

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

APPELLATE SIDE

**CRA (DB) 54 of 2024
Sk. Rafijul @ Tutul
Vs.
State of West Bengal**

With

**CRA (DB) 74 of 2024
With
CRAN 1 of 2024
Ukil Ali @ Akil Ali
Vs.
State of West Bengal**

**Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray**

For the Appellants in CRA (DB) 54/24	:	Mr. Sudipto Maitra, Sr. Adv, Mr. Vijay Verma, Mr. Dwaipayan Biswas Mr. Anik BhattacharyaAdvocates
For the appellants in CRA (DB) 74/24.	:	Mr. Santanu Talukdar Mr. Monojit Debnath Advocates
For the State	:	Mr. Madhusudan Sur, ld. APP Mr. Nirupam DhaliAdvocates
Reserved on	:	07.05.2026

Apurba Sinha Ray, J.

1. The judgment and order of conviction dated 24.01.2024 and 25.01.2024 passed by the learned Additional Sessions Judge, 2nd Court, Tamluk, Paschim Medinipur in Sessions Trial No. 9(8)16 arising out of POCSO Case no. 78 of 2014 convicting the appellant under Sections 364/34/302/376D/120B of the Indian Penal Code and also under Section 6 of the POCSO Act has been challenged on the grounds, inter alia, that the learned Special Judge has unnecessarily placed reliance on the alleged last seen theory, that the Court has also misinterpreted the present law on extra judicial confession, that although several witnesses improved the version of the prosecution case during trial, the learned Trial Judge had relied upon those improved versions of the prosecution witnesses.
2. Mr. Maitra, learned counsel appearing for the appellant Sk. Rafijul @ Tutul has relied upon the following judgments in support of his contention.
 - I. ***Manoj alias Munna vs. State of Chhattisgarh*** reported in ***AIR 2026 SC 241***
 - II. ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in ***1984 SCC (Cri) 487***
 - III. ***Smt. Basanti w/o prabhu vs. State of Himachal Pradesh*** reported in ***1987 3 SCC 227***
 - IV. ***State of MP through CBI and ors. Vs. Paltan Mallah and ors.*** reported in ***2005 3 SCC 569***

- V. ***Darshan Singh vs. State of Punjab*** reported in **2024 2 SCC (CRI) 126**
- VI. ***Vimal Suresh Kamble vs. Chaluverapinakeo Pal S.P and anr.*** Reported in **2003 3 SCC 175**
- VII. ***Siddanki Ram Reddy vs. State of Andhra Pradesh*** reported in **2010 3 CC.r LR (SC) 28.**
- VIII. ***Mahendra Singh & Ors. Vs. State of Madhya Pradesh*** reported in **2022 2 Crimes 319 SC**
- IX. ***Naresh Anija alias Naresh Kumar Aneja vs. State of Uttar Pradesh & Anr.*** Reported in **2025 1 SCC (CRI)766.**

3. The factual matrix of the case is as follows:

‘On 12.10.2014 at 10.35 hrs the de facto complainant of this case PW-1/father of victim girl, lodged a written complaint before the Officer-in-charge of Belda P.S. alleging inter-alia that her sixteen-16 years minor daughter was a friend of ‘S’, another girl of their village. On 11.10.14 at about 07.00 p.m. ‘S’ called his daughter over the telephone. Accordingly the victim girl went with her. After that, his daughter was missing. Thereafter, the local villagers asked ‘S’ about it. Then she confessed that she forcefully handed over the victim girl to her boy friend Rafijul @ Sk. Tutul. According to their prior plan Rafijul came to their village in a maruti car with his friends and driver of the maruti car and they kidnapped the victim girl and fled away from that place by the said car. Thereafter, the villagers went to the house of Rafijul at Khandrui village but Rafijul was not there as he had fled away. On 12.10.14 at about 09.00 a.m he was informed from Pataspur PS that he should go to Belda PS. After going there, he came to know

that the dead body of his daughter was found beside O.T Road at Belda. He identified the dead body of his daughter. It is alleged that according to their criminal conspiracy 'S', her boy friend Sk Rafijul and Ukil Ali kidnapped his minor daughter by maruti car no. WB 36A/5049. Thereafter they murdered his daughter and the body was thrown on O.T Road. The driver of the said maruti car was Bisu Ghorai. It is further alleged that 'S' confessed that the son of the de facto complainant refused to make any relationship with 'S' as such, out of revenge 'S' handed over the victim to the accused.'

- 4.** After the investigation was over and on receipt of the chargesheet, the appellants along with another accused Bishu Gorai were charged under Sections 364/34, 376 D, 302/34, 201/34, 120B of IPC and 6 of the POCSO Act. After recording the deposition of 28 witnesses, the learned Special Judge has convicted and sentenced the three accused persons under Sections 364/34/376D/302/34/120B of the IPC and Section 6 of the POCSO Act. From the records it appears that Sk. Rafijul filed a criminal appeal being No. CRA (DB) 54 of 2024 whereas another convict Ukil Ali @ Akil Ali has filed CRA (DB) 74 of 2024.
- 5.** Both the appeals are taken up for disposal by this common judgment.
- 6.** From the impugned judgment it appears that the learned Trial Judge has relied upon the allegation that the convicts were present at the spot and the victim was last seen with the convicts. It is further revealed that the learned Trial Judge has also relied upon the alleged extra judicial

confession of one CCL, that is, 'S' who was the friend of the victim 'T'. The learned Trial Judge has also relied upon the deposition of PW 2 Sk. Raimat who allegedly saw the convicts present at the spot wherefrom the victim was abducted. He also saw the convicts who were waiting in a Maruti Van. The learned Trial Judge has considered the deposition of PW 5 Nazrul Mallik who saw the convicts on the date of incident at Kharai bazar when the present appellant Rafijul alongwith other convicts stepped down from a steel coloured Maruti van. PW 5 has also deposed that the convicts told him that they were going to the house of 'S'. The allegation that the victim's mobile phone was recovered from the possession of the appellant Rafijul was also considered by the learned Special Judge in favour of the prosecution.

7. It appears that learned Trial Judge has endorsed the view of the prosecution that although no direct evidence is adduced regarding murder and rape of the victim girl but common intention of the accused persons can be inferred from facts and circumstances of the case.

Court's view:

8. After going through the materials on record, it appears that this is a case of circumstantial evidence and the chain of events may be narrated as hereunder.
 - i) Victim 'T' received a phone call from her friend 'S', as per the deposition of the mother of the victim and other witnesses.
 - ii) The victim left her house to meet her friend 'S'.

- iii) According to PW 2 he saw 3 convicts were waiting in a Maruti Van.
- iv) According to the prosecution, PW 2 saw the victim 'T' and her friend 'S' were coming towards a stationary Maruti van.
- v) The victim did not return to her house for a considerable period of time.
- vi) Her mother became anxious and started searching for her daughter.
- vii) The daughter being not found, the mother of the victim alerted her neighbours and her husband.
- viii) Search for the victim was carried on at the instance of the parents and neighbours of the victim.
- ix) The victim's friend 'S' was not found in her house and subsequently, she was found in the house of her grandmother which is a few yards away from her house.
- x) 'S' was interrogated by the parents and other neighbours.
- xi) Initially, she did not disclose anything.
- xii) Subsequently, she divulged that she handed over the victim to her boyfriend and the latter's friends who took the victim to an unknown place in a Maruti van. The father and other neighbours including 'S' went to the house of the appellants at Khandrui village but neither the convicts nor the victim was found.

- xiii) In the morning the dead body of the victim 'T' was found beside Orissa Trunk Road.
- xiv) Subsequently, the 3 convicts were arrested and their mobile phones were recovered.
- xv) It is also alleged that one mobile phone of the victim was recovered from the possession of the appellant Rafijul.
- xvi) One steel coloured Maruti van was seized from one of the convicts namely Bishu Ghorai.
- xvii) It is alleged that blood stains, signs of semen etc. were found in the seats and footsteps of the said car and the same were sent for chemical examination.

Extra judicial confession:

9. Needless to mention, a confession made by an accused outside of Court or to any person other than a Judicial Magistrate is historically viewed as a weak piece of evidence in Indian criminal jurisprudence, but at the same time, it can be said that if certain stringent conditions are fulfilled, such extra judicial confession can be used by the Court with some supporting corroborative evidence. Neither Indian Evidence Act, 1872 nor Bharatiya Sakshya Adhiniyam, 2023 explicitly define the term 'extra judicial confession', but its admissibility and evidentiary value emerge from the general principles governing confessions. For an extra judicial confession to form the basis of the conviction, the prosecution must establish three primary conditions.

Firstly, *the voluntariness of confession*: The confession must be free from any threat, inducement or promise as prohibited under Section 24 of the Evidence Act.

Secondly, *the truthfulness as well as trustworthiness of such confession*: The Court must be convinced that the statement is true and made by a person in a sound state of mind without coercion.

Thirdly, *the credibility of the witnesses*: Since the confession is proved through the testimony of the person to whom it was made, the credibility and independence of that witness are paramount. Therefore, the thumb rule is that as a rule of prudence rather than law, Courts generally seek corroboration in material particulars from independent evidence before relying solely on an extra judicial confession.

10. In this case, the situation is quite different. The prosecution has relied heavily upon the alleged extra judicial confession of the CCL who was not tried by the learned Trial Judge during the prosecution of the appellants since the CCL being a juvenile was being tried separately under the provisions of Juvenile Justice Act. Therefore, there was no chance to confront the said accused (CCL) over such alleged confession nor even during examination under Section 313 Cr.P.C., since trials were different.

11. In this case the learned Public Prosecutor has categorically argued that the witnesses namely PW 1 father of the victim girl, PW 7, the mother of the victim girl, PW 2 Sk. Raimat, PW 3 Sk. Sirazuddin, PW 4 Ilius Mallick, PW 6 Sk. Imran Ali, PW 19 Abdul Hakim Mallick, PW 20

Sartaz Hossain, the brother of the victim have deposed before the Court that the friend of the victim (CCL) confessed before them that she called the victim 'T' over telephone and thereafter, handed over her to the 3 convicts on the relevant date and time. Apart from PW 20 Sartaz Hossain, the other abovenamed witnesses have stated before the Court that 'S' further confessed before them that as the brother of the victim 'T' refused to carry on his love relation with her, she did the same to take revenge.

12. In ***Smt. Basanti w/o prabhu (supra)***, the Hon'ble Apex Court has been pleased to hold that extra judicial confession of a co-accused cannot be used against an accused.

13. In the ***State of MP through CBI and Ors. (supra)***, the Hon'ble Apex Court was also pleased to hold that under Section 30 of the Evidence Act, the extra judicial confession made by a co-accused could be admitted only as a corroborative piece of evidence. In the absence of any substantive evidence against the accused persons the extra judicial confession allegedly made by another accused loses its significance and there cannot be any conviction based on such extra judicial confession. In the case in hand, according to prosecution, the FIR as well as the statements of three witnesses under Section 164 Cr.P. before the Judicial Magistrate has revealed that the CCL made such a confession at the relevant point of time when she was continuously interrogated by the parents and neighbours of the CCL. The question is whether or not such alleged extra judicial confession can be the sole basis to convict the

accused. It is well settled that such extra judicial confession of a co-accused is the weakest piece of evidence and there must be some substantive piece of evidence in support of such extra-judicial confession.

14. PW 2 in his statement under Section 164 Cr.P.C. has also indicated that 'S' confessed that she sent victim 'T' with her friend Tutul. She has also stated before them that she knew the house of Tutul and asked the villagers to accompany her so that the victim could be brought back. He has made more or less same statement in his deposition. The statement of PW 6, Sk. Imran Ali before the Judicial Magistrate was that after visiting the house of the victim on the relevant night of occurrence he came to know that 'S' forced the victim to board the car of Tutul. He did not divulge from whom he came to know such fact. However, in his deposition before the learned Court he stated that 'S' confessed before them that she handed over the victim to Rafijul and others. So, there is an improvement of the prosecution case in this regard at the instance of PW 6.

15. PW 5 Nazrul Mallick has stated before the Judicial Magistrate that he also came to know that victim 'T' was called by 'S' and thereafter 'S' compelled her to board the Maruti van of the Tutul. In his deposition, he has made more or less the same statement. So, he did not hear 'S' to confess. No doubt, the deposition of PW 1 , PW 2, PW 7, PW 3 and the FIR were consistent in showing that there was confession from 'S' regarding the complicity of the appellants but such alleged confession of

a co-accused cannot be used against other accused persons unless there are other materials showing the involvement of the said other accused persons.

The missing links:

- 16.** In this case, it appears that the prosecution has tried to bring other materials on record in support of the involvement of the present appellants in commission of the crime. According to the prosecution, the mobile phone of the victim/ the mother of the victim was recovered from the possession of the present appellant Rafijul without sim card. The seizure list witnesses turned hostile. No effort was taken from the side of the prosecution to place such mobile phone without sim card for Test Identification with the help of the parents of the victim. Even during their examination before the Trial Court the said mobile was not shown to the parents of the victim to identify the same as mobile phone of the victim or her mother. The prosecution has relied upon some CDRs but they have not been marked as Exhibits. Although the prosecution has tried to show from CDRs that the mobile phone of the mother of the victim received calls from the phone numbers of other concerned persons, the same does not prove that the mobile without sim card allegedly recovered from Rafijul actually belonged to the victim or her mother. Moreover, the CDR remains unexhibited. This is a serious shortcoming in the case of the prosecution. Had it been proved beyond doubt that the mobile phone of the victim or her mother was recovered from the possession of the

appellant Rafijul, it would have given sufficient strength to the prosecution case against the appellant.

17. Furthermore, the FSL report remains inconclusive. There is no matching of DNA of the convicts with the vaginal swab of the victim.

Voluntariness of the alleged confession:

18. Another aspect which should not be lost sight of by us is that the depositions of some of the witnesses are to the effect that initially the friend of the victim i.e. 'S' did not divulge anything but subsequently, when she was pressurised by her father and PW 3 Sk. Serajuddin, a member of the then Panchayat, 'S' allegedly confessed before them that she had compelled the victim to board the Maruti van brought by the appellant and his friends for abduction of the victim. Therefore, the alleged confession made by 'S' cannot be said to be made voluntarily or made without coercion. In view of the above the alleged extra judicial confession made by 'S' cannot be said to be a legal one and is thus not acceptable in the eye of law.

Last Seen Together: Improvement of the case during trial

19. Nobody saw the victim with the appellant Rafijul and his friends in the said Maruti van.
20. In this case, although PW 2 Sk. Raimat has stated before the Court that he saw three convicts were waiting in a Maruti van at the relevant point of time and he saw that victim 'T' and her friend 'S' were coming towards the Maruti van, PW 2 did not state such thing at the time of his

examination under Section 164 Cr.P.C. If we peruse his statement under Section 164 Cr.P.C. although he has stated before the Judicial Magistrate that he saw one Maruti van was standing on the north-eastern corner of Chaltapukur, he did not mention that he saw three convicts were waiting in the said Maruti van. This is obviously an improvement of the prosecution case by the PW 2 during trial.

21. PW 5 both at the time of recording his statement under Section 164 Cr.P.C. and also at the time of his examination before the Court has stated that on the relevant date and time he saw the convicts in a Maruti van at Kharaibazar and one of them had disclosed that they are going to the house of 'S'.

22. In ***Darshan Singh (supra)***, the Hon'ble Apex Court was pleased to observe that if the Prosecution Witnesses had failed to mention in their statement under Section 161 Cr.P.C. about the involvement of an accused, their subsequent statements before Court during trial regarding involvement of that particular accused cannot be relied upon.

23. In ***Vimal Suresh Kamble (supra)***, the Hon'ble Apex Court has reiterated the same principle.

24. It appears that during the recording of his statement under Section 164 Cr.P.C. PW 2 did not say that he saw the 3 convicts waiting in the Maruti van. From the record it transpires that the said convicts were not placed in TIP during investigation and PW 2 was not asked to identify those accused as the persons who were allegedly waiting in the Maruti van. Although there was no TIP, PW 2 identified the convicts on the dock

after a considerable period of time. Therefore, such evidence of PW 2 cannot be said to be free from blemishes since, it is very much difficult for any person to identify the accused after a long period of time particularly when those persons were not known to PW 2. PW 5, has categorically stated that he saw the three accused coming down from a steel coloured Maruti van at Kharaibazar. Although the said Maruti van was seized, the same was not placed for identification with the help of PW 2 and PW 5.

- 25.** Although, the depositions of PW 2 and PW 6 show that they had deposed categorically that victim 'T' and her friend 'S' were last seen together, no evidence is forthcoming that the victim was seen alongwith the three convicts at the relevant point of time. It is true that depositions of some of the witnesses reveal that the alleged place of abduction was a desolate place and if the abduction of a girl were done therefrom, there was least chance to witness such abduction. That is a vital point in favour of the prosecution. But it appears that the prosecution is under a duty to prove the involvement of the present convicts with the commission of the crime. It appears that although blood stains and semen were found in the seats or footsteps of the seized car, the FSL report remained inconclusive and did not support the prosecution case.

Circumstantial Evidence:

26. Needless to mention that even if there is no direct evidence, a case can be proved on the basis of circumstantial evidence. The essential principle of applying circumstantial evidence is well known. However, for recapitulation, we must say that the chain of events is to be established in such a way that there cannot be any doubt that no other person apart from the accused is responsible for the commission of the offence. In this case, there are circumstances/events, but we have no doubt that the chain of events is not complete and sometimes we have found that the chain is broken and therefore, the conviction cannot be upheld on the basis of such circumstantial evidence. In the case in hand nobody saw the victim to get into the steel coloured Maruti van. There is no evidence that the victim was seen lastly with the appellants. The alleged recovery of the mobile phone of the victim/her mother from the possession of the appellant Rafijul was not proved beyond doubt; the said mobile phone was not placed for identification by the parents of the victim to verify that the said mobile phone belonged to the victim /her mother and the same was recovered from the possession of the appellant Rafijul without sim card. The CFSL report does not prove that the alleged blood stain and sign of semen belonged to the victim and the appellants respectively. Therefore, we have no doubt that there are missing links and the prosecution has failed to prove the essential ingredients of foundational facts.

27. In **Manoj @ Munna (supra)** the Hon'ble Supreme Court has discussed the landmark judgment of **Sharad Birdhichand Sarda (supra)**. In **Sharad Birdhichand Sarda (supra)**, the Hon'ble Supreme Court has been pleased to lay down the basic principle to the effect that *"it is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence."* For the proper understanding of the principle laid down in the aforesaid case, the paragraphs 153 and 154 of the said decision are quoted hereinbelow:-

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(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.

154. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”*

28. In the case in hand the said five golden principles as referred to above are not satisfied.

29. In view of the above we have no hesitation to point out that the above discrepancies found in the prosecution case were not properly considered and appreciated by the learned trial judge who relied upon the extra judicial confession of a co-accused, last seen together theory and recovery of the alleged mobile phone of the victim from the possession of the appellant Rafijul without scrutinising that such available materials are unacceptable in the eye of law as clinching evidence against the convicts.

Juvenility of the appellant Ukil Ali:

30. During pendency of this appeal the plea of juvenility of another appellant Ukil Ali was taken and this Court directed the learned Chief Judicial Magistrate to make an enquiry regarding the plea of juvenility in accordance with law. By a report dated 20.12.2025 the learned Chief Judicial Magistrate has categorically stated that the appellant Ukil Ali was minor at the time of occurrence as per report of the concerned school where he studied for sometime. We have considered the said report and we have found that such enquiry was done on the basis of cogent materials and we have no different opinion as to the juvenility of the appellant Ukil Ali at the relevant point of time. In the said report the mother of the appellant Ukil Ali disclosed that she was unable to produce relevant documents concerning the age of the appellant Ukil Ali before the learned Trial Judge and obviously the plea of juvenility was not taken up by the said appellant properly before the learned Trial Judge. However, as it appears that the appellant Ukil Ali was a minor at the time of the alleged commission of offence, the trial and the judgment of conviction and order of sentence dated 24.01.2024 and 25.01.2024 against the appellant Ukil Ali cannot be sustained under the law since the trial was conducted by the learned Additional Sessions Judge, 2nd Court, Tamruk, Paschim Medinipur without having any jurisdiction to try the juvenile and accordingly the judgment of conviction and order of sentence dated 24.01.2024 and 25.01.2024 so far as regards the appellant Ukil Ali is set aside. The appellant Ukil Ali has already been

released on bail on executing personal bond. His personal bond is discharged.

31. Accordingly, **CRA (DB) 54 of 2024 and CRA (DB) 74 of 2024** are hereby allowed on contest. The judgment and order of conviction dated 24.01.2024 and 25.01.2024 passed by the learned Additional Sessions Judge, 2nd Court, Tamluk, Paschim Medinipur in Sessions Trial No. 9(8)16 arising out of the POCSO Case no. 78 of 2014 convicting the appellant **Rafijul @ Tutul** and **Ukil Ali** are hereby set aside. They are acquitted from the charges. The appellants be released from their custody immediately, if not already released, unless they are required to be in custody in connection with any other case.

32. Accordingly, **CRA (DB) 54 of 2024 and CRA (DB) 74 of 2024** with connected applications, if any, are hereby disposed of.

33. Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)