

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 273 of 2007
With
C.R.R. 2724 of 2007

Samsuddin Sk. & Ors.

Vs.

State of West Bengal

For the Appellants : Mr. Jayanta Narayan Chatterjee, Adv.
Mr. Aniket Mitra, Adv.
Sk. Hossain Ali, Adv.
Ms. Moumita Pandit, Adv.
Mr. Supreem Naskar, Adv.
Ms. Jayashree Patra, Adv.
Ms. Ritushree Banerjee, Adv.
Mr. Bhaskar Mondal, Adv.

For the State : Mr. Saswata Gopal Mukherji, Id. P.P.
Mr. Parthapratim Das, Adv.
Ms. Zareen N. Khan, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 28.08.2023, 30.08.2023 and 04.09.2023.

Judgment on : 04.09.2023.

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 22.03.2007 and 23.03.2007 passed by the learned Additional District & Sessions Judge, Fast Track Court-VI, Alipore, South 24-Paraganas in Sessions Trial no. 04(01) 2005 arising out of Sessions Case No. 69(05)2004 convicting the appellants for commission of offence punishable under Sections 302/34 of the Indian Penal Code and under Section 376(2)(g) of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each, in default, to suffer simple imprisonment for three months more for the offence punishable under Sections 302/34 IPC and to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/- each, in default, to suffer simple imprisonment for three months more for the offence punishable under Section 376(2)(g) IPC.

Prosecution case:-

2. Prosecution case runs as follows:-

On 07.01.2004, ASI, Prosanta Kumar Guchait attached to Taratala Police Station had gone out at 1.25 PM for Anti Crime Patrolling duty. Around 3.10 PM he reached in front of an abandoned steel factory situated at 1/1, Goragacha Road. He entered the abandoned factory and proceeded to the first floor of the factory building. To his surprise, he noticed a lifeless body of an unknown female child lying on her back. The body bore injuries on the face. A white orna i.e. scarf was tied with a

knot around her neck. The child was wearing blue and white sweater and red pant. He reported the unnatural death of an unknown female child to the duty officer. On his intimation S.I., Dulal Chandra Bhadra (PW 27) came to the spot. He handed over a written complaint to the Officer-in-charge of the Police Station which was treated as FIR resulting in registration of Taratala Police Station Case No.3 dated 07.01.2004 under Section 302 IPC.

3. PW 27 took over the investigation of the case. In course of investigation he seized articles including a pair of used chappals i.e. footwear, one button with attached thread from the place of occurrence. He held inquest over the dead body and sent the body for post mortem examination. Opinion of the post mortem doctor showed that the victim had been raped and murdered. He circulated photographs of the dead body to different police stations for identification.

4. On 09.01.2004 parents of the victim came to the police station and identified the victim as their daughter. They stated that the victim had been missing since 04.01.2004.

5. In course of investigation, appellants were arrested. Semen stains found on the vaginal swab of the child matched with that of Samsuddin Sk. @ Baromoni, appellant No.1 herein. On the showing of Shew Kumar Das (appellant no.2), a shirt was recovered. Button seized from the place of occurrence matched with the missing button of said shirt. PW 18 opined that the impressions on the chappals matched the footprints of Bhola Bahadur Tamang, appellant No.3 herein. On the leading

statement of Nader Ali Sk. @ Chotomoni, appellant no.4 herein, weapon of offence i.e. hammer was recovered from the place of occurrence.

6. Investigation also revealed two months prior to the incident, Samsuddin Sk @ Baromoni, Shew Kumar Das and others had gone to the residence of PW 6 and demanded money. When he refused, he had been physically assaulted. First Information Report was lodged against them. This gave the motive to commit the crime.

7. In conclusion of investigation, charge sheet was filed against the appellants and two others i.e. Habul Sardar and Kalo Gazi @ Hannan Gazi. Charges were framed against them under Sections 302/34 IPC and Section 376(2)(g) IPC. They pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 28 witnesses and exhibited a number of documents to prove its case. Defence of the appellants was one of innocence and false implication.

8. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 22.03.2007 and 23.03.2007 convicted and sentenced the appellants, as aforesaid.

9. By the selfsame judgment and order, Habul Sardar and Kalo Gazi @ Hannan Gazi were acquitted. Hence, the present appeal.

10. At the time of admission of appeal, a co-ordinate Bench of this Court issued Rule upon the appellants to show cause why the sentence imposed upon them be not enhanced to death. Rule for enhancement was numbered as CRR 2724 of 2007.

11. The appeal and the aforesaid Rule have been taken up for hearing together and are disposed of by this common judgment and order.

Prosecution evidence on record:-

12. PW 1, ASI, Prosanta Kumar Guchait is the first informant. He deposed while on patrol duty on 07.01.2004 at 3.10 PM, he had found the lifeless body of an unknown girl on the first floor of an abandoned steel factory situated at 1/1, Goragacha Road. He informed his superior and lodged written complaint (Ext.1).

13. PWs. 2 and 3 are the plan maker and photographer respectively.

14. PW 2 (Bikash Chandra Majee) proved the rough sketch map, final sketch map and the blue print of the building where the incident occurred. Similarly, PW3 (Swapan Saha) proved the photographs of the building taken by him.

15. PWs. 5 & 6 are the most vital witnesses.

16. PW 5 (Sankar Sawain) is a young boy and used to assist PW6 in transporting goods on a rickshaw van. On 07.01.2004 while transporting cement from Century Cement Godown, Majerhat to the Railway quarters on a rickshaw van, he saw the appellants, two others and the victim entering the abandoned steel factory through a broken wall. Samsuddin Sk @ Baromoni held the hand of the victim. He knew the victim as a young girl who used to collect firewood for cooking purposes in the locality. Couple of days later, he saw the parents of the victim weeping. He came to know the victim was missing and informed

the parents about the incident. He identified the appellants in Court. He also identified the wearing apparels of the victim. During cross-examination, he stated his house is 5-7 minutes walk from the factory. He knew the house of the victim. He could not produce challan for transporting cement.

17. PW 6 (Mahabir Roy) is the owner of the rickshaw van. He deposed on 07.01.2004, he loaded bags of cement on his rickshaw van and proceeded along with his assistant viz., Sankar Sawain (PW 5) to deliver the goods at Railway quarters. While they were proceeding through Goragacha main road, they saw the appellants with two others entering the abandoned factory premises through the broken gate with the victim. Samsuddin Sk @ Baromoni was holding the hand of the victim. He further deposed on 09.01.2004 he found a gathering in front of the house of the victim. On enquiry, he came to learn that the victim had been murdered. He disclosed the incident to the father of the victim (PW 7). During cross-examination, he stated that his residence is ten minutes walk from the abandoned factory. He could not produce documents in support of the consignment of goods to Railway quarters.

18. PWs. 7 & 8 are the parents of the child.

19. PW 7 (Sk. Bholu) is her father. He stated that he is a fruit seller and has a shop near Akra Railway Station. He resides at Majerhat Madhu Basti. On 04.01.2004 his wife told him that she would take the children including the victim for polio vaccine at a nearby school. After he returned, his wife told him that his daughter had gone missing.

Ordinarily his daughter would go and stay for a couple of days at her grandmother's place at Akra. He presumed his daughter had gone there and did not make enquiries. After a few days, when his daughter did not return, he started searching for her at various places. On 09.01.2004 he went to Taratala Police Station and reported that his daughter had gone missing. At the police station he was shown the seized wearing apparels and identified them. He also identified the photograph of a dead child at the police station as that of his daughter. Thereafter, he went to the morgue and identified the body of his daughter. He also deposed PWs. 5 and 6, rickshaw van pullers had told him his daughter was last seen entering the abandoned factory premises with the appellants.

20. PW 8 (Salma Bibi) his wife corroborated his version. She stated she had taken her children including the victim for administration of polio vaccine. When she returned home at 5.00 PM, the victim went missing. PWs. 7 and 8 also stated two months ago, Samsuddin Sk @ Baromoni, Shew Kumar Das and others had demanded money for purchasing liquor. When PW 7 refused, he was assaulted. He received injuries. Her husband was admitted in hospital. They had lodged FIR. The witnesses identified the appellants in Court.

21. PW 13 (Gurupada Som) proved the FIR lodged over the incident. PW 24 (Dipak Kumar Saha) produced the bed head ticket from the hospital regarding treatment of PW 7.

22. PW 12 (Tulu Sarkar) is an employee of Kolkata Municipal Corporation. She deposed a vaccination programme was undertaken by

Kolkata Municipal Corporation and under its auspices she used to administer polio vaccine at Andha School. On 04.01.2004, she administered polio vaccine in the said school.

23. PW 16 (Dr. P. B. Das) is the post mortem doctor. On 08.01.2004 he held post mortem examination over the dead body of the victim. Upon examination he opined death was due to head injury along with evidence of sexual violence ante mortem and homicidal in nature. He gave further opinion that the injuries were a sustained and death occurred 20-30 hours prior to post mortem examination. The weapon used for causing head injuries was a heavy blunt weapon. These might have been more than one person involved in causing the sexual violence. He proved his post mortem report and further opinion, Exts.13 and 14 respectively. In cross-examination he clarified except vaginal injury, injuries sustained by the victim may be perpetrated by a single person.

24. PW 22 (Dr. Sanjay Kumar Saha), PW 25 (Dr. Ashutosh Sarkar) and PW 26 (Dr. Pralay Majumder) conducted potency test of the appellants and opined that they were capable of sexual intercourse.

25. PW 27 (SI Dulal Chandra Bhadra) is the first investigating officer. On receiving message from ASI, Prosanta Kr. Guchait (PW 1) he had come to the place of occurrence. He found the dead body of a minor girl lying on the first floor of the abandoned factory. He received letter of complaint from ASI, Prosanta Kr. Guchait. He arranged a photographer to take photographs of the victim. He held inquest over the body. He seized one pair of chappals, blue coloured jeans frock and one button

with thread from the place of occurrence under a seizure list (Ext.6/1). He also seized two plastic whistles and a blood soaked cotton from the place of occurrence. He sent the dead body for post mortem examination. He preserved the post mortem blood, vaginal swab, nail scrapings, wearing apparels etc. received from the morgue. He sent photographs of the child to various police stations for identification. Finally, parents of the child identified her through her wearing apparels and photograph. Thereafter, they identified the body at the morgue as that of the child in his presence. On 10.01.2004 the investigation was handed over to the D. D. Lalbazar, Homicide Squad.

26. PW 28 (SI P. P. Banik) took over investigation on that day. He arrested the appellants. On 12.01.2004 finger prints and footprints of the appellants were collected. They were sent for potency test. On his prayer blood samples of the appellants were collected for DNA examination at Central Forensic Laboratory. Plan maker prepared a sketch map and final plan of the place of the occurrence. On 21.01.2004 Nader Ali Sk @ Chotomoni made a disclosure statement (Ext.20) which led to the recovery of one hammer with handle from the place of occurrence under a seizure list (Ext.8). Recovery was made in presence of PW 11, a local resident. On the leading statement of Shew Kumar Das (Ext.21) and upon his showing shirt was recovered from his *jhupri* i.e. house. Recovery was witnessed by Bimal Kumar Tripathi (PW 10), a taxi driver who was having tea at a nearby tea stall and SI Ashim Kumar

Nandi (PW23) who accompanied the investigating officer. In conclusion of investigation, he submitted charge sheet.

27. PW 15 (Dr. A. K. Sharma) is the Assistant Director (Biology)-cum-Assistant Chemical Examiner, Central Forensic Laboratory, Government of India. He deposed he received sealed paper packet containing exhibits for DNA analysis and report. He submitted report stating the bloodstains present in Exhibit M1 was of a female individual. Semen stains were found on the vaginal swab of the victim. Semen stains belonged to Samsuddin Sk @ Baromoni. He proved the detailed report (Ext.12).

28. PW 17 (Susanta Mukherjee) is the Scientific Officer, Physics Division, Officer Science Laboratory, Government of West Bengal. He deposed he received a paper packet marked 'B' and service cover marked 'C' for analysis and report. The packet contained a full sleeve shirt with one button missing from the third position. The service cover contained a button with stitching thread attached to it. He opined as follows:-

“Four remaining buttons (except the collar button) from the bottom pleat of the shirt (Exhibit B) were taken out and compared with that marked 'C'. On comparison the latter one (Exhibit 'C') was found similar to that taken out from the sixth position of the button pleat of the shirt (Exhibit B) in respect of weight, design, diameter, U. V. fluorescence etc. The stitching thread adhered to 'C' was also found to be similar to that stitched at the position of missing button of Exhibit 'B' in respect of twist and ply.”

29. PW18 (Dr. Kusum Ranjan Patra) analysed the impressions on the chappals i.e. footwear recovered from the place of occurrence with the

footprints collected from the appellants. He opined that the footprints of appellant Bhola Tamang were identical with the impression on the seized chappals. He proved his report (Ext.16).

Incriminating circumstances relied by prosecution:-

30. From the aforesaid evidence, it appears that the prosecution case is based on circumstantial evidence. Distilling the evidence on record, the prosecution appears to have relied on the following incriminating circumstances. A tabular chart of the incriminating circumstances and the witnesses through whom the prosecution has proposed to prove the circumstances is set out hereinbelow:-

Circumstances	Proof
Two months ago father of the victim (PW 7) was assaulted	PWs 7, 8, 13 (proves FIR), 24 (injury on PW 7)
Victim went missing since 4 th January, 2004	PWs 7 and 8
Appellants with two others entering abandoned factory with the victim on 7.1.2004 at 9/10 am	PWs 5, 6
Recovery of dead body of victim on 7.1.2004 at 3 pm	PW 1
Victim had been raped + murdered. Rape was by more than one person	PW 16 (PM doctor)
Semen stains found in vaginal swab matched with Ext – X1	PW 15
Buttons recovered at place of occurrence matched with shirt seized from jhupri of Shew Kumar Das	PWs 10, 23, 28 (recovery of shirt); Recovery of button PW 27; PW 17 – Ext – 15 (opinion of expert)
Foot prints of Bhola Tamang matched the prints on the used chappal recovered at place of occurrence	Recovery of chappal at place of occurrence (PW 27) ; Footprints of accused taken (PW 28); PW 18 opinion of expert (Ext- 16)
Hammer recovered from place of occurrence on showing of Nader Ali Sk @ Chotomoni	PW 28 (Recovery); PW 11 (Exhibit 8) on the leading statement of Nader Ali Sk @ Chotomoni

Arguments by the parties:-

31. Mr. Jayanta Narayan Chatterjee with Mr. Aniket Mitra, learned Advocates for the appellants vehemently argued the circumstances are ambiguous and do not point to the guilt of the appellants. It is contended victim had gone missing on 04.01.2004 but no missing diary was lodged by her parents till 09.01.2004. Conduct of the parents is most unnatural and not explained by the prosecution. Similarly, recovery of the dead body of the victim from the abandoned steel factory on 07.01.2004 is also unnatural. There is no justification why PW 1 in course of patrol would enter the abandoned steel factory. Evidence of PWs. 5 and 6 who saw the appellants entering the abandoned steel factory with the minor girl ought to be taken with a pinch of salt. They failed to produce any consignment note with regard to transportation of cement on the fateful day. Evidence has come on record parents of the victim used to reside in the vicinity of the place of occurrence but they remained oblivious of recovery of the body till PW 7 went to the police station on 09.01.2004 to lodge missing diary. Prosecution has failed to explain these circumstances. They also challenged the recovery of the shirt with a missing button from the house of Shew Kumar Das. It is contended the shirt was planted to implicate the said appellant. Similarly, it is argued though searches were made at the place of occurrence on 07.01.2004, it is inexplicable why the weapon of offence i.e. hammer was recovered after 13 days i.e. on 20.01.2004. Purported recovery and the disclosure statement of the appellant Nader Ali Sk @ Chotomoni are manufactured

to suit the prosecution case. Motive of crime is too tenuous to be believed. Accordingly, it was contended that the appellants be acquitted.

32. Mr. Parthapratim Das, learned Advocate for the State argues motive to commit the crime has been proved. Two months ago Samsuddin Sk @ Baromoni, Shew Kumar Das and others had demanded money from PW 7, father of the victim. When he refused he had been assaulted. Their deposition is corroborated by PWs. 13 & 24 who have proved the FIR and injury on PW 7. PW 7 explained the reason why there was delay in informing police regarding the missing of their daughter. PWs. 5 & 6 are local witnesses. They explained the circumstances in which they were at the place of occurrence and had seen the appellants entering the abandoned steel factory holding the minor girl. Couple of hours thereafter the dead body of the minor was recovered from the first floor of the building. Opinion of post mortem doctor shows the minor had been raped and killed. Vaginal swab of the minor shows presence of semen stains belonging to the appellant Samsuddin Sk @ Baromoni.

33. PW 18 opined foot prints of Bhola Bahadur Tamang were identical with the impressions on chappals recovered from the place of occurrence. Opinion of PW 17 also showed a button recovered from the spot matched with the missing button on the shirt recovered from the house of the appellant no.2 viz. Shew Kumar Das. On the leading statement of Nader Ali Sk @ Chotomoni weapon of offence i.e. hammer was also recovered. Chain of circumstances clearly indicates the role of

the appellants in the rape and murder of the minor girl. Appeal is liable to be dismissed.

Victim was missing since 04.01.2004:-

34. PWs. 7 & 8, parents of the victim deposed she was missing from the residence on and from 04.01.2007. PW 8, her mother deposed on that day she had taken the children to a polio camp at a nearby school. Her deposition is corroborated by PW 13, an employee of the Municipal Corporation, who stated a polio camp was organized in the school on that day. The witness claimed children who had come to the polio camp had been given two whistles. It may not be out of place to note first investigating officer (PW 2) recovered whistles near the dead body of the victim at the time of recovery.

35. Learned Advocate strenuously argued failure of PWs 7 and 8 to promptly lodge missing diary was unnatural. It strikes at the root of the prosecution case. Apparently this argument appears to be catchy but the depositions of the witnesses have clarified the reason for delay. PW 7, father of the victim deposed she was habituated to go to her grandmother's place at Akra. It is apposite to note while PW7 with his family stayed at Majherhat Madhu Basti within Taratala police station, the said witness had a fruit shop near Akra railway station and the house of the grandmother of the child was also at Akra. This probabilises the version of PW 7 that the child had a habit of going to her grandmother's place and staying there for a couple of days without informing her parents. For this reason her parents were not immediately

alarmed by her absence. But when she did not return after a couple of days, they searched at different places and finally went to the police station to lodge missing diary. These witnesses are illiterate persons with meager means. Their conduct requires to be assessed in the light of the aforesaid circumstances and their standing in society. They were under an impression that their daughter had gone to her grandmother's place at Akra. After a few days when she did not return, they got alarmed and started searching for her. Finally they went to the police station on 9.1.2007. Hence, I am of the opinion delay in approaching the police station has been duly explained and does not affect the unfolding of the prosecution case.

36. It has also been argued prosecution has not explained why PW 7 was unaware of the recovery of the dead body by police on 5.1.2007. Reading the evidence of PWs 1 and 27 as a whole, it would appear that recovery of the dead body was made through suo motu police action. No compliant had been received from local people. Neither PW 1 nor PW 27 stated that they had made inquiry from the local people with regard to missing of any girl in the locality. This is a lapse in investigation which by no stretch of imagination would infringe on the credibility of the prosecution case. Under such circumstances, it is possible PW 7 and his wife were unaware of recovery of the dead body from the abandoned steel factory till they had gone to the police station to lodge a complaint.

Last Seen Together:-

37. PWs. 5 and 6 have proved that the victim was last seen with the appellants prior to her death. Both the witnesses reside in the vicinity of the abandoned steel factory. PW 6 is a rickshaw puller. His father is the owner of the van rickshaw. On the fateful day he was transporting cement to the railway gate. PW 5 was his helper. At 9.00 AM when they reached near the abandoned factory they saw the appellants with two others entering through the broken wall into the factory with the victim. Appellant no.1 viz. Samsuddin Sk. @ Baromoni was holding the minor victim. Victim was well known in the locality as she used to collect firewood for cooking. From the aforesaid evidence it appears presence of witnesses at the place of occurrence has been established. The witnesses are the residents of the locality and rickshaw van pullers. They were transporting cement when they saw the appellants taking the victim into the factory. The slender cross-examination to improbabilise their presence was on the score the witnesses failed to produce the consignment note with regard to supply of cement. Ordinarily transportation of cement through local rickshaw van pullers does not require consignment notes unlike transportation through public vehicles. Thus, mere non-production of consignment note would not improbabilise their presence at the place of occurrence and tarnish the credibility of their versions in Court.

38. Apart from the aforesaid no effective cross-examination to improbabilise the presence of the witnesses in the abandoned steel

factory was made. Furthermore, the version of the said witnesses is corroborated through the evidence of the plan maker and the photographer. Plan prepared by plan maker (PW 2) and the photographs taken by PW 3 show a broken wall around the abandoned factory which corroborates PWs 5 and 6 regarding the manner in which they claimed the appellants had taken the victim inside the building.

39. Accordingly, I am convinced that PWs. 5 & 6 are reliable and the prosecution has been able to prove that the victim was last seen with the appellants entering the abandoned steel factory. Within a couple of hours i.e. at 3.00 P.M. PW 1, ASI Prosanta Kumar Guchait, during his patrolling duty, recovered the dead body of the victim from the first floor of the abandoned building. The said witness deposed that he was on patrol duty and in the course of his duty he had entered the premises. He noticed the lifeless body of a young girl. She was wearing a white and blue sweater and a red pant. She had a white *dupatta* tied round her neck. Her body bore injuries and blood was coming out therefrom. Presence of PW 1 at the place of occurrence and the manner in which he recovered the dead body has been clearly established.

40. I find little merit of the submission of the learned Counsel for the appellants that the police officer has not explained why he entered the abandoned steel factory. The police officer was on patrol duty. The abandoned steel factory was within his jurisdiction. The factory premises was in an abandoned condition and in all likelihood the police officer suspected the site could be seat of various illegal and immoral activities.

Hence, his entry into the abandoned steel factory in course of patrolling duty is not improbable and cannot be said to be an artificial wedge in the prosecution case. Evidence of the aforesaid witnesses, therefore, prove beyond doubt the appellants were last seen with the minor entering into the abandoned steel factory and within a couple of hours a dead body was recovered from the first floor of the said factory.

Identification of the body and cause of death:-

41. After the recovery of the body PW 1 sent message to the police station. S.I., Dulal Chandra Bhadra (PW 27) came to the place of occurrence. He was the first investigating officer. He seized the wearing apparels and other articles from the place of occurrence. He held inquest over the dead body and sent the body for post mortem examination. On 08.01.2004 PW 16 conducted post mortem examination over the dead body. He opined that the victim died homicidal death. There was evidence of sexual violence. He further opined death occurred 20-30 hours prior to post mortem examination. Head injuries were caused by a heavy blunt weapon and sexual violence was caused by more than one person.

42. On 09.01.2007 PW 7 came to the police station to lodge diary with regard to his missing daughter. He identified the seized wearing apparels as that of his daughter. He also identified photographs of the dead body of the victim as his daughter. He was taken to the morgue where he identified the dead body in the presence of PW 27. No serious challenge is thrown to the identification of the dead body as that of the

daughter of PW 7. The homicidal death of the minor after a brutal act of rape is, therefore, proved.

43. Proximate nexus between the appellants seen by PWs 5 & 6 entering the abandoned factory with the minor and the recovery of her dead body within a couple of hours establishes a livelink between the last seen circumstance and the brutal rape and murder of the victim. When prosecution has established the livelink between the last seen circumstance and the rape and murder, onus shifts on the appellant to explain how the victim met the brutal end. Failure to do so, reinforces the prosecution case and close and proximate nexus between the last seen circumstance and rape and murder of the victim leads to the irresistible and unerring inference of guilt against the appellants.

Forensic reports implicating the appellants:-

44. Another species of incriminating circumstances which implicate the appellants in the crime are the scientific/forensic reports. PW 27 deposed he had preserved the vaginal swab of the victim which he received from the morgue. PW 15, scientific officer of CFSL received the vaginal swab and blood samples of the appellants for DNA examination. On analysis he found sperm stains on the vaginal swab matched the DNA profile of appellant No. 1 Samsuddin Sk @ Baromoni. This circumstance corroborates and reinforces the prosecution case that the appellant Samsuddin Sk @ Baromoni who was seen entering along with other appellants in the abandoned factory with the minor had raped the

minor prior to her death. Presence of other appellants is also probabalised through other forensic reports. PW 28 is the second investigating officer. He deposed during interrogation Shew Kumar Das made a disclosure statement (Ext 21). In terms of the disclosure statement the said appellant took him to his room i.e. a jhupri. On his showing a full sleeve shirt was recovered in the presence of an independent witness PW 10. The third button of the shirt was missing. It may not be out of place to recount a loose button with a thread had been recovered from the place of occurrence by the first investigating officer PW 27. Both the seized items were sent for forensic examination. PW 17 scientific officer opined the button seized from the place of occurrence matched with the missing button of the shirt recovered from the residence of Shew Kumar Das pursuant to his disclosure statement. Similarly opinion of PW 18 (Ext 16) shows impressions on the chappal recovered from the place of occurrence matched with the foot prints of appellant Bhola Tamang.

45. However, I am not inclined to rely on the so-called recovery of hammer from the place of occurrence. Though the place of occurrence had been searched by the first investigating officer PW 27 on 7.1.2007 no hammer had been recovered. Seizure of the hammer after 13 days from the place of occurrence appears to be artificial. There is also no independent witness to the said seizure. No forensic report to establish presence of blood on the said hammer has also been placed on record. Hence, I do not wish to rely on the said recovery on the basis of the

disclosure statement of appellant Nader Ali Sk @ Chotomoni. Notwithstanding this circumstance, presence of appellant Nader Ali Sk @ Chotomoni is clearly established through the evidence of PWs 5 and 6 as a member of the group which took the child inside the abandoned steel factory where she was raped and murdered. His conduct in accompanying the other appellants in taking the child inside the factory where she was raped and murdered clearly establishes his presence at the place of occurrence and his common intention to commit the crime.

Motive to commit the crime:-

46. PWs 7 and 8 parents of the minor deposed two months prior to the incident Samsuddin Sk @ Baromoni, Shew Kumar Das and others had demanded money to purchase liquor from PW 7. When he refused he had been assaulted. Their depositions find corroboration from PW 24, an employee of the hospital who proved the medical reports of PW 7. FIR lodged over this incident had also been proved by PW 13. As PW 7 had initiated criminal action against some of the appellants they nursed grudge against them and committed brutal crime of rape and murder of his minor daughter. Motive to commit the crime is clearly proved.

Conclusion:-

47. The aforesaid incriminating circumstances have been proved beyond doubt and unerringly establish the guilt of the appellants and rules out any reasonable hypothesis of innocence. Hence, I am inclined to uphold the conviction of the appellants.

Re : CRR 2724 of 2007

48. At the time of admission of appeal a suo motu rule to enhance the sentences imposed on the appellants to death penalty had been issued.

49. Rule was issued in 2007 and is presently taken up for hearing after almost two decades. In the meantime the appellants remained incarcerated in the correctional home.

50. Extreme penalty of death is to be imposed only in the rarest of rare cases. In *Bachan Singh vs. State of Punjab*¹ the Apex Court emphasized the necessity of balancing mitigating circumstances with aggravating circumstances in order to come to a conclusion whether a case falls in the 'rarest of rare' category. Mere reference to gravity or heinousness of the crime is not enough. The Court prior to imposing death penalty must satisfy its conscience that there is no possibility of rehabilitation and reformation of the convict and he would remain a continuing threat to society. The Court held as follows:-

"206. Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) *** ** *

(2) *** ** *

(3) *The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*

(4) *The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above."*

¹ (1980) 2 SCC 684

51. The Court also held prior to imposition of death sentence the prosecution must establish the alternate sentence of life imprisonment is wholly foreclosed:-

“209. ... Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

(emphasis supplied)

52. It is true the appellants have perpetrated the most brutal act of rape and murder of a minor child. The offence is a heinous one and needs strongest condemnation from society. However, nature and gravity of offence is not the only criteria on which imposition of death penalty depends. As noted in *Bachan Singh* (supra) the Court must satisfy its conscience that the possibility of reformation and rehabilitation of the convict is completely ruled out and the sentence of life imprisonment is thereby rendered inadequate. To do so, this court called upon the State to submit report with regard to conduct of the appellants while they awaited their final fate in the appeal.

53. Reports have been filed before us. All the reports show that their conduct in jail is satisfactory. Behavioral trend of a convict for about two decades while the appeal was pending is a clear indication that they cannot be deemed as individuals from whom the glimmer of reformation and rehabilitation has been obliterated.

54. In these circumstances after lapse of 17 years I do not find any justification to enhance the life sentences of the appellants to the extreme and irreversible sentence of death.

55. The appeal is accordingly, dismissed. Conviction and sentences imposed by the trial Court are upheld.

56. Period of detention suffered by the appellants-accused during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

57. Suo motu rule is, accordingly, discharged.

58. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

59. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)