

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.2/2022 with
Crl.M.C.No.37/2023

Heard on: 25.09.2023

Date of Judgment: 27.09.2023

State of Meghalaya Vs. Bernard Lyngdoh Phawa & anr

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant:

Mr. K. Khan, AAG with
Mr. S. Sengupta, Addl.PP
Ms. S. Laloo, GA
Ms. A. Thungwa, GA
Ms. S. Ain, GA

For the Respondents:

Mr. S. Deb, Adv. for R/1
Ms. P. Agarwal, Adv. for R/2

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| i) | Whether approved for reporting in Law journals etc.: | Yes |
| ii) | Whether approved for publication in press: | Yes/No |
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JUDGMENT

Hon'ble, the Chief Justice:

A 21-year-old man, who was enrolled in an undergraduate mass communication programme at St. Anthony's College in Shillong, was found not to have returned to his lodgings on the night of February 18, 2006. The following morning, a missing complaint was lodged with the Sardar Police Station in Shillong by the local guardian of the student.

2. Such local guardian organised one or more teams of the missing man's friends to go out on search for Biplab Das. By the evening of February 19, 2006, at least one of the search parties had discovered a PCO in Mawroh from where Biplab had called a friend named Nirvika Singhania at or about 8:30 pm on the previous evening. The first respondent herein was a part of the search party that visited the relevant PCO, but while the first respondent herein was waiting in a taxi nearby another friend of Biplab was told by the PCO owner that the first respondent herein was one of the persons who had visited the PCO around the same time the previous evening.

3. The first respondent was arrested at 9 am on February 20, 2006 by Sardar Police Station vide G.D. No.593 and the memorandum of arrest indicated a charge of kidnapping for ransom under Section 364A of the Indian Penal Code, 1860.

4. Following the first respondent's interrogation by the police, he referred to the second respondent who was arrested on February 23, 2006. According to the investigating officer, the first respondent, Bernard Lyngdoh Phawa, revealed on February 20, 2006 that a rope had been used for killing Biplab. The officer also testified at the trial that the dead body of Biplab was recovered on February 21, 2006, hinting that it

was Bernard who led them to the dead body. The relevant rope was recovered on February 24, 2006.

5. A post-mortem examination of the dead body was conducted on February 22, 2006. The report of such examination revealed that the death was due to strangulation. The medical expert indicated that the time of death was approximately 48 hours before the examination was conducted, which would suggest that the date of death was February 20, 2006.

6. The State is in appeal upon the trial court having found several anomalies in the prosecution case and disbelieving that the murder could have been committed on February 18, 2006 since the post-mortem examination indicated the approximate date of death to be February 20, 2006. The trial court rejected the prosecution case that the respondents herein, Bernard and Bonie Lyngdoh Phawa, were the killers, despite an element of confession being evident from their individual statements recorded under Section 164 of the Code of Criminal Procedure, 1973. Such statements were completely discarded by the trial court on the ground that there were certain inconsistencies in the manner of the recording thereof. The trial court further disbelieved the prosecution case on account of the erroneous reference to February 19, 2006 instead

of February 18, 2006 by one or more of the witnesses. Finally, the trial court completely overlooked the phone call records from the relevant PCO at Mawroh.

7. The State admits that the investigation in this case may not have been of the quality that it ought to have been, but the State asserts that the trial court missed the larger picture by finding minor mistakes in dates and the like, despite the individual statements of Bernard and Bonie unmistakably pointing to their guilt and the commission of murder.

8. The State submits that in the judgment and order impugned of March 26, 2019, the trial court referred to the last-seen theory and disbelieved the prosecution case that it was Bernard and Bonie who were with Biplab at the time of or immediately prior to Biplab's death. The State is critical of the trial court barking up the wrong tree in finding that a particular phone did not belong to the victim but belonged to Bonie and placing much weightage on such insignificant aspect to acquit the respondents of the serious charges. In particular, the State claims that when the individual statements of both Bernard and Bonie indicate to the commission of murder by them, the trial court could not have rejected such statements on the specious ground that it has

furnished nor could the trial court have accepted the bare denial of the two accused persons in such regard in course of their statements under Section 313 of the Code to be retractions of their statements recorded by a dispassionate judicial officer authorised so to do by law.

9. The respondents, on the other hand, caution the Court against interfering with a verdict of acquittal. The respondents maintain that since the trial court had the advantage of examining the demeanour of the witnesses and took a possible view of the matter, the appellate court should be very slow in interfering, particularly as the impugned order is one of acquittal. The respondents also exhort that since this is a case of circumstantial evidence, due credence was given by the trial court to the last-seen theory. The respondents submit that no case under Section 364A was made out and no charge was framed under Section 34 of the Penal Code for any commonality of intent to be established or come into play.

10. The respondents maintain that an order of conviction cannot be founded merely on the confessional statement of the accused, nor can a statement of a co-accused be made the basis for the conviction of another. This submission is made in the light of Bernard having alleged,

in course of his statement under Section 164 of the Code, that Bonie had strangled Biplab with a rope.

11. A few sketchy facts emerged from the investigation and, rather than ignore such irrelevant details, the prosecution attempted to tie such facts to the individual statements under Section 164 of the Code rendered by the two accused to bring such accused to the noose.

12. At this stage, it would do well to notice the essential features of some of the statements recorded by two key witnesses under Section 164 of the Code and the entirety of the two statements apparently voluntarily rendered by the two accused. Such statements were recorded long prior to the commencement of the trial and the documents evidencing the recording of such statements were handed over to the accused persons in terms of Section 207 of the Code well prior to the trial being taken up on June 19, 2006.

13. On May 2, 2006, Nirvika Singhania, a close friend of Biplab and a year senior to him in college, gave a statement under Section 164 of the Code. In such statement, Nirvika claimed that on February 18, 2006 “at around 8:30 pm Biplab informed me that he would not be able to come to my residence to collect his laptop from me.” Nirvika recalled that Biplab informed her during the call that he was in Mawkhar “with

two of his Siliguri friends, one of them I remember his name as Sumit.”

Nirvika also narrated that on the following day when Mrs. Pukaryastha, whom she described as an aunt of Biplab, came to Nirvika’s house to enquire of Biplab, she had recounted the phone call incident to Mrs. Pukaryastha.

14. An autorickshaw driver, Beldingstone Lyngdoh Nonglait, rendered a statement under Section 164 of the Code that may be seen in its entirety:

“On the 18th February, 2006, at about 8-8:15 Pm I was at Polo just at Polo Bazar. During that time one Bernard Phawa, Bonny Phawa whom I know for the last ten years, came and asked me to take them to Mawroh. During this time these two were with one non-tribal boy. I think that non-tribal boy was their friend. I do not know his name. On reaching at the junction leading to “Sanker” nursing home all three alighted from my auto rickshaw. They paid me Rs.15 (Rupees fifteen) only and there after I left.

“I have no idea about the case and that’s it all I have to say.”

15. On or about March 8, 2006, Bonie made a statement under Section 164 of the Code to a judicial magistrate. So as not to distort the recording in such regard and bring out the true meaning and purport thereof, the detailed statement along with the questions put to Bonie are set out:

“7. What do you know about the case?

On 18.02.2006 Shri. Biplop Das and Shri. Bernard Lyngdoh Phawa my Uncle at about 5:30 P.M. came to my shop at Umsohsun after they were fully drunk. They left my shop and they told me to come to a restaurant nearby. I went to that restaurant (name I cannot say) at Umsohsun and all three of us had drinks. From there we went to Polo and went to a restaurant where again we had drinks, and there we took an auto rickshaw and went to Mawroh. Reaching Mawroh we again had some more drinks and Biplop from one PCO at about 7 P.M. made a call. Biplop started vomiting and told Bernard to take Bernard to the main road, but Bernard was highly drunk. Took Biplop and I followed, till we reached the grave yard.

8. What did you do in the grave yard?

In the grave yard when Biplop was too weak due to drinks he lied on my lap and took rest I think that was the time Biplop died. On seeing that Biplop was dead both I and my uncle Bernard were scared, Bernard even open the shoes of Biplop and rubbed the shoes of Biplop and rubbed his feet thinking that Biplop was not dead but was unconscious.

Ultimately when we saw Biplop was really dead, I dug a grave on the grave yard when it was already night time.

Both I and Bernard put the dead body of Biplop on the grave yard I don't remember whether the grave I dug was already used or not.

9. What more do you want to say?

While burring the dead body of Biplop, Bernard told that we better take out the purse (wallet) and mobile set of Biplop, so that the dead body will later be not identified, so we took them as discussed.

10. Where have you kept that mobile?

Bernard gave me the mobile and I went to sell the mobile to one known person telling him that I badly need money.

However, on 19.2.2006 during day time at about 12 O'clock, while I was with Bernard, his friends told him that the FIR against the missing of Biplop was filed.

Thereafter I have not met Bernard anymore.

I know nothing more than this.”

16. The statement of Bernard recorded on March 7, 2006 is set out in full:

“7. If you are aware about the death of Biplop Das, can you tell the Court how Biplop Das died?

I know Biplop Das for the last one year through my friend where Neel who was the student of ST. Anthony's College. Biplop was a junior of my friend, Neel in St. Anthony's college. Biplop Das after knowing Neel in college shifted his residence alongwith Neel for the last six months approximately to Lachumiere, Shillong.

8. Do you ever visited Biplop Das at his residence at Lachumiere.

Yes, I have visited the residence of Biplop Das at Lachumiere for two/three times only when Neel was still there.

9. When did you meet Biplop Das last all his residence.

It was on the 1st February, 2006 but Biplop was not at his residence that time. However on the 7 or 8 February 2006. I met Biplop Das at Police Bazar Thana Road. Thereafter, we went to pine borough at Police Bazar and had coffee, there Boplop told me that he had married with Smti. Mirbika Singhania who is related with Payal Cinema's owner, against both the parent's will. Last I met Biplop Das on the 18.2.2006 at Police Bazar near Delhi Mistan at about 3:30-4 P.M. and from there we went to Bonie's shop at Umshohsun. I have taken Biplop Das to Bonie's Shop. I told Biplop Das, that Bonie my uncle needs money and told me that on that same day he had no money but he expects that he will soon receive money from home. When I took Biplop to my Uncle's shop at Umsohsun, just that my Uncle Bonie will tell him how much money he want from Biplop.

10. Whether Bonie your Uncle (co-accused) in this case told Biplop the amount of money he required in your presence?

No, but I just anticipated that the money required may be Rs.20-30 (Twenty to thirty thousand) only.

11. Where have you gone after leaving the shop of Bonie at Umsohsun?

Three of us, Biplop, Bonie and I, at about 6:30 P.M. on 18.2.2006 left police bazar and went to polo. On reaching Polo Bazar we went to restaurant "Lasha" and had drinks. Biplop after a sip or two told me that he wanted to vomit, he went out the restaurant and vomited. At about 7:30 P.M. we left the restaurant at Polo and hired an auto rickshaw and went straight to Mawroh. Reaching Mawroh after Biplop made a call to his girlfriend telling her not to worry as he was with his friends, thereafter we proceeded to the graveyard, reaching there Bonie asked cigarette from me, I told him that I don't have, he asked me to buy one I went, and while returning I saw Bonie with a rope which I thought was plastic, tying the neck of Biplop Das. I saw Biplop was strangled to death with a rope by Bonie. I asked Bonie why he killed Biplop, but Bonie refused to give any answer I opened Biplop's shoes and started to rub his feet then, I felt his heart, but was no more beating. Bonie cried, and told me to help him, telling me that he was newly married, had no money but did not tell me why he killed Biplop.

Thereafter, I told Bonie what to do. Bonie told me to bury him (Biplop) in the grave I asked Bony whether he had already dug the grave. Bonie told me that the grave was already there. It was only when I insisted that Bonie told me that he had dug the grave in the morning of 18.2.2006. When I asked him why, Bonie refused to say anything. However Bonie asked from me the phone No. of Biplop's father. Which I have given to him, but I have no idea whether Bonie made any phone call from Gauhati to Biplop's father demanding money.

12. What more do you want to say?

On the first week of February 2006. “We (Qureshi, Bernard and Bonie) jokingly had a talk that Qureshi with a beard and moustache could become a son one day. We don’t have to work but we will get money built houses outside and three of us can live life happily. I don’t really know that Bonie seemed to have taken our talks seriously, which I only realized now after Bonie killed Biplop and though I have not seen Bonie demanded Money with my own eyes, but I believes Bonie’s must have demanded money from Biplop’s father since he had asked me to give the Phone number.”

17. The case run by the prosecution in course of the trial was that the two accused persons were last seen with the victim as per the statement of the autorickshaw driver; that the ransom calls were received by the father of the victim on February 19, 2006; that both the accused persons in their statements indicated that they were along with Biplab when the victim breathed his last in the graveyard in Mawroh on February 18, 2006; that the accused persons had led the investigating agency to where the body was buried and also to the murder weapon; and that the personal belongings of the murdered victim had been passed on to third parties, particularly by Bonie.

18. The trial court disbelieved the last-seen theory and the testimony of the autorickshaw driver because in his testimony at the trial he indicated the date to be February 19 instead of February 18, 2006, though in the cross-examination it was evident that he had mixed up between February 18 and February 19. As to the ransom call, no

convincing material was produced by the prosecution. Even the owner of the PCO from Paltan Bazar in Guwahati, from which the father received the call, was not examined by the prosecution.

19. The trial court doubted the statements of the two accused persons under Section 164 of the Code because the same judicial officer had prepared the inquest report upon the recovery of the victim's body. Further, there is a mistake in the statement rendered by Bonie in that Bonie's signature appears with the date March 8, 2006 whereas the judicial magistrate signed the statement with the date March 9, 2006. Merely on the ground that Bonie's statement carried such an anomaly as to the date, Bernard's statement under Section 164 of the Code was also thrown out by the trial court on the trial court's perception that the inquest report and confessional statements could not have been recorded by the same judicial magistrate.

20. The trial court was also not convinced that either of the accused persons led the investigating agency to where Biplab's body was buried or that the murder weapon was recovered at the instance of either accused. The trial court relied on the investigating officer's testimony that no statement of either accused was recorded under Section 27 of the Evidence Act, 1872. In addition, despite independent witnesses being

taken by the police at the time of recovery of the body, the trial court did not find any evidence of any independent witness indicating who had led the police to the exact spot where the body was buried. Indeed, the statement of the father of the victim in such regard was contradictory.

21. Finally, the investigating agency made a mess of which article belonged to whom or who had possession of the same or had passed it on to another. In the anarchy of the investigation in such regard, the trial court discredited the entire prosecution case.

22. There is no doubt that the investigating agency did a rather poor job of investigation and, whether because of lack of effective training or deliberately, key matters were not recorded as they should have been and critical witnesses were not asked the appropriate questions that ought to have been. Even the police and formal witnesses examined by the prosecution contradicted themselves, not only as to dates but also as to how the body was discovered or the alleged murder weapon was found. In fact, the rope that was bandied as the murder weapon and sent for forensic examination turned out to be one without any trace of blood or other evidence for it to be connected to the incident or the commission of the offence.

23. As to the charge of kidnapping for ransom, the investigation produced little or no evidence and the trial court was perfectly justified in disregarding the charge in the absence of any material to establish the same. As a consequence of the charge of kidnapping for ransom failing miserably, the trial court found no real motive for the accused persons to murder the victim. Indeed, the respondents emphasise that in a case of circumstantial evidence when no motive is also established, the trial court was justified in acquitting the respondents of the charges.

24. The further contention of the respondents is that even though the investigating agency had suggested Section 34 of the IPC as one of the charges, at the time of framing of the charges by the trial court, they were confined to Sections 364A, 302 and 201 of the IPC and Section 34 IPC was not mentioned at all in the order of August 11, 2006 by which the charges were framed.

25. Apropos the larger picture, the respondents suggest that Biplab may have been in a relationship with Nirvika which did not meet with the approval of Nirvika's conservative and rich business family and the investigating officer glibly admitted that he did not pursue such line of investigation.

26. Much stress is also laid on Nirvika's statement under Section 164 of the Code and the reference by Biplab to a friend by the name of Sumit in course of Biplab's conversation on the telephone on the evening of February 18, 2006. The respondents also read Nirvika's testimony at the trial where she referred to Biplab speaking of being with his Siliguri friends at the time of the telephonic conversation. The respondents suggest that since, at least, Bernard was a friend of Biplab, Biplab would have asserted that he was with Bernard but Biplab, as per Nirvika's testimony, made no allusion to Bernard at the relevant time.

27. The sheet-anchor of the respondents' case appears to be the time of death as recorded in the post-mortem examination of the body. According to the respondents, since the time of death was indicated in such report to be 48 hours prior to the examination, the death must have occurred on February 20, by which time Bernard was already arrested and could not have been a party to the commission of the offence.

28. On behalf of Bernard, his statement under Section 164 of the Code is also referenced in the context since Bernard claimed in such statement that he was taken into custody on the morning of February 19, 2006. However, such date indicated by Bernard was clearly contrary to the memorandum of arrest indicated earlier herein.

29. At the outset, it must be recorded that the object of the exercise in course of adjudicating a matter of the present kind is to ascertain the veracity of the material brought before Court by way of evidence. While conducting such exercise, it must never be lost sight of that human memory is, at best, imperfect and, if there appear to be apparent mistakes as to the dates, the mistaken dates may not be taken to be sacrosanct to discredit a case if the mistakes appear to be obvious and proximate dates fit to prove the case. The duty of the Court is not to find minor faults in where the i's have not been dotted or the t's may not have been crossed, but in trying to ascertain the larger picture.

30. Before delving deeper into the evidence and which part thereof may be critical and which other parts only incidental, it ought to be recognised that, ordinarily, confessional statements may not be the only foundation for a conviction, though there is no rule to suggest that a credible confessional statement may never be the basis for a conviction even if there is no other theory inconsistent with the culpability of the accused or the key parts of the statement are corroborated.

31. The Court exercises caution in treating a confessional statement as the basis for conviction because it is possible that a false confession is made to shield another, whether out of love and affection or upon

inducement or coercion. Equally, a Court will not disregard a statement that is found to have been voluntarily made and that fits into the jigsaw puzzle, so to say, to complete the entire picture. In particular, when two persons are charged and tried together for the commission of an offence and their independent statements match, the Court may rely on such statements unless some other motive appears to have impelled the making of such statements.

32. In this case, neither Bernard nor Bonie appeared to be shielding anyone when they recorded their statements. There is no inkling of either having been induced or coerced or threatened into making such statements. Indeed, there are internal consistencies that would prompt the Court to accept such statements at face value, except to the extent that either seeks to incriminate the other person. Further, if either of the accused persons had been induced or coerced or threatened into making his statement, there would not have been any attempt at retraction as was sought to be done in course of their examinations under Section 313 of the Code. More importantly, if either statement had been made upon any inducement or coercion or threat, such fact would certainly have been alluded to at the time of the purported retraction.

33. At any rate, a mere denial as to the veracity of their statements under Section 164 of the Code at the time of their examinations under Section 313 of the Code would, ordinarily, have to be discarded. In this case, the relevant judicial magistrate was produced as a witness and such magistrate reiterated the recording of the statements upon following the due process under Section 164 of the Code by the cautioning the makers of the consequence of their statements and by giving the makers sufficient time to reflect even after the statements were made. Neither Bernard nor Bonie sought to cross-examine the relevant judicial magistrate in any great detail or to suggest, as they later attempted to do, that the words attributed to them had not been uttered by them. Indeed, Bonie sought to make out a story at the end of the trial that he made no statement at all to the judicial magistrate and that he was asked to sign a blank paper and put the date thereon which the magistrate later filled up. Bonie ought to have confronted the judicial magistrate with such suggestion at the time of her testimony. The abject failure on the part of both the accused to discredit their statements or the veracity thereof ought to have prompted the trial court to completely disregard their false denial of such recording at the stage of being examined under Section 313 of the Code.

34. Significantly, neither Bernard nor Bonie attributed any motive to the judicial officer who had dispassionately discharged her duty and had testified to following the procedure in recording the relevant statements. Section 80 of the Evidence Act mandates that whenever any document is produced before any Court, purporting to be a statement or confession by any accused person, taken in accordance with law, and purporting to be signed by any judge or magistrate, the Court shall presume “that the document is genuine; that any statements as to the circumstances under which it was taken, purporting it to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

35. Section 4 of the Evidence Act, in its second limb, instructs as follows:

“Shall presume”.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”

36. Section 3 of the Act gives the following meaning to “disproved”:

“Disproved”.— A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.”

37. On a comparison of the three expressions, “proved”, “disproved” and “not proved” as used in the Evidence Act, it is apparent that for a fact to be proved, the existence of such fact has to be affirmatively established. A fact would be said to be not proved when it is neither proved nor disproved. However, for a fact to be disproved, the non-existence of it has to be affirmatively established to the extent practicable.

38. The mere denial at the stage of examination under Section 313 of the Code of the factum or the validity of the statements rendered by the two accused persons should not have carried any weight with the trial court. Indeed, the system would fail if recording of statements by judicial officers were to be so willy-nilly doubted. A high case must be made out for a statement made before a judicial officer to be discredited, discounted or disregarded. No such high case was made out by the respondents.

39. There is a further aspect to the matter. Apart from the fact that there is no law which prohibits the same judicial officer from conducting an inquest and, subsequently, recording any statement by any person under Section 164 of the Code in connection with the same matter, it cannot be lost sight of that only a handful of judicial officers

were posted in Meghalaya in 2006, which was long prior to a separate High Court for the State being established here in 2013. Indeed, it would not be surprising to discover that only two judicial officers may have been appointed then over what is now six or seven districts in the current State of Meghalaya. Further, it does not stand to reason that a judicial officer tasked with the duty of adjudication would not take up a matter at a later stage because the same matter was taken up by such officer at an early stage. Judges are trained to know when to recuse themselves and, ordinarily, except that a judge cannot sit in appeal or revision or the like over his own judgment, it is immaterial that a judge takes up the same matter in several stages. This is particularly so since, by definition, a judge has no interest in a particular matter.

40. The impugned judgment includes a terse discussion on such aspect in paragraphs 94 to 96 before the trial court records “that the confessional stated (*sic, statements*) recorded by the Magistrate cannot be taken into consideration.” At paragraph 94 of the judgment, the trial court observes that since the inquest and the recording of the statements were conducted by the same judicial officer, it “created doubt at the very instance.” There is no legal basis for such doubt. There is no finding that the inquest influenced the judicial officer to attribute

statements to the accused persons, despite such words not being spoken. There is no reference to Section 80 of the Evidence Act and the sanctity that the rule enunciated therein attaches to a statement made before a judicial officer. Indeed, there is no basis at all to the ultimate discarding of the statements.

41. Paragraph 95 of the judgment contains an unintelligible sentence questioning whether either confession was voluntarily made and making a further reference to Section 30 of the Evidence Act. Section 30 of the Evidence Act pertains to the consideration of proved confession affecting the person making it and others jointly under trial for the same offence. Such provision is not a complete bar against the statement of one accused being used against the other. Of course, there is a rule of prudence and the Court will not take either statement at face value when two persons are tried together for the same offence and each accuses the other of the exclusive commission thereof. However, if the statement of an accused is proved, its impact on the co-accused has to follow.

42. In the present case, Bernard claimed that when he returned to the graveyard after getting a cigarette he found Bonie strangling Biplab. In the absence of any corroborative material in such regard, such aspect of Bernard's statement may not be used to convict Bonie of murder.

However, that does not mean that the entirety of Bernard's statement has to be thrown away or disregarded.

43. At paragraph 96 of the impugned judgment, the trial court refers to the obvious mistake made by the judicial magistrate who recorded the statement in indicating the date when Bonie's statement was recorded. The concerned judicial officer ought to have been more careful. However, it is apparent that such statement was recorded on March 8, 2006 as would appear from the initial part of the standard form and Bonie's recording of the date under his signature. At any rate, even if the greatest of doubts were to be harboured in respect of Bonie's statement merely on account of the mistaken date, Bernard's statement could not have been thrown out.

44. The conclusion drawn by the trial court at paragraph 97 of the judgment is patently absurd and palpably erroneous. None of the grounds indicated by the trial court to discard the statements of the two accused persons holds any water. It would be a great disservice to the rule embodied in Section 164 of the Code and sanctity accorded to the recording of a statement under Section 80 of the Evidence Act if such statements were thrown out on the flimsy grounds evident in the impugned judgment.

45. Before reverting in greater detail to the statements made by the two accused persons, the further colossal errors in the impugned judgment may be noticed. At paragraph 44 of the judgment, the trial court discussed the testimony of PW-12, the autorickshaw driver who knew both Bernard and Bonie, and who claimed that he had ferried them along with a non-tribal on the relevant evening. Much emphasis has been laid by the trial court in setting out in bold and underlining that such witness claimed that it was on February 19, 2006 when he had carried such passengers to Mawroh. It is true that in the testimony in court, the autorickshaw driver referred to the date as February 19, 2006, but even in the cross-examination it would be apparent that he was confused as to whether it was February 18 or February 19. At any rate, in his statement under Section 164 of the Code he had clearly mentioned the date to be February 18, 2006, which the trial court could not have disregarded. Indeed, the last-seen theory sought to be set up by the prosecution was demolished primarily on such ground despite it being apparent that the concerned witness had mixed up between February 18 and February 19.

46. At paragraph 47 of the judgment, the trial court relied on the expert evidence of the medical practitioner who conducted the post-

mortem examination and the opinion that the time of death of the victim was about two days or 48 hours prior to the conduct of the examination. On such basis, the trial court concluded that if the date of death was February 20, 2006, then anything that happened earlier, or particularly on February 18, 2006, was irrelevant. Clearly, more than once, the trial court missed the wood for the trees.

47. Expert opinions are, at best, opinions. A lot of credence is given to an expert's opinion, but there is always an element of presumption when it comes to the time of death. Given that February is a cold month in Shillong and the extent of decomposition or deterioration in the state of a dead body would be much less in cold weather, the approximation of two days may allow room for two extra days, if the other circumstances confirm the date of death.

48. In this case, the entirety of the evidence, including the autorickshaw driver's testimony of ferrying Bernard, Bonie and a non-tribal on the evening of February 18, 2006, the phone call of Biplab from the PCO in the area and the voluntary statements of Bernard and Bonie that they were the only persons with Biplab in the graveyard on February 18, 2006 when Biplab died, should have convinced the trial court to take a different view of the matter and not be so inelastic in the

assessment of the approximate time of death made by the medical expert.

49. At paragraph 51 of the impugned judgment, the trial court has hung on to a stray line in the cross-examination of the person who conducted the post-mortem examination to the effect that death in this case could have been due to hanging or due to strangulation. The clear indication in both the report and the oral evidence of the expert was that it was death by strangulation. However, when a question was put in cross-examination as to whether there was any other possibility, the expert had to go by the book. The fact that he acknowledged that there could have been a possibility of the death by hanging would not imply that the death was, in fact, by hanging.

50. It must also be repeated that when it was evident that it was Bernard and Bonie who were present with Biplab at the time of his death, it was for such persons to indicate how Biplab came to meet his unnatural end. Bernard blamed Bonnie. That has to be disregarded. Bonie, however, claimed that Biplab put his head on Bonie's lap and died. It would have been perfectly believable if no marks or evidence of strangulation had been found on the body of the victim. However, since it is the accepted position that Biplab died out of some form of

strangulation – irrespective of whether it was by hanging or by being throttled or choked by a rope – it was incumbent on Bernard and Bonie to indicate how the 21-year-old man met his fate. Clearly, even if Bernard’s statement implicating Bonie is disregarded, Bonie’s statement appears to be false and not in consonance with the cause of death as indicated in the post-mortem report. In such a situation, when the fact ought to have been especially within the knowledge of Bernard and Bonie, the burden of proving that Biplab suffered a natural death was on Bernard and Bonie. Upon the evidence establishing that Biplab died an unnatural death, the guilt fastens on the two accused persons.

51. The trial court dwelt at length on how the prosecution failed to prove the circumstances leading to the discovery of the dead body and the existence of any murder weapon. There is no detracting from the findings of the trial court in such regard. But it begs the question, whether merely because the investigation had been tardy or careless, the baby has to be thrown out with the bathwater. No investigation is perfect. There is always room for bettering even the best. But the approach of the court must not be to count the number of mistakes. The court’s endeavour should be to sift the irrelevant from the material and

assess whether a proper account of the incident can be gleaned from the evidence presented beyond reasonable doubt.

52. Even the Evidence Act indicates that admission is the best form of proof. When so much is admitted by the accused persons as evident from the independent statements of Bernard and Bonie, which is also corroborated by other evidence on record, there is little else that the trial court had to look into. Both Bernard and Bonie gave similar accounts of what they did in the late afternoon and evening of February 18, 2006, the places they visited and where they finally ended up. The extent of the statements matching each other is quite remarkable, even in their details. On a combined reading of the two statements it is evident that all three of them may have been drunk by the time they reached the quiet surroundings of the graveyard in Mawroh with Biplab being the worst affected. The statements are consistent to the extent that Bernard went out to get a cigarette. The best part of the statements is that each speaks of Biplab's shoes being removed and soles of his feet being massaged to revive him. Quite frankly, even though the material pertaining to the charge of kidnapping for ransom may not have been presented, the fact that the three had travelled to Mawroh, the fact that Bernard was present at the relevant PCO around the time that Biplab

made a call therefrom and further that Bernard and Bonie were with Biplab when he met his unnatural death were clearly established. In the light of the overwhelming evidence in respect of the material incident, there were only a few dots to join and no room for any doubt.

53. As to the charge under Section 201 IPC for causing disappearance of evidence of offence, the voluntary statements of Bernard and Bonie match each other and give a detailed picture of how they disposed of the body upon discovering that Biplab had died. This part of the statement is consistent with the subsequent recovery of the body, albeit it not being clear as to who led the police to where the body was buried.

54. It is not for the Court to conjecture as to what may have prompted Bernard or Bonie to record their statements. Even in this day of advanced science and medicine, human intelligence has not been able to decipher exactly what makes the brain tick or exactly what impels a person to act in a particular manner. At the time that their statements were recorded under Section 164 of the Code, Bernard and Bonie had been arrested and interrogated. It is more than probable that both the respondents herein found themselves to be in a helpless situation where

they could not altogether disassociate themselves from the circumstances leading to the disappearance and death of Biplab.

55. Even though a statement by an accused in such circumstances has to be regarded as a sort of confession, there was no real confession in either statement of having committed an offence. It is more than possible that when Bernard and Bonie found themselves cornered with all the material against them, their guilty minds may have prompted them to furnish a believable explanation as to the circumstances in which the two were with the victim immediately prior to and at the time of the victim's death. In making such statements, both Bernard and Bonie steered clear of admitting that they had plotted or intended to kidnap Biplab for ransom or that they had plotted or intended to murder Biplab. The tenor of the statements is such that the admission of the offence is confined only to the charge under Section 201 IPC and the attempt at explanation in such regard is that they may have been taken aback by the dramatic turns of events and decided to conceal the body rather than report the matter to the police. Bernard did one better. He blamed Bonie for the death of Biplab. Bonie had no credible explanation to offer as to how Biplab died.

56. There is no doubt that both respondents herein were into the matter together and acted as one. There is also admission to the extent that they wanted money from Biplab, though no admission of kidnapping for ransom was made by either. In a sense, both the statements appear to be cleverly crafted; admitting only to the extent absolutely unavoidable in the circumstances. Rather than the statements being of confession of the primary offences that they were charged with, both the accused persons made an attempt to extricate themselves; except that no credible answer as to the unnatural death of Biplab was presented. Therein lay the fallacy of the exercise and the trial court completely misdirected itself in not even referring to the essence of the statements or trying to glean any meaning therefrom.

57. Now to the aspect of dealing with the order by which charges were framed on August 11, 2006 and Section 34 IPC not being expressly indicated therein.

58. Even though it is customary to include Section 34 IPC while framing charges, it must be remembered that Section 211 of the Code of 1973 requires only that every charge “shall state the offence with which the accused is charged.” The emphasis in the provision is on the word offence.

59. The Penal Code has 25 Chapters. Chapter I has five Sections which are bunched together under the heading “Introduction”. Chapter II runs from Section 6 to Section 52A and is intituled “General Explanations”. Chapter III deals with the general principles of punishment; Chapter IV covers general exceptions; and, Chapter V pertains to abetment. The offences under IPC are indicated in the remaining 20 chapters beginning Chapter VA up to XXIII including Chapter XXA. Section 34 IPC falls within the chapter on general explanations and no offence is described therein. Section 34 of the IPC cannot stand on its own and is only used in conjunction with one or more sections indicating an offence and a consequent punishment. Strictly speaking, therefore, in terms of Section 211 of the Code of 1973, it was not necessary for Section 34 to be expressly incorporated in the contents of the charges. In any event, if the contents of the charges are meaningfully read, it would be evident therefrom that both the accused persons were being jointly accused on all three counts. That would imply a common intention in consonance with Section 34 IPC. At any rate, the charges suggested by the investigating agency included Section 34 IPC. Ordinarily, when a charge is suggested but such charge is dropped at the time of the framing of charges, the reasons for

dropping the same are recorded. There is no such recording in the order framing the charges here on August 11, 2006. To repeat, Section 34 IPC pertains to the manner of commission of an offence and such provision does not provide for any independent form of punishment.

60. Returning to the impugned judgment, the other grievous mistake the trial court made was in failing to appreciate the significance of the phone bill from the PCO in the context of the evidence as to what transpired on the fateful evening of February 18, 2006. The trial court appears to have ignored the fact that the records of the relevant PCO had been produced and it was evident therefrom that Nirvika's phone number had been called from such PCO at 20:18 hours on February 18, 2006. The number called is indicated as 9863067363. In course of the deposition of PW-1 at the trial, he proved the relevant exhibit and identified the particular slip. Nirvika confirmed in course of her deposition that her mobile number at that time was 9863067363.

61. Moreover, Roger K. Sangma, a friend of Biplab and who was examined as PW-17, claimed that when they sought out Bernard on February 19, 2006 to go looking for Biplab, "initially Bernard was reluctant to accompany us ..." The witness then recounted that they went to the relevant PCO to try and obtain information since Nirvika

had claimed that she had received a call from Biplab the previous evening from such PCO. What happened thereafter may be indicated in the words of the witness:

“... Then the owner of the PCO called me in the corner of the PCO and informed me that Bernard had come on 18.2.2006 in the evening and told that he the owner of the PCO should not tell anybody or disclose that Bernard came to his PCO on the night of 18.2.2006...”

62. On the basis of the material presented by the prosecution at the trial, it was clearly established that from the statements of Bernard and Bonie that they had been drinking at some place in Polo in the evening of February 18, 2006; from the statement of the autorickshaw driver that Bernard and Bonie and a non-tribal boy were driven by him the same evening from Polo to Mawroh; from the evidence of Nirvika and the phone bill of the PCO that a call was made to Nirvika's number from a PCO in Mawroh at 8:18 pm on the same day; from the statement of the PCO owner to Roger K. Sangma that Bernard was at the PCO in the evening of the same day; and, finally, from the statements of Bernard and Bonie that they were with Biplab just before and at the time of Biplab's death in the graveyard at Mawroh. In addition, the respondents revealed how they had disposed of the dead body and, as a matter of fact, the dead body was found buried in the same graveyard before it

was exhumed and examined. The other matters, including who led to the discovery of the body and the alleged murder weapon, despite the inconsistencies therein, had to be regarded as secondary compared to the primary material that was available and was established. Even if no case was made out of kidnapping for ransom or any obvious motive, that would not be fatal for the prosecution as long as the circumstances indicate the culpability of the accused persons beyond reasonable doubt.

63. The trial court lost its way in the minor details and failed to see the larger picture which was obvious and virtually admitted.

64. On the law relevant to the matter, several judgments have been cited. The appellants have referred to a judgment reported at (2005) 7 SCC 714 (*A.N. Venkatesh v. State of Karnataka*) which emphasises at paragraph 9 thereof as to what is required of independent witnesses to establish the discovery of incriminating material for the purpose of Section 27 of the Evidence Act. Notwithstanding the law, on facts, the prosecution here failed to establish that either Bernard or Bonie led to the discovery of the body. The prosecution also failed to establish the murder weapon. In such factual backdrop, the judgment cited is of no relevance.

65. Another judgment reported at (1978) 4 SCC 435 (*Modan Singh v. State of Rajasthan*) has been brought by the State for the proposition that if the evidence of the investigating officer is convincing, no support of seizure witness may be necessary. Again, on facts, the evidence of the investigating officer in this case is not convincing as he admitted that he did not record any statement for the purpose of conducting a search or discovering any incriminating material for Section 27 of the Evidence Act to be attracted. A further judgment reported at (1997) 7 SCC 110 (*Ajit Savant Majagvai v. State of Karnataka*) has been referred to by the State for the principle that even in a case of circumstantial evidence, a meaningful approach has to be adopted by the Court. At paragraph 18 of the report, the judgment instructs that the principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, evidentiary facts. The legal proposition that was repeated in the judgment is that circumstantial evidence may not be direct to the point in issue, but may consist of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal fact can be

legally inferred or presumed. The primary evidence in this case meets with such test as laid down.

66. The State has also brought a recent and yet unreported judgment of this Court rendered on June 1, 2023 in CrI.A.No.9 of 2023 (*Grenath Ch. Marak v. State of Meghalaya*). Paragraph 27 of the judgment and the principle embodied therein have been stressed:

“27. Further, irrespective of what the evidence was as to anyone having noticed the girl accompanying the appellant, it was the appellant’s admission that he was with the girl at the time that the girl met with her death. Since the appellant had no explanation as to how the girl came to be raped or subjected to unnatural sex and the appellant’s version of the cause of death was belied by the medical report, there was no room for any possible doubt that it was the appellant who had lured the girl and committed rape on her before killing her and doing away with her body.”

67. The respondents have first relied on a judgment reported at (1995) 3 Gau LR 443 (*Anil Gogoi v. State of Assam*) for the proposition that a confession may be retracted and that a confession is just another piece of evidence. There is no quarrel with the proposition. However, on facts, there is no retraction of the statements made by the accused persons in this case. Further, upon disregarding Bernard’s accusation qua Bonie, the rest of Bernard’s statement would match with Bonie’s and would fit in perfectly with the primary evidence to establish the unmistakable guilt of the respondents in this case.

68. A further Gauhati judgment reported at (1987) 2 Gau LR 100 (*Satya Narayan Singh v. State of Assam*) has been relied upon by the respondents pertaining to exculpatory confessional statements. Paragraph 8 of the judgment lays down that an exculpatory confessional statement is no confession against a maker or his co-accused. In that case, an exculpatory confession which was contrary to the other evidence was relied upon for conviction. The facts are clearly distinguishable. In the present case there is no confession, in the strict sense, by either respondent. The confession is limited to being with the victim at the time of the death as neither person admits to having committed any crime.

69. A judgment reported at (1996) 9 SCC 225 (*Ramesh Babulal Doshi v. State of Gujarat*) has been placed to caution the Court against reversing an order of acquittal. At paragraph 7 of the report, the Supreme Court found that the approach of the High Court in dealing with the appeal was patently wrong as it did not address the reasons which weighed with the trial court for recording the order of acquittal. The Supreme Court found that the High Court made an independent reappraisal of the entire evidence to arrive at its own conclusion. It is in such circumstances that the Supreme Court reiterated that while “sitting

in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable.” In the present case, the impugned judgment and the findings contained therein have been copiously referred to and found to be demonstrably unsustainable.

70. In similar vein, a judgment reported at (2000) 4 SCC 484 (*Jaswant Singh v. State of Haryana*) has been referred to. The final judgment brought by the respondents is the one reported at (1984) 4 SCC 116 (*Sharad Birdhichand Sarda v. State of Maharashtra*). Paragraph 153 of the report has been placed to emphasise the tests required to be met in a case of circumstantial evidence. The five golden principles as enunciated have been adequately met as more elaborately discussed earlier. The facts established are consistent only with the hypothesis of the guilt of the respondents, they are conclusive and exclude every possible hypothesis of innocence. The chain is complete and there does not appear to be any weak link.

71. In the circumstances, the judgment and order impugned dated March 26, 2019 are reversed. The respondents are found guilty and convicted under Section 302 read with Section 201 IPC for the murder

of Biplab Das and concealment of evidence thereafter. There was a common intention.

72. Accordingly, both the respondents are found guilty of committing murder and concealing the evidence of the offence. Since this is not a rarest of rare case, both the respondents are sentenced to life imprisonment under Section 302 IPC and three years of rigorous imprisonment under Section 201 IPC. The sentences would run concurrently, in the sense that the respondents will serve rigorous imprisonment in the first three years and continue to remain in prison thereafter for life. It was a dastardly act that had been plotted out with the common intention of obtaining money from the victim – whether or not it was by way of extortion or by kidnapping for ransom – and the victim died a gruesome death as a result of the plan executed by the respondents. It is only just that the respondents face the appropriate consequence for their acts.

73. The respondents will be taken into custody immediately for serving out the sentences in accordance with law.

74. CrI.A.No.2 of 2022 is allowed by reversing the impugned order.

75. CrI.M.C.No.37 of 2023 is disposed of.

76. The lower case records be immediately sent down.

77. Let authenticated copies of this judgment and order be immediately made available to the parties, particularly to the respondents, free of cost.

(Sanjib Banerjee)
Chief Justice

I agree.

(W. Diengdoh)
Judge

Meghalaya
27.09.2023
"*Lam* DR-PS"

