IN THE HIGH COURT AT CALCUTTA

Appellate/Revisional/Criminal Jurisdiction.

Present :

The Hon'ble Mr. Justice Mukul Gopal Mukherji

and

The Hon'ble Mr. Justice J.N. Hore

Death Reference No. 3 of 1991

State

versus

Dhananjoy Chatterjee @ Dhana
And
Criminal Appeal No. 272 of 1991
Dhananjoy Chatterjee, accused appellant(in jail)
Vs.
The State

For ~~xxxxx~~/Appellant/~~xxxxxx~~: Mr. Pradip Kr. Ghosh
Mr. Tapan Deb Nandi
Mr. Arjun Kr. Pain

For the State/~~xxxxxxxxx~~/~~xxxxxxxxx~~: Mr. J.K. Das
Mr. Ganesh Ch. Maity
Mr. Chandrayee Alam

Heard on : 29.4.92, 5.5.92, 7.5.92, 12.5.92 26.5.92, 27.5.92, 28.5.92, 2.6.92, 3.6.92, 4.6.92, 11.6.92, 15.6.92, 16.6.92, 22.6.92, 23.6.92, 24.6.92, 25.6.92, 26.6.92, 30.6.92, 1.7.92, 2.7.92 & 3.7.92.

Judgment on : 7th August, 1992

J.N. Hore, J

For committing murder of Hetal Parekh appellant Dhananjoy Chatterjee was convicted by the learned Additional

Contd...

Sessions Judge, Second Court, Alipore, under Section 302, Indian Penal Code and sentenced to death. The appellant was further convicted under Section 376, Indian Penal Code for committing rape on the said Hetal Parekh and sentenced to imprisonment for life. The appellant was also convicted under Section 380, Indian Penal Code for committing theft of a wrist watch from the flat of the deceased and sentenced to suffer rigorous imprisonment for 5 years. The sentences under Sections 376 and 380, Indian Penal Code were ordered to run concurrently and it was ordered that these two sentences would cease to have any effect in case the sentence of death for his conviction under Section 302, Indian Penal Code is confirmed by this Court and executed. The entire proceeding was submitted to this Court on a reference under Section 366 of the Criminal Procedure Code for the confirmation of the sentence of death. Convict Dhananjoy Chatterjee has preferred appeal against the said order of conviction and sentence. The reference under Section 366 of the Code of Criminal Procedure being Death Reference No. 3 of 1991 and the Criminal appeal preferred by the convict being Criminal Appeal No. 272 of 1991 have been heard together and this judgement will govern both.

Briefly stated, the prosecution case was as under:-

At the material time complainant Yashmoti Parekh (P.W.3) was residing at flat No. 3A on the 3rd floor of 'Anand Apartment' at 57A and B, Padma Pukur Road within Bhawanipore P.S., Calcutta with her husband P.W.4 Nagardas Parekh, her son P.W.5 Bhawesh Parekh aged about 19 years and daughter Hetal Parekh aged about 18 years(deceased). Her husband was engaged in business having his office at 71 Canning Street. Her son was studying at Bhawanipore Education Society and her daughter was studying at Weil and Goldsmith, Bowbazar. Accused Dhananjoy Chatterjee

was one of the security guards attached to ~~the~~ Anand Apartment engaged by "Messrs Security and Investigating Bureau" of which P.W.21 Syamal Karnakar was the proprietor. The accused used to reside in the Generator Room of 'Anand Apartment' and his duty hours were from 6 A.M. to 2 p.m.

On 2.3.90 Hetal complained to her mother(P.W.3) that the accused had been teasing her on her way to and back from school and proposed on that day to go with him to a Cinema Hall to see a picture. P.W.3 reported the matter to her husband P.W.4 Nagardas Parekh who made a complaint to P.W.21 and requested him to replace the accused by another security guard. On 4.3.90 P.W.21 issued a transfer order posting the accused at 'Paras Appartment' at Chakraberia Lane. Bijoy Thapa, security guard at 'Paras Appartment' was placed incharge of 'Anand Appartment' in his place. The transfer order was to take effect from 5.3.90.

On 5.3.90 P.W.4 Nagardas Parekh left for his place of business at 9 A.M. . P.W.5 Bhawesh Parekh returned home from college at about 11.30 A.M. and after taking his meals left for his father's place of business. Hetal appeared at I.C.S.C. examination at Well and Goldsmith School, Bowbazar and came back at about 1 p.m. . P.W.3 Yashmoti Parekh was in the habit of visiting Laxmi Narayan Mandir at Sarat Bose Road between 5 p.m. and 5.30 p.m. every day. On the date of incident also i.e, 5.3.90 at about 5.20 p.m. she left for the aforesaid temple leaving behind her daughter Hetal alone in the flat.

Inspite of the transfer order the accused performed his duties as security guard at 'Anand Apartment' on 5.3.90 from 6 A.M. to 2 p.m. A few minutes after departure of P.W.3 the accused came to P.W.7 Dasarath Murmu, another security guard who was on

duty from 2 p.m. and told him that he would go to Flat no. 3A on the 3rd floor for contacting his office over telephone from there and thereafter he went upstairs by the lift. At about 5-45 p.m. P.W.6 Pratap Chandra Pati, Superviser of M/s. Security and Investigating Bureau visited 'Anand Apartment' and on enquiry came to learn from P.W.7 that Bijoy Thapa did not come to 'Anand Apartment' to take charge from the accused and that the accused was on duty from 6 A.M. to 2 p.m. and that he had gone to flat no. 3A on the third floor to contact office over telephone. Being asked to call him, P.W.7 first tried to contact him through intercom but there was no response. Then he shouted the name of the accused who appeared at the balcony in front of flat no. 3A and replied that he was coming down. When he came down P.W.6 demanded an explanation as to why he had not reported for duty at 'Paras Apartment' as per transfer order and he told him that due to some personal difficulty he could not report for duty at Paras Apartment P.W.6 asked him to take over charge at Paras Apartment on the next day without fail. Around 6 p.m. the accused left Anand Apartment and was absconding till his arrest at his native place.

P.W.3 returned to her residence from the temple at about 6.05 p.m. . As she was about to enter the lift, she was told by lift man P.W.8 Ramdhan Yadav that the accused had gone to her flat for contacting the security agency over telephone. She was annoyed on hearing the information as her daughter Hetal had complained earlier on several occasions that the accused teased her on her way to and back from school. She went upstairs by the lift and rang the door bell. The door was not opened though she rang the bell repeatedly. She raised a hue and cry and being attracted by her shout, several persons came to the place.

By breaking open the lock the complainant and others entered into the flat. She found the door of her bed room open. Hetal was found in that bed room lying on the floor. Her midi-skirt and blouse were found to be pulled up and her private parts and breast were visible. Patch of blood was found near her head. Drops of blood were seen on the floor. Her hands were blood-stained. The wearing apparels were also blood-stained. Marks of blood were found on her face. her panty was lying near the entrance of the door. Hetal appeared to have lost consciousness and the complainant brought her down by the lift. A doctor came there being called by some of the neighbours. He examined the victim and pronounced her death. At about 7 p.m. Bhawesh returned from his place of business. In the mean time, another doctor was also called and he examined the victim and declared her death. The dead body of Hetal was then brought up stairs and laid on her bed in her room.

P.W.4 Nagardas Parekh, husband of the defacto complainant, returned home arount 8.30 p.m. . At about 9.15 p.m. he sent a telephonic message to the Bhawanipore P.S. that his daughter had been murdered. On receipt of the telephonic message P.W.29 S.I. Gurupada Som who was acting as duty officer made a G.D. entry (Ext.32) and visited the place of occurrence with other police personnel and recorded the statement of P.W.3 Yashmoti Parekh which was treated as the First Information Report and started investigation.

It was subsequently found that a "Richo" wrist watch with golden band belonging to P.W.3 was also taken away by the miscreant and on 6.3.90 P.W.3 sent a letter incorporating the list of the said article found stolen to the police(Ext. 3).

Police searched for the accused at different places but could not find him. The accused was ultimately arrested on 11.5.90 near his house at Kuludihi within Chatna P.S. and in pursuance of his statement a "Richo" wrist watch stolen from the flat of the complainant was recovered and a shirt and trousers were recoverec from the house of the accused. During investigation police seized a broken chain, a cream-coloured button with four holes and certain other articles from the place of occurrence. The cream-coloured button with four holes was found to be the one which was missing from the shirt of the accused and the broken chain was given by P.W.11 Gora @ Gouranga to the accused about a month before the date of the incident.

On completion of the investigation police submitted charge-sheet against the accused under Sections 302/376/394, Indian Penal Code and in usual course the case was committed to the Court of Session. The accused stood trial under Sections 302/376/380, Indian Penal Code with the result already indicated above.

In defence, the accused pleaded innocence alleging that he had been falsely implicated due to quarrel with P.W.4 over his transfer on the ground of the alleged teasing of the deceased by the accused. The specific case of the defence was that after his duty hours as security guard were over at 2 p.m., he went to see a picture and on his return from the Cinema Hall he went to Monorama School and purchased some fruits in connection with the Sacred Thread ceremony of his younger brother at his native place and left for his native place with the fruits purchased by him.

In order to bring home the charges to the accused the prosecution examined as many as 29 witnesses, while the defence examined none.

Mr. Ghosh, learned Advocate for the appellant has not disputed that the deceased died a homicidal death and was forcibly raped before her death and this has been proved beyond any reasonable doubt by the medical evidence. P.W. 20 Dr. Dipankar Guha Roy, M.O., Department of Forensic and State medicine, Medical College, Calcutta who held postmortem examination on the dead body of Hetal Parekh on 6.3.90 found the following injuries:-

1. Contusion measuring 3" x 2½" with multiple abrasions over it 7 in number of sizes varying from ¾" x ½" to ½" x ¼" on the left side of back, one inch above the level of Suprasternal notch and 2" behind and left of mid-line.
2. Contusion 4" x 2" multiple abrasions of varying sizes from 1" x ½" to ¾" x ½" over right side of neck 2" behind and right to midline and 1" above the right clavicle.
3. Abrasions-four in number of sizes varying from ¾" x ¼" to ½" x ¼" over left side of face, 2" anterior to the left angle of mandible and 1" above the lower border of mandible.
4. Abrasions two in numbers of sizes 1" x ½" to 1/6" x 1/8" over left side of face, ½" below the injury no. 3
5. One abrasion 2 x ½" placed 1" below the chin over midline.
6. Abrasion 2½" x 1" over right side of the face 1" right to mid-line and 1" above the lower border of mandible.

6(a) Abrasion 2½" x 1" over left side of face, ¾" right to angle of mouth 1½" above the lower border of mandible.

7. Lacerated would ½" x 1/8" x muscle over bridge of nose ½" below the fronto-nasal junction. On dissection

there was a communated fracture of nasal bones.

8. Abrasion ½" x ½" over tip of nose.
9. Laterated would ¼th inch x ½ inch x muscle over inner aspect of lower lip, ½ inch left to the mid-line.
10. One abrasion ½ inch x ½ inch over fronto-nasal junction.
11. One contusion 2" x 2" covered lids of left eye and adjacent part of left side of forehead.
12. Haematoma ½" x ½" on medial aspect of conjunctiva of left eye.
13. Abrasion ¾" x ½" over right frontal eminence.
14. Abrasions two in numbers, each of sizes 2" x 1/3" over medial aspect of left upper arm 5 inches above the level of left elbow joint.
15. One contusion measuring ¾th inch x ¾th inch over posterior aspect of left elbow joint.
16. Abrasion ¾ inch x ½ inch over posterior aspect of left elbow joint.
17. Abrasions, two in number, each sizes 1/8 inch x 18 inch on the lateral aspect of right hip joint 4 inch below the level of highest point of iliac-crest.
18. Extra-vasation of blood in the subcutaneous tissue and muscle on the left side of neck over an area of 3" x 2" corresponding to injury no. 1.
19. Extra-vasation of blood present in and around the larynx, trachea and oesophagus, corresponding to injury nos. 1 and 2.
20. Extra-vasation of blood measuring 2" x 1" over the ventral aspect of sterno-clavicular junction.
21. Fracture and dislocation of hyoid bone on its greater cornu of left side.

P.W.20 also found internal injuries on the person of the victim. Hymen of the victim showed fresh tear at 4,5, and 7 O' clock positions with evidence of extra-vasation of blood in margin. The pubic hair was matted. Blood-stained discharge was found on nostril and face. In the opinion of the doctor death was due to the effect of smothering with strangulation which were ante mortem and homicidal in nature. According to doctor, the injury showed evidence of vital reaction. In the opinion of the doctor the injuries were sufficient to cause death in the ordinary course of nature. According to him, injury no. 21 was alone sufficient to cause death of the victim in the ordinary course of nature. He has further opined that the fresh tear in the hymen and the matted pubic hair indicated that the victim girl had been raped before she was murdered. Semen was detected in the panty and under garment and the pubic hair of the deceased on chemical analysis (vide the report of the senior Scientific Officer-cum-Assistant Chemical Examiner, Forensic Science Laboratory, Govt. of West Bengal, Ext.36). There cannot, therefore, be any doubt that it is a case of homicide with rape.

The next question for our consideration - and the crucial one-is whether the accused was responsible for the rape on, and the death of, the deceased and the order of conviction and sentence as passed by the lower Court can be sustained. There is no direct evidence of eye-witnesses and the prosecution case rests entirely on circumstantial evidence. It is well-settled that in cases where the evidence is of a circumstantial nature, the circumstances, duly established, should be consistent only with the hypothesis of the guilt of the accused person, i.e. the circumstances should be of such a nature as to reasonably exclude every hypothesis but the one proposed to be proved. To put it in other words,

the chain of evidence must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused person. In such cases, the Court must guard itself against the danger of allowing conjecture or suspicion to take the place of legal proof. In Hanumant Vs. State of Madhya Pradesh, 1952 SCR 1091 : AIR 1952 SC 343, the Supreme Court laid down the rule regarding the nature, character and esstntial proof recuired in a criminal case which rests on circumstantial evidence alone as follows:-

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
This case has been uniformly followed by the Supreme Court in a large number of later decisions. Upon an analysis of this decision, the Supreme Court has laid down 5 principles which constitute the 'Panchsheel' of proof of a case based on circumstantial evidence in Sarad Birdhi Chand Sarda's case, AIR 1984 SC 1622. The following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) The circumstances from which the conclusion of guilt

is to be drawn should be fully established. 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 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. It has further been held that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

Bearing the above in mind, let us now proceed to consider the circumstances relied on by the prosecution and see whether the guilt of the appellant has been proved beyond reasonable doubt. Before doing so it would be convenient to deal with the objection raised by Mr. Ghosh with regard to the First Information Report. It has been contended that the G.D. entry (Ext 32) containing the substance of the telephonic message of P.W.4 disclosing the commission of a cognizable offence which was earlier in point of time and which set the police in motion should be treated as the First Information Report and the subsequent statement

of ~~PR~~ P.W.3 recorded by police after visit to the place of occurrence is hit by Section 162 Cr. P.C. The contention of Mr. Ghosh merits acceptence. The telephone message sent by P.W.4, though cryptic, clearly discloses the commission of a cognizable offence. It is not a vague and indefinite ~~xx~~ telephonic information by an anonymous person. It is true that when the information, which is first given to the police, is of such a vague and indefinite character that it cannot be treated as coming under Section 154 of the Criminal Procedure Code, so as to make it incumbent upon the officer-in-charge of the police station to start an investigation, and he may reasonably require more information before doing so, any further information given to him in such circumstances may fall within Section 154. In such a case further information will not fall within Section 162. But we have already seen that in the telephonic message (Ext. 32) the name and address of the informant, the place of occurrence and the nature of the cognizable offence have been specifically stated. It is immaterial that essential particulars and the name of the offender are not stated. It also appears from the evidence of P.W.28 that on the basis of the telephonic message of P.W.4 police took steps for investigation. P.W.28 along with other police personnel visited Flat no. 3A of P.W.4 of 'Anand Apartment' and found the deceased lying on a cot in bleeding condition in the bed room of Mr. and Mrs. Parekh. Marks of blood, a broken chair and a cream-colcured button, some clothings and other articles including a cradle were found. A steel almirah was found open and articles inside the almirah were in disturbed condition and a panty in torn condition with some stains of blood and other materials was found near the entrance of the drawing-room. Some hairs and the door lock in broken condition were also found. Requisitions were made under the orders

of the officer-in-charge of Bhawanipore police station for the Dog Squad and photographers. Thereafter P.W.28 recorded the statemen of P.W.3 which has been treated as the First Information Report in this case. The statement was recorded after the investigation had already commenced and is, therefore, hit by Section 162, Criminal Procedure Code. In the case of H.N. Rishbud and another Vs. State of Delhi, AIR 1955 SC 196 the Supreme Court has held that under the Code investigation consists generally of the following steps:-

(1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and the arrest of the offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statement into writing, if the officer thinks fit (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, (5) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a chargesheet under Section 173. It would appear that at least the first two steps were already taken by the Investigating Officer. We are, therefore, of the opinion that the statement of P.W.3 recorded by the police after the investigation had already commenced could not be treated as the First Information Report.

According to the prosecution, transfer order was issued to the accused by his employer directing him to leave 'Anand Apartment' and to move to 'Paras Apartment' on a complaint lodged by P.W.4 Nagardas Parekh for the alleged teasing of his daughter Hetal to be

effective from 5.3.90 but the accused flouted the said order and was on duty at 'Anand Apartment' from 6 A.M. to 2 p.m. on 5.3.90. P.W.3 Yashmoti Parekh has deposed that a few days before the occurrence Hetal had complained to her that the accused used to tease her on her way to and back from school and she informed her husband accordingly. P.W.4 Nagardas Parekh has stated that on 2nd March, 1990 he came to know from his wife (P.W.3) that the accused had teased Hetal while she was on her way to school and back. Thereafter, he called dwellers of the Apartment including P.W.13 Mahendra Chouhatia and P.W.14 Harish Vakhria and informed them of the alleged teasing to his daughter by the accused. According to P.W.4 they gave him the option to replace the accused by another security guard. It further appears from his evidence that he asked P.W.21 Syamal Karmakar who was the employer of the accused to come to his residence on 3rd March 1990 and when the latter came to his house on 3.3.90 he complained to him that the accused had teased his daughter Hetal and he wanted him to be replaced by another security guard. He handed over a written complaint to P.W.21 Syamal Karmakar (Ext.4). This part of his testimony has not been challenged in the cross-examination.

P.W.13 Mahendra Chouhatia has corroborated P.W.4 by stating that on 2nd March 1990 P.W.4 called him through intercom and he along with P.W.14 Harish Vakhria, a resident of Flat No. 4C of 'Anand Apartment', had been to the flat of P.W.4. He has further stated that P.W.4 had reported to him that the accused had been teasing his daughter Hetal and he suggested that the accused should be replaced by another security guard. This witness and Harish Vakhria consented to the suggestion of P.W.4. P.W.13 has further stated that on 3.3.90 around 9 p.m. P.W.4 contacted him through intercom and informed that he had called one Karmakar,

the proprietor of the security agency and asked him to remove the accused from the premises. There was no cross-examination of this witness at all.

The evidence of P.W.4 receives further corroboration from P.W.21 Syamal Karmakar and the original and the copy of the written complaint made by P.W.4 to P.W.21 (Exts. 4 and 4/1 respectively) P.W.21 has stated that on 3.3.90 P.W.4 rang him and asked him to meet him on the same day in the evening. He accordingly met P.W.4 in the evening and received a written complaint from him (Ext. 4). P.W.4 wanted him to remove the accused from 'Anand Apartment' and post another security guard in his place. He proves the endorsement on the copy of the complaint "received the original". This part of evidence of P.W.21 was also not challenged in the cross-examination.

The evidence of P.W.21 shows that after receiving the complaint against the accused from P.W4 he made an order of transfer of the accused from 'Anand Apartment' to 'Paras Apartment' at Chakraberia Lane. Bijoy Thapa who was acting as security guard of 'Paras Apartment' was deputed in charge of 'Anand Apartment' in place of the accused with effect from 5th March 1990. The witness has further stated that he handed over the written order of transfer to Rezaul Haque for delivering it to the accused. Ext. 23 is the copy of the said transfer order. Rezaul Haque has been examined as P.W.5. He has specifically stated in his evidence that P.W.21 sent a letter in a covered envelope to the accused through him on 4.3.90 and that he handed over the same to the accused on 4.3.90 when he was in 'Anand Apartment'. This part of his evidence has not been challenged in the cross-examination.

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The written complaint being Ext. 4 dated 3.3.90 was seized from P.W.21 only on 29.6.90 (vide seizure list Ext. 24) and the copy of the same was seized from P.W.4 on 30.6.90 (vide the seizure list Ext. 5). Copy of the transfer order dated 4.3.90 was seized from P.W.21 on 29.6.90. Mr. Ghosh has contended that this unusual delay in seizure of the complaint and the transfer order gives rise to a reasonable suspicion that these documents were fabricated subsequently as an after-thought in aid of the prosecution. According to Mr. Ghosh this suspicion is strengthened by the facts of non-examination of Bejoy Thapa who was to replace the accused at 'Anand Apartment' and absence of evidence that Bejoy Thapa was apprised of the new arrangement, absence of proof of service of the transfer ofder on the accused and that the accused as usual was on duty at 'Anand Apartment' on 5.3.90 from 6 A.M. to 2 p.m. . This contention is based on mere surmise and is not based on reasonable grounds. From the mere fact that there was delay in seizure of the complaint and the transfer order it cannot be presumed that these documents were subsequently manufactured in aid of the prosecution. At best it will indicate negligence on the part of the Investigating Officer. We have already seen that the transfer order (Ext. 23) was not challenged in the cross-examination of P.W.21 at all. The complaint (Ext.4) was not also challenged in the cross-examination of P.W.4. The evidence of P.W.9 with regard to service of the transfer order was not also challenged in the cross-examination. The fact of transfer of the accused on the basis of a complaint of the alleged teasing of the deceased by the accused made by P.W.4 to P.W.21 was not disputed at all at the time of trial. No suggestion was also put to the Investigating Officer regarding the alleged fabrication of the complaint and the transfer order. On the other hand, there was a specific suggestion by the defence to P.W.4 that

the accused had quarrelled with P.W.4 over his transfer from 'Anand Apartment' and that the accused had, therefore, been falsely implicated in this case out of grudge. This suggestion, which was denied by the witness, clearly suggests that the accused had knowledge of the transfer order with the background of his transfer. This defence plea was given up at the time of examination of the accused under Section 313, Criminal Procedure Code where he (Consciously) denied the receipt of the transfer order altogether. It is preposterous to suggest that P.W.s 21, 13 and 9 who are absolutely independent witnesses along with P.W.4 would enter into an unholy alliance with the Investigating Officer and fabricate the documents in order to falsely implicate an innocent person letting off the real culprit of such a heinous offence. Mr. Ghosh has urged that P.W.9 proves only the delivery of an envelope and that P.W.9 has not stated that the envelope contained transfer order but we have seen from the evidence of P.W.21 that he handed over the envelope containing the transfer order to P.W.9 for service on the accused and the evidence of P.W.9 shows that he handed over the same to the accused on 4.3.90 which is unchallenged in the cross-examination. The copy of the transfer order is Ext. 23 duly proved by P.W.21. It also appears from the evidence of P.W.6 Pratap Chandra Pati, Superviser, M/s. Security and Investigation Bureau who visited 'Anand Apartment' at about 5-45 p.m. on 5.3.90 that the accused admitted that he had received the transfer order and offered an explanation that due to some personal business he could not report for duty at 'Paras Apartment' on that day. P.W.6 asked him to report for duty at 'Paras Apartment' with effect from 6.3.90 without fail. Non-examination of Bejoy Thapa is of little consequence in view of the clear proof of service of the transfer order on the accused. It is significant that the accused did not ask for time for joining his new assignment because of personal difficulties though he received the transfer order on

4.3.90 and it was only when P.W.6 demanded an explanation as to why he had not reported for duty at 'Paras Apartment' that he put forward the plea of personal inconvenience. It is clear that the accused received transfer order but deliberately flouted it and did his duties at 'Anand Apartment' from 6 A.M. to 2 p.m.. The transfer of the accused from 'Anand Apartment' on the allegation that he had teased the deceased on her way to and back from school might serve as a motive for retaliation and commission of the crime.

Let us next consider whether the prosecution has been able to prove the alleged teasing of the deceased by the accused. The evidence of P.W.3 is that 10/15 days prior to the incident Hetal complained to her that Dhananjoy used to tease her on her way to and back from school. She has further deposed that Hetal also stated to her on 2.3.90 that the accused wanted to know from her if she would accompany him to a cinema. She reported the matter to her husband. The fact that P.W.4 made a complaint to P.W.21 and took steps for transfer of the accused lends support to the testimony of P.W.3 that she reported to her husband what the deceased had told her. Now, the question is whether the statement of the deceased as proved by P.W.3 with regard to the alleged teasing is admissible in evidence. Mr. Ghosh has contended that the statement does not come within the purview of Section 32(1) of the Evidence Act inasmuch as it does not relate to the cause of the death of the deceased. We are not inclined to accept this contention. The Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of clause (1) of Section 32 viz.,

"the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English law. The leading decision on this question which has been followed by a long catena of authorities of almost all the courts including the Supreme Court is the case of Pakala Narayana Swami Vs. Emperor, AIR 1939 PC 47, where Lord Atkin has laid down the following tests:

."It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transactions; general expressions indicating fear of suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible..." circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relavant facts. It is on the other hand narrowwer than "res gestae." Circumstances must have some proximate relation to the actual occurrence ..... It will be observed that "the circumstances are of the transaction which resulted in the death of the declarant."

In Shard Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 Supreme Court 1622, Fazal Ali, J. on a review of the authorities, laid down the following among other propositions:

(1) Sec. 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicide, or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relavant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very shot time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

Turning to the facts of the present case, it appears that rape and murder are part of the same transaction. The alleged teasing and the transfer of the accused from 'Anand Apartment' on that ground are inextricably bound up together. We have already seen that the transfer of the accused on the ground of the alleged

teasing casting aspersion on his character and reputation might be a possible motive for committing the crime as retaliation. The statement of the deceased with regard to the alleged teasing at least furnishes an immediate motive and is, therefore, admissible under Section 32(1) as being a part of the transaction of death. The prosecution has, therefore, succeeded in proving the fact that a few days before the occurrence the accused used to tease the deceased on way to and back from school.

According to the prosecution, the accused was seen proceeding to flat no. 3A on the third floor of P.W.s 3 and 4 on the plea of using the telephone of that flat for contacting the office of his employer immediately after P.W.3 left the flat leaving the deceased alone at about 5-15 p.m. and that he was again seen on the balcony of flat no. 3A at about 5-45 p.m. The evidence of P.W.3 shows that she used to visit Lakshmi Narayan Mandir at Sarat Bose Road every day between 5 p.m. and 5.15 p.m. On 5.3.90 also she left for the said temple ~~at~~ around 5.15 p.m. leaving the deceased alone in the house. She returned between 6 p.m. and 6.05 p.m. but there was no response when she rang the door-bell repeatedly. She started shouting and banging on the door calling the name of her daughter Hetal asking her to open the door. Some residents of the building including P.W.15 Harish Desai assembled. The door was broken open and she along with others entered into the room. Hetal was found lying on the floor of the bed-room of the witness. Her private parts and breasts were visible. There was patch of blood found near her head. Drops of blood were seen on the floor. Her hands and wearing apparels were blood-stained. She was brought down in the lift. A doctor (P.W.17 Dr. Kirti Barishi) came there being called by neighbours. He examined the victim and declared her to be dead. It is clear, therefore, that the ghastly crime was committed during the temporary ~~ax~~ absence of P.W.3 from about 5.15 p.m. to 5.05 p.m.

The evidence of P.W.7 Dasarath Murmu, another security guard who was on duty from 2 p.m. is that on 5.3.90 at about 5.15 p.m. she saw 'Parekh Maijee' (meaning P.W.3) coming downstairs by lift. The accused came to him 5/6 minutes after 'Parekh Maijee' had left and told him that he would go to flat no. 3A on the 3rd floor for contacting their office over telephone from there. Ramdhani (P.W.8) took the accused upstairs by lift. His further testimony is that around 5.45 P.W.6 Pratap Chandra Pati, Superviser of "M/s Security and Investigation Bureau" came to the premises to check up their duties. He enquired if Bejoy Thapa reported for duty in the morning shift. He informed P.W.6 that the accused acted as a security guard in 'Anand Apartment' in the first shift in the morning. On the query of P.W.6 he told him that the accused had gone to flat no. 3A for contacting their office over telephone. P.W.6 asked him to call the accused. He at first tried to contact the accused in flat no. 3A through intercom but did not get any response. He then shouted the name of the accused 4/5 times from the gate of the building. The accused came to the balcony of flat no. 3A on hearing his shouts and by leaning out his face told him that he would be coming soon. Shortly thereafter, the accused came down. P.W.6 went ahead to talk to the accused. The accused went out of the gate of the building by sidetracking P.W.6 and asked him to come out saying that he would talk to him after going out of the gate of the building.

The testimony of P.W.7 receives corroboration from P.W.6 Pratap Ch. Pati. His evidence shows that on 5.3.90 he went to office at about 1 p.m. and came to know about transfer of the accused to 'Paras Apartment'. At about 5.45 p.m. he came to 'Anand Apartment' and found P.W.7 on duty there. He enquired of P.W.7 if Bejoy Thapa had reported for duty and P.W.7 told him that the accused had performed duty in the morning hours. He wanted to know the whereabouts of the accused and was told that the accused had gone to the flat of

Parekh Babu on the 3rd floor for making a telephone call to their office. He asked P.W.3 to call the accused. He unsuccessfully tried to contact the accused in the flat of Parekh Babu through intercom. He then called the accused by his name from his duty post in his presence. Leaning over the balcony of the 3rd floor flat of Parekh Babu the accused replied that he was coming down. Thereafter he came down. He wanted to talk to him (the accused) but he wanted to leave the place hurriedly and asked him to come out. He followed him. On his query the accused admitted that he had received the transfer order but could not report for duty at 'Paras Apartment' for some personal work. P.W.6 asked the accused to report for duty at 'Paras Apartment' from 6.3.90 without fail. He then left 'Anand Apartment' at about 6 p.m. and went to 'Paras Apartment' and asked Bejoy Thapa to hand over charge to the accused and proceed to 'Anand Apartment' from 6.3.90.

Both P.W.s 6 and 7 are disinterested and independent witnesses having no animus against the accused and there is no serious infirmity in their testimony. Nothing transpires from their cross-examination which may impeach their credibility. Mr. Ghosh has drawn our attention to the fact that P.W.7 has not stated to the Investigating Officer that he tried to contact the accused in flat No. 3A through intercom and that he called the accused from near the gate of the building. These omissions are not in material particulars and may be safely ignored. There is no contradiction with regard to the calling of the accused. The omission of the exact spot wherefrom he called the accused is not material. P.W.6 has no doubt stated that P.W.7 called the accused from his duty-post. But this does not really contradict the testimony of P.W.7. The duty-post is near the gate of the building. The statement of P.W.6 need not be taken too literally. At any rate, the discrepancy in a minor detail may be overlooked.

Mr. Ghosh has sought to assail the evidence of P.W.s 6 and 7 on the following grounds:-

Firstly, it is absurd to suggest that the accused would openly declare his intention to P.W.7 if he was really going to the 3rd floor for the purpose of taking revenge on the victim or even meet the victim. If the accused really wanted to go to Flat No. 3A, he could have easily gone up without informing any one by using the staircase. Even if he were asked as to where he was going, he could have availed of any fake excuse to keep P.W.7 unaware of his destination.

Secondly, it is patently absurd and inherently improbable that one who had just committed a crime would go out in the open balcony to be seen by all and sundry that he was present in Flat no. 3A. It is against normal human conduct. Such a suicidal move can never be expected of a man who has just committed such a crime. He could easily come out of the flat and come down by the stairs instead of appearing on the balcony to say that he was coming. It was not at all necessary for him to respond to the call of P.W.7 that he was coming. No one would be foolish enough to create evidence of his complicity by coming out in the open to say that he was in Flat no. 3A to the entire neighbourhood. This is opposed to common sense and broad probabilities of the situation.

Thirdly, the conduct of P.W.7 makes it highly improbable that the accused had told him that he was going to Flat No. 3A and that he saw the accused on the balcony of Flat no. 3A. If he had known that the accused was going to Flat no. 3A as soon as P.W.3 had left and that during the crucial time he was again seen on the balcony of Flat no. 3A he was expected to disclose the vital facts to the

Parekh and also to the other inmates of the building. Hetal's deadbody was brought down at 6 P.M. . Many people assembled downstairs when P.W. 7 was on duty. But even after he came to know about death of Hetal, he did not tell any one anything as to the complicity of the accused until he was interrogated by the police.

Fourthly, if the accused really declared his intention to go to Flat no. 3A, P.W.7 as a routine duty ought to have contacted inmates of the said flat through intercom and obtained permission before letting him to go there.

Fifthly, if P.W.7 shouted the name of the accused at the top of his voice from the downstairs so as to reach the ears of the accused on the third floor some inmates of other flats must have heard the same and come out of their flats and seen the accused on the balcony of Flat no. 3A but no inmate has been examined to corroborated the testimony of P.W.7.

Lastly, not only is the evidence of P.Ws 6 and 7 absurd and improbable it can also be characterised as highly artificial and mechanical evidence which the Court should reject, even if it is found that the witnesses were not shaken in the cross-examination. Mr. Ghosh has referred in this connection to the case of Bahadur Singh Vs. State of U.P., AIR 1990 SC 431 (paragraph 6) where the Supreme Court has observed : " ... Rather the fool-proof narration given by the prosecution witnesses has left us with the impression that the story put forward is lifeless and mechanical and does not stand scrutiny when tested on the preponderance of probabilities, having regard to human behaviour in the day-to-day happenings when moving on the road of life and on that analysis some doubts have entered our mind which we express hereafter." Mr. Ghosh has also referred to

the observation of the Supreme Court in Datar Singh Vs. State of Punjab, AIR 1974 SC 1193. (paragraph 4) : " .... The superstructure of the prosecution case is based on the testimony of two alleged eye-witnesses whose evidence is not only of an inherently unreliable nature but the artificial and incredible versions of the shooting put forward by them are too unnatural to be expected. It seems to us to be quite unsafe to convict the appellant on their testimony despite some circumstances which raise grave suspicion against the appellant ..."

We have given anxious consideration to the contentions of Mr. Ghosh but we are not inclined to discard the evidence of P.Ws 6 and 7 on any of the grounds urged by Mr. Ghosh. With regard to the first ground, it is to be borne in mind that the accused had already been transferred from 'Anand Apartment' to 'Paras Apartment' with effect from 5.3.90 but inspite of the transfer order he was on duty at 'Anand Apartment' on 5.3.90 from 6 A.M. to 2 p.m. . The accused knew well that he might give some excuse for not carrying out the order of transfer on 5.3.90 but he would not be allowed any further time for joining his new assignment at 'Paras Apartment' and so he might not get any opportunity to commit the crime after 5.3.90. The act must be done during the temporary absence on 5.3.90 of P.W.3 from about 5.15p.m. . From the stand point of the accused he was placed in a desperate situation. It is quite probable that in such a situation he would be prepared to take some risks. In any event, he was not likely to go to the 3rd floor of the building unnoticed by P.W.7 who was on duty at that time near the staircase and lift and even by the lift man P.W.8 Ramdhan Yadav. P.W.7 was likely to ask him where he was going as part of his duty. In such a situation there would be nothing improbable if the accused thought it wise to come forward beforehand with a plausible excuse for going to flat no. 3A. It appears from the cross-examination of P.W.7 that except the intercom connection there was no

arrangement of telephone for the guards downstairs and that it was not necessary for the servants and the security guards to contact any resident of any flat through intercom and they could straight-way visit such a flat. The accused owed an explanation to his employer as to why in violation of the order of transfer which was to take effect from 5.3.90 he did his duties at 'Anand Apartment' on that day. So contacting the office over telephone from a flat of the building was a natural and plausible excuse for going to Flat no. 3A. So it was not improbable that the accused made the statement to P.W.7 in order to avoid any query in the matter particularly when it was almost impossible to go upstairs without being seen by P.W.7 or P.W.8. He had not much time at his disposal. Considering all the circumstances the testimony of P.W.7 in this regard does not appear to be inherently improbable and absurd. Human conduct varies from person to person in a given situation. How a person would react to a particular situation depends on a variety of factors such as age, education, temperament, intelligence, presence of mind and moral upbringing. In this connection we may also take into consideration of the fact that the accused made himself scarce from 6 p.m. even before detection of the crime and was absconding till his arrest on 12.5.90 as we shall see later. So it appears that absconding immediately after the incident was a part of the plan of the accused. Even if he did not make the alleged statement he was aware that suspicion was bound to fall on him because of the circumstances relating to his transfer, his flouting of the order of the transfer, his absconding immediately after the occurrence and the possibility of his being seen by P.W.7 and P.W.8 going upstairs. In his wisdom he might have thought that he could avoid apprehension by absconding for ever. His immediate concern was not to arouse any suspicion what ever in the

minds of P.Ws. 7 and 8. He, therefore, offered a natural and plausible plea for his going to Flat no. 3A in order to remove any possible hindrence that might be caused by P.Ws. 7 and 8.

While considering the second ground urged by Mr. Ghosh, we must bear in mind the predicament in which the accused was placed when he was called by P.W.7 at the instance of P.W.6 which he could never anticipate. P.W.7 could not contact him through intercom and he was shouting his name for some time and if the accused did not respond in any way there was always the risk of P.Ws. 6 and 7 coming to Flat no. 3A and his being caught redhanded and the crime being detected before he could escape. Placed in such a situation it was not inprobable on the part of the accused to come out on the balcony and declare that he was coming down soon. In this situation he acted rather cleverly in dispelling the possible suspicion and the danger of P.Ws. 6 and 7 coming upstairs and preventing his escape.

Regarding the third ground, we have already seen that P.W.7 reported to P.W.6 at about 5.45 p.m. that the accused had gone to Flat no. 3A for the purpose of making a telephone call to the office. So P.W.7 disclosed the fact at the earliest opportunity even before the detection of the crime. It cannot, therefore, be said that P.W.7 did not disclose the matter to anybody before he was examined by police. It may be pointed that he was examined by police on that very night.

Regarding the fourth ground, it appears from the evidence of P.W.7 that as security guard his duty was to guard the premises and prevent outsiders from entering into the building. Outsiders

would be allowed entry only after contacting through intercom the residents of the concerned flat and getting permission from them for the entry of any such people to any such flat. It has been elicited in the cross-examination that he did not try to contact Flat no. 3A through intercom when the accused gave out that he would go to that flat for using the telephone there for contacting their office because for the servants and the security guards it was not necessary to contact residents of any flat but they could straight-way visit such a flat. The servants working in the flat and the security guards like the witness and the accused used to go upstairs without such permission by using the staircase or by lift. The accused was a security guard like P.W.7 engaged by the same security agency. P.W.7 has sufficiently explained as to why he did not contact inmates of Flat no. 3A through intercom and obtain permission before letting the accused go there.

With regard to the fifth ground it appears from the evidence of P.W.3 that there are two other flats in the 3rd floor-Flat nos. 3B and 3C. At the material time flat no. 3C was vacant. Arunaben Shah was occupant of flat no. 3B. There is no evidence that Arunaben Shah was present in her flat at the material time. The evidence of P.W.8 shows that Arunaben Shah's mother was coming to her flat by the lift when the accused was proceeding to the superviser. This shows that she was not present when the accused was called by P.W.7. Assuming that some persons were present in other flats of the first and second floor, the shouting of the name of the accused by P.W.7 was not such an event which was likely to arouse interest in them and attract their attention so that they would come out of their flats to see what was happening. Moreover, a person standing on the balcony of flat no. 3A on the 3rd floor is not easily visible from balcony of flats of other floors.

The voice of P.W.7 might not also reach the 4th and 5th floor. The fact that no other person saw the accused on the balcony of Flat no. 3A where he remained for a very short time is no ground for disbelieving the testimony of P.Ws. 6 and 7.

The last contention of Mr. Ghosh is not also acceptable to us. The evidence of P.Ws. 6 and 7 cannot be characterised as highly artificial and mechanical evidence. As a supervisor the duty of P.W.6 was to check up the duties of the security guards engaged by M/s. Security and Investigation Bureau at different places and submit reports to the office. On such inspection and on the basis of the aforesaid reports the attendence sheets of the security guards were prepared. On 4.3.90 he went to his office at about 1 p.m. and came to know about the transfer of the accused from 'Anand Apartment' to 'Paras Apartment'. It was quite natural that he came to 'Anand Apartment' at about 5.45 p.m. to check up whether Bejoy Thapa had assumed duties at 'Anand Apartment' and whether the accused had taken over charge at 'Paras Apartment'. His visit to 'Anand Apartment' at 5.45 p.m. was, therefore, quite natural and it was also quite natural that he would enquire about whereabouts of the accused when he came to know that inspite of the transfer order the accused was on duty in the morning shift at 'Anand Apartment'. It was also quite natural for him to ask P.W.7 to call the accused who was reported to have gone to Flat No. 3A for the purpose of contacting his office over telephone. The decisions referred to by Mr. Ghosh are of no assistance to the appellant. The observations were made by the Supreme Court upon appreciation of evidence and the facts and circumstances of those two particular cases which are quite different from those in the present case.

Mr Ghosh has also urged that P.Ws. 6 and 7 did not see marks of blood on the wearing apparel of the accused. The deceased was raped before her death. The accused must have removed his wearing apparel at the time of commission of rape. Moreover, there was no profuse bleeding. Absence of blood on the wearing apparel of the accused in these circumstances is quite probable. It may be mentioned in this connection that both P.Ws 6 and 7 noticed something unusual in the conduct of the accused when he came down from the 3rd floor of the building. He was in a hurry and tried to sidetrack P.W.6. When P.W.6 asked him to stop so that he might talk to him he told P.W.6 to follow him and talk to him outside the building and went out of the gate of the building.

The evidence of P.Ws 6 and 7 receives corroboration to some extent from P.W.8 Ramdhan Yadav who was the lift man at 'Anand Apartment' at the material time though he was declared hostile. He has not supported the prosecution case that he took the accused by lift to 3rd floor and that the accused proceeded towards the flat of Parekh Babu. The statement of P.W.3 that P.W.8 told her that the accused had gone to their flat for using their telephone is, therefore, hearsay and inadmissible. His statement that he did not take the accused to the 3rd floor by lift and saw him proceeding to Flat no. 3A is contradicted by his statement recorded under Section 161, Cr.P.C.. It is only this part of his testimony that was sought to be contradicted by the prosecution with leave of the Court. He has, however, stated that while he was taking the mother of Arunaben Shah by the lift he found the accused coming down by the staircase from the 3rd floor between 5.30 and 5.45 p.m.. But he did not make such a statement to the Investigating Officer who recorded his statement under Section 161, Cr.P.C.. So this

statement of P.W.8 cannot be relied on, He has, however, stated further that he found P.Ws. 6 and 7 and the accused standing near the gate of the premises of 'Anand Apartment' when he came down with lift and thereafter P.W.6 and the accused went out of the gate of the premises of 'Anand Apartment'. This part of his testimony is not discredited in any way and it fits in well with the evidenc of P.Ws. 6 and 7. So this part of his testimony may be accepted. Another statement of the witness that after reporting for duty at 4 p.m. he saw the accused and P.W.7 standing near the gate is not also discredited in any way and supports the testimony of P.W.7 and merits acceptance. It is now well-settled that the evidence of a hostile witness need not be discarded altogether. Even in a criminal prosecution where a witness is cross-examined and contradicted with the leave of the Court by the party calling him, his evidence cannot as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stand thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness as a whole, with due caution and care accept, in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process the witness stands squarely and totally discredited, the Judge should as a matte of prudence discard his evidence in toto (Satpal Vs. Delhi Administration, AIR 1976 SC 294). This part of the evidence which was not impugned and which fits in well with the testimony of P.Ws.6 and 7 ca therefore, be safely accepted.

Upon a careful consideration of the evidence on record, the facts and circumstances of the case and the contentions raised on behalf of the appellant we have, therefore, no hesitation in accepting the evidence of P.Ws. 6 and 7 as true. The prosecution has been able to prove satisfactorily the facts that immediately after departure of P.W.3 the accused went to Flat no. 3A on the 3rd floor on the false plea of using the telephone there for contacting his office and immediately after the occurrence he was found on the balcony of Flat no. 3A.

Let us next consider the alleged recovery of a "Rotcoh" wrist watch which according to the prosecution had been stolen from the flat of P.Ws. 3 and 4 on 5.3.90 at the time of rape and murder, from the house of the accused in pursuance of his statementand at his instance and the recovery of pant and shirt from the house of the accused, which according to the prosecution, the accused was wearing at the time of the occurrence. P.W.29, S.I. of Police attached the Detective Department, Homicide Squad, Lal Bazar took charge of investigation of the case on 9.3.90. His evidence shows that on 11.5.90 he along with Inspector S.N. Mazumdar, Additional O.C., Homicide Squad and police force started for Kuludihi village under Chatna P.S. in the District of Bakura which is the native place of the accused for working out a secret information. After meeting the S.P., Bakura they went to Chatna P.S. . Thereafter they proceeded to Kuludihi village with P.W.24 S.I. Pranab Chatterjee attached to Chatna P.S. and police force of Chatna P.S., Two witnesses named Nandagopal Deoghoria and P.W.19 Debulal Mukherjee were collected on their way. After reaching Kuludihi village the police party went to the house of the accused and searched for him but he was not found there. Thereafter they searched the adjoining house belonging to the uncle of the accused but the accused was not found there also.

Therefore, they searched the house of the elder brother of father of the accused and found the accused hiding behind a stack of straw and P.W.29 arrested him there at 2.05 A.M. . He interrogated the and recorded his statement. He has proved the statement of the accused (part of Ext. 34) as follows:-

"I kept the ladies' "Ricoh" wrist watch with golden metal band which was stolen by me from flat no. 3A of 'Anand Apartment' on 5.3.90 on the rack of our house. I also kept my garments by wearing which I raped on Hetal Parekh and killed her on another rack of our house. I will point out the racks and those articles." According to the witness the accused then took them to a house and brought out a packet packed with newspaper. That packet contained one shirt and one pant which were seized under a seizure list (Ext. 16). Witnesses Nandagopal Deoghoria, Debdulal Mukherjee, S.I. Pranab Chatterjee of Chatna P.S., Inspector S.N. Mazumdar, the accused and the witness signed in the seizure list. After seizing the articles he labelled, packed and sealed them. The wearing apparel seized and identified by the witness is marked material Ext. XII. The further evidence of P.W.29 is that a ladies' wrist watch with golden metal band which was found on the rack inside the room of the accused and pointed out to him by the accused was also seized under the same seizure list (Ext.16) in presence of the witnesses. The wrist watch is marked material Ext. IV. Thereafter, he recorded the statements of Nandagopal Deoghoria and Debdulal Mukherjee and returned to Chatna P.S. along with the accused and the seized articles and the accused was produced before the learned Chief Judicial Magistrate at Bankura with a prayer for retaining the seized articles in his custody. Both P.W.24 S.I. Pranab Chatterjee and P.W.19 Debdulal Mukherjee corroborate the testimony of P.W.29. P.W.24 has stated that he

accompained the officers of the Detective Department for conducting a raid in the house of the accused at village Kuludihi on 12.5.90. He has stated that a ladies' "Ricoh" wrist watch which the wit-ness identified in Court(Ext.IV) was brought out by the accused from his house. He also corroborates P.W.29 by stating that the accused led the party to his room and brought out a packet wrapped with newspaper from a shelf in the room. A pant and a shirt were wrapped with newspaper. P.W.29 seized the same and the "Ricoh" wrist watch. He proves his signatures in the seizure list and in the labels and identifies the seized "Ricoh" wrist watch and the wearing apparel. P.W.19 Debdulal Mukherjee has stated that on 12.5.90 at about 12.30 A.M. he was having a chat with his neighbour Nandagopal Deoghoria in front of the sweetmeat shop of his elder brother at Chatna when the second officer of the Chatna P.S. came there and at his request both of them accompained the police party including the police officers from Calcutta and the second officer of Chatna P.S. to village Kuludihi. The house of the accused was searched by police but he was not found there. Another house was searched but he was not found there. Then a third house was searched and the accused was found behind a stack of straw. Police apprehended him and interrogated him who was then brought to his house. One shirt and one trouser wrapped with newspaper were recovered from the house of the accused. One wrist watch was also recovered from his house. These articles were seized in his presence under a seizure list prepared there. The seized articles were packed and sealed. The witness proves his signature in the seizure list marked 16/1. He also proves his signature in the label attached to the wrist watch (Ext.IV/1). He has identified the wrist watch (material Ext. IV) and the two wearing apparel

(material Ext.1 collectively) seized from a rack in the house of the accused. He also proves his two signatures in the newspaper marked Ext. XIII/1.

The entire statement of the accused made to the Investigating Officer which is inculpatory in nature has been wrongly admitted in evidence and made an Exhibit in this case (Ext. 34) and Mr. Ghosh has rightly deprecated this. Only that part of the statement of the accused made to the police while in police custody which relates distinctly to the fact thereby discovered may be proved under Section 27 of the Evidence Act. The learned Judge has, however, observed that except a small portion of the statement relating to the recovery of the wearing apparels of the accused and a ladies' wrist watch purported to have been stolen by him from the flat of P.Ws. 3 and 4 in Ext. 34, other statements are not admissible in evidence. He has relied on that part of the statement of the accused in Ext. 34 which has been proved by P.W.29 and referred to above. But the words "which was taken by me from flat no. 3A of 'Anand Apartment' on 5.3.90" and the words "by wearing which I committed rape on Hetal Parekh and killed her" are clearly inadmissible inasmuch as they relate to the past history of the crime and have nothing to do with the discovery.

The Judicial Committee considered the scope of Section 27 of the Evidence Act in Pulukuri Kottaya and others Vs. Emperor, AIR 1947 P.C. 67 and observed:

"Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into

operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused." While considering how much of the information given by the accused to the police would be admissible under Section 27 the Judicial Committee laid stress on the words" So much of such information ..... as relates distinctly to the fact thereby discovered.". It held that the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It was further pointed out that "the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact." It was further observed that "information as to past user, or the history of the object produced is not related to its discovery in the setting in which it is discovered." This was exemplified further by the Judicial Committee by observing as follows:-

"Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' ... adds to the discovery of the fact that a knife is concealed in the house

of the informant to his knowledge and if the knife is proved to have been used in the commission of the offence the fact discovered is very relevant. If, however, to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate tothe discovery of the knife in the house of the informant."

Relying upon the Privy Council decision in Pulukuri Kattaya case referred to above, the Supreme Court has held in K. Chinnaswami Reddy Vs. State of Andhra Prodesh, AIR 1962 SC 1788 that Section 27 is an exception to Sections 25 and 26, which prohibit the proof of a confession made to a police officer or a confession made while a person is in police custody, unless it is made in immediate presence of a Magistrate and Section 27 allows that part of the statement made by the accused to the police "whether it amounts to a confession or not" which relates distinctly to the fact thereby discovered to be proved. Thus even a confessional statement before the police which distinctly relate to the discovery of a fact may be proved under Section 27. It is only that part which distinctly relates to the discovery which is admissible if any part of the statement distinctly relates to the discovery it will be admissible wholly and the Court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not. In that case, the accused in police custody made the statement to the police that he would show the place where he had hidden ornaments and that statement led to the discovery of the stolen ornaments. It was held that the whole of the statement relates distinctly to the discovery of the ornaments and is admissible under Section 27. The words "where he had hidden them" have nothing to do with the past history of the crime and are

distinctly related to the actual discovery that took place by virtue of the statement and would, therefore, not be inadmissible.

The same view was taken by the Supreme Court relying upon the Privey Council decision referred to above in Udai Bhan Vs. State of U.P., AIR 1962 SC 1116. It has been held that Section 27 of the Evidence Act is in the nature of a proviso to Section 26 which interdicts the provision of confessional statement made by a person in custody of the police. Section 27 partially removes the ban placed on the reception of confessional statements under Section 25. But the removal of the ban is not of such an extent as to absolutely undo the object of Section 26. All it says is that so much of the statement made by a person accused of an offence and in custody of a police officer, whether it is confessional or not, as relates distinctly to the fact discovered is provable. It has further been held that a discovery of a fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence. In that case the evidence in regard to the disvoery of the key as well as the box in pursuance of the statement of the accused was held admissible in evidence under Section 27. But the part of the statement of the accused that with that key the shop of the complainant was opened was held to be inadmissible.

It would be clear from the above that the statement of the accused as proved by P.W.29 in pursuance of which the wrist watch was recovered from the house of the accused to the effect that he kept the ladies' wrist watch with golden metal band on the rack of his house is admissible inasmuch as it distinctly relates to the recovery of the watch from the house of the accused but the words "which was stolen by me from Flat No. 3A of 'Anand Apartment' on 5.3.90" are clearly inadmissible inasmuch as these do not distinctly relate to

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the recovery of the watch but relate to the past history of the crime. Similarly, the statement "I also kept my garments on another rack of my house and I will point out the rack and those articles" which led to the recovery of these articles from the house of the accused is admissible but the words" by wearing which I committed rape on Hetal Parekh and killed her" are clearly inadmissible. These relate to the past user and history of the crime and have nothing to do with the discovery of the said articles. The words "which was stolen by me from Flat no. 3A of 'Anand Apartment' on 5.3.90 and the words "by wearing which I committed rape on Hetal Parekh and killed her" are on par with the words "with which I killed" in the illustration given in the Privy Council decision referred to above.

Mr. Ghosh has urged that the evidence of recovery is not free from blemishes and the possibility of planting of the wrist watch cannot be ruled out in view of non-compliance with provisions of sub-sections (4) and (6) of Section 100 of the Criminal Procedure Code. It is contended that Nandagopal Deoghoria, an alleged witness to the search and seizure, was not examined by the prosecution and P.W.19 is not an inhabitant of the locality within the meaning of sub-section (4) of Section 100, Code of Criminal Procedure. It has further been contended that P.W.19 is not an independent witness inasmuch as the sweetmeat shop of his brother is in close vicinity of Chatna P.S. and the police officers of that Police Station occasionally purchased sweatmeats from that shop as the evidence of P.W.19 discloses. According to P.W.19, the distance between his house at Chatna and the house of the accused at Kuludihi is 1½/2 miles and it takes about 20 minutes to cover that distance on foot. According to P.W.24, the distance is about 5 kilometres. The eviden

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of P.W.29 shows that the copy of the seizure list was not handed over to the accused or any member of his family in violation of sub-section(6) of Section 100. It has further been urged by Mr. Ghosh that the possibility of the wrist watch having been planted be ruled out. Whether it was carried by the I.O. in his pocket or was only notionally seized on paper and later on supplied from the police Station or whether the seizure list itself was prepared at the police station as stated by the accused in his examination under Section 313, Cr. P.C. may be a matter of conjecture but surely the infirmities in the prosecution evidence with regard to the search and seizure are consistent with the theory of planting. We have carefully considered the contentions as raised by Mr. Ghosh but we are unable to accept the same. Failure to call inhabitants of the locality does not itself render a search illegal. The effect of irregularities in conducting search is only to necessitate a careful scrutiny of the evidence and if it is ~~behind~~ believed, they have no other effect. Sometimes the attitude of the men nearby does not make it worthwhile calling them as witnesses. It has been elicited in the cross-examination of P.W.29 that the inmates of village kuludihi where the accused was arrested at about 2 A.M. were all relations of the accused. There was, therefore, no question of calling any inhabitant of village Kulydihi. The evidence does not show that there are other villages between Chatna and Kuludihi. It is impossible to define "locality" precisely. In a densely populated town it means persons in the immediate vicinity. "Locality" may also well include villages within 2 or 3 miles. At that unearthly hour of the night few persons in that rural area would be willing to be called as witnesses. There is nothing to show that P.W.19 is not a respectable and independant witness. Simply because his brother has a sweetmeat shop near the police station and police of that local police station buy sweetmeats from that shop it cannot

be said that he is under the control of local police and not an independent witness. It is significant to note that no suggestion was put to P.W.19 that the wrist watch was planted by police at the house of the accused or even that the wrist watch was not seized from his house at all. The only suggestion put forward to P.W.29 is that the statement of the accused was recorded after the recovery. The recovery of the articles was not challenged as such in the cross-examination but what was challenged is the recovery at the instance of the accused or in pursuance of the statement made by the accused. It may be noted here that the recovery of the shirt and pant is not disputed by the accused in his examination under Section 313, Cr. P.C. though according to him it was seized by police from a trunk after search and was not produced by him in pursuance of his statement. Considering all the circumstances of the case we have no hesitation in accepting the evidence of recovery of the "Ricoh" wrist watch and the wearing apparel of the accused from the house of the accused at his instance and in rejecting the theory of planting of the wrist watch.

According to the prosecution, the "Ricoh" wrist watch which was recovered from the possession of the accused belonged to P.W.3 and it was stolen from the almirah of P.W.3 on 5.3.90. The prosecution case is that on the very next day i.e., 6.3.90 P.W.3 discovered that her newly purchased "Ricoh" wrist watch had been missing and she made a complaint to the police by a letter dated 6.3.90 (Ext. 3). The evidence of P.W.3 is that on 6th March, 1990 she found her wrist watch with golden band which had been purchased only 10 days back missing. According to her dictation her son (P.W.5) wrote a letter to the police in the nature of a complaint regarding the theft of the wrist watch. She has identified the "Ricoh" wrist watch (material Ext. IV) as her wrist watch which was stolen on 5.3.90. It appears from the evidence of P.W.3 that she used to keep her wearing apparel including sarees, the wrist watch

(material Ext. IV) and some bangles made of glass in the Godrej Steel Almirah in her bed room which was found open after the occurrence on 5.3.90. P.W.4 corroborates P.W.3 by stating that on 6th March, 1990 his wife reported to him that her wrist watch was missing from her almirah and a complaint was written by his son and his wife signed in the complaint and then he and his son and other relatives went to the police station and handed over the complaint to police along with the guarantee card of the wrist watch which was purchased by him for his wife from M/s. H.M. Watch Company at Radhabazar on 21.2.90 for Rs. 350/-. He also identifies the wrist watch (material Ext. IV) as the one which he purchased for his wife. In the cross-examination he has stated that the clothings of his wife and the said wrist watch were kept in the almirah. He has further stated that he did not check up on 5.3.90 after the incident as to whether all the articles inside the almirah in the bed room were intact inasmuch as he was not in a mood to make any enquiry in this regard at that time. P.W.10 Md. Fakhruddin, a sales man of M/s. H.M. Watch Company at 147 and 149 Radhabazar Street, Calcutta proves the guarantee card for a "Ricoh" ladies wrist watch sold from their shop on 21.2.90. The guarantee card was written and signed by him (Ext. 15). He has further deposed that the wrist watch was sold to one Jashmati Parekh of 57A and B Padma Pukur Road, Calcutta-20 for Rs. 350/- on 21.2.90.

Mr. Ghosh has rightly contended that the letter (Ext.3) containing narration of facts addressed by P.W.3 to a police officer during investigation of the case is not admissible in evidence being hit by Section 162 of the Code of Civil Procedure (vide Kali Ram Vs. State of Himachal Pradesh, AIR 1973 SC 2773). But there is substantive evidence of P.W.3 that she found her wrist watch missing on the very next day. The evidence of P.Ws 3 and 28 shows that the almirah was found open after the occurrence on 5.3.90 and the

articles inside the almirah were ransacked. It is quite natural that after the shocking incident on 5.3.90 P.Ws. 3 and 4 did not search the almirah though found in a ransacked condition to ascertain if any article was stolen and it was only on the next day that they came to know about theft of the watch.

Mr. Ghosh has contended that the best evidence of the purchase of the wrist watch, namely, cash memo which contains a serial number and date that cannot be tampered with, has not been produced. Neither the original nor the carbon copy thereof was seized by police. According to Mr. Ghosh, the guarantee card (Ext.15) is a manufactured document which was fabricated at a later stage. It is true that the Investigating Officer ought to have seized the cash memo or at least the carbon copy of the cash memo but this lapse on the part of the Investigating Officer does not necessarily lead to the conclusion that the guarantee card (Ext.15) was subsequently manufactured. For non-seizure of the cash memo by the Investigating Officer, the evidence of P.Ws 3,4 and 18 which does not suffer from any infirmity and supported by the guarantee card (Ext.15) cannot be discarded. There is no good reason to disbelieve the testimony of these witnesses. It is quite improbable that P.Ws 3,4 and 18 would enter into a conspiracy and manufacture the guarantee card in order to falsely implicate an innocent man. We have no hesitation in accepting the evidence of P.W.s 3,4 and 18 in this regard as trustworthy. It has been elicited in the cross-examination of P.W.3 that she used to wear the wrist watch habitually after purchase. P.W.4 himself purchased the wrist watch for his wife and saw her wearing it. The evidence of identification of P.W.s 3 and 4 may be relied on.

Mr. Ghosh has contended that it is highly improbable that the wirst watch was left behind in the almirah when P.W.3 left for

the temple. It was expected that she would put it on while going out. P.W.3 went out to visit the temple and she came back within a very short time. It was not, therefore, unlikely for her to leave the watch while going out for a short visit to the temple.

The last contention of Mr. Ghosh is that if the person responsible for the rape on, and murder of, the deceased wanted to steal anything he could have easily stolen the ornaments and the wrist watch of the victim. We have already seen that no valuable ornaments except only glass bangles were kept in the almirah. There is no evidence that the victim was wearing any watch at the material time. No watch was found on the deadbody of the victim. The ransacked condition of the almirah suggests that the offender searched for valuables. In our opinion, the prosecution has proved satisfactorily the recovery of the "Richh" wrist watch of P.W.3 which was stolen on 5.3.90, from the possession of the accused. The accused has not offered any explanation for the possession of the stolen article.

Let us next consider the alleged recovery of a broken chain and a cream-coloured button with four holes from the bed room of P.W.s ~~ex~~ 3 and 4 where Hetal was found lying dead. The seizure of these two articles from the floor of the bed room of P.W.3 and 4 where the occurrence took place is proved by P.W.28, the first Investigating Officer and the two seizure witnesses P.W.5, Bhawesh Parekh and P.W.10 Rajiv Bakharia, a friend of P.W.5 who had come to the place of occurrence on receipt of information from P.W.5 and the seizure list (Ext.19) Item nos 5 and 9 relate to the seizure of the said two articles. The evidence of P.W.28 shows that after seizure these articles along with other articles seized were packed and sealed.

Regarding the broken chain (material Ext. XI) P.W. 11 Gouranga Chandra Raut who was in the employment of one Aruna Shah, a resident of 'Anand Apartment' when the incident occurred, identified the chain as one which he had given to the accused about a month prior to the date of the incident.

The cream-coloured button recovered from the place of occurrence and the wearing apparels seized from the house of the accused along with other articles were sent by the police to the Forensic Science Laboratory under communication marked Ext. 35 (collectively). P.W.27 Partha Sinha, senior scientific officer attached to Physics Division of Forensic Science Laboratory, Government of West Bengal, examined the said button (marked C by the expert) and the shirt (marked Ext.U). He has stated that Ext. C examined by him was a faint cream-coloured button and Ext. U was a cream-coloured full sleeved open breast synthetic shirt. He has further deposed that all the buttons stitched on the shirt except the third button from the top of the front vertical plate were light cream-coloured and stitched in similar pattern with off white thread of 3 ply and X type twist, whereas the third button was white, stitched in a different pattern with milky white thread of 2 ply and Z type twist. It is evident from the testimony of this expert that the third button on the shirt examined by him was distinctly separate and different from the other buttons found on the shirt. It is also evident from the testimony of the witness that the stitching pattern of the other buttons was distinctly and separate from the stitching pattern of the third button. The evidence of this witness leads to the inevitable conclusion that the third button had been replaced and stitched in a different mannter. It further appears from the testimony of the witness that marks of application of force downward with respect to the shirt could be observed beneath the third white button at the position

where the original button had been stitched. He has further stated that all the buttons on the front button plate of the shirt marked U, except the third white button were cut off and compared with the button marked C and the button marked C was found similar with the buttons cut off from the shirt in respect of shape, dimension, colour and weight upto the hundred part of miligram. His testimony indicates that the button marked C which was found at the place of occurrence was identical with the five other buttons cut off from the front button plate of the shirt marked U which is the shirt seized by police from the residence of the accused. He has stated in the cross-examination that there were six buttons in the shirt and that one of the buttons had been kept intact and the five others were cut off by him. He identified those five buttons which have been marked Ext. XIV ∅ (collectively). The evidence of the expert clearly points to the conclusion that the button marked C by the expert (material Ext. X) was the original third button of the shirt of the accused seized from his house and it was replaced subsequently by a different button with a different stitched pattern. This points to the presence and complicity of the accused. P.W.7 has stated that the accused was wearing when he came to him after departure of P.W.3 a grey-coloured trouser and a cream-coloured shirt like the pant and shirt(material Ext. XII collectively). Discovery of the button at the place of occurrence and the testimony of P.W.27 that there was evidence of application of force downward at the place wher the third button was located lead to the conclusion that the third button of the shirt of the accused must have come out during scuffles with the victim.

With regard to the discovery of the neck chain, Mr. Ghosh has urged that it is natural that P.W.11 Gora would try to save his own skin and take a false plea when the chain was found on the

floor of Flat no. 3A. It is not unlikely that Gora on being called by the police and knowing that the police suspected Dhananjoy as the possible culprit quitely invented the story that he had given the chain to the accused to save his own skin. He has further urged that it is significant that Gora left his earlier employer almost immediately after the incident as is revealed from his evidence. The evidence of P.W.11, that he gave the neck chain to the accused about a month before the incident, particularly in the absence of any corroborative evidence, cannot, therefore, be accepted. This argument of Mr. Ghosh is based on rather conjecture. There are no materials on record which may even remotely suggest the complicity of P.W.11. It is highly improbable that if he had any complicity in the matter he would admit that the neck chain belonged to him after it was found at the place of occurrence. He has stated that he was employed in the office of Aruna Shah and his duty hours in the office were from 8.30 A.M. to 7 p.m. and when he returned from office on 5.3.90 he found many people who had assembled near Anand building and he came to know from his father that Hetal Parekh had been murdered. This part of his testimony has not been challenged in the cross-examination. His unchallenged testimony shows that he was not present at 'Anand Apartment' at the time of the occurrence. The medical evidence shows that the height of the deceased aged about 18 years was 5'3" and the weight was about 45.2 Kgs. and that height of the accused is 5'6" and he weighed 56 kgs. on the date of examination i.e., 19.5.90. In the opinion of P.W.20, the physique and general build of the accused is suggestive that he possesses physical strength to over-power singly a girl 18 years of age and build like the deceased Hetal Parekh. The fact that Gora left his earlier employer shortly after the incident is a mere coincidence and in the absence of any incriminating circumstance against him it cannot be said that he deliberately made a false statement implicating the accused in order to save his own skin. Considering all the circumstances we are

of the view that the evidence of P.W11 that he gave the neck chain recovered from the place of occurrence to the accused about a month before the occurrence is reliable and may be accepted as true.

With regard to the discovery of the cream-coloured button at the place of occurrence and the absence of one cream-coloured button in the shirt recovered from the accused and the Expert's evidence in this regard, Mr. Ghosh has commented that the button seized from the Flat no. 3A had all along been lying with the police prior to the arrest of the accused and the same was sent for analysis only on 28.5.90 although many other articles had been sent for analysis on 16.3.90. The fact that the button seized on 6.3.90 at Flat no. 3A had remained with the police till 12.5.90 when the shirt was seized from the house of the accused and that the shirt and the particular button were sent to the Forensic Expert only on 28.5.90 indicates that the police had unlimited opportunity to pull out one button, namely, the third button from the shirt of the accused and to stitch a different white button in its place and to pass off a cream-coloured button removed from the shirt of the accused as the button recovered from the flat on 5.3.90. This conjecture of Mr. Ghosh is not borne out by any materials on record. There was no question of sending the cream-coloured button seized on 6.3.90 at the place of occurrence to the Forensic Expert for examination before the shirt of the accused was seized on 12.5.90 particularly when the button had no blood-stains. The presence of the button at the place of occurrence suggests that it might have fallen off from the shirt of the assailant due to scuffle and unless the shirt of the suspect was seized no useful purpose would have been served by sending it to F.S.L. It was quite natural that P.W.29 sent the said button and the shirt of the accused only after the recovery of the latter to F.S.L. for ascertaining as to whether the button

had fallen off from the said shirt. The evidence of P.W.29 shows that he seized the shirt of the accused from his house under the seizure list Ext.16 which was prepared and signed by him and the witnesses and the accused on the spot. In the description of the shirt seized in Ext. 16 it is specifically noted that the third button of the shirt from the top is dissimilar to other buttons of the shirt. So the theory of pulling off the third button by police and replacing it by a different button with a different stitch and passing off this as cream-coloured button seized at the place of occurrence has no foundation. It is also in evidence that the cream-coloured button (material Ext. X) seized at the place of occurrence was packed and sealed and this was sent in a sealed cover to the F.S.L.

Let us next deal with the alleged abscondence of the accused. The evidence of P.Ws. 6,7 and 8, as discussed already shows that the accused was seen at 'Anand Apartment' immediately after the occurrence at about 6 p.m. . He left 'Anand Apartment' at 6 p.m. and was not seen again. The unchallenged evidence of P.Ws. 3,4,6 and 7 shows that the accused used to live in the Generator Room at 'Anand Apartment'. In the transfer order (Ext.23) the accused was also asked to remove his belonging from the Geberator Room at 'Anand Apartment'. The statement of the accused in his examination under Section 313, Cr.P.C. that at the material time he was living at Monorama School which is a belated plea, is falsified by the unchallenged evidence of a number of witnesses as referred to above. The evidence of P.W.23 shows that he searched the Generator Room but he did not find him or any of his belongings there on the night between 5.3.90 and 6.3.90. The evidence of P.Ws. 6 and 21 shows that in addition to the duties at 'Anand Apartment' the accused also used to do part time duties as security guard at night in the house of one Rajat Roy at 3/1B Mahendra Road, Bhawanipore

This is not disputed. P.W.26 S.I. Moloy Mukherjee searched for the accused at that place and also at Chakraberia Road, presumably at 'Paras Apartment' but did not find the accused on the night between 5.3.90 and 6.3.90. The attendence-sheets (Ext.14/ collectively) also show that the accused was absent at Rajat Roy's house at 3/1B Mahendra Road, Bhawanipore, on that night. The evidence of P.W.21 and the attendence-sheets show that the accused did not work as security guard after 5.3.90. Neither he applied for leave nor sent any letter of resignation. Nor did he collect his wages for 5 days for working at 'Anand Apartment' and his wages for 4 days for working at premises no. 3/1B Mahendra Road. P.W.25, S.I. Anil Kar under orders of the Assistant Commissioner, Detective Department, searched for the accused at the house of Santi Pada Banerjee at Q/100 Sarat Chandra Road at Durgapore on 7.3.90 and 8.3.90 but he could not find the accused. He also visited the house of the accused at village Kuludihi on 7.3.90 and 8.3.90 after sending a requisition to the local police station at Chatna(Ext.28) but could not find him. The evidence adduced by the prosecution clearly establishes that the accused left 'Anand Apartment' on 5.3.90 at about 6 p.m. immediately after the occurrence and was absconding till his arrest on 12.5.90.

It is true that absconding by itself is not conclusive either of guilt or of guilty conscience as contended by Mr. Ghosh. A person may abscond on account of fear of being involved in an offence or for any other allied reason (Rahman Vs. The State of U.P., AIR 1972 SC 1110). In Dater Singh Vs. The State of Punjab, AIR 1974 SC 1193 the Supreme Court relying upon the principle laid down in Prakash Mahadeo Godse Vs. State of Maharashtra, (1959) 3 SCC 741 held that conduct of the accused such as hiding after the offence, by itself, does not conclude matters. But though not clinching by itself, this is a link in the chain of circumstances. The act of absconding of the accused in this case assumes considerable importance in view of the fact that

he absconded immdiately after the occurrence even before the detection of the crime when, if innocent, he could not have any apprehension whatever that he was wanted by police and the conduct of the accused in the facts and circumstances of this case leads to a reasonable inference of his guilty knowledge.

Let us next deal with the plea of alibi as taken by the accused in his examination under Section 313, Criminal Procedure Code. He has stated that he left 'Anand Apartment' to see pictures in a cinema hall after being relieved of his duties at 2 p.m. . Thereafter, he returned to Manorama School where he used to reside, collected his belongings and left for his native place after purchasing some fruits in connection with the sacred Thread Ceremony of his brother and operation on her wife. He has also stated that he took leave for this purpose. This is a belated plea the foundation of which was not laid in the cross-examination. No attempt was made to substantiate the plea. There is not an iota of evidence that he had been to a cinema hall, that the sacred Thread Ceremony of his brother took place at his native place after 5.3.90 and that he took leave for attending the said ceremony. It is well-settled that the plea of alibi is to be proved by cogent and satisfactory evidence so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence. If any authority is necessary, reference may be made to the decision of the Supreme Court in State of Maharashtra Vs. Narsinrao Gangaram Pimple, AIR 1984 SC 63 where it was held that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence. This vague plea, even taken on its face value, does not exclude such possibility. There is no whisper as to the distance of the cinema hall or of Manarama School from 'Anand Apartment' or when the show was over or when he left for home or whether he was present in the cinema hall throughout the

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show. On the other hand, the plea of alibi is falsified by the clear and cogent evidence of P.Ws. 6,7 and 8 that the accused was present at 'Anand Apartment' at the time of the occurrence. The defence plea that the accused used to reside at Manorama School is falsified by the unchallenged evidence of P.Ws. 3,4,6, 21 and the transfer order (Ext.23) which clearly established that at the material time he was residing in the Generator Room at 'Anand Apartment' and the story of collecting his materials from Manorama School after return from cinema is false. The accused did not take leave and even when P.W.6 took him to task for disobeying the transfer order and asked him to report for duty at 'Paras Apartment' next day without fail, he did not express his intention to go to his native place to attend the sacred Thread Ceremony of his brother and ask for leave. Nor any subsequent intimation was sent. Nor did he collect his wages. The plea of alibi is a myth.

Mr. Ghosh has urged that delay in sending the purported First Information Report to the Magistrate is a circumstance which provides a legitimate basis for suspecting that the First Information was recorded much later than the time noted affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In support of his contention he has referred to the decision of the Supreme Court in Iswar Singh Vs. State of U.P., AIR 1976 SC 2423. In Iswar Singh's case the Supreme Court pointed out that Section 157 of the Criminal Procefure Code requires the First Information Report to be sent forthwith to the Magistrate competent to take cognizance of the offence and that no explanation was offered in that case for the extraordinary delay in sending the report to the Magistrate and this is a circumstance which provides a legitimate basis for suspecting that the First Information Report was recorded much later than the

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stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. The Court also pointed out that this suspicion harders into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the First Information Report. Informant in that case stated in the Court that some people were invited to his house to effect a settlement between him and Iswar Singh and that he had also sent Ghanashyam to call Iswar Singh there. The First Information Report in that case did not mention anything like this. From the F.I.R. it appeared as if the accused persons came uninvited to his house, demanded why he demolished the drain and started assaulting him and the other persons who were present there. The Court also mentioned various other omissions in the F.I.R. in that case.

It appears from the cross-examination of P.W.28 that the statement of P.W.3 Yashmoti Parekh which was treated as First Information Report was recorded at 9.50 p.m. though the formal F.I.R. was drawn at 2.45 A.M. on 6.3.90 after return to the police station. The date of forwarding the First Information Report to the Magistrate is recorded as 6.3.90. Unfortunately, the learned Magistrate who received the First Information Report did not put the date under his signature. It cannot be said that the First Information Report was received by the Magistrate after 6.3.90. Apparently there is no material to suggest that there was delay in sending the F.I.R. . Assuming, however, that there was delay in sending the First Information Report we are not in a position to hold that the purport First Information Report in this case suffers from any infirmity pointed out in the case referred to above. There is no discrepancy between Ext.33 and the evidence of P.W.3. We have not understood the decision of the Supreme Court in the case of Iswar Singh referre

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to above to mean that in all cases where there is delay in First Information Report reaching the Court, the Court should reject the prosecution case and came to the conclusion that the First Information Report did not come into existence on the stated date or at the stated hour. In Pala Singh Vs. The State of Punjab, AIR 1972 SC 2679 the Supreme Court held that where the FII.R. was actually recorded without delay and that investigation started on the basis of that F.I.R. and there is no other infirmity brought to the notice of the Court, then, however, improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. The Supreme Court, however, emphasised the necessity of sending the F.I.R. forthwith to the Magistrate without delay. This decision was followed by the Supreme Court in Sarwan Singh Vs. State of Punjab, AIR 1976 SC 2304 where it has been held that delay in despatch of the First Information Report is not a circumstance which can throw out the prosecution case in its entirety. In the instant case, on receipt of the telephonic message from P.W.4, P.W.28 with force came to the place of occurrence at 9.25 p.m. and the statement of P.W.3 was promptly recorded at 9.50 p.m. only 25 minutes after arrival of P.W.28 and investigation was started forthwith. There is no infirmity in the evidence of P.W.3. So delay in sending the F.I.R., if any, does not justify the conclusion that the prosecution is tainted and unsupportable. Moreover, the statement of P.W.3, as already seen, cannot be treated as F.I.R. and investigation had already commenced on the basis of the earlier telephonic message of P.W.4.

Another point raised by Mr. Ghosh is that non-disclosuere of the name of the accused even as a suspect in the telephonic message to the police station on the basis of which G.D. entry being Ext.32 was made and which is to be treated as the First Information

Report in this case leads to a reasonable doubt that the subsequent disclosure of the name of the accused is a concoction and embellishment after deliberation and this cuts at the root of the prosecution case. We are unable to accept this contention on the following grounds. Firstly, the evidence of P.W.4 shows that the name of the accused transpired before he sent the telephonic information. His attention was not drawn to the omission in the telephonic information so as to give him an opportunity to explain the omission, and his testimony that the name of the accused had already been disclosed to him cannot be said to have been contradicted. Secondly, the evidence of P.W.4 shows that he returned home at 8-30 p.m. and seeing his daughter lying dead in that condition was terribly shocked. He became very much upset and was wondering what to do. Some people asked him to ring up police and he rang up the police reporting that his daughter Hetal had been murdered in his flat and asked them to visit his flat. — It is quite natural that in that state of mind he did not give the particulars including the name of the suspect in the cryptic telephonic message. In that dazed condition of mind he just informed the fact of murder of his daughter to police being asked by some neighbours so that police might come and take steps. Lastly, police came shortly after the telephonic information and recorded the statement of P.W.3 at 9.50 p.m. which was treated, though wrongly, as the First Information Report where the name of the accused transpired. Considering the circumstances of the case, we are of the opinion that the prosecution case is not liable to be discarded simply because there was non-disclosure of the name of the accused in the cryptic telephonic message.

From the above discussion it is clear that the prosecution has firmly established the following circumstances:-

(1) The accused used to tease the victim Hetal on her way to and back from school.

(2) On the complaint lodged by Nagardas Parekh, father of the victim, for such conduct of the accused, transfer order was issued on the accused by his employer directing him to leave 'Anand Apartment' and move to 'Paras Apartment' with effect from 5.3.90 but the accused flouted the transfer order and reported for duty at 'Anand Apartment' in the morning shift on 5.3.90. The transfer order on the ground of teasing of the deceased by the accused might serve as a motive for the crime as revenge.

(3) Immediately after departure of P.W.3 leaving her daughter Hetal alone in their Flat no. 3A at about 5-15 p.m. on 5.3.90, the accused was seen proceeding to that flat on the pretext of using the telephone for contacting the office of his employer.

(4) Immediately after the occurrence, the accused was seen on the balcony of flat no. 3A and soon thereafter he was seen leaving 'Anand Apartment' in a hurry at about 6 p.m. just before return of P.W.3 and discovery of the crime.

(5) Discovery of 'Ricoh' wrist watch of P.W.3 stolen from the flat no. 3A at the time of the incident, from the house of the accused at his instance. No explanation for possession of the said wrist watch has been offered by the accused.

(6) Discovery of a neck-chain of the accused (given by P.W.11) from the place of occurrence.

(7) Discovery of a cream-coloured button with four holes from the place of occurrence and discovery of a shirt of the accused from his house at his instance in which the third button from the top was found different from the other five buttons with a different pattern of stitch and the expert evidence shows that the button found at the place of occurrence is identical with the buttons of

the shirt of the accused except third one and that there was mark of application of force downward at the place where the third button was located suggesting that the button found at the place of occurrence was the original third button in the shirt of the accused which was pulled off during scuffle with the victim. The accused was seen wearing the said shirt before he went to flat no. 3A.

(8) Immediately after the occurrence and even before detection of the crime and any possible apprehension of his being wanted in connection with this case, the accused made himself scarce and was absconding till his arrest from a hiding place on 12.5.90.

In our opinion, the above circumstances, taken together, make a chain of events so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and they are clinching in nature and irresistibly lead to the conclusio that the accused was guilty of rape on, and homicide of, Hetal Parekh and theft of the wrist watch of P.W.3 from her flat. Absence of explanation of the circumstances and the false plea of alibi constitute an additional link which lends further assurance to the said conclusion It is true that the mere failure of the accused to offer any explanation consistent with his innocence or a false explanation cannot by itself be considered a circumstance against the accused where the prosecution has not otherwise succeeded in establishing a chain of events where the links are themselves complete which with reasonable certainty point to the guilt of the accused. It is only when the links in the chain are in themselves complete, absence or explanation or false explanation may be used as an additional link which lends further assurance to the conclusion of guilt of the accused. In Sharad Birdhi Chand Sarda's case, AIR 1984 SC 1622 (Supra) the Supreme Court has observed that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the

defence. Where the links in the chain are in themselves complete, then a false plea or a false defence may be called in aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court. We have already seen that all the links in the chain have been firmly established by the prosecution and there is no lacuna or infirmity. The chain of events is complete by itself excluding any reasonable hypothesis consistent with innocence of the accused and irresistibly leading to the conclusion of the guilt of the accused. So, absence of explanation and false defence of alibi may be used as an additional link which lends further assurance to the conclusion of guilt of the accused.

Mr. Ghosh has contended that it cannot be said with any amount of certainty that the accused intentionally caused the death of the deceased. The possibility that the accused had no intention to cause death and applied force only to overcome the resistance of the deceased in order to commit rape on her and unwittingly applied more force than necessary resulting in death of the unfortunate girl, cannot be ruled out. According to him, the offence is culpable homicide not amounting to murder punishable under Section 304, part II of the Indian Penal Code and not murder punishable under Section 302, Indian Penal Code. We are unable to accept the contention. The logical conclusion of the submission would be that rape was committed after causing her death which is absurd or at any rate, highly improbable. The circumstances clearly suggest that Hetal had been raped before she was killed. This is also the opinion of the autopsy surgeon. There were as many as 21 injuries found on the body of the deceased.

Injury nos. 3 to 13 on the face of the victim were due to smothering caused by pressing with hands or any hard substance the face and the nose of the victim closing air orifice of the victim causing asphyxia as opined by the doctor. Injury no. 21 was caused by throttling with great force fracturing the hyoid bone. According to the doctor, smothering injury nos. 3 to 13 could be caused by pressing the face with a cradle like Mat. Ext. VIII which was seized from the place of occurrence with stain of blood. According to the autopsy surgeon, great force is necessary for fracture of the hyoid bone. Injuries due to smothering and strangulation could not be unintentional. The injuries coupled with the attending circumstances leave no doubt that after committing rape the accused deliberately and intentionally caused the death of the victim either for taking revenge for disclosing the fact of teasing or for silencing the victim for ever so that his complicity might not come to light. We have no doubt that it was a pre-meditated and planned murder. At any rate, clause (3) of Section 300, Indian Penal Code would apply. For cases to fall within clause(3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. In Virsa Singh Vs, State of Punjab, AIR 1958 SC 465, the Supreme Court explained the meaning and scope of clause (3) thus:-

"The prosecution must prove the following facts before it can bring a case under Section 300, "3rdly". First, it must establish, quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, it was not accidental or unintentional or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly it must be proved than the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender." Thus, according to the rule laid down in Virsa Singh's case (Supra), even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this. The rule laid down in Virsa Singh's case was followed by the Supreme Court in State of Andhra Pradesh Vs. Rayavarapu Punnayya, AIR 1977 SC 45. We have already seen that the autopsy surgeon found as many as 21 injuries on the body of the deceased. These injuries, particularly the injuries due to smothering and strangulation as noted by the doctor, were intentional and not accidental and according to the doctor these injuries are sufficient to cause death in the ordinary course of natuee. Injury no. 21 alone was sufficient to cause death of the victim in the ordinary course of nature. There is, therefore, no escape from the conclusion that the offence is murder punishable under Section 302, Indian Penal Code and not culpable homicide not amounting to murder punishable under either part-I or part-II of Section 304, Indian Penal Code. The accused was rightly convicted under Sections 302/376/380, Indian Penal Code.

This brings us to the question of sentence. According to the changed legislative policy which is patent on the face of Sec. 354(3) of the new Criminal Procedure Code, 1973, the normal punishment for murder is imprisonment for life and death penalty

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is an exception to be resorted to for special reasons to be stated. In Bachan Singh's case, AIR 1980 SC 898 : 1980 Cr.L.J. 636 the Supreme Court has observed that the present legislative policy discernible from Sec. 235(2) read with Sec. 354(3) is that in fixing the degree of punishment or making choice of sentence for offences, including one under Sec. 302, Indian Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal. The Supreme Court formulated the following broad guidelines :-

1. For making the choice or punishment or for ascertaining the existence or absence of "special reasons", the Court must pay due regard both to the crime and the criminal.

2. The mitigating factors in the area of death penalty must receive a liberal and expansive construction by the Courts in accordance with the sentencing policy writ large in sec. 354(3). 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.

3. The extreme penalty of death need not be inflicted except it grievous cases of extreme depravation. All murders are cruel but such cruelty may vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravity that "special reason" can legitimately be said to exist.

4. For persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through the law's instrumentality. That ought not to be done save in

the rarest of rare cases when the alternative option is unquestionably foreclosed.

In Machhi Singh Vs. State of Punjab, AIR 1983 SC. 957 the Supreme Court has affirmed the principles laid down in Bachan Singh's case. In Sher Singh Vs. State of Punjab, AIR 1983 SC 465 it has been observed by the Supreme Court that death sentence is permissible within the constraints of the rule in Bachan Singh's case. The rule of 'rarest of rare cases' as laid down in Bachan Singh's case was followed in Eerabhadrappa Vs. State of Karnataka, AIR 1983 SC 446 and in Javed Ahmed's case, AIR 1963 SC 594.

Bearing the above in mind and having given our anxious consideration to the circumstances of the crime and the criminal, we are of the opinion that this case comes within the category of the 'rarest of rare' cases where the lesser sentence of imprisonment for life appears to be totally inadequate. The murder was commited in cold blood in a planned and brutal manner without any provocation after committing rape on an innocent and defenceless young girl. Rape itself is a heinous offence. The accused did not stop there and after committing forcible rape, he killed the innocent and defenceless girl in a brutal and savage manner. The accused was the security guard and his duty was to look to the safety and security of the occupants of the flats. He betrayed the trust reposed in him and it was unthinkable that being the security guard he would rape and kill a defenceless girl of 18 years in her flat taking advantage of her helpless condition. The incident is shocking to judicial corsciance and the conscience of society. The circumstances clearly reveal the utter depravity and the savage nature of the mind of the accused who had not an iota of repentance for such an enormous crime. The accused is aged about 27 years and his parents are alive. He

married only about 2 years back. But these would be common in many cases and cannot outweigh the extreme depravity of the crime which is shocking to the conscience of society. In our opinion, there are exceptional and special reasons in this case for opting for the extreme penalty of death. The test of 'the rarest of rare' cases is applicable in this case where the alternative option is unquestionably foreclosed.

We accordingly allow the death reference and dismiss the appeal. The order of conviction under Section 302, Indian Penal Code and the sentence of death is confirmed. The order of conviction and sentence under Section 376 and 380, Indian Penal Code also stands confirmed. The sentence of death shall remain ~~stayed~~ suspended for 2(two) months. Addl. Registrar-II of the Appellate Side is directed to take steps for sending a copy of this order as per provisions of Section ~~221~~ 371, Criminal Procedure Code to the Court of Session. Let a copy of this judgement be sent to appellant Dhananjoy Chatterjee through the Superintendent of the Central Jail, Calcutta.

Mukul Gopal Mukherji,J.

I agree.