

Henry Westmuller Roberts

Vs

State of Assam

Chabil Prasad Agarwala

Vs

Sunil Chandra Biswas and Others

And

State of Assam

Vs

Sunil Chandra Biswas and Others

Criminal Appeals Nos. 545 of 1982, 209, 210-213 of 1983

(Syed M. Fazal Ali, A. Varadarajan, Sabyasachi Mukharji JJ)

27.03.1985

JUDGMENT

A. VARADARAJAN, J. -

1. These appeals by special leave are against the common judgment of a Division Bench of the Gauhati High Court in Criminal Death Sentence Reference No. 1 of 1981 in regard to two accused persons Henry Westmuller Roberts and Sunil Chandra Biswas and Criminal Appeal No. 19 of 1981 filed by those two condemned persons and Criminal Appeals Nos. 24 and 25 of 1981 filed by Naresh Chandra Ghatani and Anil Chandra Barua respectively. The Sessions Judge, Dibrugarh in Sessions Case No. 33 (TSK) of 1978, convicted and sentenced Henry Westmuller Roberts and Sunil Chandra Biswas (hereinafter referred to as Henry and Sunil respectively) to death under Section 302 read with Section 34 IPC for the murder of a boy Sanjay alias Gettu Agarwala (hereinafter referred to as Sanjay), and to imprisonment for life under Section 364 read with Section 34 IPC and rigorous imprisonment for seven years under Section 201 read with Section 34 IPC and those two accused Henry and Sunil and accused Anil Chandra Barua and Naresh Chandra Ghatani (hereinafter referred to as Anil and Naresh respectively) to rigorous imprisonment for five years each separately under Section 120-B and Section 387 read with Section 34 IPC. The sentences awarded to all the four accused were directed to run concurrently. Henry, Sunil, Anil and Naresh were accused 1, 2, 3 and 4 respectively in the Sessions Court.

2. The High Court allowed Criminal Appeals Nos. 24 and 25 of 1981 in full and acquitted Anil and Naresh and also allowed Criminal Appeal No. 19 of 1981 in full as regards Sunil and acquitted him and rejected the death sentence reference relating to him and allowed the appeal of Henry in part as regards his conviction under Section 120-B IPC and dismissed his appeal in other respects and

accepted the death sentence reference relating to him. The result is that the High Court found Henry guilty under Sections 302, 364, 201 and 387 IPC and not guilty under Section 120-B IPC and maintained the sentence awarded to Henry by the Sessions Court except in regard to the offence under Section 120-B IPC and acquitted the other three accused persons in full.

3. Henry has filed Criminal Appeal 545 of 1982 against his conviction and sentence awarded to him under Sections 302, 364, 201 and 387 IPC. The deceased Sanjay's father Chabil Prasad Agarwala has filed Criminal Appeal No. 209 of 1983 against the acquittal of Sunil, Anil and Naresh in entirety. The State of Assam has filed Criminal Appeal No. 210 of 1983 against the rejection of the death sentence reference in regard to Sunil and Criminal Appeals Nos. 22, 212 and 213 of 1983 against the acquittal of Sunil Criminal Appeal No. 19 of 1981, Naresh in Criminal Appeal No. 25 of 1981 and Anil in Criminal Appeal No. 24 of 1981. Henry who had been acquitted by the High Court under Section 120-B IPC is not a party to Criminal Appeal Nos. 209 to 213 of 1983.

4. The case of the prosecution is this :

5. In 1975 Henry, Sunil and Naresh were employees of the Oil and Natural Gas Commission (ONGC) at Sibsagar in Assam. Henry, an Anglo-Burmese was a laboratory attendant. Sunil, a Bengali Hindu was a truck driver. Naresh, a Nepalese was blacksmith. Anil, an Assamese was a mohurrir under a contractor of the ONGC at Sibsagar. These four accused entered into a conspiracy to kidnap minor children at Sibsagar, Dibrugarh and Tinsukhia with a view to extract ransom. Chabil Prasad Agarwala, PW 23 was doing business in foodgrains in a shop at Siding Bazar, Tinsukhia situate in Dibrugarh district. He was living in a dwelling house situate adjacent to his shop with his wife Lilavati Agarwala, PW 19 and seven children including Sumita Agarwala, PW 21 and the deceased Sanjay who was nine years old and studying in the Girls' Hindi School.

6. There was a day-long 'Holi' (fagua) festival in Tinsukhia town on March 26, 1975. The people belonging to the Marwari community of Siding Bazar had created a pandal near a Shiva temple in connection with the 'Holi' festival. On that day three persons who came to the temple for darshan at 9 or 9.30 a.m. stayed on in the temple till about 12.30 p.m. Two of them have been subsequently identified as Henry and Sunil. A number of children collected in the pandal to participate in the festivities. Sanjay was in the pandal at about 5 or 5.30 p.m. playing with some children including Anil Kumar Chetri, PW 12 and Nirmal Kumar Jain, PW 13. One man, who has been subsequently identified as Henry, came and watched the play and remarked that Sanjay was playing well. A little later he gave chocolates to PW 12 and Sanjay and asked them for the names of their fathers which they really mentioned. Soon thereafter Sanjay's elder sister, PW 21 aged about 10 or 11 years came to the pandal in search of Sanjay as directed by her mother, PW 19 and called him to go along with her. Then Henry who was in the pandal called Sunil, who was present there, as 'driver' and asked him to bring chocolates. When PW 21 and Sanjay were moving away from the pandal Henry called Sanjay by his name and asked him to come saying that he would give him chocolates. Thereupon, Sanjay stayed behind after telling his sister, PW 21 that he would come a little later. Sunil brought chocolates which Henry distributed to the children. Henry asked Sunil whether the car was ready and he answered in the affirmative. PW 13 left the pandal a little later while Henry, Sunil and Sanjay remained in the pandal at about 6 or 6.30 p.m.

7. Sanjay did not return home. His father, PW 23 who came home at about 7 p.m. on that day went out again and returned home only at about 3 a.m. on March 27, 1975. PWs 19 and 21 told PW 23 that Sanjay had not returned home. Thereafter, PW 23 and his men went out searching for Sanjay. Ramabatar Agarwala, PW 20, an accountant in the partnership business of PW 23 and Hanuman

Prasad Agarwala, PW 35 informed the Inspector of Police, Tinsukhia Police Station, PW 42 at about 3.30 a.m. on March 27, 1975 about Sanjay missing since the previous day. At about 12 noon on March 27, 1975 when PW 23 and others including PW 42 were in PW 23's shop a message came over telephone No. 159 located at the shop demanding a ransom of Rs. 3 lacs for the return of Sanjay. PW 23 informed PW 42 about this demand then and there and later sent a written complaint, EX. 17 to Tinsukhia Police Station at about 4.30 p.m. in the same day. A few minutes before PW 42 registered a case on the basis of that report, Brahamadeo Rai, PW 29, a rickshawman, came to the Police Station and handed over a packet saying that it was left behind by a passenger in his rickshaw who entered market and did not turn up. PW 42 opened the packet and found it to contain a pair of small boy's shorts, M. Ex. 26, two martons, M. Ex. 28 and an envelop, M. Ex. 1 containing the letter, M. Ex. 2 written in English and addressed to "Shri. Chabil Das, Siding" and two other items. The letter written in capital letters read : "Come with Rs. 3 lacs to Jewel Hotel tomorrow 6 p.m. (28). Do not inform police. Come alone. If not I kill. If no money take loan." The address on the envelop, M. Ex. 1 and the body of the letter, M. Ex. 2 have been found by the handwriting expert, PW 1 on a comparison with the specimen handwriting and signatures taken from Henry to be in the handwriting of a Henry. Sanjay's mother, PW 19 identified the shorts, M. Ex. 26 as those which were worn by Sanjay on the day of his disappearance on which she had embroidered the alphabet 'sha' in Marwari script.

8. On March 30, 1975 PW 23 received the telegram, M. Ex. 13 addressed to "Chabil Das, Siding T.S." to the effect "I am not satisfied by your performance. Last chance for transaction. If you want your item want instruction - Lal", and he informed PW 5 and others about it. Ex. 3 is original of that telegram seized by the police from the Post Master, Moran Post office, PW 9. On March 31, 1975 PW 23 received the bearing envelop, M. Ex. 6 containing the letter, M. Ex. 7 written in Hindi. The handwriting expert, PW 1 has, on a comparison of M. Exs. 3 and 6 with the specimen handwritings of Henry found M. Exs. 3 and 6 to be in the handwriting of Henry.

9. On April 8, 1975 PW 23 received a telephone call from Digboi asking him whether he had received letter and telegram. When PW 23 answered the caller in the affirmative he asked PW 23 to come to Digboi if he wanted back his son. PW 23 told the caller that he could not pay such a huge amount. It was ultimately agreed over the phone that PW 23 should pay a ransom of Rs. 40,000. The caller told PW 23 that he should come to the church gate situate behind Digboi Railway Station and not according to a letter which would be found under a stone by the side of one of the panels of that gate. PW 23 and others accordingly, went there and found a plastic cover underneath a stone near the gate, containing the letter, M. Ex. 5 written in English capital letters. The handwriting expert, PW 1 has found M. Ex. 5, on a comparison with the specimen handwriting of Henry to be in the handwriting of Henry.

10. The police had deployed some plain-clothed police personnel at the Digboi public call office for arresting anyone coming to book a call to Tinsukhia telephone No. 159. Henry went to that office at about 7.30 or 8 p.m. on April 10, 1975 and booked a call to that telephone number. After obtaining confirmation about the booking of the call from the telephone office employee, Ajit Kumar Chakraborti, PW 33, the Town Sub-Inspector of Police, PW 24 with the help of two constables PWs 26 and 34 arrested Henry near that public call office. When interrogated by the Investigating Officer, PW 42 Henry made a statement, Ex. 33 offering to show the place where the dead body of Sanjay had been buried.

11. On April 11, 1975 Henry took the police party including the Assistant Political Officer and Magistrate, Kanta Das, PW 38 to a place situate by the side of a hillock in Bapapung. There was a

mound from which the earth had been disturbed at that place. Two bones and three ribs were found near that mound and a big bone was found in the bushes and 8 more bones and a jaw-bone with some teeth were found nearby. When the mound was dug a human skull with some hair sticking to it and seven bones were found.

12. At the Digboi Police Station, PW 38 obtained specimen handwriting and signatures from Henry, M. Exs. 11 to 14. The interrogation of Henry on April 10, 1975 led to the arrest of the other three accused Sunil, Anil and Naresh on April 11, 1975 at Sibsagar. Exs. 15 to 17 are the specimen handwritings of Naresh obtained by the Judicial Magistrate, PW 3 on May 27, 1975. Ex. 2 is the report of the handwriting expert, PW 1 submitted to the Chief Judicial Magistrate, Dibrugarh on August 20, 1975, containing his opinion about the handwritings.

13. The Investigating Officer, PW 43 who had taken over from PW 42 produced Henry before the Chief Judicial Magistrate, Dibrugarh on April 12, 1975 for recording his confessional statement which he was in a mood to make, and it was recorded by the Judicial Magistrate, PW 3 on April 12, 1975 itself after giving him some time for reflection. Sunil was arrested by the Inspector of Police, PW 41 on April 14, 1975. Sunil, Anil and Naresh made their confessional statements, Exs. 7, 8 and 9 on April 18, 1975, April 19, 1975 and April 21, 1975 respectively before the Judicial Magistrate, PW 3.

14. The Medical Officer, PW 37 packed the incomplete skeletal remains mentioned above in the presence of the Judicial Magistrate, PW 3 and sent them to the Forensic Science Laboratory, Gauhati on April 24, 1975 under the directions of the Chief Judicial Magistrate, Dibrugarh along with PW 37's autopsy certificate and two photographs of Sanjay. The Assistant Director, Biology Section, Forensic Science Laboratory, Gauhati, PW 27 obtained some more photographs of Sanjay with their negatives and also a coat and a check-shirt of the boy from the Chief Judicial Magistrate, Dibrugarh. After a study of the skeletal remains PW 27 found that they related to a 9 to 10 years old boy. By making superimposition PW 27 concluded that the skull in question could have been the skull of Sanjay as per his enlarged photographs. Ex. 26 is the report of PW 27. The Scientific Officer of the Photograph Section of the Forensic Science Laboratory, Gauhati, PW 28 performed the superimposition experiment of the photograph of the skull, M. Ex. 48 and the photograph of Sanjay, M. Ex. 59 and found them to be of the same person. Ex. 27 is the report of PW 28.

15. The four accused were subjected to test identification in the parade held by the Second Class Magistrate PW 2 on April 30, 1975 and September 4, 1975. In the parade held on April 30, 1975 Henry was identified by 12 witnesses without any mistake while Sunil was identified by 6 witnesses without any mistake and Anil was identified by two witnesses without any mistake. Ex. 5 is PW 2's report relating to the proceedings of April 30, 1975. In the parade held on September 4, 1975 Henry was identified by Rajender Nath Sharma, PW 9 and Jiten Barua, PW 25 without any mistake. Ex. 3 is the report relating to the proceedings of September 4, 1975.

16. In their statements recorded under Section 313 of the Code of Criminal Procedure all the four accused enacted their confessional statements and denied all the circumstances appearing against them in the evidence.

17. The learned Sessions Judge, Dibrugarh, on a consideration of the evidence convicted all the four accused and sentenced them as mentioned above, accepting the confessional statements, Exs. 6 to 9, of the four accused received by the Judicial Magistrate, PW 3 and the other evidence in the case. The learned Sessions Judge has considered these confessions in paras 101 to 110 of his judgment

and has observed that there is nothing improbable or unbelievable in them, that they appear to be spontaneous and are studded with vivid facts about the manner of commission of the crimes, that they receive assurance in several material particulars from the circumstantial evidence let in by the prosecution and that they are all voluntary and reliable though it appeared from the cross-examination of the prosecution witness and from the statements of the accused recorded under Section 313 CrPC that they are retracted.

18. But the learned Judges of the High Court rejected all the confessions and the evidence of PWs 10, 11, 16 and 25 regarding the identification of the accused in the test identification parade. They have considered the confession of Henry in paras 45, 55, 62 and 64 of their judgment and have observed that the Judicial Magistrate, PW 3 had failed to act properly in giving only three hours to Henry for reflection before recording his confession, Ex. 6 on April 12, 1975. They have further observed that though it is difficult to lay any hard and fast rule, in *Sarwan Singh Rattan Singh v. State of Punjab* (AIR 1957 SC 637 : 1957 SCR 953 : 1957 Cri LJ 1014) it has been held by this Court that generally speaking when an accused is produced under police custody it is reasonable to insist upon giving him at least 24 hours for reflection. They have held that Henry's confessional statement, Ex. 6 has been obtained by coercion and is not voluntary and that it suffers from serious infirmity and cannot be acted upon. They have considered Sunil's confessional statement, Ex. 7 in paras 74 and 76 of their judgment and found that he too had been given only three hours for reflection before his confession was recorded by the Judicial Magistrate, PW 3 on April 18, 1975 and that it is not voluntary and therefore, it is invalid in law. They have considered the confession, Ex. 8, of Anil in paras 77 and 79 of their judgment and have observed that the Judicial Magistrate, PW 3 who recorded it on April 19, 1975 had failed to see whether the accused was going to make the confession voluntarily after comprehending the implications of his admission. They have considered the confession, Ex. 9, of Naresh recorded by the Judicial Magistrate, PW 3 on April 21, 1975 in paras 84, 87 and 88 of their judgment and found that it has been made due to duress and inducement by the police and is not voluntary and that it suffers from serious infirmities and cannot be acted upon.

19. On a consideration of the other evidence, the learned Judges found that Sanjay had been kidnapped and murdered, and they accepted the trial court's judgment that the corpus delicti has been correctly identified to be that of Sanjay. They accepted the evidence of PWs 12 to 15 and 21 about the presence of Henry and Sunil in the pandal at the temple before Sanjay had disappeared on March 26, 1975. They accepted the evidence of the rickshawman, PW 29 who has identified Henry in the test identification parade held by PW 2 as the man who had left behind in his rickshaw the packet containing Sanjay's shorts, M. Ex. 26 and certain other things including the letter, M. Ex. 2, enclosed in the envelope, M. Ex. 1 which he had produced at the police station on March 27, 1975, and found on the evidence of the handwriting expert, PW 1 M. Ex. 2 to be in the handwriting of Henry.

20. On the evidence of the post Master, Moran, PW 9 who has identified Henry in the test identification parade held by PW 2 as the person who handed over the telegram, Ex. 3, copy whereof, Ex. 13 had been received by PW 23, the learned Judges found that Henry had given the telegram, Ex. 3. On the evidence of the handwriting expert, PW 1 they found that Ex. 3 is in the handwriting of Henry and they held that Ex. 3 connects Henry with the crime.

21. The learned Judges found on the evidence of PW 23 that he had received a bearing letter, M. Ex. 7 written in Hindi on March 31, 1975 enclosed in the envelope, M. Ex. 6, but held that it is not proved to be in the handwriting of any of the accused though the address written on the envelope,

M. Ex. 6, of that letter is proved by the handwriting expert, PW 1 to be in the handwriting of Henry, and they rejected the evidence relating to that letter.

22. The learned Judges accepted the evidence of PW 23 about the telephonic conversation he had with some caller from Digboi at about 8 or 8.30 p.m. on April 8, 1975 when the caller demanded a ransom of Rs. 3 lacs for the return of Sanjay and it was ultimately agreed that PW 23 should pay Rs. 40,000 for the purpose. They accepted the prosecution evidence that in accordance with that conversation PW 23 accompanied by some police personnel in plain clothes who posted themselves at suitable places went near the gate of the church situate behind Digboi Railway Station on April 9, 1975 and found the letter, Ex. 5 which has been found by the handwriting expert, PW 1, to be in the handwriting of Henry in English capital letters and they held that this was a strong piece of circumstantial evidence against Henry.

23. The learned Judges found that Henry attempted to run away when he was pointed out by PW 33 while he was standing near a pan-shop in front of the public telephone call office at Digboi on April 10, 1975, waiting for the trunk-call booked by him at about 7 or 7.30 p.m. on that day to Tinsukhia telephone No. 159 to mature and that he bit the constable, PW 34 and tried to escape from his hold and that the circumstances under which he was arrested and his conduct at that time unerringly point to his guilt.

24. The learned Judges accepted the evidence of PWs 14, 15 and 21 about the identification of Henry and Sunil in the test identification parade held by the Judicial Magistrate, PW 2 as the persons who were present in the pandal before the disappearance of Sanjay on March 26, 1975, observing that these three witnesses had seen the suspects in broad daylight and were in a position to notice their physical features correctly.

25. The learned Judges accepted the prosecution evidence that the skeletal remains were recovered at the instance of Henry and pursuant to his confessional statement, Ex. 33 (admissible portion) and found that the evidence of PWs 27, 28 and 37, agreeing with the trial court, that the skull bone recovered pursuant to Ex. 33 is that of Sanjay and they have observed that the recovery of the skull bone of Sanjay at the instance of Henry is an important piece of evidence pointing unerringly to his guilt.

26. The learned Judges accepted the evidence of the witnesses who had identified Henry in the test identification parade held by the Judicial Magistrate, PW 2 except the evidence of PWs 10, 11, 16 and 25 on the ground that the photographs of Henry had been shown to PWs 10, 11 and 25 before the identification and PW 16 could not identify Henry in the court during the trial.

27. The learned Judges noticed the law relating to circumstantial evidence in para 19 of their judgment thus :

The law regarding circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy three tests :

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused; and

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

28. After thus taking note of the law relating to circumstantial evidence the learned Judges have held in para 146 of their judgment that the circumstantial evidence against Henry taken cumulatively forms a chain so complete that there is no escape from the conclusion that the crime was committed by him and none else and that each of the circumstances established against him is incriminating and they cumulatively prove the complicity of Henry in the kidnapping and murder of Sanjay. They found that the evidence is not satisfactory to prove the offence of conspiracy under Section 120-B IPC against Henry and acquitted him of that charge, but agreed with the trial court in regard to the finding on the other charges and held him guilty under Sections 364, 387, 302 and 201 IPC. They thus allowed his appeal in part only as regards his conviction under Section 120-B IPC and dismissed it in other respects and they accepted the death sentence confirmation case against him and confirmed the sentence of death as well as the other sentences awarded to him by the trial court except under Section 120-B IPC.

29. As regards Sunil, apart from the confession, Ex. 7 which has been rejected by the learned Judges they found that there was no other evidence except the evidence let in to prove his presence with Henry in the temple and the pandal in the morning and evening of March 26, 1975 and they held that it is not sufficient to sustain his conviction and that as regards the other two accused, Anil and Naresh there is non evidence except their retracted confessions, Exs. 8 and 9 which have been rejected by them. In that view they acquitted these three accused, Sunil, Anil and Naresh of all the charges framed against them and rejected the death sentence confirmation case against Sunil.

30. The trial court acted upon the judicial confessional statements, Exs. 6 to 9 of all the four accused as being voluntary and reliable. But the learned Judges of the High Court rejected all of them as not being voluntary or acceptable. They have held that Henry's confession, Ex. 6 has been obtained by coercion and suffers from serious infirmity. As regards Anil's confession, Ex. 8 they have observed that the Judicial Magistrate, PW 3 who had recorded it on April 19, 1975, had failed to see whether Anil was going to make the confession voluntarily after comprehending the implications of his admission. As regards Naresh's confession, Ex. 9 they have held that it has been made due to duress and inducement by the police and that it suffers from serious infirmities. In the view we are taking as regards Anil and Naresh, it is not necessary to consider which of the two views, whether of the trial court or of the High Court is correct in regard to their confessional statements, Exs. 8 and 9. The acceptability or otherwise of the confessional statements of the other two accused, Henry and Sunil, has to be considered in detail.

31. The Judicial Magistrate, PW 3 who had recorded Exs. 6 and 7 on April 12, 1975 and April 18, 1975 respectively had admittedly given only three hours time for reflection before he recorded them. He has stated in his evidence that after Henry was produced before him by constable Hadi Hussein at 11 a.m. on April 12, 1975 he told Henry that he is a Judicial Officer and no other person was present inside the court and nobody would harm if he showed any reluctance to confess and that he was not bound to make any confessional statement but if he made one it would be used against him. He has stated that after Henry told him that his mind was clear from the time of his arrest and

that he wanted to confess out of repentance for what he had done he gave him three hours time for reflection and put him in the custody of a peon of the Chief Judicial Magistrate, Dibrugarh in his own chamber and saw to it that no police officer was allowed to enter the court until the recording of the confessional statement of Henry was over. He has stated that after Henry was brought before him from his chamber after the said interval he cautioned him as above and that after being satisfied that Henry was going to confess voluntarily he recorded his statement in Ex. 6. As regards Sunil also, PW 3 has stated that he administered the caution as he did in the case of Henry when he was produced before him at 11.30 a.m. on April 18, 1975 and that Sunil told him that he wanted to confess because he was repentant for what he had done and that he replied in the negative when he asked him if he had been threatened by the police. He has stated that after giving him three hours time for reflection he repeated the aforesaid warning to Sunil and that he expressed his willingness to make the confessional statement and he recorded it in Ex. 7 after he was satisfied that Sunil was going to confess voluntarily. It appears that Henry had some injury on his person when he was produced before PW 3 and that on an earlier occasion Sunil had expressed his unwillingness to make any confessional statement. The injury found on Henry, according to the entry, Ex. 'Ka' 1 in the jail register was this : "Both hands on the back slight swelling, complains of pain in both legs". The injury was not serious enough to force Henry to make a false confessional statement. It must be remembered that Henry had attempted to run away when the postal employee, PW 33 pointed him to the police personnel in plain clothes and that after he was caught by the constables, PWs 26 and 34 as directed by the Sub-Inspector of Police, PW 24 he bit the hand of PW 34 (according to PW 26) before he was put in a police vehicle and taken to the police station. It was suggested to PW 34 in cross-examination that Henry was beaten by the police on or after April 10, 1975, which has no doubt been denied by him. It is not improbable that Henry was roughed up and given some beating by the police when he tried to escape from the hold of PWs 26 and 34 before he was forcibly put into the police vehicle and taken to the police station, resulting in some injury to his person. It has to be noted that Henry had not told the Judicial Magistrate, PW 3 that he was beaten by the police for causing him to make a confessional statement. It is not possible to hold that Sunil's confessional statement, Ex. 7 was not voluntary from the mere fact that he had on a prior occasion declined to make a confessional statement. The Judicial Magistrate, PW 3 would have been well advised if he had given more time for reflection to the accused than he has done. But it is not possible to reject the confessional statements merely because only three hours time had been given for reflection, if they are otherwise acceptable. Therefore, it is necessary to note what Henry and Sunil have stated in their confessions to find out whether intrinsically they are voluntary statements or tutored ones made under coercion. We will state in our own words what Henry and Sunil have stated in their confessional statements. Henry has stated in his confession thus :

I was arrested at Digboi at 7.30 p.m. on April 10, 1975. On March 26, 1975 I and Sunil and Anil went from Dibrugarh to Tinsukhia. Boys were playing in a big pandal in Tinsukhia. I was waiting a little away from the pandal. Sunil went near the pandal and called a boy and after asking him for his father's name he brought the boy to me. Sunil offered sweets to the boy and asked him to follow me, saying that I would give him many things. I took the boy in a rickshaw and proceeded a furlong, and Sunil brought a taxi. The boy mentioned his name as Sanjay Agarwala. Sunil told me that the boy could be confined in an abandoned house in Bapapung, and we went there. I was proceeding ahead of Sunil and the boy. When we were proceeding towards the Bapapung oil field area I heard moaning sound. I looked back and found that Sunil had caught hold of the boy's neck and pulled him down. Sunil pressed the chest of the boy with his knee and also pressed his mouth. Ultimately Sunil strangled the boy

to death. There was a hole which looked like a fox-hole. Sunil kept the dead body of the boy inside the hole and filled it up with earth. Sunil tore off the shirt and pants of the boy and took them with him. After the murder we came to Digboi. Next morning I and Sunil came to Tinsukhia. I rang up the father of the deceased to demand a ransom of Rs. 3 lacs. Then at 3 p.m. we sent the pants and the shirt of the deceased to his father through a rickshawwallah. We sent a letter along with the clothes. The letter was written by me in English. In the letter I mentioned that if the father wanted the boy back he would have to give three lacs of rupees. The father was directed to give the money at the Jewel Hotel, Dibrugarh. On March 29, 1975 I sent a telegram to the father of the boy from Moran Post Office directing him to wait for our instructions. On April 7, 1975 I and Sunil went to Dibrugarh and spent the night there. On the next day I booked a call to the father of the boy. When the bell rang Sunil held the receiver and demanded the money to be given positively on the next day, but the father did not turn up. On April 10, 1975 Sunil asked me to book a call. I held the receiver in a public phone-booth and asked the exchange to book a call to Tinsukhia telephone No. 159. In the mean time Sunil suspected something and asked me to leave the place and he disappeared. When I entered the sweepers' line, two plain-clothed cyclists stopped me and took me to the police station. On my asking the deceased mentioned the name of his father as Chabil Das Agarwala or something like that. I have done all this at the instigation of Sunil.

32. Sunil has stated in his confessional statements thus :

About one and a half months ago I went to Naresh's shop to buy provisions at fair price. Then Henry came there and said that we had not achieved anything in life by work and that if I follow the line shown by him I would get a lot of money overnight. When I asked him what the line was, he said that we should kidnap sons of rich people and keep them for two or three days and demand money and return them after getting the money. Thereafter, on March 25, 1975 I, Henry and Anil went to Naresh's shop where Henry said that we should kidnap boys at Dibrugarh and he would bear all the expenses. We went to Dibrugarh on that day at 5 p.m. and stayed in Kusum Hotel. On the next day we went to Tinsukhia and spent the night in the railway station platform. After hunting the whole of next day Henry managed to take away a boy by inducement from a pandal at Tinsukhia and put him in a rickshaw and I followed them in another rickshaw. Henry sent Anil for a taxi and when it was brought I and Henry boarded it along with the boy near Shivadam, and Anil went away. We got down near the gate of Bapapung oil field. While getting down Henry made the boy to stand up leaning against his own body. When the taxi left Henry took up the boy in his arms. As the boy's hands were hanging loose I asked what had happened. Henry told me that the boy had gone to sleep for ever and he had finished him off. Looking closely I found a length of string tied round the boy's neck. Then Henry said that the boy's disposal should be arranged. Taking the boy we went to the cremation ground at Bapapung. Finding a hole there, Henry took off the boy's pants and shorts and pushed the boy into it. I and Henry completed the burial by putting earth over the body. Next morning we went to Tinsukhia by train. In the platform Henry wrote a letter and placed the boy's pants with the letter and asked a rickshaw puller to deliver the packet to Chabil Marwari. Before kidnapping the boy Henry stated that after kidnapping he would demand three lacs of rupees from his father. While getting down at Namrup, Henry said that I would have to go to Moran on the

next day with Ghatani. After reaching Sibsagar I went to Moran with Ghatani on March 27, 1975 and we met Henry and Anil. While I was taking tea in a hotel Henry sent a telegram from the post office to Chabil Agarwala informing him that he would let him know when and where the money should be delivered. Only then Henry said that the boy was Sanjay and his father was Chabil Agarwala. In the Kusum Hotel Henry said that Chabil would deliver the money at the Jewel Hotel. Henry went into the Jewel Hotel and came back and said that it would not be convenient and that we should move off. On April 6, 1975 I and Henry went to Digboi and stayed there for the night. At 6 p.m. on the next day Henry telephoned Chabil Marwari from the Digboi main post office, informing him that on April 8, 1975 he would leave a letter at the gate of the church situate behind the railway station and that he should collect that letter after leaving a sum of Rs. 3 lacs. At 3 p.m. Chabil came by car and collected the letter and left a letter written in Hindi at the gate. On April 9, 1975, or April 10, 1975 Henry wanted to telephone once again and at 6 p.m., I and Henry went to Digboi Post Office. While I waited near a pan shop Henry booked a call from that post office. The Post Master said that it would take about ten minutes to put the call through. Four or five policemen in plain clothes arrested and took away Henry. I hid myself in the cremation ground from where the police found me and arrested me.

33. A perusal of these confessional statements, Exs. 6 and 7 shows that they are more or less exculpatory of the maker, for Henry had attributed everything to Sunil and stated that he had done everything at the instance of Sunil while Sunil had attributed the important role in the crime to Henry. As pointed out by Mr. Rajender Singh, senior counsel appearing for the complainant, PW 23, this would not normally be the position if the confessions were the result of tutoring by the police. The confessional statement of Henry is quite long while that of Sunil is much longer. As remarked by the learned Sessions Judge these confessions are full of facts and minute details which would not be there normally if the confessions are the result of tutoring or of compulsion. The circumstantial evidence relied upon by the trial court and the High Court lend assurance to the genuineness and voluntary nature of these confessions. They have no doubt been retracted, but in view of the fact that they are generally corroborated by the circumstantial evidence in ample measure, there is no satisfactory reason for the confessions not being accepted and acted upon. In these circumstances, we agree with the learned Sessions Judge that the confessional statements of Henry and Sunil, Exs. 6 and 7, are voluntary and can be acted upon, together with the circumstantial evidence, for basing a conviction.

34. We agree with the courts below that the corpus delicti has been correctly established by the prosecution to be that of Sanjay. The letter M. Ex. 2 (enclosed in the envelope, M. Ex. 1) was found in the paper packet delivered by the rickshawman, PW 29 at the Tinsukhia Police Station on March 27, 1975. The packet contained inter alia the pair of shorts, M. Ex. 26 which have been identified by Sanjay's mother, PW 19 as those which he was wearing on the day of his disappearance. In that letter, M. Ex. 2 addressed to "Shri Chabil Das, Siding", it is stated that if the ransom of Rs. 3 lacs is not paid by 6 p.m. on March 28, 1975 at the Jewel Hotel the person who wrote that letter would "kill". No doubt it is not mentioned in that letter as to who would be killed if the money was not paid within the time. The amount which was finally settled at Rs. 40,000 in the telephone conversation which PW 23 had from some caller from Digboi on April 8, 1975 had not been paid. In the confessional statements, Exs. 6 and 7 it is stated that Sanjay was killed though the manner, the place and the hands which killed him are mentioned differently. Pursuant to the confessional statement, Ex. 33 (admissible portion) of Henry offering to show the place where the dead body of the boy had been buried some skeletal remains including the skull which have been later found to be

that of a nine or ten years old human being were recovered from a pit or hole situated by the side of hillock in the Bapapung oil field area. Those skeletal remains were sent by the Medical Officer, PW 37 duly packed in the presence of the Judicial Magistrate, PW 3 to the Forensic Science Laboratory, Gauhati. The Assistant Director, Biology Section in that laboratory. PW 27 obtained some photographs of Sanjay with their negatives from the boy's family through the police. After performing the superimposition test with Sanjay's enlarged photograph, M. Ex. 59 the Scientific Officer of the Photography Section of that laboratory, PW 28, found the skull, M. Ex. 48 and the photograph, M. Ex. 59 of Sanjay to be of the same person. Ex. 27 is his report. In these circumstances, we think that there is no reason to disagree with the findings of the courts below that the corpus delicti recovered from the place pointed out by Henry as per his confessional statement, Ex. 33 has been proved to be that of Sanjay who had disappeared from the pandal at the temple in Tinsukhia town in the evening of March 26, 1975. We agree with the courts below and find that the prosecution has proved beyond all reasonable doubt that Sanjay, who was about nine years old at the time of his disappearance, had been kidnapped and murdered.

35. The case rests purely upon circumstantial evidence, there being no direct evidence about the kidnapping and other offences alleged. The case of the prosecution is that all the four accused stayed at the Kusum Hotel on March 24, 1975 as shown by the entries in the register of that hotel, M. Ex. 10 and that Henry and Sunil were together in the pandal at the Shiva temple in Tinsukhia town in the forenoon and evening of March 26, 1975. On the basis of this circumstance and the confessional statements the prosecution has sought to establish its case of conspiracy against the accused. In his confessional statement, Ex. 7 Sunil had stated that when he went to Naresh's shop about one and a half months prior to April 18, 1975 for buying provisions at fair price Henry came there and told him that they had not achieved anything in life by work and that if he would follow the line shown by him he would get a lot of money overnight, that when he asked Henry about what that line was he told him that they should kidnap sons of rich people and keep them for two or three days and demand money as ransom and return them after getting the money, and that thereafter on March 25, 1975 he went along with Henry and Sunil to Naresh's shop where Henry stated that they should kidnap boys at Dibrugarh and he would meet all the expenses. He has also stated that Henry told him at the Kusum Hotel that Chabil (PW 23) would deliver the money at the Jewel Hotel. He has mentioned about the presence of Anil and Naresh on some other occasions also in his confessional statement. In his confessional statement, Ex. 6 Henry has made repeated reference to Sunil but only once to Anil and that is that he went along with Sunil and Anil from Dibrugarh to Tinsukhia on March 26, 1975. There is no other evidence about the conspiracy. We agree with the High Court that the evidence adduced by the prosecution is not sufficient to prove that charge. Mr. Rajender Singh, learned senior counsel who appeared for the complainant did not advance any argument regarding the charge of conspiracy. He admitted that there is no evidence against Anil and Naresh except their retracted confessions and that they may not be sufficient to prove any of the charges against them. In these circumstances, we find no satisfactory reason by which to interfere with the conclusion of the learned Judges of the High Court that the charge of conspiracy against all the four accused and the other charges against Anil and Naresh have not been proved satisfactorily.

36. The circumstances found by the trial court and the learned Judges of the High Court to have been proved satisfactorily against Henry are these :

- (1) His presence along with Sunil in the pandal at the Shiva temple in Tinsukhia town in the forenoon and afternoon of March 26, 1975; his offer of sweets to Sanjay and other boys, PWs 12 and 13, during that time; his calling Sanjay when he was moving away from the pandal with his sister, PW 21 with an offer of more sweets to

him; and his continued stay in the pandal along with Sunil and Sanjay even after PWs 12, 13 and 21 left the place, the last of them at about 5.30 p.m.

(2) Receipt at the Tinsukhia Police Station on March 27, 1975, of the packet containing inter alia the pair of shorts, M. Ex. 26 and the letter, M. Ex. 2 written in English and addressed to "Shri Chabil Das, Siding", demanding a ransom of Rs. 3 lacs for the return of Sanjay by 6 p.m. on the next day at the fixed place on pain of murder of the boy in case of default. The shorts, M. Ex. 26 have been identified by Sanjay's mother, PW 19 to be those which Sanjay was wearing on the day of his disappearance. The handwriting expert, PW 1 has opined in his report, Ex. 2, on a comparison of the handwriting contained in M. Ex. 2 with the specimen handwriting and signatures of Henry, M. Exs. 11 to 14 obtained by PW 38 at Digboi Police Station that M. Ex. 2 is in the handwriting of Henry.

(3) Receipt of the telegram, M. Ex. 13 by PW 23 on March 30, 1975 to the effect "I am not satisfied with your performance. Last chance for transaction. If you want your item await instructions". M. Ex. 3 the original telegram was handed over to the Post Master, Moran, PW 9 on March 29, 1975 by Henry who has been identified by PW 9 in the test identification parade held by PW 2 as well as in the court during the trial. The handwriting expert, PW 1 has found M. Ex. 3 to be in the handwriting of Henry in his report, M. Ex. 2.

(4) On March 31, 1975 PW 23 had received the bearing envelop, M. Ex. 6 containing the letter, M. Ex. 7 written in Hindi. The Hindi writing in M. Ex. 7 has not been proved to be in the handwriting of any of the accused but the handwriting expert, PW 1 has found the address on the envelope, M. Ex. 6 to be in the handwriting of Henry in his report, M. Ex. 2.

(5) On April 8, 1975 PW 23 had received a telephone call from Digboi asking him if he had received the letter and telegram, and when he answered in the affirmative he was asked by the caller to come to Digboi if he wanted his son back. In that conversation the amount to be paid by PW 23 as ransom for return of his son was fixed at Rs. 40,000 and he was told by the caller that he should come to the gate of the church of Digboi where he would find a letter underneath a stone and that he should act according to the contents of that letter. Accordingly, PW 23 and others went by a car, and PW 23 proceeded towards the gate of the church alone and found the letter, M. Ex. 5 written in English capital letters. That letter which has been recovered by the police has been found by the handwriting expert, PW 1 to be in the handwriting of Henry in his report, M. Ex. 2.

(6) On April 10, 1975 at about 7 or 7.30 p.m. Henry had booked a call from Digboi public call office to Tinsukhia telephone No. 159 relating to PW 23 and was waiting outside for the call to materialise. Then he was pointed out by the public telephone call office employee, PW 33 to the police who were keeping a watch in plain clothes. At the instance of the Sub-Inspector of Police, PW 24 the constables, PWs 26 and 34 caught hold of Henry when he tried to run away from the place. In the process he kicked PW 34 and bit one of his fingers. However, he was overpowered and apprehended. As soon as PW 26 grabbed him he said "I do not know about this matter". He was taken from there by a police vehicle to the police station. This is

suspicious conduct on the part of Henry.

(7) On April 10, 1975 when interrogated by the Investigating Officer, Henry made a statement, Ex. 33 (admissible portion) offering to show the place where the dead body of the boy had been buried. On the next day Henry took the police party and others including the Political Officer and Executive Magistrate, PW 38 to a place situate by the side of a hillock in the ONGC oil field area of Bapapung. From a mound from which earth had been disturbed and from the surrounding area some skeletal remains including the skull bone, M. Ex. 48 were recovered by the police. The skull bone, M. Ex. 48 has been found by the superimposition test conducted by the experts, PWs 27 and 28 of the Forensic Science Laboratory, Gauhati to be the skull bone of Sanjay as per PW 28's report, Ex. 27.

(8) Henry has been identified in the test identification parade held by the Judicial Magistrate, PW 2 on April 30, 1975 by 12 witnesses without any mistake and on April 4, 1975 by the Post Master, Moran, PW 9 without any mistake. Some of the witnesses who identified Henry in the test identification parade as well as in the court are PWs 10, 14, 15, 17, 18, 26 and 29.

37. The above are very strong circumstances which can safely be relied upon. They form a complete chain pointing unerringly to the guilt of Henry and are inconsistent with his innocence. We were taken through the evidence by the learned counsel for the parties and we also perused the summary of the evidence given by the learned Sessions Judges is paras 13 to 13(43) of his judgment. We do not think it necessary to deal with the evidence of the witnesses in detail as we agree with the courts below in regard to these circumstances. Accordingly, we agree with the courts below that Henry's guilt has been proved by the prosecution satisfactorily beyond all reasonable doubt in respect of all the charges framed against him except the one under Section 120-B IPC.

38. As regards Sunil, there is the evidence of PWs 14, 15 and 21 about his presence in the pandal at the Shiva temple in Tinsukhia town in the forenoon and evening of March 26, 1975. The perjury of the temple, PW 14 has identified Henry and Sunil as the persons who were present in the pandal on March 26, 1975 correctly both in the test identification parade held by the Judicial Magistrate, PW 2 and in the court. PW 15, a businessman of Tinsukhia, who had gone to the temple on March 26, 1975 also has identified Henry and Sunil both in the test identification parade held by PW 2 as well as in the court as the men who were standing near a bamboo post of the pandal when Sanjay and other boys were playing nearby. He learnt on the next day about Sanjay missing. Sanjay's elder sister, PW 21 who went to fetch him from the pandal at about 5 or 5.30 p.m. on March 26, 1975 has stated in her evidence that Henry and Sunil, both of whom she had identified correctly in the test identification parade held by PW 2 as well as in the court, were present in the pandal when Sanjay and other boys including PWs 12 and 13 were playing. When she called Sanjay to go home with her one of those two men called the other as 'driver' and asked him to get chocolates. Then PW 21 left the place along with Sanjay, but after they had covered some distance one of the men called Sanjay by his name and said that he would give him chocolates. Then Sanjay asked PW 21 to go ahead and inform his mother that he would come in a short while. So PW 21 had left the place leaving Sanjay behind. She had pointed out that it was Henry who sent Sunil to fetch chocolates. There is no reason for not accepting the evidence of these three witnesses. PWs 14, 15 and 21 about the presence of Sunil along with Henry in the pandal at the Shiva temple in Tinsukhia town on March 26, 1975 when Sanjay was playing there with other boys, PWs 12 and 13. There is also no reason for not accepting the evidence of PW 21 that Henry called Sanjay when he was moving away along with

her back to the place saying he would give him chocolates, that he called Sunil as 'driver' a few minute earlier and asked him to get chocolates, and that PW 21 left Sanjay behind as desired by him and went away to her house at about 5.30 p.m. on the day of Sanjay's disappearance.

39. Sunil has been identified by 6 witnesses in all without any mistake. There is also the evidence of PW 41, the then officer in charge of Sibsagar Police Station that he arrested Sunil on April 14, 1975 from a house in Sibsagar town cremation ground after a long chase and that he was until then hunting for him in vain from April 11, 1975. He has stated that Sunil started to flee as soon as he saw him and that he succeeded in catching him after giving him a chase for 1 1/2 or 2 furlongs. In his confessional statement, Ex. 7 Sunil has admitted his presence with Henry in the pandal at Tinsukhia on March 26, 1975 and his arrest from the cremation ground on April 14, 1975. There are some other circumstances brought out in the evidence and his confessional statement extracted supra pointing to his guilt unmistakably. Mr. Rajender Singh, learned counsel for the complainant submitted that circumstantial evidence against Sunil is practically the same as in the case of Henry except that no recovery has been made at his instance and that there is nothing on record by way of his handwriting unlike the case of Henry. Mr. C. B. Singh, learned counsel who appeared for Sunil as amicus curiae submitted that having regard to Henry's letter, Ex. 2 in which he had stated that he would kill (the victim) if the ransom amount is not paid by 6 p.m. on the next day it is probable that Henry might have killed Sanjay. He submitted that there is no satisfactory material on record to show that Sunil either did anything for killing Sanjay or that he shared the intention of Henry to kill the boy. He further submitted that Sunil's intention as reflected in his confessional statement Ex. 7 was only to kidnap and keep the boy for two or three days and send him back after collecting the ransom. having regard to all the circumstances of the case we are inclined to accept this submission of Mr. Singh as being most probable and reasonable. We hold that the offence proved against Sunil is only kidnapping of Sanjay with intent to secretly and wrongfully confine him, an offence punishment under Section 365 IPC.

40. Henry had nothing to say when he was examined by the learned Sessions Judge on the question of the sentences to be awarded to him except that he intended to file an appeal in the High Court. The learned Sessions Judge has observed that the crimes committed by Henry are heinous and he had held Sanjay for ransom and that it is a fit case in which the extreme penalty of the law is called for as regards Henry. Accordingly, he sentenced Henry to death under Section 302 read with Section 34 IPC, imprisonment for life under Section 364 read with Section 34 IPC, rigorous imprisonment for seven years under Section 201 read with Section 34 IPC, and rigorous imprisonment for five years under Section 387 read with Section 34 IPC, and directed the sentences to run concurrently. The learned Judges of the High Court have agreed completely with reasons given by the learned Sessions Judge for awarding the sentence of death to Henry and they have confirmed all the sentences awarded to him and accepted the death sentence reference relating to him as mentioned above. We are of the opinion that the offences committed by Henry, the originator of the idea of kidnapping children of rich people for extracting ransom, are very heinous and pre-planned. He had been attempting to extract money from the unfortunate boy's father, PW 23 even after the boy had been murdered by making the father to believe that the boy was alive and would be returned to him if he paid the ransom. In our opinion, this is one of the rarest of rare cases in which the extreme penalty of death is called for the murder of the innocent young boy, Sanjay in cold blood after he had been kidnapped with promise to be given sweets. We, therefore, confirm the sentence of death and the other sentences awarded to Henry by the High Court under Sections 302, 364, 201 and 387 IPC and dismiss Criminal Appeal No. 545 of 1982 filed by him. We allow Criminal Appeal No. 209 of 1983 filed by Chabil Prasad Agarwala, PW 23 against the acquittal of Sunil, Anil and Naresh in part and convict only Sunil under Section 365 IPC for having kidnapped Sanjay in order to secretly

and wrongfully confine him and sentence him to undergo rigorous imprisonment for seven years and dismiss that appeal in other respects. We reject Criminal Appeal No. 210 of 1983 filed by the State of Assam against the rejection of the death sentence reference in regard to Sunil and dismiss Criminal Appeals No. 212 and 213 of 1983 filed by the State of Assam against the acquittal of Naresh in Criminal Appeal No. 25 of 1981 and of Anil in Criminal Appeal No. 24 of 1981, both on the file of the High Court, and allow Criminal Appeal No. 211 of 1983 filed by the State of Assam against the acquittal of Sunil of Criminal Appeal No. 19 of 1981 on the file of the High Court as indicated in Criminal Appeal No. 209 of 1983 and dismiss it in other respects. The sentences of imprisonment awarded to Henry by the trial court and confirmed by the High Court and by us shall run concurrently and merge with the sentence of death.

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