hearing the victim was missing, he retorted "*thik hoyeche amake dhoka dieche*" before PW16. On the next day, he confessed his guilt before PWs.4, 5 and 15. On his leading statement his trouser was recovered which was stained with mud similar to one recovered from the place of occurrence and his tee shirt was stained with blood. PW10, a NVF who was at the police lines had seen the appellant and the victim in the morning on the date of occurrence. Post mortem doctors found extensive injuries on the body of the deceased. Signs of sexual intercourse were also present. Chain of circumstance is, therefore, complete and the conviction does not call for interference.

Circumstances relied on by the trial Judge :-

The case is based on circumstantial evidence. Following circumstances have been relied upon by the trial judge to come to a finding of guilt. They are as follows:-

- 1) Victim had brought allegation against accused to his employer for which both were rebuked;
- 2) Victim and accused have been seen last together on 4.9.12 at about 8.30 A.M.;
- 3) On the date and time of occurrence the victim and accused were within the premises of Police Line at Balurghat;
- 4) Accused spontaneously retorted on hearing of missing of victim that he has been betrayed;
- 5) Radical change has been detected by accused's employer in behavioural pattern and body language of accused;
- 6) Accused made extra-judicial confession;
- 7) Accused made statement to Police while in custody leading to discovery of incriminating materials;
- 8) Accused put his signature on seizure list;
- 9) Mud was detected on his pant matching with the control earth taken from P.O.;
- 10) Victim was subjected to sex being a minor;
- 11) Victim was attacked with brick; and
- 12) Victim was strangled also.

Law on circumstantial evidence:-

In ***Sharad Birdhichand Sarda Vs. State of Maharashtra***¹, the Apex Court laid down five golden principles with regard to proof of a prosecution case based on circumstantial evidence. They are as follows :-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

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

Whether incriminating circumstances relied by the prosecution have been proved :-

Let me examine whether the prosecution has been able to establish its case in light of the aforesaid principles of law enunciated in ***Sarda*** (supra).

(A) Last seen together

One vital circumstance relied upon by the prosecution is the ‘last seen’ theory. PW10, NVF Sadhan Sarkar deposed on 04.09.2012 he was at the police lines. He had seen the victim and the appellant in the garden inside the police lines around 8.00/8.30 A.M. He was extensively cross-examined. In course of cross-examination he admitted inspite of seeing

¹ (1984) 4 SCC 116

the dead body of the victim on 05.09.2012 around 2/2.30 P.M, he did not disclose he had seen the appellant with the victim to anyone till he was examined by the police on 09.09.2012.

Mr. Acharya has severely criticized the conduct of the said witness. He submitted PW10 was a police personnel and it is most unnatural after having come to know of the death of a young girl on 05.09.2012, he would keep mum about the aforesaid vital circumstance incriminating the appellant for four days. He also submitted it was not possible for the witness to have seen the appellant with the victim around 8.00/8.30 A.M. on the fateful day. PW1 stated the victim returned home after tuition around 9.30 A.M. PW20, Amar Chowdhury, who was giving tuition stated that the victim left the tuition class around 8.30 A.M. As per PW1, it would take half an hour to reach police lines. Hence, PW10 could not have seen the couple at 8/8:30 A.M. as claimed by him.

Mr. Banerjee, on the other hand, submitted PW10 had withstood the rigors of cross-examination and was rightly believed by the trial Judge.

PW10 has been pressed into service as the sole witness to prove the '*last seen theory*'. It is trite if the evidence of a sole witness is unblemished and inspires confidence, his evidence can be relied without corroboration. Before doing so, however, it is necessary for the Court to test the intrinsic truth of the said witness on the anvil of probability and normal human conduct. PW10 is a police personnel who was posted at the police lines at the time of occurrence. He claims to have seen the victim and the appellant in the morning of the fateful day. On the next day the dead body

of the victim was recovered inside the police lines. PW10 was aware of the incident. He, however, kept silent with regard to the fact that he had seen the victim with the appellant immediately prior to her disappearance and death. His conduct is most unnatural and no explanation is forthcoming why PW10 kept mum for five days and did not come out with this vital information regarding the victim being last seen with the appellant prior to her death. This unnatural conduct of the witness and his delayed examination after five days raises strong doubt with regard to his credibility. It is possible that the said witness, being a police personnel, was belatedly pressed into service to manufacture the '*last seen theory*' in order to bolster the prosecution case. Moreover, PW1 stated it takes half an hour to reach police lines. If the victim had returned home after tuitions at 8:30 A.M., she could not have reached the police lines before 9 A.M. Hence, PW10 by no stretch of imagination could have seen the appellant with the victim at 8/8:30 A.M. in the police lines. Thus, I am of the opinion the vital circumstance viz. appellant was last seen with the victim around 8.30 A.M. inside the police lines has not been proved beyond doubt.

(B) Unnatural conduct of the appellant and his extra-judicial confessions.

PW4, employer of the appellant, stated on the date of occurrence appellant had left the hotel around 8.00 A.M. stating that he is going to the jungle to relieve himself. After he returned he did not participate in the cooking and also ate sparingly. In the night when PW16, a neighbor of the

victim, came to the hotel to purchase *roti* and informed PW4 the victim was missing, he retorted “*thik hohechhe, amake dhoka diyechhe*”. On the next day when the dead body was recovered, appellant became very nervous and admitted his guilt to PW4. Thereafter, he was brought to the residence of PW4 where he again admitted his guilt before PW5 (brother of PW4) and PW15 (son of the PW4). PW15 telephoned the police and appellant was taken away.

Mr. Acharya submitted the evidence of the aforesaid prosecution witnesses bristles with contradictions and improbabilities. Upon hearing the confession, PW4 claimed he fell sick and came home. Appellant remained in the hotel alone. Appellant did not run away but stayed put till he was brought to the residence of PW4 where he again confessed before other relations. This conduct of the appellant is most unnatural and militates against the truthfulness of the so-called confession before PW4. Moreover, arrest of the appellant as narrated by PW15 is not supported by PWs. 4, 5 or the Investigating Officer (PW30). Even the earlier retort made by the appellant before PW16 ought to be taken with a pinch of salt. Both PWs. 4 and 16 were known to the parents of the victim. Had the appellant made such statement on 04.09.2012 when the victim was missing, these witnesses would have certainly informed the parents who would have brought the matter to the knowledge of the police when the missing diary was registered.

On the other hand, Mr. Banerjee submitted the appellant was a young boy and became nervous when the dead body was recovered. Being

perplexed he made the confessional statement to his employer (PW4). PW4 is corroborated by his relations PWs. 5 and 15. Earlier statement of the appellant has also been proved by PW16.

I have given anxious considerations to the aforesaid submissions of the parties.

Extra-judicial confession is a weak piece of evidence but if such confession is found to be reliable, truthful and proved beyond doubt it can form the basis of conviction. To test the reliability of an extra-judicial confession it is necessary to examine the circumstances attending the making of such confession including the conduct of witnesses upon whom the accused is said to have reposed faith and confessed before, during and after such confession.

PW16 is a neighbour of the victim. He was aware the victim was missing and her parents were searching for her everywhere. He claimed he had come to purchase *roti* at the hotel owned by PW4 on the night on 04.09.2012. When he stated victim was missing, appellant retorted "*thik hohechhe amake dhoka diyechhe*". This did not raise curiosity on the part of either PW16 or PW4, employer of the appellant. They did not inform the parents of the victim with regard to the hostile attitude of the appellant towards the victim. Such conduct of PWs. 4 and 16 casts a doubt whether the appellant had at all made such retort.

Similarly conduct of PW4 upon hearing the confession of the appellant is most unnatural. He claims he became sick and leaving the hotel in the hands of the appellant he returned home. It is unusual the

appellant even after being left alone in the hotel remained there till PW5 (brother of PW4) brought him to the latter's residence. It is nobody's case that the appellant had been forcibly restrained or tied up in the hotel after he made the confession. He was a free agent and did not run away after making the confession although he had opportunity to do so.

Confession again made at the residence of PW4 also does not inspire confidence. PWs. 5 and 15 were present at the time of making confession. PW15 claimed he telephoned the police after the confession and police came and took away the appellant. PWs. 4 and 5 are completely silent with regard to such fact. Even PW30, Investigating Officer contradicts PW15 on such score. He states the appellant was arrested on the basis of '*source information*'. Arrest memo Ext-A shows that the appellant was arrested near Uttamasha Club and not the residence of PW4. Signatures of PWs. 4, 5 and 15 are not appearing from the arrest memo. These circumstances cast serious doubt with regard to the fact whether the appellant had at all made confessional statement before PWs. 4, 5 and 15 as claimed by the prosecution.

Arrest of the appellant near Uttamasha Club does not support the prosecution case. Trial court glossed over this lacunae in the prosecution case by holding Uttamasha Club is situated near the residence of PW4. Such reasoning is a weak one and does not appeal to us. PW30 has contradicted PW15 with regard to the fact the latter had intimated the police resulting in the arrest of the appellant. Moreover, arrest has not been witnessed by any of the aforesaid witnesses namely PWs. 4, 5 and

15. They were not interrogated on the date of the arrest or on the next day. PWs. 4 and 5 were interrogated on 07.09.2012 while PW15 was interrogated on 15.09.2012. These loose ends in the prosecution case have not been explained and therefore, I am not inclined to rely on the evidence of PWs. 4, 5 and 15 to come to a finding that the so-called extra-judicial confessions of the appellant are credible and ought to be relied.

With regard to unnatural conduct of the appellant viz. he did not participate in cooking or ate sparingly, most parts of the evidence of PW4 appear to be embellishments which were stated for the first time in Court. Investigating Officer (PW30) during cross-examination stated PW4 had not stated to him that the appellant had not eaten his full lunch or he did the necessary cooking work.

Even with regard to the prior interaction between the appellant and the victim and the fact that PW4 had chided the appellant on such score is not convincing. Victim did not complain to her parents that the appellant was disturbing her. Trial court held that the victim being a young girl was shy to bring the matter to the notice of her parents. It is the prosecution case that the victim brought the matter to the notice of PW4, an employer of the appellant. It is difficult for me to appreciate how a young girl reposed faith on an outsider (who is neither her friend nor confidant) but not her mother on a private matter.

(C) Recovery of wearing apparels on the leading statement of the appellant.

PW30 deposed on 05.09.2012 appellant stated :

“Amake Ghatanasthale Niye Gele Kothay Jamakapar Rekhechhi Dekhiye Dibo, Ber Kore Dibo.” (If you take me to the place of occurrence, I can show you where I have kept my wearing apparels.)
Statement was marked as Ext. 25.

After two days i.e. on 07.09.2012 it is claimed the appellant was taken to the hotel where he brought out his wearing apparels which were stained with mud/blood stains. Recovery was made in presence of PWs.4, 5 & 8. The disclosure statement refers to *ghotonasthal* i.e. place of occurrence. Place of occurrence is not the hotel room where the recoveries were made but a jungle behind the petrol pump inside police lines. Although PW30 claimed that recovery was made on the basis of the aforesaid leading statement, it is not explained why appellant was taken to the hotel instead of the place of occurrence where the dead body was recovered. No explanation is forthcoming why the aforesaid leading statement was not worked upon on the next day i.e.06.09.2012. Evidence has also come on record that the hotel room had not been sealed by police and was under the control of PW4.

In this backdrop, unexplained delay in recovery of the wearing apparels on the so-called leading statement does not rule out the possibility of planting of incriminating evidence in the meantime. It is also apposite to note a tracking dog was utilised by the police on 06.09.2012 and it is claimed that the dog had in course of tracking scratched on the

locked door of the hotel. Prosecution however, is silent why on that day itself the hotel was not opened and searched.

Forensic report is also not conclusive and may yield to other innocuous interpretations. Ext.28/1 shows mud on the full pant matches with the controlled earth collected from the place of occurrence. Evidence has come on record appellant used to go to the adjoining jungle to relieve himself. Hence, it is not unlikely that his trouser may be mud stained. There is nothing on record that the mud at the place of occurrence is unique from that of the adjoining jungle where appellant used to go to relieve himself. Serologist's report is also inconclusive. Nature and group of blood on the tee shirt could not be determined.

For the aforesaid reasons, I hold recovery of mud stained/blood stained wearing apparels from the hotel has not been proved and it would be unsafe to treat such recovery as an incriminating circumstance in the factual matrix of the case.

Hence, I am of the opinion that the aforesaid vital circumstances relied upon by the prosecution have not been proved beyond doubt.

(D) Other loose ends :-

Prosecution case suffers from other loose ends too.

Time of death is vital in a case based on circumstantial evidence. But post-mortem doctors are silent with regard to the time of death.

It is the prosecution case that incident occurred between 8:30 A.M. to 9:30 A.M. inside the police lines. Evidence has come on record police

personnel stay in the police lines and as per PW10 the body was found behind the police garage adjoining a mandir and petrol pump.

It is most unnatural that the incident of rape and murder which is said to have occurred during daytime at a place inside the police lines beside a mandir and petrol pump but nobody saw the incident.

Tracker dog evidence is also not reliable. No *panchnama* was prepared with regard to conduct of tracker dog namely, Devil and prosecution relied on the oral evidence of the dog handler PWs.9 & 12 to prove its case. In ***Babu Magbur Shaikh Vs. State of Maharashtra***² the Apex Court insisted on preparation of *panchnama* in respect of dog tracking evidence so that oral deposition of dog handler may be tested against the document. Non-preparation of *panchnama* denies the court the opportunity to test the oral evidence of dog handler against the *panchnama* contemporaneously prepared. Thus, I do not consider it prudent not to rely on the uncorroborated oral deposition of PWs.9& 12 to prove the conduct of tracker dog.

(E) Conclusion :-

For the aforesaid reasons, I am inclined to hold that the vital circumstances relied upon by the prosecution viz. last seen theory, extra-judicial confession and recovery of stained wearing apparels of the appellant are based on shaky foundation and cannot be said to have been proved beyond doubt to unerringly point at the guilt of the appellant and rule out all possible hypotheses of innocence.

² 1993 Cr.L.J 2808

Thus, I am inclined to extend the benefit of doubt to the appellant.

Conviction and sentence of the appellant is set aside.

The appeal is accordingly, allowed.

Appellant shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

Lower court records along with the copy of the judgment be sent down at once to the learned trial court for necessary action.

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

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

akd/as/tkm/cm