

Form No: J(1)

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

Present:-

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Anuj Singh**

**CRA 259 of 2017
Sunil Lakra & Anr.**

v.

The State of West Bengal & Anr.

For the Appellants:

Mr. Manas Kumar Das, Ld. Advocate.

Mr. Prodyut Kumar Roy.

Mr. Aritra Kumar Thokdar.

For the State:

Mr. Anurag Sardar, Ld. Advocate.

Hearing concluded on-

September 10th, 2026

Judgment pronounced on-

September 15th, 2026

RAJASEKHAR MANTHA , J.

1. This appeal is directed against the judgment of conviction and order of sentence dated February 28th, 2017, and March 1st, 2017, respectively, passed by the Additional Sessions Judge, Alipurduar, in Sessions Trial No. 3(4)/2013, arising out of Sessions Case No. 100/2013.
2. The appellants were sentenced to 10(ten) years of rigorous imprisonment and to pay a fine of ₹5,000 (five thousand) for the offence of rape under Section 376(2)(g), Indian Penal Code. In default thereof, each appellant was directed to serve 5(five) months of simple imprisonment.
3. The appellants were also sentenced to life imprisonment and to pay a fine of ₹10,000 (ten thousand) for the offence of murder under Section 302, IPC. In default thereof, each appellant was directed to serve 10(ten) months of simple imprisonment. Both sentences were directed to run concurrently. The period of pre-trial detention suffered by the appellants was directed to be set off in terms of Section 428 of the Code of Criminal Procedure.

THE PROSECUTION CASE

4. On September 30th, 2012, the victim girl aged approximately about 18 years went outside her home to answer the nature's call and went missing thereafter. On October 2nd, 2012, her half-clad body was found in the bushes of Munshi Line, Rydak Tea Garden, PS. Samuktala District- Jalpaiguri. The victim was known to have a history of leaving and staying away from home without intimating her family. She suffered from epilepsy and was mentally slow.

5. The victim's disappearance from September 30th, 2012 to October 2nd, 2012, coincided with the disappearance of the appellants from Rydak Tea Garden. The victim and appellants resided in the same village.
6. On October 2nd, 2012 UD Case No. 52 of 2012 was started by Samuktala P.S., and the inquest commenced. **PW 20**, an SI of Smauktala P.S, conducted the inquest on the victim.
7. The inquest report recorded that the dead body was found in the bushes of a beetle nut garden behind the house of one **Manga Kerketta (PW-7)**, near Rydak Tea Garden. No external physical injuries were found on the said dead body. The victim was suffering from epilepsy. Neighbors discovered the dead body and informed the victim's family on October 2nd, 2012.
8. The inquest report recommended a post-mortem examination, which was conducted on October 4th, 2012. It revealed that the victim was raped and murdered, dying as a result of severe and excessive penetrative sexual assault.
9. Formal **FIR No. 292/2012, dated October 11th, 2012**, was registered by the Samuktala PS, based on a complaint lodged by the victim's father, (PW-1), of the same day. The said complaint was therefore lodged 9 days after the victim's dead body was recovered on October 2nd, 2012, and 7 days after the PM report opined that the victim was raped and murdered. Neither the FIR nor the inquest report named the appellants. The appellants were arrested from Delhi two months after October 2nd, 2012, sometime in December 2012.

10. Upon completion of the investigation a charge sheet was submitted against the appellants under Sections 376(2)(g), 302 and 34 of the Indian Penal Code. On April 24, 2013, the learned Trial Court framed charges against both appellants under Section 376(2)(g) of the Indian Penal Code for the alleged joint commission of rape and under Section 302 read with Section 34 of the Indian Penal Code for allegedly committing the murder of the victim in furtherance of their common intention. The charges were read over and explained to the appellants, who pleaded not guilty and claimed to be tried.

THE TRIAL AND EVIDENCE ON RECORD

11. **PW-1 was the father of the victim girl.** He deposed that the victim girl was suffering from epilepsy. On the fateful day, the victim went out of her house to attend to nature's call and did not return. PW-1 searched for his daughter for four days from the date of her disappearance on September 30th, 2012. The tea leaf pluckers of Rydak Tea Garden found the dead body of the victim at the Supari Garden (betel nut garden) of **PW 7, Manga Kerketta**, and alerted the villagers. He rushed to the PO and found the naked dead body is that of his daughter.

12. He confirmed that **PW-3, Biswajit Chakraborty** wrote the complaint at the police station on his behalf. He later came to learn that the appellants raped and murdered his daughter. The appellants were from his locality.

13. During cross-examination, PW-1 has deposed that he did not see any injury marks on his daughter's dead body. He confirmed that he lodged the complaint on the date he found the victim's dead body. The dead body

of the victim was discovered on October 2nd, 2012. PW 1, however, lodged the complaint on October 11th, 2012.

14. PW-1 confirmed that none from his locality had informed him that the appellants raped and murdered his daughter. He, however, suspects the appellants because they left the locality immediately after his daughter went missing. He confirmed that on earlier occasions as well, the victim girl used to leave the house without informing any one.

15. **PW-2, Subodh Barua**, was a member of Rydak Gram Panchayat, where the victim girl resided. He was an inquest witness. He confirmed that the victim suffered from epilepsy. The victim girl was missing since September 30th, 2012. On October 2nd, 2012, police recovered her dead body from a bush behind the house of **PW 7, Manga Kerketta**. The police called him to the PO; he went there. He signed on the inquest report. The defense did not cross-examine him.

16. **PW-3, Biswajit Chakraborty**, scribed the complaint. He was a law clerk. He has deposed that on October 11th, 2012, PW-1 requested him to draft the said complaint. PW-3 read out and explained the contents of the complaint to PW-1, who then affixed his left-thumb impression (LTI) on it. During cross-examination, PW-3 has deposed that he regularly visited the police station to draft complaints for various aggrieved persons.

17. **PW-4 was the mother of the victim girl**. She confirmed that the victim was 15 years old when she went missing.. She has deposed that the assailants raped her daughter at the betel garden of **PW 7**. The victim went missing on September 30th, 2012, and remained untraceable despite several efforts to trace her until her dead body was found on October 2nd,

2012 at the PO. She had no personal knowledge of the incident. The defense did not cross-examine her.

18. **PW-5 was the victim's brother.** He confirmed that his sister remained untraceable for three days before her naked dead body was discovered in the said supari garden. The defense did not cross-examine him. **PW-6**, the victim's sister-in-law, confirmed that the dead body of the victim was found lying at the said supari garden. The victim was raped and murdered. The defense did not cross-examine her.

19. **PW 7, Manga Kerketta, the owner of the said Supari Garden**, has deposed that he was at his house in Rydak village when the victim went missing on September 30th, 2012. On that fateful night he was inside his room. On hearing a shout, he came out to the road inside his Supari garden and saw the appellants, Sunil and Samir. On the following morning of October 1st, 2012, PW 7 discovered the victim's fully naked body at the PO. In the trial, he identified both appellants. During cross-examination, PW 7 confirmed that the appellants previously resided in the labor quarter of his supari garden. They were known to him. He clarified that the road inside his garden, where he saw the appellants, is approximately one-quarter of a kilometer distant from his house. There were street lights on the pathway on September 30th, 2012, when he claimed to have seen the appellants thereat.

20. During cross-examination, PW 7 has contradicted himself and has stated that he did not come out from his room after hearing the said shout. He, however, maintained that he saw Sunil and Samir that night.

21. **PW 8, Pradeep Kerketta**, was a resident of Rydak and co-villager of the appellants, has deposed that between 10:00 PM and 11:00 PM on September 30th, 2012, he was returning home from work when he saw the appellants on the road with the victim. The two appellants were trying to forcibly grab the victim by her hands and dragging her with them. He has deposed that the mother of the victim girl covered the girl's dead body with a cloth. He identified the appellants in the trial. During cross-examination, PW 8 reaffirmed that he saw the appellants holding the victim's hand and forcefully dragging her along the road.
22. **PW 9, Dipesh Oraon, was a resident of Bharat Chowpati, Nimti**, has deposed that on September 30th, 2012, the appellants came to his house requesting for shelter and stayed for five to six days. The appellants told him that they will leave for Delhi in a few days. Before leaving for Delhi, the appellant Samir sold his mobile phone to PW 9. Police later arrived at PW 9's residence, informed him of the murder, and seized Samir's mobile phone. He identified the appellants in the trial.
23. During cross-examination, PW 9 has deposed that the appellants were residents of Rydak village. PW 9 lived at Nimti. The distance between the two villages is substantial.
24. **PW 10 was Moniram Bagwar. He was a resident of Munshi Line, Rydak Tea Garden.** He deposed that the dead body of the victim girl was found in the betel nut garden of PW 7. The appellants resided at the said garden. The appellants were untraceable in the village after the victim girl went missing. He identified the appellants in the trial. —During cross-examination, he has, however, deposed that he did not know how the

victim girl died. He confirmed that the appellants were workers at the tea garden.

25. **PW 11, Dilghit Barua**, resided in Munshi Line, Rydak Tea Garden, and worked as a tea garden worker and **PW 12, Magda Minj**, resided in Munshi Line, Rydak Tea Garden have deposed along the lines of PW 10.

26. **PW 13, Suroj Balmiki**, was a resident of the Munshi Line, Rydak Tea Garden. He has deposed that the police, along with the appellants, arrived at the PO. The appellants showed the place, where the victim girl was murdered, to the police. He identified the appellants in court.

27. **PW 14 was Akshay Roy**. He was cited as a witness by the prosecution but not examined in the trial by either party.

28. **PW 15, Gonu Mangar, was the owner of a video camera shop and a videographer by profession**. Sometime in December 2012, the Samuktala Police Station assigned him the task of video recording the statements made by appellants to the police at the police station. He identified them in the trial. The police further directed him to video record several areas at Rydak, Munshi Line, and Rydak. He handed over the video cassette of such recordings to the Samuktala Police Station.

29. **PW 16, Dr. Amitava Dasgupta**, has deposed that on January 31st, 2013, he was posted as a Medical Officer at the Rydak Tea Garden Hospital. On that date, he issued the birth certificate of the victim girl, which stated her date of birth as September 20th, 1994. He handed over the birth certificate to the police and identified it in the trial.

30. **PW-17 was Parimal Ray bearing constable No. C/887)**. On October 2nd, 2012, he was posted at Samuktala P.S. At around 14:30 hours, he

proceeded towards Raidak Tea Garden, Munshi Line, alongside PW 20, SI Prem Kumar Thami, to investigate U.D. Case No. 52/12 dated October 2, 2012 concerning the death of a 15-year-old girl. He confirmed that PW 20 conducted inquest over the victim's dead body in his presence and handed over the same to PW 17 at 16:45 hours on the same date for transporting it for PM examination. PW 17 identified it in Court.

31. PW 17 transported the victim's dead body to the Alipurduar Morgue, from where it was transferred to North Bengal Medical College & Hospital (NBMCH) for post-mortem. He identified the victim's dead body to PW-19, the PM Doctor. Upon conclusion of PM examination, PW 19 handed over the victim's viscera, blood samples, and wearing apparel to PW 17; he delivered them to PW 20, SI Thami.

32. PW 17 confirmed that PW 20 seized such articles and prepared two seizure lists in PW 17's presence. He signed and identified the said seizure list in the trial. **PW-18, Dudheshwar Das, was posted as Constable on October 11, 2012, at Samuktala P.S.** He accompanied PW 22, the I.O. to the PO. During cross-examination, he could not recall the name of the PW 20.

33. **PW-19: Dr Dibakar Chhetri (Demonstrator, Forensic Medicine).** On October 4th, 2012, PW 19 performed post-mortem on the victim girl. He arrived at the following findings as regards the injuries and cause of the death of the victim girl:-

- a) The body was decomposed, showing dark discoloration, putrefactive gas swelling, and skin marbling across the chest,

abdomen, and limbs. Scalp hair was loosening at the roots. The dead body of the victim had a torn, greenish printed salwar.

b) A tear of the hymen and fourchette extended to the fossa navicularis, with muscle-deep tears at the 5 o'clock and 7 o'clock positions, accompanied by congestion of the labia minora, hymen, and vaginal cavity.

34. PW 19 handed over the apparels, scalp hair, nail scrapings, vaginal swabs/smears, post-mortem blood, and viscera to the constable, PW 17. PW 19 has deposed that the cause of death was forceful penetration in the vagina. The estimated time of death was 40 to 45 hours prior to the post mortem examination.

35. **PW-20, SI Prem Kumar Thami, was posted at Samuktala P.S.** On October 2nd, 2012, he received information from Duty Officer ASI Gurudas Roy regarding a dead body of a victim discovered in Rydak Munshi Line. He and PW 17, Constable Parimal Ray, arrived at the PO around 15:05 hours. The victim's elder brother, PW 5, identified the victim's dead body to PW 17 and 20 and informed them that she was about 18 years old.

36. During the inquest, PW 20 did not find any external injury marks on her neck, body, or genitalia. He noted a greenish, snail-like discharge in the vaginal area. He made a spot enquiry which revealed that the victim was last seen at her home in the afternoon of September 30th, 2012, before going missing. Her body was discovered in the morning of October 2nd, 2012, behind a labor quarter at said Supari Garden owned by PW 7.

37. PW 20 confirmed having prepared the dead body challan and dispatched the body to Alipurduar S.D. Hospital via PW 17. He identified the challan in the trial. During cross-examination, PW 20 clarified that the labor quarter was situated behind the tea garden of Manga Kerketta, PW 7 where the villagers found the dead body.

38. **PW-21, Fabinu Janwar**, a resident of Munshi Line, Rydak, has deposed that two years ago, the police arrived at Munshi Line with the appellant Sunil Lakra and searched his house. They seized a t-shirt and trousers from his house in PW-21's presence under a formal seizure list, onto which PW-21 affixed his left thumb impression. PW-21 identified the appellant, Sunil Lakra, in the trial.

39. PW-21 further deposed that police also went to the house of appellant Samir Charat and seized a pair of trousers from his house in PW 21's presence. Police prepared a seizure list for this recovery, on which PW-21 also affixed his LTI. During cross-examination, PW-21 confirmed that he put his LTI on the said seizure list at the Police Station. He, however, deposed that trousers and t-shirt produced during the trial did not match with the apparels actually seized by the police in his presence. He further deposed that he affixed his LTI on the said two seizure lists in front of his house. He could not recall the exact date of the seizure.

40. **PW-22** was the Sub-Inspector of Police at Samuktala PS on October 11, 2012, the IO. He identified the FIR(supra) in the trial. He deposed that on October 11th, 2012, he visited the PO and prepared a rough sketch map along with an index, both of which he identified in the trial.

He arrested the appellants, Sunil Lakra and Samir Charat, in Delhi and produced them before the court. He has confirmed seizing the wearing apparels of the appellants under two separate seizure lists, which he identified in the trial. He, however, did not send them for FSL examination.

41. PW-22 has deposed that the appellants confessed their guilt to him. However, he did not produce the appellants before a Magistrate to record their statements under Section 164 of the CrPC. PW-22 has recorded the statements of PW-10 and PW-11 under Section 161 of the CrPC. Both PW-10 and PW-11 deposed that the disappearance of the appellants matched the exact time the victim went missing.
42. PW 22 did not send PW 7, 8, and 9 to the local magistrate for recording their statements under Section 164, CRPC. PW 7 claimed to have seen the appellants on September 30, 2012, in his betel nut (supari) garden when the victim went missing. The victim's dead body was later discovered in this same garden. PW-8 saw the victim with the appellants on September 30, 2012. He saw the appellants forcefully dragging the victim away. PW-9 gave shelter to the appellants on September 30, 2012. The appellants told PW-9 that they would leave for Delhi within 5 to 6 days.

FINDINGS OF THE LD. TRIAL JUDGE

43. The learned trial Judge convicted the appellants based on the evidence of PW-7, PW-8, and PW-9, and the subsequent arrest of the appellants from Delhi. The learned trial judge linked the evidence of PW-7, PW-8, and PW-9

to the subsequent arrest of the appellants from Delhi pointing towards the guilt of the appellants.

44. The learned Trial Judge noted corroboration of the aforesaid evidence from the post-mortem report of the victim, which established that the victim had been raped and murdered. The learned trial judge linked the disappearance of the appellants with the missing of the victim, both events happening September 30th, 2012.

ANALYSIS OF THIS COURT

a) *The evidence of PW 7, 8, and 9 are contradictory and tutored and thus is unreliable*

45. PW-7 has deposed that he owned a supari (betel nut) garden from where the victim's dead body was discovered. He has deposed that on September 30, 2012, he heard a shout which prompted him to step outside his house. He saw the appellants, Sunil and Samir, thereat. He, however, did not question the appellants about their presence.

46. During cross-examination, PW-7 took deposed to the contrary stating that he did not leave his room even after hearing the said shout. He further clarified that the road inside the Supari Garden where he saw the appellants was located about a quarter of a kilometer from his house. He deposed that there was no provision of electric lighting along that road. Adequate lighting was, thus, unavailable at the PO. PW 7, thus, abandoned his evidence that he saw the appellants at the PO.

47. PW 7 has deposed that the appellants used to live in the labor quarter at the tea garden. The presence of the appellants at the PO is thus not unnatural. He deposed that on the following morning i.e. October 1st,

2012, he discovered a dead body of the victim girl. The victim girl was known to him. The evidence of other PWs and the inquest report have established that the dead body of the victim was discovered on October 2nd, 2012. Thus, PW 7 remained silent about having seen the appellants for a day which is unexplained. Hence the evidence of PW-7 that he saw the appellants at the PO in the night of September 30th, 2012, is not believable.

48. PW-8 has deposed that he saw the appellants, Samir and Sunil, on the road with the victim girl in the night of September 30th, 2012. He also deposed that they were dragging the victim girl with them without her consent. He, however, did not intervene and stop the appellants. The appellants were not armed.

49. In the natural course of events, PW-8, thus, ought to have intervened to save the victim girl or at the very least, informed her parents immediately. He was aware that the victim was suffering from epilepsy and in the past, had frequently left her home without informing anyone. Instead, he waited for two to three days before the victim girl was found dead in the said Supari Garden. The unusual conduct of the appellants renders his evidence unreliable.

50. Further, two days intervened between the appellants being last seen with the victim girl and the estimated time of her death. She was last seen with the appellants by PW 8 on September 30th, 2012. The post mortem examination was conducted on October 4th, 2012. The PM Doctor opined that the victim's death likely occurred 24 to 45 hours prior to the PM examination. Working backwards from October 4th,

2012, 45 hours places the estimated time of death of the victim around October 2nd, 2012. Thus, two full days intervened between the last-seen instance and the actual estimated time of death. This creates a substantial time gap between the appellants being last seen with the victim and the time of her death.

51. The "last seen theory" alone cannot form the sole basis for a conviction under Sections 376 and 302. The prosecution must produce additional corroborative evidence namely, medical evidence correlating the death of the victim with the accused persons. Such a correlation is absent in the present case. In **Anand Jakkappa Pujari @ Gaddadar v. The State Of Karnataka, reported in 2026 INSC 417**, it was held as follows:-

41. The last seen theory comes into play **where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.** Even in such a case, the courts should look for some corroboration.

43. By now, it is a well settled position of law that the circumstance of "last seen together" **does not by itself and necessarily lead to the inference that it was the accused who committed the crime.** There must be **something more** establishing the connectivity between the accused and the crime. The Courts should look for some corroboration.

Emphasis Applied

52. PW-9 provided shelter to the appellants without knowing the allegation of rape and murder against them. The appellants were his friends; they stayed at his house for five to six days starting from September 30th, 2012, coinciding with the period when the victim went missing. The appellant Samir sold him a mobile handset before leaving for Delhi. The evidence of PW-9 is, thus, relevant to the extent that the appellants resided in his house and nothing further. It cannot be ruled

out that the appellants stayed at PW-9's house to spend time with their friend, PW 9.

53. The Ld. Trial Judge, however, linked PW-9's evidence, where the appellants informed PW 9 that they will leave for Delhi, with the appellants' subsequent arrest from Delhi, and held against the appellants.

54. PW 9 has deposed that the appellant Samir sold his mobile handset to him and informed him that they are leaving for Delhi. The police seized the said mobile handset from the house of PW 9. No material, however, was extracted from the mobile phone linking the appellants with the crime.

55. Had the appellants intended to flee, they would not have informed PW-9 of their intention to go to Delhi. There was no need to sell the mobile handset to PW 9. This mobile set actually helped the police to trace out PW 9, who told the police that the appellants left for Delhi. The appellants would not have left evidence with PW 9 for the police to trace them.

56. One may argue that the appellants may have wanted to get rid of the mobile set to evade their detection by the Police. The appellants would have destroyed the phone. The appellants may have sold the mobile set to fund the trip to Delhi they would not have revealed their destination to PW 9, which actually did happen. PW-9 therefore appears to have been tutored.

57. In **M.P. v. Balveer Singh, reported in (2025) 8 SCC 545**, the test for examining a tutored witness was specified as follows:-

63. or **by proving that the witness fell prey to tutoring and was influenced by someone else either by cross-examining such witness at length that leads to either material discrepancies or contradictions**, or exposes a doubtful demeanour of such witness rife with sterile repetition and confidence-lacking testimony, or **through such degree of incompatibility of the version of the witness with the other material on record** and attending circumstances that negate their presence as unnatural.

65.3. When eyewitness is examined at length it is quite possible for him to make some discrepancies. **But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.**

Emphasis Applied

58. In **Gangadhar Behera v. State of Orissa, reported in (2002) 8 SCC 381**, ‘material discrepancy’ in the evidence of a witness was explained as follows:-

15.....Material discrepancies are those **which are not normal, and not expected of a normal person.** Courts have to label the category to which a discrepancy may be categorised. **While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.** These aspects were highlighted recently in Krishna Mochi v. State of Bihar [(2002) 6 SCC 81 : 2002 SCC (Cri) 1220] .

Emphasis applied

59. In the present case, the evidence of PW-7 tendered during his examination-in-chief ‘materially contradicts’ his evidence given during his cross-examination. The evidence of PW 8 also suffers from the same vice. The contradiction in the evidence of PW 7 does not stem from his previous statements given to the police or magistrate or from a comparison with another witness's evidence.

60. When a witness directly contradicts his/her own examination-in-chief during his own cross-examination, it constitutes a material contradiction and may even amount to falsehood. The reason is that a witness may forget what he has stated to the police and magistrate, but he is expected **not** to forget what he or she has deposed on oath before the Court in his examination-in-chief.

61. The evidence of PW 9 is tutored in that it makes an artificial attempt to fit into the prosecution case. The evidence of PW 9 appears to be set up in that the appellant Samir sold his mobile set to PW 9 and also revealed that the appellants are heading towards Delhi. The police later reached out to PW 9, seized the mobile set, and subsequently arrested the appellants from Delhi.

b) Non-examination of PWs 7, 8, 9 and appellants Section 164 , CRPC

62. PW 7 and PW 8 were key prosecution witnesses. PW 7 claimed to have seen the appellants at the PO. PW 8 saw the victim with the appellants. PW 9 purchased the mobile set of the appellant Samir. Ethical tapping of this mobile phone led the police to PW 9 and ascertain the whereabouts of appellants, who told PW 9 that they will go to Delhi.

63. PW 22, IO, thus, should have given greater weight and attention to their statements and knowledge, and sent them before the Magistrate for recording their respective statements. This could have enabled the prosecution to use the same for corroboration in absence of direct eye-witness account of the crime.

64. The absence of a statement of the appellants confessing their guilt under Section 164 of the CrPC is a notable factor. PW 22, the IO, has deposed

that the appellants have confessed to raping and murdering the victim girl. Despite this alleged confession, the police did not produce the appellants for recording such confession under Section 164 of the CrPC. Other prosecution witnesses who deposed that the victim's disappearance coincided with that of the appellants from the village were also not examined under Section 164 of the CrPC.

65. When a prosecution case relies entirely on circumstantial evidence, the IO must exercise greater vigilance than in cases supported by direct eyewitness accounts. Thus when the Police rely on witnesses, who did not witness the crime, the IO should definitely have their statements recorded under Section 164 of the CrPC to ensure greater credibility.

c) The absence of the appellants coinciding with that of victim is at best a suspicion and not a proof

66. The victim girl was missing from September 30th, 2012. The appellants were also untraceable from that date. PW 10 and 11 have confirmed this coincidence. They, however, clarified that they do not know the circumstances under which the victim girl was raped and murdered. PW-22, the IO, recorded the statements of PW-10 and PW-11 under Section 161 of the CrPC, but did not send them for examination under Section 164 of the CrPC.

67. Suspicion, no matter how strong, cannot replace proof. The absence of the appellants from the village coinciding with the victim's disappearance is at best an incomplete link in the chain. The chain remains incomplete because the prosecution failed to establish that the appellants were

untraceable due to their involvement in the rape and murder of the victim.

d) Section 27 does not render the evidence of PW 13 admissible.

68. PW 13 has deposed that the Police brought the appellants to the said Supari Garden. The appellants pointed out the place where the victim was raped and murdered thereat. This statement is irrelevant in the context of Section 27 of the Indian Evidence Act, 1872, in view of the decision in **Perumal Raja v. State reported in 2024 SCC OnLine SC 12**, wherein it was held as follows

22. However, we must clarify that Section 27 of the Evidence Act, as held in these judgments, **does not lay down the principle that discovery of a fact is to be equated to the object produced or found.** The discovery of the fact resulting in recovery of a physical object **exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto.** In *Mohmed Inayatullah v. State of Maharashtra*, elucidating on Section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. **A fact already known to the police will fall foul and not meet this condition.** The third is that at the time of receipt of the information, the accused must be in police custody. **Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible.**

.....

Emphasis applied

69. Paragraph 22 of the **Perumal Raja decision (supra)** has held that discovery of a physical object, under Section 27(supra), renders both the

physical object, so recovered, and accused's mental awareness of the said object's location admissible. Thus, when no physical object is recovered, mental awareness of the accused thereof cannot be inferred.

70. No incriminating material was recovered from the said PO. Further, the evidence of PW-13 that the accused pointed out the PO to the police is irrelevant since the PO was known to all concerned including the police even before the accused could have pointed it out.

e) The medical evidence does not link the appellants with the crime.

71. The dead body of the victim showed advanced decomposition. PW 19 has deposed that the estimated time of death was between 24 and 45 hours prior to the PM examination. Physical force was applied to the victim resulting in extensive tearing of the hymen, the fourchette, and deep muscle tissue. Tears at the 5 and 7 o'clock positions of the vaginal opening suggest significant force arising from non-consensual sexual penetration. Additionally, localized congestion indicates a severe reaction to considerable tissue trauma.

72. The medical evidence thus has clearly established that the victim was raped and murdered. The physical samples including scalp hair, nail scrapings, vaginal swabs, and post-mortem blood of the victim were collected and handed over to PW 22, the IO. They were never sent for forensic examination. The medical evidence thus has not linked the appellants with the rape and murder of the victim.

73. When direct eyewitness accounts confirm the commission of crime by an accused person, a forensic testing report is not strictly necessary. In absence of direct eyewitnesses account in this case, comparing the physical samples collected from the victim with that of the appellants was thus crucial, necessary and essential.

f) The delay in registration of FIR in the instant case was a vital unexplained omission.

74. The police were informed about the discovery of the body on the 2nd of October 2012. The Inquest and Post Mortem were conducted against a UD Case. It was only against a complaint lodged 9 days after the incident that the police registered FIR on the 11th of October 2012. The police have not explained the delay. In the facts of the case the attempt by the victim's family, PW-7-9 and the police to cook up a case against the appellants cannot be ruled out.

g) Evidence on record does not point towards the guilt of the appellants

75. The evidence on record does **not** invariably point towards the guilt of the appellants for the following reasons

- A) The appellants lived in the same village as the victim girl, and both went missing on the same day, September 30, 2012.
- B) PW-7 initially deposed during his examination-in-chief that he saw the appellant at the PO after coming out from his house upon hearing a shout. However, during cross-examination, PW-7 deposed that he did not come out of his house after hearing the shout.

- C) PW 7 deposed that he discovered the dead body of the victim in the morning of October 1st, 2012. He, however did not inform any other PWs. The victim's dead body was discovered on October 2nd, 2012 by the other PWs.
- D) PW 8 saw the appellants forcibly dragging the victim with them on the road. He however did not intervene. He did not inform anybody of the same.
- E) The evidence of PW 7 claiming to have seen the appellants at the PO and PW 8 claiming to have seen them forcibly dragging the victim were thus not proven at all.
- F) PW-9 deposed that the appellants reached his house, stayed for five to six days, sold him a mobile set, and stated they were leaving for Delhi. PW-9 purchased and had the appellant Samir's mobile set, making it easy for the police to trace out PW-9 and ascertain the appellant's whereabouts. This is highly improbable for accused persons to do, who have raped and murdered a girl suffering from epilepsy.
- G) Although medical evidence has established that the victim was raped and murdered, the wearing apparel and other physical materials of the victim were not sent for forensic examination. This would have revealed whether the appellants are connected with the victim's death.
- H) Even assuming that these events were proven, the appellants could not be convicted. The PO was accessible to the public, there was no eye-witness. The physical evidence from the

victim's body was not sent for FSL. There is no evidence to link the appellants to the crime. Therefore, even treating the prosecution witnesses as reliable, guilt cannot be inferred.

- I) The appellants' disappearance is not inherently incriminating. The prosecution has failed to link such disappearance to the crime in question.

76. While a faint suspicion may arise against the appellants, suspicion cannot take the place of legal proof. The appellants are, thus, acquitted on benefit of the doubt. The impugned judgment of conviction dated February 28th, 2017, and order of sentence dated March 1st, 2017, is set aside. **CRA 259 of 2017** is allowed. The appellants shall be set at liberty forthwith.

77. The appellants, if on bail, such bail bonds shall be discharged. If not so, the appellants shall be set at liberty immediately, if not required in any other case, upon execution of bonds under Section 437A of CRPC, corresponding to Section 481 of the BNSS, 2023.

78. Let a copy of this judgment and the Trial Court Records be sent to the trial court at once.

79. Urgent certified copy of this judgment, if applied for, shall be made available to the parties upon compliance with due formalities.

(Rajasekhar Mantha, J.)

I agree.

(Anuj Singh, J.)