

**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. (DB) 113 of 2023

***Banamali Choudhury @ Banamali Chaudhuri
-Vs-
The State of West Bengal & Anr.***

For the Appellant	:	Mr. Sudipta Moitra, Sr. Adv. Mr. Dinabandhu Chowdhury, Adv. Mr. Kallol Mondal, Adv. Mr. Amal Kr. Saha, Adv. Mr. Krishanu Roy, Adv.
For the State	:	Mr. Debasish Roy, Id. P.P. Mr. Sandip Chakraborty, Adv.
Heard on	:	29.11.2023, 30.01.2024, 19.02.2024, 20.02.2024, 20.03.2024, 21.03.2024, 02.04.2024, 03.04.2024, 16.04.2024, 24.04.2024, 01.05.2024, 07.05.2024.
Judgment on	:	12.06.2024

Joymalya Bagchi, J.:-

1. Appeal is directed against judgment and order dated 20.04.2023 and 21.04.2023 in Sessions Trial No. 02(05)87 corresponding to Sessions Case No. 07(08)1986 passed by learned Additional Sessions Judge, 2nd Court, Bankura convicting the appellant for commission of

offence punishable under sections 376 and 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,00,000/-, in default, to suffer simple imprisonment for two years more for the offence punishable under section 376 of the Indian Penal Code and to suffer rigorous imprisonment for life and to pay a fine of Rs. 50,000/-, in default, to suffer simple imprisonment for one year more for the offence punishable under section 302 of the Indian Penal Code, both the sentences to run concurrently.

Prosecution case:-

2. Thumbnail sketch of the prosecution case is as follows:-

Father of the deceased (P.W. 1) is a resident of Bankura. He was in the process of constructing a cinema hall named and styled as 'Shibani Cinema Hall' on Cinema Road at Bankura. He along with his family comprising of his wife and two daughters were residing on the third floor of the partly constructed building where the cinema hall was to be set up. On 22.02.1983 at 6:30 p.m. he had gone to his shop. His wife (P.W. 7) along with his mother-in-law went to meet her sister (P.W. 2). His two daughters were alone in the house. Around 6:30 p.m. he received a phone call from his younger daughter who stated her elder sister was missing. He asked his younger daughter to look for the keys of the house. His younger daughter again phoned him and informed the key was in place but her elder sister was untraceable. Hearing this news, he returned home. He found the main gate leading to the staircase locked. He opened the lock with the duplicate key and proceeded to the second

floor. The door leading to the staircase of the third floor was locked from outside. He opened the lock and went to the third floor. He found his younger daughter standing there who stated that his elder daughter was not in the residence. He came down to the second floor and searched the bathroom. He did not find her there. He went to the balcony. In the dark he noted something was lying there. He asked his younger daughter to bring a torch. In the torch light he found the dead body of his daughter. He noticed the tongue of his daughter had come out in a manner as if someone had strangled her. Her body and clothes were burnt. In the room occupied by his elder daughter he noticed her clothes and other articles were scattered. His elder daughter was to take her 'M.A.' examination on 24th February. Thereafter, she was proposed to be married on 14th Baishakh. He telephoned his youngest brother-in-law (i.e. the appellant) who came to the spot. Hearing the news, his wife and mother-in-law returned home. Local people and police also assembled at the spot. He lodged written complaint with the local police. Appellant scribed the First Information Report resulting in registration of Bankura PS Case No. 23/54 dated 22.02.1983 under sections 302 and 201 IPC against unknown persons. Investigation in the case was taken up by P.W. 19. Investigating officer (P.W. 19) seized various articles including bed sheet, wearing apparels, loose hair from the room of the deceased as well as balcony from where her body was recovered. Fingerprints were also collected from an almirah at the spot. Initially one Sarban Sharma, a friend of the deceased was suspected. After interrogation, he was

released. Inquest was prepared at the spot and the body was sent for post mortem examination. Investigation was transferred to detective department and taken over by P.W. 21.

3. Post mortem doctor (P.W. 17) examined the body and opined death was due to combined effect of strangulation and smothering associated with burns which were ante mortem and homicidal in nature. P.W. 17 collected semen like substance from the thigh, vaginal canal, vaginal swab, fingerprints of nail scratches. On 11.03.1983, P.W. 21 sent over the seized articles including the samples collected from the post mortem doctor for forensic examination.

4. P.W. 22, SK Basu, Senior Scientific Officer, FSL examined the seized articles and found semen stains on bed sheet, petticoat, vaginal swab, swab of vaginal wall. Morphologically, hair strands seized at the spot were found to be of male and female origin. On 11.03.1983, investigating officer made prayer before Magistrate to direct the appellant to appear before medical officer, Bankura Medical College and Hospital to give his semen and pubic hair. On 11.04.1983, investigating officer submitted another prayer before Magistrate to direct the appellant to appear at Calcutta Medical College & Hospital to give his semen and pubic hair. On 18.04.1983, he sent a letter to appellant requesting him to appear before the doctor at Calcutta Medical College & Hospital to give semen and pubic hair. On 30.04.1983, appellant wrote a letter stating that he was unable to attend due to ill health. Thereafter, on 12.05.1983 and 16.06.1983 investigating officer again wrote letters calling upon the

appellant to attend medical officer for giving semen and pubic hair samples. Instead of doing so, appellant by letter dated 15.07.1983 wanted to know why he was required to give semen and pubic hair samples. By a subsequent letter dated 21.08.1983 the appellant refused medical examination. No steps were taken to compel the appellant to give semen and pubic hair samples and a new investigating officer (P.W. 24) was handed over the charge of investigation. The third investigating officer submitted charge-sheet. Charges were framed against the appellant under sections 302 and 376 IPC.

5. Prosecution examined 24 witnesses to prove its case. A number of documents and material exhibits were proved in Court.

6. Defence of the appellant was one of innocence and false implication.

7. During his examination under section 313 Cr.P.C. appellant stated he wished to examine defence witness. He examined a constable as D.W. 1. Thereafter, he took out an application seeking production of a purported suicide note by the deceased. The prayer being denied, he approached this Court in Criminal Revision being 1564/88. Due to the pendency of the revision petition, trial could not proceed for more than two decades. Finally, in 2020 the revision petition was dismissed and the trial re-commenced. Upon conclusion of trial, by judgment and order dated 20.04.2023 and 21.04.2023 the appellant was convicted and sentenced, as aforesaid.

Evidence on record:-**(i) Relations of the deceased -**

8. P.Ws. 1, 2, 4, 6 and 7 are the relations of the deceased. P.W. 1 is her father and complainant. He deposed on 22.02.1983 at 6:30 p.m. he was in his shop. At 6:30 p.m. he received phone call of his younger daughter (P.W. 4) enquiring the whereabouts of his elder daughter. He told his younger daughter to see whether the key of the lock to the main gate was in place. Sometime later he phoned his younger daughter. She stated that the key was in place but her elder sister was not traceable. Hearing this he left for his residence on his bicycle. He found the main gate of the house in front of the staircase leading to the third floor locked. He unlocked the main gate with a duplicate key and proceeded up the stairs. There was another gate at the staircase leading to the third floor. That gate was also locked from outside. He opened the gate and went to the third floor. He found his daughter standing there. She stated her sister was not in the residence. As his elder daughter was not on the third floor he went to the second floor and looked into the bathroom. Then he went to the balcony on the second floor and in darkness he noticed something was lying there. He took a torch light from his younger daughter and found the body of his elder daughter. Her tongue was protruding from her mouth as if she had been strangled. Her body was burnt. He telephoned his youngest brother-in-law (the appellant) who came to the spot. In the meantime, his wife (P.W. 7) and his mother-in-law also came to the spot. Other relations also came to the spot. Police

had arrived. Appellant scribed the F.I.R. which was received at the police station (Exhibit – 1). Police seized various articles from different rooms, room of the deceased as well as the balcony. He signed on the seizure lists. During cross-examination, he stated he had property dispute with his relations. Appellant had given the idea of constructing the cinema hall and had assured all assistance. Appellant was a lawyer and had represented him in all litigations with his relations including the one regarding construction of the cinema hall. Initially, he suspected the involvement of one Sarban Sharma, with whom the deceased had an affair while she was in school. Letters written by the deceased were with Sarban. His brother Kartik contacted Sarban and took the letters written by deceased from him and informed Sarban that letters written by him had been destroyed. When they were trying to negotiate the marriage of the deceased, she was in a disturbed mental condition as she suspected all letters had not been returned by Sarban. Appellant associated himself in the marriage negotiations. Ultimately, they had selected one Malay Dey, an engineer and the marriage was to be solemnised on 14 Baishakh. His maid servant also had links with Sarban. Appellant had interrogated his maid servant over this issue. Sarban had been taken to police station. He had the case investigated by a private detective agency, namely, 'Secret Eye'. They had submitted report. Often, he had noticed Sarban passing by the road side on a scooter casting glances at his house.

9. P.W. 7 is the mother of the deceased. She deposed on the fateful day i.e. 22.02.1983 she had planned to go out for watching a film. At

1:30 p.m. her husband informed tickets were not available. Then she decided to visit the house of her sister-in-law (P.W. 2). In the meantime, her maid servant (P.W. 3) came to the house. P.W. 3 was engaged in household work. Before leaving her residence, she gave money to the maid servant to purchase snacks for her daughters. She told her daughters that snacks and sweets are kept in fridge. At that time she found her elder daughter was dressing up. Her younger daughter had gone to her room for singing. Around 4:50 p.m. she left her house with her mother. Her two daughters and the maid servant were in the house. Around 7:00 p.m. she received a call and rushed to her house. She was told her elder daughter had died. She fell unconscious. Upon regaining consciousness, she shouted “catch hold of the maid servant and Sarban”. She stated she had three brothers, namely, Rabilochan Chowdhury, Sunil Chowdhury and the appellant. Appellant was her youngest brother. He had a scooter. Appellant had an affectionate relationship with her elder daughter but she denied that there was any romantic relationship. During cross-examination, she deposed her daughter had romantic relationship with one Sarban. Kartik had gone to Sarban and had taken the love letters which were in the latter’s possession. Her daughter told her that Sarban had not returned all the letters. She was apprehensive and expressed reluctance to marry. P.W. 7 suspected that her maid servant had links with Sarban. Though her daughter was reluctant they had taken her to Kolkata for negotiating her marriage. At that time, she noticed Sarban was following them. Marriage of her daughter was fixed

with one Malay Dey. She clarified her elder daughter used to address her three brothers as '*boro mama*', '*mejo mama*' and the appellant as '*choto mama*'. They were never referred to as '*mama*' which was the expression used for her cousins.

10. P.W. 2, sister-in-law of P.W. 7 corroborated the latter. She stated P.W. 7 had come to her house on the fateful day.

11. P.W. 4, younger sister of the victim is the most vital witness. She was present in the house at the time of occurrence but she has not supported the prosecution case. She deposed on 22.02.1983 at 4:30 p.m. her mother and grandmother left the house. She went inside her room, closed the door and windows and started singing. After completing her songs, at about 6:10 p.m. she searched for her elder sister but could not find her. Then she rang up her father. Her father returned and started searching. Her sister could not be traced. Something was found in the balcony. At this stage, she was declared hostile and cross-examined with reference to her previous statement to the police. During cross-examination by defence, she stated occasionally they received phone calls from someone speaking from Madras Café.

12. P.W. 6 is a nephew of P.W. 1. He stated he was not aware whether the victim was alive or dead. He was declared hostile.

(ii) Maid Servant -

13. P.W. 3 is the maid servant of the house. She was another vital witness. She was present in the house along with the younger sister (P.W. 4) when the mother of the deceased left the house to meet her sister-in-

law. This witness has also turned hostile. In her chief, she stated she came to the house at 3:00 p.m. P.W. 7 told her to bring snacks for her daughters. Thereafter, P.W. 7 left the house. Deceased was in her room while the younger sister (P.W. 4) was singing in another room. After completing her work, she locked the main door and tied the key to the rope which was pulled up by the elder sister i.e. the deceased. When she left the residence she did not meet anybody. Appellant had a scooter at that time. She had not seen a scooter parked in front of the house. At this stage, she was declared hostile. During cross-examination, she deposed she had stated to the investigating officer while leaving the house P.W. 7 left a bag of wheat on a bench. She had asked P.W. 3 to winnow the wheat. She however denied that she had heard the sound of a scooter or had seen the appellant entering the house. She also denied when leaving she had seen the scooter of the appellant parked near the house. She also denied her statement before the Magistrate (P.W. 20). During cross-examination by the appellant, she stated she was detained at the police station. She was threatened, assaulted and compelled to implicate the appellant.

(iii) Friend of deceased -

14. P.W. 8, Sarban Sharma, is a former friend of the deceased. He deposed in 1975 he had developed friendship with the deceased while they were in school. They had correspondences for two-three months. In last part of 1975, uncle of the deceased came to his petrol pump. He asked him to return the letters written by the deceased. He returned the

letters. When he asked his letters to be returned, he was told they had been destroyed. Thereafter, he joined college. He did not know where the deceased and her family had shifted. On 22.08.1983, he had been at 'Biswakarma Cinema Hall' from 3:00 p.m. to 6:00 p.m. accompanied by one Mita Dutta and one Shyam Dey. After watching cinema, he returned to his residence. At 11:30 midnight police came. He was taken to police station and examined by police. On subsequent days, he was interrogated by C.I.D. During cross-examination, he admitted he was arrested by police in connection with dealing in uncensored film cassettes. He had a scooter bearing No. CPM 6097.

(iv) Local witnesses -

15. P.W. 5 is a local witness. He deposed around 07:30/08:00 p.m. he went to the house of P.W. 1. He found dead body lying in the balcony in burnt condition. Police prepared inquest. He signed on the seizure list.

16. P.W. 11, Ganesh Dutta deposed he resides at Cinema Road in Bankura. He had a grocery shop at Mangala Road, Bankura. He knew one Sambhunath Choudhury (P.W. 13). He knew the deceased. He was declared hostile. During cross-examination, he admitted he told the investigating officer on 22.02.1983 Sambhunath Chowdhury came to his cinema road house to purchase wheat. He was not at his house. Sambhu told him he heard a girl crying '*mama mama*' from the Mini Cinema Hall.

17. P.W. 13, Sambhunath Choudhury deposed on 22.02.1983 at 6:00 p.m. he went to the house of P.W. 11. The latter was not in his house. He was in his shop. He heard a lady shouting '*mama mama*'

presumably from Mini Cinema Hall. Hearing the sound he left the house. Two days later, he met Ganesh. He could not recall their conversation. During cross-examination, he stated he had filed an eviction suit against one Nirod Baran Goswami. Appellant was the lawyer of Nirod. He met mother of P.W. 11 when he was in the house. P.W. 11 also came to the house. Hearing the words ‘*mama mama*’ he went to the spot. Local people had also rushed to the spot. He heard there was a murder in the house. P.W. 11 also went to the spot. His wife was the cousin of Rabi Nandy, a relation of P.W. 1.

(v) Medical witness -

18. On 23.02.1983, P.W. 17, Dr. JN Dey, Head of the Department, in-Charge of Forensic and State Medicine, Bankura Medical College and Hospital held autopsy over the body of the deceased. He found the following injuries:-

- “a) First and second degree burn over whole of face including forehead and external ears;*
- b) Second degree burn over front and side of trunk including external genital organ;*
- c) Second degree burn over the whole of both upper limbs except fingers almost all around except a strip of unburnt area over the posterior aspect of both arms;*
- d) Second degree burn over both lower limbs all around except both feet;*
- e) One bruise (reddish in colour) ½” x ½” over the mucus surface of the upper lip at mid-part opposite the upper incisors;*
- f) One bruise reddish in colour over the outer part of left cheek close to outer angle of mandible;*

g) One bruise reddish in colour $\frac{3}{4}$ " x $\frac{1}{2}$ " over the lower part of right side of head over the body of the mandible on the right side 1" to the right of midline.

On further dissection he found the additional injuries:-

"a) Extravassated clotted and liquid blood seen to have infiltrated deep into the tissues of front of neck on both sides which is evidence of subluxation of the joint between the right greater cornue and the body of the hyoid bone on the right side where small clot of blood was also seen in and around;

b) Diffused bruise reddish in colour over the medial aspect uppermost part of the left thigh covering an area of $2\frac{1}{2}$ " x 1";

c) Hymen showed two recent tears with small blood-clot adherent at the margin of torn segment at 5 O'clock and 7 O'clock position, each measuring .3" x .1";

d) One lacerated wound .8" x .3" x muscle over the posterior vaginal wall near the fornix.

He opined death was due to combined effect of manual strangulation and smothering associated with burns which were ante mortem and homicidal in nature. Victim in all probability was subjected to sexual assault before death. Larynx and trachea were found intact except the hyoid bone. Soot was found present in both larynx and trachea. This indicates the victim sustained burn injuries before death. Injuries were sufficient in the ordinary course of nature to cause death. After post mortem examination, he preserved vaginal fluid and vaginal smear from the vaginal cavity, seminal like fluid from the posterior part of the fornix, semen like substance on the thigh, hair from vaginal canal, blood, vaginal swab, finger and nail scrapping, two gold like ear rings. He also

preserved viscera, hyoid bone and trachea. The hyoid bone and trachea were sent to Dr. G.D. Mukherjee, Head of the Department of Forensic and State Medicine, Calcutta Medical College & Hospital and other articles were sent to the police station through a constable. Subsequently, he received the requisition from Bankura police seeking his opinion on (1) time of death, (2) oedema of lung (3) meaning of vital reaction and the cause of the absence of blisters. He opined as follows:-

- “1) Time of death:- Death, in my opinion occurred within a period of 24 hours prior to my examination;*
- 2) Oedema of lung:- such a condition is seen in a case of congestion which may occur in various conditions;*
- 3) Vital reaction:- Indicates that the injury was ante-mortem in origin;*
- 4) No blisters were found over the body – due to pugilistic attitude means boxer attitude which means stretching of both upper and lower limbs.”*

He deposed the sequence of injuries may be firstly sexual assault then smothering followed by manual strangulation and burning of the body.

(vi) Forensic witnesses -

19. P.W. 22, S.K. Basu is the Senior Scientific Officer, Forensic Science Laboratory, Belgachia, Calcutta. He deposed on 27.04.1983, he received some articles in connection with the case. He prepared the report. It bears the signature of the supervisor (Exhibits – 12/4 and 12/5). From the report it appears semen stains were detected in the articles (A) bed sheet, (C) petticoat, (J) vaginal swab, (K) swab of vaginal wall, (L) swab of dried samples semen like fluid, (M & N) in the contents of test tube. Blood was also detected in the contents of glass-phial

marked 'G'. Morphologically, hair in test tube marked 'G' was not similar to that in the packet marked 'Q'. The hair stains marked 'P' were of pubic origin. The stains were a mixture of male and female origin. Identity of a person can be established by comparison of semen if the semen had not disintegrated. Without scientific analysis no liquid substance can be confirmed as semen or pubic hair. He further deposed he had visited the site on 24.02.1983. He proved his report (Exhibit – 18).

(vii) Police witnesses -

20. P.W. 10, Balaram Singh is a constable. He was posted at Lalbazar Outpost, Calcutta. He deposed one day in January, 1982 at 7/7:15 p.m. he had come to the house of Ganesh (P.W. 11). At that time, there was a jungle where the mini cinema was situated. When he came out of the house of Ganesh, he heard a sound coming from the jungle. He went there and noticed a boy and a girl. He saw someone going towards the jungle. He did not go to the spot. He denied his previous statement to police officer that he had found the appellant and the deceased in a compromising position.

21. P.W. 18, S.N. Saha deposed he received written complaint from P.W. 1 and registered formal F.I.R.

22. P.Ws. 19, 22 and 23 are the investigating officers. P.W. 19, P.C. Das deposed on 22.08.1983 he was posted as officer-in-charge, Bankura Police Station. At 7:30 p.m. he received a telephonic message from the appellant that the victim had been murdered by miscreants. He recorded the information in general diary being G.D. Entry No. 861 dated

22.02.1983 (Exhibit – 15). He went to the Mini Cinema Hall. He posted a guard in front of the room of the deceased on the third floor. He found a saree, one blouse, inner garments, a Bengali book, letter writing pad and other articles lying in the room. He found a steel almirah with impression of fingers. He found some hair on the floor. In the balcony of the second floor he found the body of the deceased lying on her back. Part of her body was burnt. There was a fountain pen, a match stick, pen box, partly burnt letter and half burnt photograph. He held inquest over the body. The body was sent for post mortem examination. He prepared sketch map of the place of occurrence (Exhibit – 16). He seized the articles from rooms and the balcony from where the body was found. He proved the seizure lists. He requisitioned a photographer (P.W. 21) to take photographs of the body and the rooms. He asked the father of the deceased (P.W. 1) to submit written complaint. He sent the written complaint to police station. He recorded the statements of witnesses. On 23.02.1983 at 7:30 a.m. police along with a dog came to the place of occurrence. Appellant was present there. The dog went upto him and started barking. On 24.02.1983 P.W. 3 was sent to the Magistrate for recording her statement under section 164 Cr.P.C. On that day he recorded the statements of Ganesh Dutta and Sambhunath Choudhury. One Sarban Sharma was also interrogated in his house. On 26.02.1983 appellant was brought to police station and interrogated. On 05.03.1983 appellant was brought under arrest. On the same day he was released on bail by order of Court. During cross-examination, he stated Sarban

Sharma was interrogated by superior police officers. He examined Sarban at 6:30 p.m. on 24.02.1983 but did not record his statement. He is not an expert on dog tracking. He handed over the investigation to CID on 05.03.1983. He did not seize any scooter in connection with the incident. He did not receive post mortem report. He did not send alamat for FSL examination. He waited for the arrival of the FSL experts at the spot. Experts came to the spot on 27.02.1983 at 11:00 a.m. G.D. Entry No. 898 dated 23.02.1983 was made at the police station with regard to the articles sent by autopsy surgeon.

23. P.W. 23, Jiban Ranjan Sanyal is the second investigating officer. On 06.03.1983 as per order of D.B.I., Bankura he took up investigation. On receipt of post mortem report he added section 376 I.P.C. On 11.03.1983, he prayed before SDJM, Bankura for a direction on the appellant to appear before medical officer, Bankura Medical College and Hospital to give his semen and pubic hair. He also applied for specimen hand writing and fingerprints of the appellant. On 06.04.1983, appellant requested to give his semen and pubic hair at Calcutta. On 11.04.1983, he submitted a prayer before Magistrate for a direction on the appellant to appear before the medical officer, Calcutta Medical College & Hospital for giving semen and pubic hair. On that day, he sent some seized alamat for FSL. On 18.04.1983, he sent a letter to the appellant to appear before medical officer. On 20.04.1983, appellant sought time due to ill health. On 23.04.1983, he sent alamat to FSL for examination. On 12.05.1983, he again wrote letter to appellant to give his

semen and pubic hair samples before medical officer. Appellant did not do so. On 09.06.1983, he submitted prayer before Magistrate for a direction on appellant to appear before the medical officer. On 16.06.1983, he again sent a letter requesting the appellant to fix a date for appearing before the medical officer. On 15.07.1983, appellant enquired why his semen and pubic hair samples were necessary. On 04.08.1983, he replied the samples were necessary for investigation. On 21.08.1983, appellant refused to give his semen and pubic hair samples. He received report from FSL. He handed over the charge of investigation to P.W. 24 who submitted charge-sheet.

(viii) Other official witnesses -

24. P.W. 20 (A.K. Raha) is a Judicial Magistrate. He recorded the statement of P.W. 3.

25. P.W. 21, Sukumar Dalal is the photographer. He took photograph of the deceased.

(ix) Defence witness -

26. Appellant examined C.I. Jayhari Ghosh as D.W. 1. He proved the general diary entries made on 25.02.1983 and 26.02.1983 at Mejia Police Station.

Arguments at the Bar:-

27. Mr. Maitra for the appellant submits the prosecution has singularly failed to prove its case. P.W. 4, younger sister of the victim who was present at the residence has not supported the prosecution case. P.W. 3, maid servant deposed she was threatened by police to implicate

the appellant before Magistrate. She resiled from her previous statement to police and Magistrate. P.W. 13 (Sambhunath Choudhury) is an unreliable witness. His deposition in chief is inconsistent with that during cross-examination. Mother of Ganesh Dutta (P.W. 11) has not been examined to corroborate presence of P.W. 13 at their residence. P.W. 13's version that he heard a lady crying "*mama mama*" presumably from the Mini Cinema Hall is not corroborated by local witnesses. Even if P.W. 13's version is believed it does not prove conclusively that the appellant was inside the house and had committed the crime since mother of the victim (P.W. 7) claimed that the appellant was referred to as '*choto mama*' and never as '*mama*'. Accordingly, there is no reliable evidence to show that the appellant had entered the house at the time of occurrence. Other incriminating circumstances have also not been proved by the prosecution. There is inordinate delay in dispatching the samples collected from the spot or by post mortem doctor for chemical examination. In this factual matrix, no adverse inference ought to be raised against the appellant for his alleged non-cooperation to provide semen or pubic hair. Hence, appellant is entitled to an order of acquittal.

28. On the other hand, learned Public Prosecutor argues appellant was the youngest maternal uncle of the victim. They had a romantic relationship. On the fateful evening he had come on his scooter to her residence and committed the crime. Thereafter, he tried to cover his tracks by throwing the blame to one Sarban Sharma (P.W. 8), a former friend of the deceased. He resorted to various excuses and avoided

submission of semen and pubic hair for DNA examination. As a result, semen found on the vaginal swab and other articles could not be compared with that of the appellant and prosecution was denied the opportunity to adduce vital evidence. In these circumstances, adverse inference of guilt ought to be drawn against the appellant. He is a practising lawyer at Bankura. He subverted the trial by winning over witnesses and engineering frequent changes of Public Prosecutor. On a flimsy plea to produce purported suicide note he stalled the trial for more than three decades. The incriminating circumstances on record coupled with refusal of the appellant to submit his semen/hair samples prove the prosecution case beyond doubt. Appeal is liable to be dismissed.

Principles governing cases involving circumstantial evidence:-

29. Analysis of the evidence on record in light of the arguments advanced at the Bar would demonstrate the prosecution case is based on circumstantial evidence. In a case based on circumstantial evidence the golden principles laid down in the locus-classicus *Sharad Birdhichand Sarda vs. State of Maharashtra*¹ are:-

“153. ... (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should

¹ (1984) 4 SCC 116

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.”

30. In light of the aforesaid legal proposition, I proceed to examine whether the prosecution has proved the chain of circumstances emergingly pointing to the guilt of the appellant or not.

(a) Rape and homicidal death of the deceased:-

31. Post mortem doctor (P.W. 17) conducted autopsy over the body of the deceased. He found extensive injuries and opined death was due to combined effect of strangulation and smothering associated with burns which were ante mortem and homicidal in nature. He also opined victim was subjected to sexual assault before death. On further query from police he opined death occurred within 24 hours prior to his examination. He further clarified the sequence of injuries may be firstly sexual assault then smothering followed by manual strangulation and burning of the body. Notwithstanding searching cross-examination the medical officer remained unshaken with regard to his opinion regarding the cause of death. This establishes beyond doubt the victim, a 21-year-old girl had been raped, smothered, strangulated and burnt at her residence.

32. The next and most pertinent question is who committed the ghastly crime?

(b) Presence of appellant at the crime scene -

33. As per prosecution case incident occurred between 04:30 – 06:30 p.m. on 22.02.1983 at the residence of the victim. At that time victim's father (P.W. 1) was at his shop and her mother (P.W. 7) had gone to the house of her sister-in-law (P.W. 2). The victim, her younger sister (P.W. 4) and the maid servant (P.W. 3) were in the house. P.W. 7, mother of the deceased in her deposition stated before leaving the house she had instructed P.W. 3 to buy snacks for her daughters. As per her instruction, P.W. 3 bought snacks and then left the residence after locking the outer door. Key of the lock was tied to a rope which was pulled upstairs by the victim herself. The aforesaid evidence shows victim was alive when the maid servant (P.W. 3) had left the house. Around 6:30 p.m. victim's younger sister telephoned her father (P.W. 1) to enquire the whereabouts of the victim. When P.W. 1 enquired about the key to the outer door, his younger daughter (P.W. 4) informed him the key was in the right place. This proves that no one could have entered the house through the outer door after the maid had left unless he had been permitted entry by one of the inmates, namely, P.W. 4 or the deceased. P.W. 4 stated she was for the entire time singing in her room till around 6:30 p.m. She came out for snacks and found her sister missing. Was it the victim who had allowed entry to her own predator? If so, the said predator must be known to the victim and prosecution would argue that

the appellant is a probable suspect. To raise its case from the realm of suspicion to one of proof, prosecution relied on maid servant (P.W. 3) and the younger sister (P.W. 4) who were in the house after the mother had left the residence to prove the presence of the appellant in the house. Unfortunately, both these vital witnesses have turned hostile and have not supported the prosecution case. During her examination-in-chief, P.W. 4 gave evasive answers. She did not even admit that she had seen the burnt body of her sister. At that stage she was declared hostile and cross-examined with reference to her earlier statement. P.W. 3, maid servant also resiled from her earlier statement to police and Magistrate that she had seen the appellant come on a scooter and enter the house. During cross-examination by the appellant, she claimed she had been detained and subjected to torture by police to falsely implicate the appellant.

34. When a witness resiles from her earlier statement to police officer or Magistrate, the said statement cannot be treated as substantive evidence. It can be used only to contradict or corroborate the witness and nothing more. During cross-examination P.W. 4 was confronted with her prior statement to police. For reasons best known to her she resiled from her earlier statement implicating the appellant. She even refused to admit that the burnt body of her elder sister was found in the balcony. This renders P.W. 4 an untruthful witness and no credence can be given to her version.

35. P.W. 3 also resiled from her earlier statements before police and Magistrate wherein she had stated she had seen the scooter of the appellant in front of the house and appellant had entered the residence. During cross-examination, she stated police had detained her and she was forced to make such statement under coercion. Evidence has come on record after the body of the deceased was recovered her mother (P.W. 7) shouted “catch hold of the maid servant and Sarban”. This probabalises P.W. 3’s version that after the incident she was detained and interrogated.

36. Appellant is the youngest brother-in-law of P.W. 1. He is a practising lawyer and was very close to the family. P.W. 1 relied on his advice regarding his business activities and the appellant had represented him in various litigations against his relations. In this backdrop, one would wonder why the police authorities would seek to implicate the appellant? The answer lies in the evidence of P.W. 19, the first investigating officer.

37. P.W. 19, investigating officer deposed during investigation on 23.02.1983 at 07:30 a.m. police dog came to the place of occurrence. The dog went up to the appellant and started barking. On the very next day i.e. 24.02.1983 P.W. 3 was sent before the Magistrate for recording her statement wherein she implicated the appellant under compulsion. Needless to mention P.W. 19 was not the dog handler and even so dog

tracking may be used for investigation but cannot be taken as evidence to prove guilt.²

38. Presumably in this background the needle of suspicion shifted towards the appellant and P.W. 3 (who was earlier suspected to be an accomplice in the crime), was allegedly compelled by police to make a statement before Magistrate implicating the appellant. Be that as it may, P.W. 3 did not support her statement in Court. Under such circumstances, her statement before Magistrate cannot be treated as substantive evidence and prosecution cannot reap benefit therefrom to prove that the appellant had entered the residence at the time of occurrence.

39. The other slender evidence on which prosecution relies to establish presence of the appellant at the place of occurrence is P.W. 13. P.W. 13 deposed on 22.02.1983 at 6:00 p.m. he came to the house of Ganesh (P.W. 11). Ganesh's house was adjacent to Mini Cinema Hall on Cinema Road. When P.W. 13 was waiting in the house, he heard the shriek "*mama mama*" from a female presumably from inside the Mini Cinema Hall. Hearing this he left Ganesh's house. During cross-examination, the witness came out with a different version. Firstly, he stated Ganesh's mother was present when he came to the house and after the shriek, Ganesh arrived at the spot. He also claimed hearing the cries a large number of people had assembled around the house. Ganesh Dutta was examined as P.W. 11. Though declared hostile he admitted

² Dinesh Borthakur vs. State of Assam, (2008) 5 SCC 697; (para 40)

during cross-examination he had told the police that P.W. 13 had come to his house on the fateful evening and had told him that he had heard cries of a girl in distress.

40. Analysis of their evidence would show P.W. 13 is a chance witness. He stated Ganesh had a wheat grinding shop on Mangala Road and he had come to his residence to purchase wheat. It is unclear why the witness would go to P.W. 11's residence instead of the shop for transacting in wheat. P.W. 13 also stated Ganesh's mother was present in the house. She has not been examined to corroborate the presence of this chance witness. Furthermore, the deposition of P.W. 13 is self-contradictory. In chief, he stated after hearing the cries coming from Mini Cinema Hall he had left the spot. During cross-examination, he stated after the cries local people rushed towards the house. Ganesh (P.W. 11) had also arrived and proceeded to the spot. This is not corroborated by Ganesh (P.W. 11). On the other hand, Ganesh stated he told police that P.W. 13 had told him he had heard shriek of a girl when he had visited the house. P.W. 13, however, does not state he told Ganesh about hearing cries from the Mini Cinema Hall. No local witness has been examined to support the chance witness (P.W. 13) that cries had been heard from the Mini Cinema Hall. Hence, I am unable to rely on the sole deposition of P.W. 13 that he had heard cries "*mama mama*" in a female voice from the Mini Cinema Hall on the fateful day. Even if he is believed the words "*mama mama*" may not refer to the appellant. Appellant was the youngest maternal uncle of the deceased and her mother (P.W. 7)

stated he was referred to as '*choto mama*' and not '*mama*' – an expression which the girl used for her cousins. For these reasons, I am of the opinion prosecution has failed to prove the presence of the appellant at the residence beyond reasonable doubt.

(c) Motive of crime:-

41. It is contended appellant had romantic relationship with his elder niece i.e. the deceased. He committed the crime when her marriage was settled with another person. This was squarely rebutted by her mother (P.W. 7). She categorically stated that the relationship between her youngest brother and elder daughter was not romantic. On the other hand, father of the deceased (P.W. 1) deposed appellant had taken active interest in negotiating the marriage of her elder daughter i.e. the deceased. P.W. 10 whom prosecution proposed to press into service to prove romantic relationship turned hostile. P.W. 10 resiled from his earlier statement before police and did not support the prosecution case that he had discovered the appellant and the deceased in a compromising position earlier. In this backdrop, motive of the appellant to rape and murder the deceased prior to her proposed marriage falls through.

(d) Role of Sarban Sharma (P.W. 8):-

42. After P.Ws. 1 and 7 found their daughter had been murdered, they suspected the role of Sarban Sharma, a former friend of the deceased. In Court, parents of the deceased deposed Sarban had a romantic relationship with their elder daughter and love letters had exchanged. Though Kartik (another maternal uncle of the deceased) had

contacted Sarban and brought back the letters, the deceased suspected there were other letters and she would be blackmailed. So she was reluctant to enter into a negotiated marriage. Mother of the deceased (P.W. 7) stated that she had seen Sarban following the deceased when they took her for marriage negotiation in Kolkata. Sarban was examined as P.W. 8. Though he admitted there was romantic relationship between him and the deceased in school he emphatically stated the relationship had come to an end in 1975. Thereafter, he was unaware where the deceased and her family had been shifted. He further stated on 22.08.1983 between 3:00 to 6:00 p.m. he was watching a movie at 'Biswakarma Cinema Hall' with one Mita Dutta and one Shyam Dey. P.W. 19, first investigating officer deposed Sarban had been interrogated and released. But none of the investigating officers clarified whether they had verified the alibi of Sarban that he was watching a movie at 'Biswakarma Cinema Hall' with Mita Dutta and Shyam Dey at the relevant point of time. This leaves a lingering doubt with regard to the existence of alternate hypothesis with regard to involvement of Sarban in the crime.

(e) Refusal to give semen/pubic hair – adverse inference:-

43. Mr. Roy argues appellant inspite of directions by Court refused to give his semen/pubic hair for DNA examination. His refusal prevented the prosecution from adducing the most clinching evidence with regard to identity of the person whose biological materials were found at the place of occurrence and/or wearing apparels/body of the deceased.

Accordingly, an adverse inference under section 114 of the Evidence Act ought to be drawn against the appellant.

44. In rebuttal, Mr. Maitra contends in the factual matrix no adverse inference can be drawn. Validity of a DNA report depends on strict quality assurance regarding the manner in which samples are collected, preserved and the technique adopted for testing. Referring to the evidence of P.W. 23 he submits specimen samples had been collected on 23.02.1983 and were sent for FSL examination after a lapse of more than one and half months i.e. on 11.04.1983 and 23.04.1983. No evidence was adduced to show how integrity of the samples was preserved at the *Malkhana* during this period. These circumstances would erode the evidentiary value of the DNA report even if the same was produced in Court.

45. DNA examination is a vital tool to prove identity of an accused particularly in sex offences. Presence of bodily fluids, pubic hair etc. on wearing apparels, body of the victim or at the place of occurrence when compared with that of the suspect may give valuable evidence with regard to his involvement in the crime. A Constitution Bench in *State of Bombay vs. Kathi Kalu Oghad*³, inter alia, held collection of blood/hair samples from an accused during investigation does not violate the constitutional prohibition to self-incrimination under Article 20(3) of the Constitution of India. Taking note of the distinction drawn between testimonial evidence and physical evidence like collection of blood samples etc., Law

³ 1961 SCC OnLine SC 74

Commission in its 37th⁴ and 41st⁵ Report recommended insertion of a provision in the Code of Criminal Procedure for medical examination of an accused without his consent. This led to the amendment of the Code of Criminal Procedure and incorporation of section 53 in the Code. The said provision provides for medical examination of an arrested accused if such examination would provide valuable evidence with regard to commission of offence and if necessary, by use of reasonable force.

46. In *Selvi vs. State of Karnataka*⁶ the Court while interpreting sections 53/54 Cr.P.C. clarified that medical examination can also be done of an accused who is on bail or has been granted anticipatory bail. With advancement in science the aforesaid provisions i.e. section 53/54 Cr.P.C. was further amended and the expression 'medical examination' was defined to include examination of blood samples, semen, hair samples for DNA profiling etc. A separate yet similar provision for medical examination of an accused in rape cases was also incorporated (Section 53A Cr.P.C.). Though the subsequent amendments were incorporated in 2005, unamended section 53 providing for medical examination of an arrested accused for collection of evidence was in the statute book at the time of the incident.

47. In *Jamshed alias Dalli vs. State of U.P.*⁷ Allahabad High Court while interpreting unamended section 53 Cr.P.C. held blood sample can

⁴ The Code of Criminal Procedure, 1898 (Sections 1 to 176), 1967

⁵ The Code of Criminal Procedure, 1898, 1996

⁶ (2010) 7 SCC 263 (para 166)

⁷ 1976 SCC OnLine All 10

be compulsorily extracted during medical examination of an accused. Subsequent amendment in 2005 has merely inserted an inclusive definition of medical examination. Nature of the amendment is clarificatory and makes patent what was latent in the expression 'medical examination' with reference to advancement in science and technology. Or in other words, medical examination of an accused for the purpose of securing valuable evidence would even in the absence of such amendment include collection of physical evidence, namely, blood/hair sample which does not amount to testimonial compulsion. Under the statutory scheme prevalent at the time of occurrence, the investigating agency had ample powers to compulsorily extract blood/hair samples from the appellant without his consent.

48. In *Justice K.S. Puttaswamy (Retd.) And Anr. vs. Union of India And Ors.*⁸ the Apex Court while recognising the right to privacy as a fundamental right observed such right was not absolute and must yield to compelling/legitimate state interest like combating crime. A just, fair and reasonable procedure, that is, compulsory drawing of blood/hair samples under section 53 Cr.P.C. would not breach such right. In *Sharda vs. Dharmpal*⁹ the Apex Court while dealing with the right to privacy of an individual vis-à-vis power of the Court to direct medical examination observed as follows:-

“62. By way of example, we may refer to Sections 185, 202, 203, 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of

⁸ (2017) 10 SCC 1 (per Nariman, J., para 488)

⁹ (2003) 4 SCC 493

Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Penal Code, 1860. Constitutionality of these laws, if challenge is thrown, may be upheld.”

49. From this perspective one needs to examine whether refusal to give blood/hair sample during investigation of a crime would lead to adverse inference against the accused.

50. Section 114 of the Evidence Act states having regard to the common course of natural events, human conduct, public and private business, the Court after considering the impact of the aforesaid factors to the factual matrix of a particular case ‘may presume’ the existence of any fact, for example:-

“114. Court may presume existence of certain facts. –

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Illustrations

(a) *** **

(b) *** **

(c) *** **

(d) *** **

(e) *** **

(f) *** **

(g) *that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it;*

(h) *that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.”*

51. As discussed earlier, compulsory drawing of blood samples during medical examination involves collection of non-testimonial

physical evidence which does not violate the constitutional mandate of self-incrimination or privacy. If an accused refuses to co-operate, it is open to the investigating agency to resort to reasonable measures including reasonable force for collection of such evidence. In the present case, the investigating agency failed and neglected to resort to such course and collect blood/hair samples for DNA profiling. Recalcitrance of the appellant ought to have been combated by seeking cancellation of bail for obstructing the investigation and committing the appellant to custody for obtaining samples by use of reasonable force as per statutory mandate. Failure of the agency to exercise statutory powers vested in it cannot give justification to invoke statutory presumptions under section 114 of the Evidence Act.

52. In *Sharda* (supra) the Apex Court while dealing with the power of the Civil Court to direct medical examination of a party in a divorce proceeding where divorce was sought on the ground of medical illness held as follows:-

“81. To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.”

[Emphasis supplied]

53. Similarly in another divorce case alleging infidelity,¹⁰ the Supreme Court held though DNA test may be ordered a party cannot be compelled to undergo the test and if she refuses the Court shall draw an adverse presumption against her. This course was adopted to balance the right of privacy with the cause of justice. The Court held as follows:-

“18. This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice.”

54. The aforesaid cases involved matrimonial disputes between private individuals and the Court was not called upon to factor in compelling State interest of collecting vital evidence to prove a heinous crime while balancing competing right. The present case deals with a heinous offence involving mandatory life imprisonment. It is trite, graver the offence stricter is the proof and burden rests on the prosecutor to discharge it beyond reasonable doubt. This compelling State interest far outweighs the individual right to privacy/dignity and empowers the State to collect vital physical evidence like blood/hair samples *dehors* consent and even by resorting to reasonable force. Evidence on record reveals apart from a couple of requests no serious effort was made by the investigating agency to enforce the orders and compel the appellant to give samples by seeking cancellation of bail and committing him to custody, if necessary.

¹⁰ Dipanwita Roy vs. Ronobroto Roy, (2015) 1 SCC 365

55. The issue may be viewed from another angle. The value of scientific evidence depends on the development of science itself. DNA profiling in India in the 1980's was not as developed as it is today. DNA analysis methods like Short Tandem Repeat (STR)/ Single Nucleotide Polymerase (SNP) which may be undertaken on low quality and even degraded DNA material were not available. Methods like Restriction Fragment Length Polymorphism (RFLP) required large volumes of uncontaminated DNA material. Even in 2003 the Law Commission in its 185th Report on Review of the Indian Evidence Act, 2003 was of the view –

“... DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a Court of law.”

56. In the present case, P.W. 22 candidly admitted DNA examination was of no value if the semen had disintegrated. No evidence has come on record that DNA material in the samples sent for FSL examination had not disintegrated and could have been utilised for profiling. Reliability of a DNA report also depends on the quality assurance with regard to collection, preservation and the protocol adopted in forensic analysis. Mr. Maitra rightly argues there was inordinate delay in dispatching samples for FSL examination. No evidence is forthcoming with regard to the manner in which samples were preserved in *Malkhana*.

57. In *Rahul vs. State of NCT of Delhi*¹¹ the Apex Court refused to rely on DNA report, inter alia, on the ground possibility of tampering of

¹¹ (2023) 1 SCC 83

samples while they were in *Malkhana* could not be ruled out. In this case there is inexplicable delay for more than one and half/two months in sending the samples for FSL examination. This delay was due to investigational lethargy and not attributable to the appellant's reluctance to give samples. Lack of cogent evidence with regard to proper preservation of biological samples in the *Malkhana* and inordinate delay of more than one and half/two months would undoubtedly cast a shadow on the reliability of the DNA report even if the appellant had co-operated.

58. In this factual matrix, I am of the view it would be incorrect to draw an adverse presumption against the appellant under section 114 of the Evidence Act. However, refusal of the appellant to give semen/hair samples may be treated as conduct of an accused relevant under section 8 of the Evidence Act. Such conduct may provide an additional link to the chain of incriminating circumstances to prove the guilt. However, conduct by itself in the absence of proof of any other incriminating circumstance may not be sufficient to prove the guilt of the appellant beyond doubt.

Conclusion:-

59. Under such circumstances, I am inclined to extend the benefit of the doubt to the appellant.

60. Appeal is, accordingly, allowed.

61. Appellant, namely, Banamali Chowdhury @ Banamali Chaudhuri shall be discharged from his bail bond after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

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

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

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

PA (Sohel)