CASE NO.:
Appeal (crl.) 453 of 2006

PETITIONER:
Bishnu Prasad Sinha & Anr

RESPONDENT:
State of Assam

DATE OF JUDGMENT: 16/01/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. Sinha, J.

Appellants were charged with and convicted for commission of offences under Sections 376(2)(g), 302 and 201 read with Section 34 of the Indian Penal Code, 1860 for rape and murder of one Barnali Deb @ Poppy (the deceased), a 7-8 year old girl. She was travelling with her parents \026 Bishnu Deb (father-P.W.23), Anima Deb (mother- P.W.22) and younger brother in a private transport service known as Net Work Travels from Dharmanagar (Tripura). They were on their way to Dimapur in the State of Nagaland. They reached Net Work Travels' Complex at Paltan Bazar, Guwahati at around 10.30 p.m. on 12.7.2002. There was no connecting bus to Dimapur at that time. They were advised to stay over for the night at Guwahati. Appellant No.1 was a night chawkidar of the waiting room of the said Net Work Travels. He represented that they could stay there for the night and therefore should not have any apprehension in regard to their safety. Their luggage was carried by the appellant No.1 to the waiting room. The waiting room had two openings. It was covered by grills. Only the front gate was open, which was kept under lock and key, the key whereof was with the appellant No.1.

The family of P.W.23 went out for dinner and came back to the said waiting room. He and both his children slept. Anima Deb (P.W.22), mother of the deceased, however, kept on sitting. Appellant No.1 insisted on her repeatedly that she should go to sleep stating that as the waiting room would be locked, there was nothing for her to worry about. As she had not been sleeping, the appellant No.1, allegedly, scolded her to do so. At that time, a bus bearing No.AS-25-C-1476 arrived at the said bus stop. Putul Bora - Appellant No.2 was the 'handiman' of the said bus. While the Manager, Driver and the Conductor slept in the said bus, he did not. He was seen talking with the appellant No.1.

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

Shri Kapil Kumar Paul-P.W.2, the Cashier of the Net Work Travels was informed about the missing of Barnali Deb. As the girl could not be found despite vigorous search, Bishnu Deb, the father of the girl was advised

to inform the police. A missing entry was lodged before the Officer-in-Charge of Paltan Bazar Police Station. At about 8.30 a.m. on 14.7.2002, a complaint was made that the flush in the toilet was not working. P.W.7-Amar Deep Basfore (sweeper) was asked by P.W.2-Shri Kapil Kumar Paul to find out the reason therefor. He later on opened the septic tank and saw the head of a small child. He immediately reported the matter to P.W.1-Shri Bidhu Kinkar Goswami as well as P.W.2-Shri Kapil Kumar Paul.

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

Pursuant to the said First Information Report, a case under Sections 376(2)(g) and 302 read with Section 34 of the Indian Penal Code, 1860 was registered. A Magistrate was called. An inquest of the dead body was made. The said bus was intercepted and the driver-P.W.26, conductor-P.W.25 and Appellant No.2-Putul Bora were arrested. They were brought to the police station.

During the course of investigation, the appellant No.1 made a confessional statement before the Magistrate under Section 164 of the Code of Criminal Procedure, 1973 ('the Code' for short). He gave a vivid description as to how the offence was committed by him and the appellant No.2.

On completion of investigation, a charge-sheet was filed against the appellants. They were convicted by the learned Sessions Judge, Kamrup and sentenced to death. An appeal preferred by them, by reason of the impugned judgment, has been dismissed by the High Court.

The appellants are, thus before us.

At our request, Ms. Vibha Datta Makhija, learned counsel assisted us as Amicus Curiae in the matter.

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

As against Appellant No.1 :

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

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

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

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

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

suspicious circumstances.

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

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

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

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

As against Appellant No.2 :

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

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

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

iv) P.W.3-Shri Kamal Goswami, Manager of the Travel Agency, at about 2/2.30 p.m. had suddenly felt some touch on his leg. He found the appellant No.2 climbing the upper bunker of the vehicle. He was wearing a long pant, although during his journey he was wearing only a jangia.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We may, at the outset, place on record that this is one of the rare cases where the witnesses examined on behalf of the prosecution, inter alia, were the employees of the company where the appellants had also been working.

The presence of the appellants at the place of occurrence on the said night is not in dispute.

Appellant No.1 was the chawkidar of the waiting room of Net Work Travels and he was the only person who had the key, and without his knowledge nobody could have entered into the waiting room.

The waiting room was otherwise secure, having grills and collapsible gates. The second collapsible gate was also closed.

The bathroom as also the latrine were situated within the said premises.

The family came back to the waiting room after 10.30 p.m. The girl was found missing at about 3 O'clock. A search of the deceased was commenced. She was not found not only within the premises of the waiting room but also other nearby places.

The buses belonging to other travel agencies were also searched. A search was carried out even at the railway station.

The bus bearing No.AS-25-C-1476, in which the appellant No.2 was working as a handiman, left at about 6.30 a.m. for Jorhat.

The dead body was detected at about 9 a.m.

The Manager of the Net Work Travels himself lodged the First Information Report suspecting the appellant No.1 as also the driver, conductor and the handiman of the bus bearing No.AS-25-C-1476, as having

committed the offence.

The said bus was intercepted at about 10 a.m. and they were brought to the police station.

P.W.22-the mother of the victim saw the appellants herein talking to each other. According to her she was goaded to go to sleep; she was even threatened.

Appellant No.2 did not have any injury on his face earlier. Shri Kamal Goswami, the Manager of the Net Work Travels, who had travelled with the appellant No.2 in the same bus, in no uncertain terms stated that while he went to sleep, at about 2/2.30 p.m. he suddenly felt a touch on his leg and found the appellant No.2 moving to the upper bunker of the said vehicle. He had been wearing a long pant, although he had been wearing only a jangia while traveling from Nagaon to Guwahati. He had heard that the couple and the children were staying in the waiting room having missed their bus to Dimapur as also in regard to the searches carried out for tracing the missing girl.

He also deposed to the effect that although the appellant No.2 had some injuries on his face, he had not offered any explanation therefor. He is also a witness to the seizure of the under pants. Apparently, there is no reason to disbelieve his statement, particularly when both the appellants in their examination under Section 313 of the Code have accepted their presence. Appellant No.2 at no point of time, even during his examination under Section 313 of the Code, could offer any suitable explanation in regard to the stains/injuries on his face.

Shri Krishna Hazarika, the driver of the bus, examined himself as P.W.26. He proved that the appellant No.2 was seen to be gossiping with the appellant No.1 inside the complex of Net Work Travels. He proved the fact that a search was carried out in regard to the missing of Barnali. He also spoke about the seizure of the under pants containing some stains. This witness categorically stated that when they had gone to sleep, the appellant No.2 was not seen. On the aforementioned aspects he was not even cross-examined.

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

We have noticed hereinbefore that the parents of the deceased girl (P.Ws.22 and 23) stated in details as to under what circumstances they had to stay in the waiting room. The Cashier of the Net Work Travels \026 Shri Kapil Kumar Paul, who examined himself as P.W.2, apart from his statements which have been noticed hereinbefore, categorically stated that the appellant No.2, together with the driver and conductor of the bus bearing No.AS-25-C-1476 persuaded pressed him to allow the bus to leave for Jorhat earlier than the scheduled time, and he refused to accede to their request. It is only because of their conduct he suspected their involvement in the crime. This witness also categorically stated that lock and key of the waiting room would always be with the chawkidar.

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

being satisfied as regards the voluntariness thereof. The said confessional statement reads as follows :

"I am the night watchman of the Paltan Bazar counter of Network travels. On 13/7/02 I was on duty at the counter. Around 10.30 that night a bus arrived from Dharmanagar. Some passengers : from that bus came and requested me to allow them to stay at the counter for the night. The group comprised a man, two women \026 a girl of about 8 or 9 and a child of about 3 or 4. I allowed them to sleep at the counter. Around 1.30 am one 'NR Super' bus (No.1476) arrived from Jorhat and its staff slept in the bus itself. Around 2 a.m. Putul Bora, handyman of the N.R. Super bus got down from the bus and came to me. Then I proposed to Putul Bora rape of the said 8 or 9 year old girl sleeping at the counter. According to my plan I and Putul Bora lifted the said 8 or 9 year girl in her sleep and in the bathroom at the counter, we raped her, first me and then Putul Bora. As the girl was asleep, she did not shout. After having raped her, we found the girl still. Then I and Putul Bora opened the lid of the septic tank of the lavatory at the counter, put the girl inside the septic tank and closed the lid. Then I left for my duty and Putul Bora went back to the bus and slept there."

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

A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefor the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, in our considered opinion, can be fully relied upon.

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

"Q.No.41 : It is also in her evidence that on your production, the Magistrate asked you whether you were willing to give a confessional statement of guilt. What is your say?
Ans : The Magistrate asked me whether I was willing to make confessional statement. I wanted to give my confessional statement as I committed the offence.

Q.No.42 : It is also in her evidence that she made you understand that you are not bound to make confessional statement, the confession so to be made would go against you, that she was not a police man but a magistrate. What is your say?
Ans : The Magistrate did explain me the above fact to me and consulted the same carefully about the result of such confession.

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

Q.No.44 : It is also in her evidence that at your production again she again explained to you the import of confession and you expressed your willingness to give confessional statement. What is your say?
Ans : Yes I, expressed my willingness to give confessional statement. I understand her all questions (sic) put to me.

Q.No.45 : It is also in her evidence that inspite of repeated caution you were sanguine to give a confessional statement about your guilt. What is your say?
Ans : I was sanguine to given confessional statement because I was repenting to my misdeed that I did.

Q.No.46 : It is also in her evidence that you voluntarily gave confessional statement, what is your say?
Ans. : Yes, I voluntarily gave my confessional statement because I committed the offence. I am guilty of the offence.

Q.No.47 : It is also in her evidence that she recorded your confessional statement and the statement was readover to you and put your signatures having found the same as correct. What is your say?
Ans : Yes, my confessional statement was recorded by the Magistrate. The confessional statement so recorded was not read over to me. I put my signature in the confessional statement.

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

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

It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record. {See Mohan Singh vs. Prem Singh [(2002) 10 SCC 236], State of U.P. vs. Lakhmi [(1998) 4 SCC 336], and Rattan Singh vs. State of HP. [(1997) 4 SCC 161].}

In Aloke Nath Dutta & Ors. vs. State of West Bengal [2006 (13) SCALE 467], this Court noticed the law in regard to the effect of a confessional statement of the accused in the following terms :

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

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

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

Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should some time, in our opinion, be more intrusive than what is required in law. [See Babubhai Udesinh Parmar v. State of Gujarat \026 2006 (12) SCALE 385].

In a case, where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself that whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

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

It was further opined :

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

In State (N.C.T. of Delhi) vs. Navjot Sandhu @ Afsan Guru [(2005) 11 SS 600], this Court stated :

"As to what should be the legal approach of the court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarised in Bharat v. State of U.P. Hidayatullah, C.J., speaking for a three-Judge Bench observed thus: (SCC p. 953, para 7)
"Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true\005"

We may also notice that in Sidharth & Ors. vs. State of Bihar [(2005) 12 SCC 545], this Court opined :

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

In a case where sufficient materials are brought on records to lend assurance to the Court in regard to the truthfulness of the confession made, which is corroborated by several independent circumstances lending assurance thereto, even a retracted confession may be acted upon. {See State of Tamil Nadu vs. Kutty @ Lakshmi Narsimhan [(2001) 6 SCC 550]; Bhagwan Singh vs. State of M.P. [(2003) 3 SCC 21]; and Sarwan Singh Rattan Singh vs. State of Punjab [1957 SCR 953].}

We have analysed at some length the corroborative nature of evidences brought on records by the prosecution. The fact that the appellants were seen talking to each other, absence of the appellant No.2 from the bus in question, his effort to sleep in another bus leaving his own

bus, his absence for about 1 to 1= hour, injury/stains on his face and change of his garments during that period, all stand well proved. They, in our considered view, lend corroboration to prosecution case as also the judicial confession made by the appellant No.1. Indeed corroboration to the said confession and the circumstantial evidences as noticed hereinbefore can also be judged from the statements made by the appellant No.2 in his examination under Section 313 of the Code of Criminal Procedure.

The relevant questions and answers thereunder are as follows :

"Q.14 : Was the other accused, the watchman, present that night?
Ans : It is true the other accused, the watchman, was there.

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

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

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

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

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

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

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

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

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

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

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

The question has been considered in State of M.P. through CBI & Ors. vs. Paltan Mallah & Ors. [(2005) 3 SCC 169], stating :

".....Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession.."

In Sidhartha (supra), this Court held :

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

In Ram Parkash vs. The State of Punjab [1959 SCR 1219], it was held :

"That a voluntary and true confession made by an accused though it was subsequently retracted by him, can be taken into consideration against a co-accused by virtue of s. 30 of the Indian Evidence Act, but as a matter of prudence and practice the court should not act upon it to sustain a conviction of the co-accused without full and strong corroboration in material particulars both as to the crime and as to his connection with that crime. The amount of credibility to be attached to a retracted confession would depend upon the circumstances of each particular case."

It was further opined :

"On the evidence in the case the confession of P was voluntary and true and was strongly corroborated in material particulars both concerning the general story

told in the confession concerning the crime and the appellant's connection with crime."

{See also Navjot Sandhu (supra) and Jaswant Gir vs. State of Punjab (2005) 12 SCC 438].}

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

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

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

Submission of Ms. Makhija, that the possibility of the other passenger committing the crime cannot be ruled out, in our opinion, is wholly misplaced. Some more passengers may be there in the waiting room, but, they were found present at the time of search of the deceased girl. Evidently, they must have been found sleeping. If they had committed the offence, some suspicious circumstances could have been found. They were not suspected even by the parents of the deceased girl. Evidently, they could not have gone out as the lock and key was with the appellant No.1. Even no outsider would come in to commit the offence. The bathroom, where the offence had been committed, measures 5 ft. x 5 ft. It was within the locked premises. Only the septic tank was outside the premises, wherefrom the dead body of Barnali was recovered.

There were two other small rooms. One was urinal for the passengers. Another was the place of drinking water. Both were on the two sides of the said bathroom. Even the office room and the store room of the Net Work Travels were within the enclosed premises. There was an office room of Air India.

There were three buses, which were parked outside. Only because six other persons were there in the bus, suspicion cannot be pointed out to them.

It is settled that the conviction can be based solely on circumstantial evidence, but it should be tested by the touchstone of law relating thereto as laid down by this Court in Hanumant Govind Nargundkar vs. State of M.P. [AIR 1952 SC 343]. {See Sharad Birdhichand Sarda vs. State of Maharashtra [(1984) 4 SCC 116].}

In Hodge's case [168 ER 1136 at 1137], it was held :

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

other rational conclusion than that the prisoner was the guilty person."

He then pointed out to them the proneness of the human mind to look for \026 and often slightly to distort the facts in order to establish such a proposition \026 forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

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

The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, the appellant No.1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt.

In State of Rajasthan vs. Kheraj Ram [(2003) 8 SCC 224], this Court has stated the law thus :

"In Machhi Singh v. State of Punjab [(1983) 3 SCC 470] it was observed:

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

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? (SCC p.489, para 39)

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

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

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

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

(iv) A balance sheet of aggravating and mitigating

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

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

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

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-'-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland. (SCC p.488, para 34)

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

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

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

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

In State of M.P. vs. Munna Choubey & Anr. [(2005) 2 SCC 710], it was observed as under :

"Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu (1991 3 SCC 471."

In Sahdeo & Ors. vs. State of U.P. [(2004) 10 SCC 682], this Court opined :

"As regards the sentence of death imposed on five accused persons by the sessions court, which was confirmed by the appellate court, the counsel for the appellants, Shri Sushil Kumar submitted that in the absence of clear and convincing evidence regarding the complicity of the accused, these appellants could not be visited with the death penalty, while the counsel for the State submitted that this is a ghastly incident in which eight persons were done to death and the death penalty alone is the most appropriate punishment to be imposed. Though it is proved that there was an unlawful assembly and the common object of that unlawful assembly was to kill the deceased persons, there is another aspect of the matter inasmuch as there is no clear evidence by the use of whose fire-arm all the six deceased persons died as a result of firing in the bus. It is also pertinent to note that the investigating agency failed to produce clear and distinct evidence to prove the actual overt acts of each of the accused. The failure to examine the driver and conductor of the bus, the failure to seize the bus and the absence of a proper 'mahzar', are all lapses on the part of investigating agency. Moreover, the doctor who gave evidence before the court was not properly cross-examined regarding the nature of the injuries. Some more details could have been collected as to how the incident might have happened inside the bus. These facts are pointed out to show that the firing may have been caused by the assailants even while they were still standing on the footboard of the bus and some of the appellants may not, in fact, have had an occasion to use the fire-arm, though they fully shared the common object of the unlawful assembly. Imposition of the death penalty on each of the five appellants may not be justified under such circumstances. We take this view in view of the peculiar circumstances of the case and it should not be understood to mean that the accused persons are not to be convicted under Section 302 read with Section 149 and the death penalty cannot be imposed in the absence of various overt acts by individual accused persons. In view of the nature and circumstances of the case, we commute the death sentence imposed on A-1 Sahdeo, A-4 Subhash, A-5 Chandraveer, A-7 Satyapal and A-10 Parvinder to imprisonment for life."

In Raju vs. State of Haryana [(2001) 9 SCC 50], it has been opined by this Court :

"However, the next question is whether this would be a rarest of rare cases where extreme punishment of death is required to be imposed. In the present case, from the confessional statement made by the accused, it would appear that there was no intention on the part of the accused to commit the murder of the deceased child. He caused injury to the deceased by giving two brick blows as she stated that she would disclose the incident at her house. It is true that learned Sessions Judge committed error in recording the evidence of SI Shakuntala, PW 15 with regard to the confessional statement made to her, but in any set of circumstances, the evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick blows which caused her death. There is nothing on record to indicate that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these

circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty."

Yet, recently in Amrit Singh vs. State of Punjab [2006 AIR SCW 5712], this Court, in a case where the death was not found to have been intended to be caused, was of the opinion that no case under Section 302 of the Indian Penal Code was made out stating :

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

{See also Sheikh Ishaque & Ors. vs. State of Bihar [(1995) 3 SCC 392], Rony vs. State of Maharashtra [(1998) 3 SCC 625], Bachan Singh vs. State of Punjab [(1980) 2 SCC 684] and Machhi Singh (supra).}

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

There is another aspect of this matter which cannot be overlooked. Appellant No.1 made a confession. He felt repentant not only while making the confessional statement before the Judicial Magistrate, but also before the learned Sessions Judge in his statement under Section 313 of the Code of Criminal Procedure.

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

Subject to the modification in the sentence mentioned hereinbefore, this appeal is dismissed.

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