

GAHC010166712019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/22/2022

SAHED ALI AND ANR
S/O LATE ABDUL JABBAR

R/O NO. 2 KANDHULIMARI
P.S. DHING
DIST- NAGAON

2: AZIZUL HOQUE @ AIJUL HOQUE
S/O LATE KALIMUDDIN

R/O NO. 2 KANDHULIMARI
P.S. DHING
DIST- NAGAON
VERSUS

THE STATE OF ASSAM
REP. BY PP
ASSAM

Advocate for : MR. N UDDIN
Advocate for : MS. B BHUYAN(ADDL.PP
ASSAM) appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT & ORDER (CAV)

Date : 05-08-2023

(Kardak Ete, J)

Heard Mr. N. Uddin, learned counsel for the appellants. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor for the State of Assam.

2. This appeal from Jail has been preferred by Sahed Ali and Azizul Hoque @ Aijul Hoque assailing the judgment and order dated 13.05.2019 passed by the Court of Sessions Judge, Nagaon in Sessions case no. 387(N) of 2012 whereby the appellants namely Sahed Ali and Azizul Hoque @ Aijul Hoque along with 4 (four) other accused namely Md. Abdul Hekim, Md. Abdul Rahim, Miya Hussain and Habibur Rahman have been convicted under Section 302/201/34 IPC, 1860 for committing the murder of Azibur Rahman and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 10,000/- each and in default, rigorous imprisonment for another six months. The accused persons have also been sentenced to undergo rigorous imprisonment for three years and also to pay fine of Rs 1000/- each, in default, rigorous imprisonment for another one month under section 201/34 IPC, 1860.

3. The case of the prosecution, in brief, is that on 14.04.2008, the informant Mustt Rumena Khatoon lodged an FIR before the Dhing P.S alleging that there arose some dispute and the deceased, Azibur Rahman was in bad terms with the accused persons namely Md. Fakaruddin, Md. Abdul Hekim, Md. Abdul Karim, Md. Abdul Rahim, Md. Habibur Rahman, Md. Azizul Hoque @Aijul Hoque, Miya Hussain and Sahed Ali with regard to certain issues for some time.

After such dispute, the accused persons have been looking for an opportunity to cause harm to him. It is further alleged that on 13.04.2008, at around 7:00 pm, the above accused persons came to their house in group and called her husband namely, Azibur Rahman on the pretext of discussing certain important matters. Then when her husband took out his bicycle, she held a lamp to show him the road to outside and she saw the accused persons in the gleam of the lamp, but for the whole night her husband did not come back. As such, in the morning, she intimated the matter to other people and the people caught and interrogated Md. Habibur and Azizul Hoque who in turn admitted that they had killed her husband and buried him. Thereafter, the accused persons Md. Habibur and Azizul Hoque were handed over to the Police.

4. On receipt of FIR, the case was registered being Dhing P.S. Case no 61/2008 under section 302/201/34 IPC, 1860. After completion of the investigation, the Investigating Officer has filed a charge-sheet on 31.01.2010 against the accused persons namely Md. Fakaruddin, Md. Abdul Hekim, Md. Abdul Karim, Md. Abdul Rahim, Md. Habibur Rahman, Md. Azizul Hoque, Miya Hussain and Sahed Ali while the accused persons Md. Fakaruddin and Sahed Ali were shown as absconder. The Judicial Magistrate First Class, Nagaon committed the case to the Court of Sessions, Nagaon on 16.10.2012.

5. The accused Sahed Ali subsequently appeared during the trial while the accused Md. Fakaruddin remained absconder. Based on the charge-sheet, charges were framed against the accused persons Md. Abdul Hekim, Md. Abdul Karim, Md. Abdul Rahim, Md. Habibur Rahman, Md. Azizul Hoque, Miya Hussain and Sahed Ali and the same was read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried. The matter went up for trial. It is noted that during the proceedings of the trial, the accused

Abdul Karim expired, as such, the case against him got abetted recorded vied order dated 08.07.2015.

6. During the course of trial, the prosecution has examined in all 9 (nine) witnesses. The statements of the accused persons under section 313 Cr.PC were also recorded. The defence plea is total denial, no evidence has been adduced by the accused persons. Upon consideration of the evidence adduced on records, the learned Trial Court concluded that considering the facts and circumstances of the case and the evidences and materials available on record, the accused persons in furtherance to common intention have caused the death of Azibur Rahman and buried his dead body to cause disappearance of the evidence and the prosecution had succeeded to bring home charges against the accused persons mentioned above, beyond reasonable doubt and accordingly convicted them under section 302/201/34 IPC, 1860 and sentenced them as mentioned herein above.

7. Mr. N. Uddin, learned counsel submits that the learned Trial court convicted the appellants on the basis of evidence of PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9. He further submits that in the instant case, there is no eye witness to the occurrence, as such, the learned court below decided the case on the basis of circumstantial evidence, i.e., last seen theory, so-called extra judicial confession purportedly made by the accused persons Habibur Rahman and Azizul Hoque, leading to discovery of the dead body of the deceased.

8. Mr. N. Uddin, learned counsel referring to the statements of PW-2 submits that PW-2 stated in the FIR that on 13.04.2008 at about 7 PM the accused persons called her husband on the pretext of discussing certain important matter. She saw the accused persons in the gleam of the lamp. On

the other hand, PW-2 in her deposition before the Court deposed that the occurrence took place on 14.04.2008 and on the day of occurrence at around 6 o'clock her husband was taken away from her house by the accused persons for discussing earth cutting. In her cross examination, PW-2 stated that she could identify the accused persons with the help of a lamp (chaki).

9. Mr. N. Uddin, learned counsel further submits that from the evidence of PW-2 it is seen that she stated to two different dates and time, i.e., 13.04.2008 at about 7 pm and 14.04.2008 at about 6 o'clock regarding the date of occurrence. Moreover in the FIR, PW-2 stated that her husband was called on the pretext of discussing certain important matter, but in her deposition PW-2 stated that her husband was called for discussion regarding earth cutting towards Roumari. Thus, PW-2, contradicted her own statement in FIR and in her deposition regarding the date and time of occurrence and purpose of calling her husband by the accused persons and as such her evidence is exaggerated evidence and hence not reliable. Moreover, the I/O of the case failed to seize the lamp as mentioned by the PW-2 which implies that there was no lamp used at all to identify the accused. Therefore, the question of identifying the accused persons in night time is covered by shadow of doubt and therefore last seen theory is not proved in the instant case and hence the same is not applicable in the present case.

10. Mr. N. Uddin, learned counsel further submits that PW-5 deposed that the PW-2 told PW-5 that accused persons Azizul and Habibur took away her husband and on the other hand PW-2 deposed that all accused persons took away her husband which is contradictory to the evidence of PW-5. Similarly, the PW-7 deposed that PW-1 told PW-7 that accused persons Azizul and Habibur took away her husband and on the other hand PW-2 deposed that all accused

persons took away her husband which is contradictory to the evidence of PW-7. He submits that PW-2 stated that she could identify the accused persons in the gleam of lamp but the PW-9 (I.O) admitted that he did not seize the lamp and it might be reason that there was no lamp at all which was used to identify the accused. Had there been any lamp, the I.O. would have seized the same.

11. Mr. N. Uddin, learned counsel further submits that it is settled principle of law that an accused cannot be convicted solely on the basis of last seen together theory. It is held by the Hon'ble Supreme Court Criminal Appeal No. 378/2015, **Chandrapal V. The State of Chhattisgarh** reported in **2022 Live Law(SC) 529** that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "last seen together" even if version of the prosecution in this regard is believed.

12. Mr. N. Uddin, learned counsel submits that PW-1 deposed that he saw that some villagers caught hold of and cordoned Habibur and Azizul. PW-1 deposed after arrival of police, when police interrogated them they admitted that they had killed the deceased. From perusal of evidence of PW-1, it is seen that accused persons, Habibur and Azizul did not mention the name of any other accused persons. It is further seen that before making the purported extra-judicial confession, the accused persons Habibur and Azizul was caught hold of and cordoned by the villagers which implies that so called extra-judicial confession was forceful and not voluntary. He submits that PW-2 was present all along with detention of accused persons, Habibur and Azizul, upto recovery of the dead body but in her evidence, there is not even a whisper about the extra-judicial confession of Habibur and Azizul.

13. Mr. N. Uddin, learned counsel submits that PW-3 deposed that accused Azizul and Habibur were altercating with the villagers when they were asked by

the villagers to find out the deceased. Thereafter, both of them were taken to the market and after some interrogation by the villagers and VDP, they confessed that they (Azizul, Habibur, Fakaruddin and Sahed Ali) killed the deceased and buried the dead body in the Char. From the deposition of PW-3 it appears that the accused persons Habibur and Azizul implicated accused Fakaruddin and Sahed Ali in their confession but the PW-1 though was present in the same gathering, he did not mention anything about implication of Fakaruddin and Sahed Ali. Moreover, PW-3 stated that after making of so called confession, O/C of Dhing P.S. arrived there but PW-1 deposed that after arrival of police the so called confession was made.

14. Mr. N. Uddin, learned counsel submits that PW-4 stated that he saw that Azizul and Habibur were kept detained in the Pharmacy of VDP Secretary, Afjal Khan and saw around 200 people gathering there. On being asked about the incident Azizul and Habibur said that both of them along with Abdul Karim, Fakaruddin, Taibur Rahman, Sahed Ali and some others had killed Azibur. From the deposition of PW-4, it appears that the accused Habibur and Azizul implicated the accused persons Abdul Karim, Fakaruddin, Taibur Rahman, Sahed Ali and others in their confession but the PW-1 and PW-3, although were present in the same gathering, were silent about implication of the accused persons Abdul Karim and Taibur Rahman. Moreover, PW-4 stated that police did not record any statement when the accused persons confessed that would show the place but prosecution has exhibited statement of the accused persons, Azizul Hoque @ Aijul Hoque and Habibur Rahman @ Habi, recorded under section 161 Cr.PC as exhibits 5 and 6 respectively though PW-9 which goes to show that evidence of PW-4 and PW-9 are contradictory to each other and hence not reliable at all.

15. Mr. N. Uddin, learned counsel submits that PW-5 deposed that being the Secretary of VDP, he along with other members of VDP and villagers went to meet Azizul and Habibur and brought them to his pharmacy and questioned them. Then Azizul and Habibur confessed that they both along with Sahed Ali and Fakaruddin had killed Azibur and buried his body. Thereafter, PW-5 informed the police. PW-5 stated that about 4000/5000 people were gathered there.

16. Mr. N. Uddin, learned counsel submits that from the perusal of evidence of PW-5, the accused persons, Habibur and Azizul implicated accused persons Sahed Ali and Fakarauddin in their confession but PW-5 was silent about the implication of accused Taibur Rahman, Sahed Ali and Abdul Karim as stated by the PW-4, as such, the evidence of PW-1, PW-2, PW-3, PW-4 and PW-5 are contradictory to each other regarding extra-judicial confession of accused persons Azizul and Habibur, as such, the so called confession of accused persons Azizul and Habibur are not voluntary but it might be made by forceful manner and therefore, it has no evidentiary value. PW-6 deposed that accused persons Azizul and Habibur admitted that they killed Azibur Rahman and buried his body. PW-6 deposed that around 4000/5000 people were gathered there. PW-6 is silent about the implication of any other accused persons by the accused persons Azizul and Habibur in their so called confessional statement. As such, PW-6 does not corroborate the evidence of PW-2, PW-3, PW-4 and PW-5 and as such, the conviction on the basis of uncorroborated evidence is liable to be set aside and quashed.

17. Mr. N. Uddin, learned counsel submits that PW-7 deposed that accused persons Azizul and Habibur admitted that they had killed Azibur Rahman and buried his body and that Fakaruddin, Abdul Karim another person were with them. In cross-examination, the PW-7 stated that the accused Azizul and

Habibur admitted inside the room that they had killed Azibur. From the evidence of PW-7, it appears that the alleged confession was made by accused persons Azizul and Habibur inside a room but PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 never stated that the confession was made inside a room and as such, the PW-7 came up with a different story than other PWs. PW-7 further stated that the police did not record his statement and the statement of the other witnesses present in the room.

18. Mr. N. Uddin, learned counsel further submits that PW-8 deposed that he found some cut marks over the dead body but none of the PWs stated anything about injury marks over dead body.

19. Mr. N. Uddin, learned counsel submits that the PW-9 in cross-examination admitted that he did not send the accused persons Habibur and Azizul to the court for getting their confessional statement recorded in connection with their confession and their assertion that they would be able to produce the dead body that day. He also admitted that he did not record the statements of independent witnesses at the time when the accused persons said that they would show the place where the dead body was buried. Thus, from the deposition of PW-9, it is seen that he did not send the accused persons Azizul and Habibur for recording their confessional statement before the Magistrate. It might be due to the reason that the accused persons Azizul and Habibur did not make any confession. Therefore, evidence of PWs that the accused persons Azizul and Habibur made confession regarding the killing of deceased is negated by the PW-9.

20. Mr. N. Uddin, learned counsel further submits that under the above facts and circumstances of the case, it appears that the making of extra-judicial confession by the accused persons Azizul and Habibur is under the shadow of

doubt and as such the same cannot be based for conviction of the appellants. Moreover, the extra judicial confession is a weak kind of evidence and conviction cannot be based solely on extra judicial confession and an accused cannot be convicted on the extra judicial confession of a co-accused as held by the Hon'ble Supreme Court in catena of judgments.

21. Mr. N. Uddin, learned counsel submits that PW-3 deposed that the villagers, VDP Secretary and Gaonburah came and informed him that one Azibur was missing. They also told him that some articles like a comforter, a pair of slippers and a bicycle were lying on the river bank. Then the PW-3 along with others went to the said place and found the said articles. Thereafter, both the accused persons Azizul and Habibur led the police to a spot and dug out the dead body. Further, from the evidence of PW-3, it is seen that prior to the leading by the accused persons Azizul and Habibur, the villagers, PW-3, VDP and Goanburah had already visited the spot from where the dead body was dug out and some articles were also recovered. As such, the leading by the said accused persons to the spot is doubtful because the villagers had earlier information about the spot.

22. Mr. N. Uddin, learned counsel submits that PW-4 in his cross-examination deposed that having seen the muffler, sandal, bicycle and blood at a place about 1/2 km away, some people requested the police to visit that place and as per the request of the public, the police visited that place.

23. Mr. N. Uddin, learned counsel submits that on perusal of evidence of PW-3 it appears that prior to the leading by the accused persons Azizul and Habibur, the villagers and public had knowledge about the spot where the dead body was buried and as such the public requested the police to visit that place. Therefore, question of leading by the accused persons Azizul and Habibur to the

spot does not arise at all because the people had prior knowledge about the spot. He further submits that PW-5 also in his cross-examination stated that after getting the information of muffler, sandal, blood lying there, the police went there. At that time, the accused persons Azizul and Habibur were also with police. As per evidence of PW-6, they had prior information about muffler, sandal, blood and bicycle and prior to the arrival of police, accused (s) Azizul and Habibur were taken to the spot by the public and VDP Secretary. As such, the question of leading by the accused persons to the spot does not arise at all because the public had the prior knowledge about it.

24. Mr. N. Uddin, learned counsel submits that as per evidence of PW-7, he along with other villagers went near embankment and saw the blood stain shirt, a pair sandal and a bicycle there. Thereafter, they went to the house of Habibur and Azizul and caught them. Thus, as per PW-7, the people had the prior knowledge about the spot and as such, the fact of leading the accused to the spot is under shadow of doubt. Hence, under the above facts and circumstances, it cannot be said that the accused persons Azizul and Habibur led the police to the spot where the dead body was buried because the villagers and the public had the prior knowledge about the spot.

25. Mr. N. Uddin, learned counsel further submits that the learned trial court convicted the accused persons/appellants on the basis of circumstantial evidence but the prosecution has failed to prove the chain of circumstances pointing to the guilt of the accused persons/appellants. The chain of circumstances is not complete because the last seen together theory is not proved in the instant and the extra judicial confession purportedly made by the accused persons Azizul and Habibur is under the shadow of doubt and the leading to discovery of the dead body is also under shadow of doubt. Moreover,

the appellants cannot be convicted on the basis of so called extra judicial confession of a co-accused of the case. Thus, under the above facts and circumstances, the learned counsel prays that the conviction and sentence of the appellants namely Azizul Hoque and Sahed Ali be set aside and quashed and set them at liberty for the ends of justice.

26. Mr. N. Uddin, learned counsel has relied on the judgments of the Hon'ble Supreme Court and Hon'ble High Court in the following cases:

- (i) **Chandrapal V. State of Chhattisgarh** reported in **(2022) Live Law (SC) 529**
- (ii) **Indrajit Das v. The State of Tripura** reported in **(2023) Live Law (SC) 152**
- (iii) **Joyram Ingty v. State of Assam** reported in **2006 (4) GLT 33**
- (iv) **Bijuli Bala Rabha V. State of Assam and Anr** judgement dated 27.03.2023 passed in **Crl.Appl.(J)/54/2017**

27. In the case of **Chandrapal V. State of Chhattisgarh** (supra) the Hon'ble Supreme Court held that *at the outset, it may be stated that undisputedly the entire case of the prosecution rested on the circumstantial evidence, as there was no eye witness to the alleged incident. The law on the appreciation of circumstantial evidence is also well settled. The circumstances concerned "must or should be" established and not "may be" established, as held in Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra¹ . The accused "must be" and not merely "may be" guilty before a court can convict him. The conclusions of guilt arrived at must be sure conclusions and must not be based on vague conjectures. The entire chain of circumstances on which the conclusion of guilt is to be drawn, should be fully established and should not leave any reasonable ground for the conclusion consistent with the innocence of*

the accused. The five golden principles enumerated in case of Sharad Birdhichand Sarda Vs. State of Maharashtra² laid down in para 152 may be reproduced herein for ready reference: "...152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."...It is also needless to reiterate that for the purpose of proving the charge for the offence under Section 302, the prosecution must establish "homicidal death" as a primary fact. In order to convict an accused under Section 302, the court is required to first

see 1 (1973) 2 SCC 793 2 (1984) 4 SCC 116 5 as to whether the prosecution has proved the factum of homicidal death. So far as the facts of present case are concerned, the evidence of PW-13 Dr. R.K. Singh, who had carried out the post-mortem of the deceased Brinda and Kanhaiya, would be most relevant in this regard. He had stated in his deposition before the court, inter alia, that on 12.12.1994, he had carried out the post-mortem of Kumari Brinda, daughter of Bhagirathi, and of Kanhaiya alias Chandrashekhar Gaur. The dead bodies of both the deceased were in decomposed state. He had further stated that the knot mark present on the neck of the deceased Brinda was ante-mortem, and that the cause of death appeared to be Asphyxia due to hanging. The death had taken place within 8 to 10 days and the nature of death was Suicidal. The said Doctor had stated similar facts for Kanhaiya that the dead body of Kanhaiya was found bent towards left side from his neck and a ligature mark having size 10 " x 5" was present on the neck. The cause of death appeared to be Asphyxia due to hanging and the death appeared to have taken place within 8 to 10 days. He had further stated that there was neither fracture found on the dead bodies of the deceased, nor any blood clots were found, nor any injuries were found, and therefore he had opined that the cause of death was hanging which normally is found in case of suicide. He specifically stated that as the dead bodies were decomposed, he could not express any opinion whether it was a homicidal death. In the cross-examination by the learned counsel for the accused, he had categorically admitted that he did not find any symptom of homicidal death, nor he had opined in his report given on 12.12.1994 that the deaths of the deceased were homicidal. Of course, he had stated that on the basis of the report submitted on 30.04.1995, an inference could be drawn that the deaths could be homicidal deaths...At this juncture, it may be noted that as

per Section 30 of the Evidence Act, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. However, this court has consistently held that an extra judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra judicial confession. As held in case of State of M.P. Through CBI & Ors. Vs. Paltan Mallah & Ors.³, the extra judicial confession made by the coaccused could be admitted in evidence only as a corroborative piece of evidence. In absence of any substantive evidence against the accused, the extra judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra judicial confession of the co-accused.... This takes the court to examine the theory of "Last seen together" propounded by the prosecution. As per the case of prosecution, PW-1 Dhansingh had seen the accused Chandrapal calling the deceased Kanhaiya and taking him inside his house on the fateful night. Apart from the fact that the said Dhansingh had not stated about the time or date when he had lastly seen Kanhaiya with Chandrapal, even assuming that he had seen Chandrapal calling Kanhaiya at his house when he was sitting at the premises of village panchayat, the said even had taken place ten days prior to the day when the dead bodies of the deceased were found. The time gap between the two incidents i.e., the day when Dhansingh saw Chandrapal calling Kanhaiya at his house and the day Kanhaiya's dead body was found being quite big, it is difficult to connect the present appellant with the alleged crime, more

particularly when there is no other clinching and cogent evidence produced by the prosecution.

28. In the case of ***Indrajit Das V. The State of Tripura*** (supra), the Hon'ble Supreme Court held that *the present one is a case of circumstantial evidence as no one has seen the commission of crime. The law in the case of circumstantial evidence is well settled. The leading case being Sharad Birdhichand Sarda vs. State of Maharashtra . According to it, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. The said principle set out in the case of Sharad Birdhichand Sarda (supra) has been consistently followed by this Court. In a recent case – Sailendra Rajdev Pasvan and Others vs. State of Gujarat Etc.³ , this Court observed that in a case of circumstantial evidence, law postulates two-fold requirements. Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, all the circumstances must be consistent pointing out only towards the guilt of the accused. We need not burden this judgment by referring to other judgments as the above principles have been consistently followed and approved by this Court time and again....The basic links in the chain of circumstances starts with motive, then move on to last seen theory, recovery, medical evidence, expert opinions if any and any other additional link which may be part of the chain of circumstances....The extra-judicial confession is a weak piece of evidence and*

especially when it has been retracted during trial. It requires strong evidence to corroborate it and also it must be established that it was completely voluntary and truthful. In view of the discussion made above, we do not find any corroborating evidence to support the extrajudicial confession, rather the evidence led by prosecution is inconsistent with the same.

29. In the case of **Joyram Ingty V. State of Assam** (supra) the Hon'ble Supreme Court held that *in order to fasten criminal liability, the prosecution must show that the recovery was under the first instance, i.e. the accused was involved in keeping of the article or thing and he has knowledge about the same. Supporting the decision in Pulukuri Kottaya Vs. Emperor, AIR 1947 PC 67, State of Rajasthan Vs. Bhup Singh (1997) 10 SCC 675 and the decision in Abter Singh Vs. State of Rajasthan, AIR 2004 SC 2865, the Apex Court has summed up the above proposition of law u/s 27 of the Evidence Act in the following words : "The various requirements of the: Section can be summed up as follows : (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible. (2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by accused's own act. (4) The persons giving the information must be accused of any offence. (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is*

inadmissible."

30. In the case of ***Bijuli Bala Rabha V. State of Assam*** and ***Anr.*** (supra) the Hon'ble High Court held that *in the case of Kuthu Goala –Vs- The State of Assam reported in 1980 SCC OnLine Gau 21, the Division Bench of this Court has held that the piece of evidence in regard to the conduct of an accused admissible under Section 8 of the Evidence Act, is by itself not sufficient to find the accused guilty of the offence of murder. It may give rise to suspicion, but it cannot be the basis for conviction for the offence of murder. In the above case, the accused therein had brought the severed head of a human body in a bag to the police station at Dibrugarh and he had admitted under Section 313 Cr.P.C that he had brought the human head to the police Station. The Division Bench on considering the statement made by the accused under Section 313 Cr.P.C in the above case, held that the accused was entitled to the benefit of doubt and was entitled to be acquitted on the ground that there was no other evidence to fasten the accused to the offence.....In the case of ***Gamparai Hrudayaraju vs. State of Andhra Pradesh***, reported in (2009) 13 SCC 740, the Apex Court has held that the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. It has further stated that the circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the present case, the conviction of the appellant has been basically made by the learned Trial Court, on account of the appellant having allegedly surrendered before the police and admitting that she had killed her husband. However, the appellant has denied surrendering before the police or*

admitting to the murder. Her explanation given under Section 313 Cr.P.C also does not corroborate the stand of the police that the appellant had admitted to murdering her husband or being present in the place of occurrence at the relevant time of the incident. In fact her case is that she had been arrested by the police due to her brother-in-law blaming her as the person who killed her husband, without any evidence being adduced to that effect....With regard to whether the "last seen together" theory could be applied to the facts of the case, we find that there is no evidence adduced, to show that the appellant was staying with the deceased on the night of the incident and as such, it cannot be said that the prosecution has succeeded in leading evidence to show that the appellant and the deceased were last seen together on the night of the incident. As stated earlier, Section 26 of the Indian Evidence Act prohibits proof of a confession made by a person in custody, unless the confession is made in the immediate presence of a Magistrate. In view of the fact that the alleged statement/confession made by the appellant has only been made to police officers, the said statement/confession cannot be the basis for convicting the appellant for an offence under Section 302 IPC, as the same is inadmissible in evidence. In that view of the matter, we are of the view that the conviction of the appellant by the learned Trial Court under Section 302 IPC is not sustainable in law. The judgment dated 28.04.2017 passed by the Court of the learned Additional Sessions Judge, Goalpara in Sessions Case No. 27/2016 is hereby set aside. Consequently, the sentence imposed upon the appellant under Section 302 IPC is also set aside. The appellant is acquitted of the charge under Section 302 IPC. The State respondent is directed to immediately release the appellant from jail.

31. Ms. Bhuyan, learned Additional Public Prosecutor for the State of Assam

submits that prior to lodging of the FIR one GD entry was made by the O/C Dhing Police Station on 14.04.2008 at 7:55 AM. On the basis of information over telephone made by the VDP Secretary No. 2 that a person was murdered and his dead body was kept buried and in this connection they had apprehended two boys. On the basis of the said GD entry one S.K. Dutta S.I. Officer-in-Charge, Dhing P.S. along with S.I. Anil Bora, constable/1131, Bhimal Hazarika and one Sec 16 APBN personnel proceeded to Kandhulimari and started investigation of the case. During the course of investigation PW-9, S.I. Anil Bora said that they investigated into the matter and interrogated the apprehended accused persons and they said that they killed Azibur Rahman and buried his dead body in the field and they could show the place. When the police personnel were proceeding to the field, they saw one old hero cycle, a pair of leather sandal and a violet colour muffler lying near the embankment. The wife of the deceased identified all these things to be of her husband and in presence of the witnesses, the materials were seized. Thereafter, the accused persons showed the police personnel where the dead body was buried. The disclosure statement of the accused persons namely Habibur and Azizul were recorded thoroughly. The accused persons made the statement that they led the police and showed the place where the dead body was buried.

32. Ms. B. Bhuyan, learned Additional PP further submits that thereafter the Investigating Officer informed the Magistrate and after arrival of the Magistrate and the Circle Officer, Dhing circle, the dead body was exhumed as shown by the accused persons and inquest was made on the dead body. The IO prepared the sketch map and examined the witnesses. Thereafter the police registered the FIR lodged by Rumena Khatoon and registered the case as Dhing P.S. Case no. 61/08 under section 302/201/34 IPC. Police examined other witnesses and

went searching for the other accused persons involved in the case but could not find them out. He arrested the accused persons Habibur and Azizul and forwarded them to the Court. In cross examination, he reiterated that on the basis of the GD Entry he visited the place of occurrence i.e., going to Matikhula Bazar, taking the accused persons into custody, preparing the sketch map at the embankment, seizing the items, exhuming the dead body, holding the inquest and sending the dead body for Post Mortem examination.

33. Ms. B. Bhuyan, learned Additional PP submits that PW-1 is a co-villager, PW-2 is the wife of the victim, PW-3 is an acquaintance. PW-4 is also an acquaintance, PW-5 is the VDP Secretary of Village No. 2, Kandhulimari having a Pharmacy at Kandhulimari, PW-6 is a shop-owner, PW-7 is also an acquaintance and PW-8 is the Doctor. PW-2 who is the wife of the deceased deposed that she knew all the accused persons and they are from her village. The occurrence took place on 14.04.2008. On the day of occurrence at around 6 O'clock in the afternoon, her husband Azibur was taken away from their house by the accused persons informing her that they had a discussion regarding earth cutting towards Roumari. Accordingly, her husband went with the accused persons. She waited in their house but her husband did not return till morning. During night hours, some co-villagers came to her house and she informed them that her husband had not returned. She informed about the fact to Ajgar Ali, one of her uncles, who had already expired. In the morning, she informed the co-villagers, the VDP and the village head man Nurul Islam (PW-1). Then she went to the police station at around 7-7:30 am.

34. Ms. B. Bhuyan, learned Additional PP submits that PW-4, Abul Kasem has deposed that the incident took place on 14.04.2008 on the day of occurrence, he was standing at the gateway of his house, then he heard from

Jahangir that Ajibur had been killed and two persons were detained by the public at Matkhula Bazar. On getting the information, he went and saw that Azizul and Habibur were kept detained in the pharmacy of VDP Secretary Afzal Khan, and saw around 200 people gathered there. On being asked about the incident Azizul and Habibur said that both of them along with Abdul Karim, Fakaruddin, Taibur Rahman, Sahed Ali and some other had killed Ajibur. Jahed Ali, Javed Ali, Hamat Ali, Jaynal Abedin, Majibur Rahman, Govt. Gaonburha, Nurul Islam, Abul Kasem Faraji and many other people were present when the accused duo confessed their guilt. PW- 4 had also deposed that Azizul and Habibur led the police to the place where Ajibur was kept buried after he was killed.

35. Ms. B. Bhuyan, learned Additional PP submits that PW-5 who is the VDP Secretary, on the basis of whose information, Police had made GD entry. PW-5 also deposed that Rumena Khaton (PW-2) told him at about 8:00 PM that on the previous night Azizul Hoque and Habibur called his husband away from home, PW-5 has also deposed that Azizul and Habibur confessed that they both along with Sahed Ali and Fakaruddin had killed Azibur and buried his body. Accordingly, he informed the Dhing P.S. about the incident over phone. PW-5 had also reiterated that the police took the accused duo and went to the place where Azibur was buried. The accused persons led the police to the place where jute seeds were sown on the other side of the dead channel of the river and showed the place where the body of Azibur was buried.

36. Ms. B. Bhuyan, learned Additional PP further submits that PW-6 is another witness namely Abul Kasem Faraji who deposed that Azizul and Habibur admitted that they had killed Azibur and buried the body at a place. Then on being informed by VDP Secretary, the police came there.

37. Ms. B. Bhuyan, learned Additional PP submits that PW-7 Iqbal Hussain Kabir has also deposed before the Court that Hajibur and Azizul had admitted that they had killed Ajibur and buried his body and that Fakaruddin, Abdul Karim and another person were with them. Habibur and Azizul admitted their guilt and said that they would show the place where the dead body was buried. PW-8 is the doctor who conducted post mortem examination of the body of the Azibur Rahman. The accused persons under section 313 statements had denied their guilt.

38. Ms. B. Bhuyan, learned Additional PP submits that in the case in hand, the accused persons more particularly Azizul and Habibur disclosed before the police and public more particularly the witnesses mentioned above that for some days Habibur, Azibur, Fakaruddin, Sahed Ali, Abdul Barek etc including the accused Azizul were doing earth cutting work at village Roumari. Fakaruddin, Abdul Rahim, Sahed Ali, Abdul Hekim had old dispute with Azibur and out of that grudge, on 13.04.2008, the said persons told Azizul and Habibur that they would kill Azibur that very night and that Habibur and Azizul had to call out Azibur from his residence. The other accused persons made a threat that they would kill them too if they didn't do so. The other accused persons told that after calling Azibur, they had to take him to the embankment of village Roumari, and that they would be in hiding and as soon as they reach near the embankment of village Roumari, the other accused persons would attack and kill Azibur. After Azibur had died, they took his dead body to the land of Fakaruddin's brother and buried it there following a discussion. When Azibur didn't come back to his house till morning, people searched for him and people recovered his bicycle and sandal near the embankment. When Habibur and Azizul were coming towards the market, people apprehended and questioned

them and they confessed before the public that they killed Azibur and kept his body buried under the earth. Later they led the police and showed the site where the dead body was kept buried. The people of the village dug out the dead body and Abdul Hekim arranged the spade and other things at the time of digging the pit.

39. Ms. B. Bhuyan, learned Additional PP submits that the other accused persons Md. Habibur Rahman also deposed that Azizul, Azibur, Fakaruddin, Barek, Sahed Ali and him, together do earth cutting at Roumari. In the evening of 13.04.2018, Abdul Hekim, Fakaruddin, A. Barek and Sahed Ali told Azizul and him that they had to kill Azibur and they would have to call out Azibur from his residence and take him near the embankment towards Roumari and the other accused persons would be hiding near the embankment of village Roumari and that they would kill Azibur as soon as he reach there. They were threatened to be killed if they did not do so. Then at 8:00 pm on that day, Azizul and Habibur went to the resident of Azibur and asked him to accompany them to collect remuneration for the art cutting work at Roumari. His wife objected but when they said that they would return soon, she didn't comment. As decided earlier, they took Azibur by bicycle towards Roumari. As soon as they reached the near the embankment of Roumari, A. Hakim and Fakaruddin came out with khukuri in their hands, Sahed Ali came out with sword in his hand and Abdul Barek came out with a dao in his hand from near the embankment where they were hiding. When Azibur died, they discussed and thought of burying the dead body by digging a pit. Accordingly, they dug a pit on the cultivation field of Karim, brother of Fakaruddin and kept the dead body buried. The bicycle and sandal, etc were lying at the PO and they did not get time to pick the same up. As Azibur did not return home in the morning, people started searching for him and

recovered bicycle, sandal near the embankment. At that time when Azizul and Habibur were coming towards the market, people apprehended and questioned them, they narrated everything before the public and led the police and showed the place where they buried the dead body. Accordingly, the dead body was dug out, Abdul Hakim arranged the spade and other things at the time of burying the dead body. The disclosure statements of the accused Azizul Hoque and Habibur Rahman duly recorded and signed by the I.O concerned and it was duly exhibited as Exhibit 5 and 6.

40. Ms. B. Bhuyan, learned Addl. PP submits that the Investigating Officer took all the steps as required under the law while registering the disclosure statement. In the instant case, before the formal FIR was registered on the information received from PW-2, the Investigating Officer took all the steps such as thorough interrogation of the accused persons, before the accused persons led the Investigating Officer to discover the corpus. The place where the dead body was dug out was absolutely within the knowledge of appellant Habibur and Azizul. So, GD Entry which was registered on the basis of information given by PW-5 can be treated as FIR, on the basis of which investigating agencies set in motion and took all steps relating to the investigation, so the FIR lodged by Rumena Khatun may be treated as a 161 statement of PW-2.

41. Ms. B. Bhuyan, learned Additional PP further submits that regarding the submission made by the learned counsel for the appellant that Habibur was not found on the dock on the date on which the evidence of PW-1 and PW-2 were recorded i.e., on 03.04.2014 and has come on record in their evidence that they did not see Habibur on the dock and he was found absconding and that Habibur was granted bail on 16.07.2008 on completion of 90 days. Even after issuance of summon and warrant, Habibur did not appear, the learned

Committal Court issued NBWA on 28.07.2015 as in the report of process server, the accused was not found in his address. On 28.07.2015 PNA was issued against the accused person Habibur. On 27.12.2015, Habibur was produced, in the meantime vide order dated 25.10.2012 committal court committed the matter to the learned Session Judge, Nagaon and as such on 03.04.2014 when the evidence of PW-1 and PW-2 was taken they did not find Habibur on the dock as he was absconding at that time.

42. Regarding the contention of the learned counsel for the appellant, that in the light of lamp there is no possibility to see accused Habibur and Azizul by PW-2 at night, learned APP submits that the accused persons more particularly Habibur and Azizul are the close relatives of the deceased and they used to reside adjacent to the house of the informant Rumena. The accused persons were the cousins of her husband and it is impossible that the informant would not recognize the accused persons in the light of the lamp.

43. Ms. B. Bhuyan, learned Addl. PP submits that regarding the submission of the learned counsel appearing on behalf of the appellant is that the accused persons are not the resident of No. 2 Kandhulimari but the resident of village Roumari, in 313 statement although resident of Habibur Rahman was shown as Roumari but in the chargesheet dated 31.01.2010, the address of the Habibur was shown as No. 2 Kandhulimari. Thus it can be understood that after the occurrence had taken place, Habibur might have changed his address. In the chargesheet dated 31.01.2010 the address of Azizul was shown as No. 2 Kandhulimari and 313 statement also he stated his address to be No. 2 Kandulimari. Regarding the submission that there are lapses in the prosecution case as to non-seizing of lamp used by Rumena & non-sending the material discovered in the river bank such as bicycle, sandal and muflar for FSL, the

learned APP submits that such lapse is not fatal to the prosecution case.

44. Ms. B. Bhuyan, learned APP submits that regarding non-sending the accused persons for TIP, the accused persons are the resident of same village and are close relatives of the deceased. PW-2 clearly identified the accused persons Habibur and Azizul while they took her husband away, so there is no requirement to send the accused persons for test identification parade. The accused persons were very much involved in taking away the deceased on the previous day of the lodging of the FIR, although motive is not a prime factor to be taking into account in a case of circumstantial evidence but if the disclosure statement of accused persons Habibur and Azizul is taken at its face value, the motive of killing is due as dispute arose for earth cutting work by accused Habibur, Azizul, Fakaruddin, Sahed Ali, A Hakim and it was an old dispute.

45. Ms. B. Bhuyan, learned APP submits that there is no explanation on behalf of the accused persons on the 313 statements which has given additional link to the circumstantial evidence. Although inculpatory part of the disclosure statement made by Azizul and Habibur would not be admissible but exculpatory part made in the disclosure statement would be admissible in evidence.

46. Ms. B. Bhuyan, learned APP further submits that all the accused persons whose names came in evidence had common intention to kill the deceased because of the dispute which had taken place due to earth cutting work.

47. Ms. B. Bhuyan, has relied on the judgments of the Hon'ble Supreme Court and Hon'ble High Court in the following cases:-

(i) Yanab Sheikh vs State of West Bengal reported in **(2013) 6 SCC 428**

(ii) Prem Singh vs State (Nct of Delhi) reported in **(2023) 3 SCC 372**

(iii) Ningappa Yallappa Hosamani & Ors vs State of Karnataka & Ors reported in

(2009) 14 SCC 582

(iv) Antar Singh vs State of Rajasthan reported in **(2004) 10 SCC 657**

(v) Simon and Ors vs State of Karnataka reported in **(2004) 2 SCC 694**

(vi) Dayal Singh and Ors vs State of Uttaranchal reported in **(2012) 8 SCC 263**

(vii) Superintendent of Police, CBI and Others vs Tapan Kumar Singh reported in **(2003) 6 SCC 175**

(viii) Charansingh vs State of Maharashtra and Ors reported in **(2021) 5 SCC 469**

(ix) Subed Ali And Ors vs State of Assam reported in **(2020) 10 SCC 517**

(x) Suresh And Another vs State of U.P reported in **(2001) 3 SCC 673**

(xi) Sahadevan & Anr vs State of Tamil Nadu reported in **(2012) 6 SCC 403**

48. In the case of ***Yanab Sheikh v State of West Bengal*** (supra) the Hon'ble Supreme Court held that *first and foremost, we may examine the question whether FIR, Ex.1/3, can be treated by the Courts as the First Information Report and if so, what is the effect of Ex.7 in law, keeping in view the facts and circumstances of the present case. It is clearly established on record that the occurrence took place in the evening of 19th December, 1984. The occurrence was a result of an altercation and the abuses hurled at PW1 and the deceased by Yanab near the water tank. Immediately upon the altercation, the accused had ran to his house and returned along with Najrul and threw a bomb at the deceased. PW1, brother of the deceased, PW5, Basera Bibi, wife of the deceased and PW6 Abdus Sukur, cousin of the deceased are the eye-witnesses and they said that they had seen the appellant throwing a bomb upon the deceased and that the accused, Yanab, had taken the said bomb from the bag of Najrul. After the incident, PW6 had gone to the*

Duni Gram Post Office and informed the police about the incident over the telephone. He informed the police that there had been a murder in the village and they should come. When the police arrived, he was in the village and he met the police at the house of the deceased Samim. This phone call was taken and the G.D. Entry was registered by PW14, SI R.P. Biswas. According to PW14, on 19th December, 1984 at about the 0805 hours, he had received a telephonic information and noted the information in General Diary No. 708 and thereafter he had proceeded towards village Lauria along with PW15, SI S. Chatterjee. Ex.7 had been recorded by PW14 and he had received the written complaint by PW1, Sadek Ali, and the same was submitted to him after he had reached the village Lauria and was addressed to the Officer In-charge, Rampurath Police Station. This written complaint was Ex.1. The cumulative effect of the statements of PW1, PW6 and PW14 clearly indicate that Ex.7 was not the First Information Report of the incident. It gave no details of the commission of the crime as to who had committed the crime and how the occurrence took place. A First Information Report normally should give the basic essentials in relation to the commission of a cognizable offence upon which the Investigating Officer can immediately start his investigation in accordance with the provisions of [Section 154](#), Chapter XII of the Code. In fact, it was only upon reaching the village Lauria that PW14 got particulars of the incident and even the names of the persons who had committed the crime. A written complaint with such basic details was given by PW1 under his signatures to the police officer, who then made endorsement as Ex.1/1 and registered the FIR as Ex.1/3. In these circumstances, we are unable to accept the contention that Ex.7 was, in fact and in law, the First Information Report and that Ex.1/3 was a second FIR for the same incident/occurrence which was not permissible and was opposed to

the provisions of the [Section 162](#) of the Code. In the case of [Manu Sharma v. State \(NCT of Delhi\)](#) (2010) 6 SCC 1, a Bench of this Court took the view that cryptic telephone messages could not be treated as FIRs as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of [Section 154](#) of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him, free of cost. Similar view was also expressed by a Bench of this Court in the case of [State of Andhra Pradesh v. V.V. Panduranga Rao](#) (2009) 15 SCC 211, where the Court observed as under: -“10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of [Sections 154](#) and [162](#) of the Code of Criminal Procedure, 1973 (in short “the Code”). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR.”Thus, the purpose of telephone call by PW6, when admittedly he gave no details, leading to the recording of Entry, Ex.7, would not constitute the First Information Report as contemplated under [Section 154](#) of the Code. The reliance placed by the learned counsel appearing for the appellant upon the provisions of [Section 162](#) of the Code, is thus, not well-founded. Even in the case of [Ravishwar Manjhi & Ors. v. State of Jharkhand](#),

(2008) 16 SCC 561, another Bench of this Court took the view that "...we are not oblivious to the fact that a mere information received by a police officer without any details as regards the identity of the accused or the nature of the injuries caused to the victim, name of the culprits, may not be treated as FIR, but had the same been produced, the nature of the information received by the police officer would have been clear....On the plain construction of the language and scheme of [Sections 154, 156](#) and [190](#) of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of [Section 154](#) suggest that every information relating to commission of a cognizable offence shall be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of [Section 173\(2\)](#) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of [Section 154](#) of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the Investigating Agency has no determinative right. It is only a right to investigate in accordance with the

provisions [of the Code](#) . The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police cannot be ruled out. It is with this intention in mind that such interpretation should be given to [Section 154](#) of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, re-investigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme [of the Code](#) and more particularly [Section 167\(2\)](#) of the Code.

49. In the case of **Prem Singh Vs. State (NCT of Delhi)** (supra) the Hon'ble Supreme Court held that *it is also pertinent to notice that in the said case of Sharad Birdhichand Sarda, this Court also enunciated the principles for using the false explanation or false defence as an additional link to complete the chain of circumstances in the following terms: –“158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in Deonandan Mishra v. State of Bihar 7 to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case....159. It will be seen that*

this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved, (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and (3) the circumstance is in proximity to the time and situation...160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise.....Apart from the above, we may also usefully take note of the recent decision of this Court in the case of Sabitri Samantaray (supra). Therein, with reference to [Section 106](#) of the Evidence Act, a 3-Judge Bench of this Court noted that if the accused had a different intention, the facts are especially within his knowledge which he must prove; and if, in a case based on circumstantial evidence, the accused evades response to an incriminating question or offers a response which is not true, such a response, in itself, would become an additional link in the chain of events. The relevant part of the enunciation by this Court reads as under: -“19. Thus, although [Section 106](#) is in no way aimed at relieving the prosecution from its burden to establish the guilt of an accused, it applies to cases where chain of events has been successfully established by the prosecution, from which a reasonable inference is made out against the accused. Moreover, in a case based on circumstantial evidence, whenever an incriminating question is posed to the accused and he or she either evades response, or offers a response which is not true, then such a response in itself becomes an additional link in the chain of events.As regards

the relevancy of motive in a case based on circumstantial evidence, the weight of authorities is on principles that if motive is proved, that would supply another link in the chain of circumstantial evidence but, absence of motive cannot be a ground to reject the prosecution case, though such an absence of motive is a factor that weighs in favour of the accused. In Anwar Ali and Anr. v. State of Himachal Pradesh: (2020) 10 SCC 166, this Court has referred to and relied upon the principles enunciated in previous decisions and has laid down as under: -“24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in Suresh Chandra Bahri v. State of Bihar that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by this Court in Babu, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under:-“25. In State of U.P. v. Kishanpal, this Court examined the importance of motive in cases of circumstantial evidence and observed:’38. ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one.....This Court has also held that the absence of motive in a case depending on

circumstantial evidence is a factor that weighs in favour of the accused. (Vide Pannayar v. State of T.N. 27).

50. In the case of ***Ningappa Yallappa Hosamani and Ors vs State of Karnataka and Ors*** (Supra) the Hon'ble Supreme Court held that *as regards recovery of the dead body is concerned, the High Court noted as follows:As regards the second ground urged by the learned counsel for the appellants, there also what has been stated is that a rumour had been spread that four persons had committed the murder of Namadeva and his dead body had been buried near the canal and later he was called on 2.3.2005 by Lokapur police. The mahazars regarding the place of offence of murder conducted on 3.2.2005 and the place where the dead body of Namadev was recovered were conducted in the early hours of morning of 3.2.2005 and it is not unlikely that information immediately spread in the village and immediately Namadev's dead body had been placed near the place of canal. Therefore, this cannot be taken as indicating the knowledge the people about the burial of the dead body even before the dead body of Namadev was detected in furtherance of the voluntary information furnished by the accused Nos.1 and 2. For this reason, we do not accept the interpretation put forth by the learned counsel for the appellants with regard to the recovery of dead body of Namadev. The evidence of P.W.20, investigating officer shows that the accused Nos.1 and 2 were arrested on 3.2.2005 at Mahalingapura and in furtherance of the interrogation, they furnished information and police and panchas were led by the accused Nos.1 and 2 to a place near the canal. This claim of P.W.20 has been corroborated by the evidence of P.W.14-Basappa Ramappa Pujari, who says that he had accompanied the police and panchas to the place where the accused Nos.1 and 2 were taken and the accused Nos.1 and 2 showed a place as a place of burial*

of Namdev's body. Then, his deposition further shows that he and C.Ws 22, 24 and 25 were asked to dig the land and when they dug the land, they found a gunny bag. That gunny bag contained a dead body which was later identified by PWs 1 and 5 as the body of Nadadev. We have very carefully gone through the evidence of PWs 14 and 20 in this regard and find no material to disbelieve the version of PW-14 that the place was shown by A-1 and A-2 and that when the place was dug up, they found a gunny bag containing Namadev's dead body. This evidence conclusively shows that the accused Nos. 1 and 2 had buried the said gunny bag containing the dead body of Namadev and that it was detected in furtherance of the voluntary information furnished by them. In State of Maharashtra vs. Suresh (2000 (1) SCC 471) it was observed as follows: "Three possibilities are there when an accused points out the place where dead body or an incriminating material was concealed without setting that it was concealed by him. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

51. In the case of **Antar Singh V. State of Rajasthan** (supra) the Hon'ble

Supreme Court held that *the expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly [Section 25](#) and [26](#). It is not necessary in this case to consider if this Section qualifies, to any extent, [Section 24](#), also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that*

the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Palukuri Kotayya's case and in [Udai Bhan v. State of Uttar Pradesh](#).

52. In the case of ***Simon and ors V. State of Karnataka*** (supra) the Hon'ble Supreme court held that *whether the identification of an accused for the first time in court in absence of any test identification parade can be made the basis of the conviction depends upon the facts and circumstances of the case. No hard and fast rule can be laid down. We have been taken through the testimony of PW 63 (Achutananda). The main criticism that has been levelled by Mr. Gonsalves to the deposition of PW-63 who was working in the Special Task Force and was travelling in the second bus and who identified accused No. 18, 30 and 31 is that these accused even as per testimony of PW63 were pointed out to him at the place of occurrence by another witness PW 89 (Alageshan) who was working at the relevant time as a Forest Guard and had claimed that he knew the accused. It is further pointed out that PW 63 does not claim that he knew these accused earlier. Further submission of learned counsel is that at best PW 63 only had the opportunity of getting a fleeting glimpse of the accused from a distance and that too when the accused were running away and the said glimpse was also only of the side face. Similar criticism has been made of PW 64 who identified accused Nos. 30 and 31. This witness was travelling in the first bus and had received injuries. PW65 who was travelling in the second bus also identified accused No. 18 and 31. He was also a member of the Special Task Force. The learned counsel has on similar grounds assailed the testimony of all the witnesses who have identified the appellants. Appellant Simon has been identified by 16 witnesses, Ghana Prakash has been identified by 4*

witnesses, Madhiah has been identified by 9 witnesses and Bilavendra has been identified by one witness. We may, however, note that it is not the quantity which matters but the quality of witnesses that matter. Further, learned counsel for the appellants submits that PW 89 who at the relevant time was working as the Forest Guard has wrongly identified all the appellants except Simon. It is contended that this star witness of the prosecution who is alleged to have pointed out and shown the appellants to the other witnesses who identified them in court having himself wrongly identified all accused except Simon, the testimony of other witnesses deserves to be discarded on this ground itself and this is said to be fatal to the case of the prosecution. The conviction, it is contended, based on identification of such witnesses cannot be sustained.....The next contention urged is that not holding of test identification parade, identifying the accused is fatal to the case of the prosecution in the present case. The submission is that by very nature, the identification of the accused for the first time in court is a weak piece of evidence and cannot be made the basis of conviction. Reliance has been placed on State of Maharashtra through CBI v. Sukhdev Singh alias Sukha & Ors [(1992) 3 SCC 700] in support of the contention that in absence of test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time. But it has to be kept in mind that this principle will apply to case of total strangers. In this contention, it has to be kept in view that PW 97 knew the accused as stated hereinbefore. The question of identification arises when accused are not known. Since the appellants were known in the manner above stated, the holding of a test identification parade, on the facts of the case, would have been wholly unnecessary. Regarding the contention about the names of the appellants not being mentioned in the FIR, it

has been explained that the FIR was not recorded on the information of PW97. PW97 had already been shifted to the hospital before recording FIR and, therefore, non-mentioning of the names of the accused in the FIR is of no consequence. On facts of the case, the lapse of the time between the date of the incident and the date of identification by PW97 is also of no consequence. As already noticed, out of fifty accused, PW 97 deposed only about presence of four appellants who were earlier known to him.....Relying upon Budhsen & Anr. v. State of U.P. [(1970) 2 SCC 128], it was contended that evidence as to identification deserves to be subjected to a close and careful scrutiny by the court. The decision in Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra was relied for the proposition that when the accused were already shown to the witnesses, their identification in court by witnesses was meaningless and such identification lost all its value and could not be made the basis for rendering conviction. The legal position on the aspect of identification is well settled. Under Section 9 of the Indian Evidence Act, 1972, the identity of the accused persons is a relevant fact. We have no difficulty in accepting the contention that evidence of mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are stranger to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there

is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration {see Malkhansingh & Ors. vs. State of M.P. These well settled principle, however, have no applicability to facts of the instant case. This is a case where appellants were known to PW 97 and he has identified them in court and other witnesses, as we would presently notice, corroborated the testimony of PW97, though, in our view, conviction could be sustained on the sole testimony of PW 97.

53. In the case of **Dayal Singh and Ors V. State of Uttaranchal** (supra) the Hon'ble Supreme Court held that *Dr. C.N. Tewari, PW3, medical officer in the Civil Hospital, Haldwani, performed the post mortem upon the body of the deceased and did not find any ante-mortem or post-mortem injuries on the dead body. On internal examination, he did not find any injuries and could not ascertain the cause of death. Further, he preserved the viscera and gave the post-mortem report, Exhibit Ka-4. After noticing that there was no injury or abnormality found upon external and internal examination of the dead body, the doctor in his report recorded as under:"Viscera in sealed jars handed over to the accompanying Constables. Jar No.1 : Sample preservative saline water. Jar No.2 Pieces of stomach 44 Page 6 Jar No.3 Pieces of liver, spleen and kidney. Death occurred about one day back.Cause of death could not be ascertained. Hence, viscera preserved.....We have already discussed above that the presence of PW2, PW4 and PW5 at the place of occurrence was in the normal course of*

business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW3 and PW6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to the case of C. Muniappan v. State of Tamil Nadu.....We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and 44 Page 40 then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the

one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

54. In the case of ***Superintendent of Police, CBI and Ors. V. Tapan Kumar Singh*** (*supra*) the Hon'ble Supreme Court held that the crucial finding recorded by the High Court is that the facts stated in the G.D. Entry did not disclose the commission of a cognizable offence, and consequently, the police had no power or jurisdiction to investigate the allegations made therein. Thus, the investigation undertaken, and the search and seizures made were illegal and without jurisdiction and deserved to be quashed. It is the correctness of this finding which is assailed before us by the appellants. They contend that the information recorded in the G.D. Entry does disclose the commission of a cognizable offence. They submitted that even if their contention, that after recording the G.D. Entry only a preliminary enquiry was made, is not accepted, they are still entitled to sustain the legality of the investigation on the basis that the G.D. Entry may be treated as a First Information Report, since it disclosed the commission of a cognizable offence. The parties before us did not dispute the legal position that a G.D. Entry may be treated as a First Information Report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the appellants is upheld, the order of the High Court must be set aside because there was in law a First Information Report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. It is, therefore, not necessary for us to consider the authorities cited at the bar on the question of validity of the preliminary enquiry and the validity of the search and seizure. We have earlier in this judgment reproduced

the G.D. Entry dated 17-10-1990 in extensor. The facts stated therein are that the respondent was a corrupt official and was in the habit of accepting Illegal gratification; that he had demanded and accepted cash to the tune of rupees on lakh approximately; and that he would be carrying with him the said amount while going to Nagpur by Gitanjali Express on 17-10-1990..... Since we have directed the investigation to continue, the investigating agency should complete the investigation and thereafter take such action as may be justified in law. Nothing said in this judgment should be construed as expression of opinion on the merit of the case. It is for the investigating agency to collect all necessary evidence and take such steps as may be justified, having regard to the evidence collected by it. We should not be understood to have expressed any opinion on the truthfulness or otherwise of the allegations made in the report on the basis of which the investigation was undertaken. Observations, if any, have been made only for the purpose of deciding the question as to whether the investigating agency was justified in taking up the investigation pursuant to the G.D. Entry No. 681 recorded on the 17th October, 1990. Similarly, any observation made by the High Court while disposing of the Revision should not prejudice the case of the parties.

55. In the case of **Charansingh vs. State of Maharashtra and Ors** (supra) the Hon'ble Supreme Court held that even as held by this Court in the case of [Superintendent of Police, CBI v. Tapan Kumar Singh](#) (2003) 6 SCC 175, a GD entry recording the information by the informant disclosing the commission of a cognizable offence can be treated as FIR in a given case and the police has the power and jurisdiction to investigate the same. However, in an appropriate case, such as allegations of misconduct of corrupt practice by a public servant, before lodging the first information report and further conducting the

investigation, if the preliminary enquiry is conducted to ascertain whether a cognizable offence is disclosed or not, no fault can be found. Even at the stage of registering the FIR, what is required to be considered is whether the information given discloses the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage, it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. Despite the proposition of law laid down by this Court in catena of decisions that at the stage of lodging the first information report, the police officer need not be satisfied or convinced that a cognizable offence has been committed, considering the observations made by this Court in the case of P. Sirajuddin (supra) and considering the observations by this Court in the case of Lalita Kumari (supra) before lodging the FIR, an enquiry is held and/or conducted after following the procedure as per Maharashtra State Anti-corruption & Prohibition Intelligence Bureau Manual, it cannot be said that the same is illegal and/or the police officer, Anti-corruption Bureau has no jurisdiction and/or authority and/or power at all to conduct such an enquiry at pre-registration of FIR stage.

56. In the case of **Subed Ali and Ors v. State of Assam** (supra), the Hon'ble Supreme Court held that *common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of a case based on the cumulative assessment of the nature of*

evidence available against the participants. The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility by which a person is held to be answerable for the acts of others with whom he shared the common intention. The presence of the mental element or the intention to commit the act if cogently established is sufficient for conviction, without actual participation in the assault. It is therefore not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault. If the nature of evidence displays a prearranged plan and acting in concert pursuant to the plan, common intention can be inferred. A common intention to bring about a particular result may also develop on the spot as between a number of persons deducible from the facts and circumstances of a particular case. The coming together of the accused to the place of occurrence, some or all of whom may be armed, the manner of assault, the active or passive role played by the accused, are but only some of the materials for drawing inferences. [In Ramaswami Ayyangar vs. State of T.N.](#), in order to establish common intention it was observed as follows : "12.... The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of [Section 34](#) that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of

which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act'. The essence of [Section 34](#) is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them....[In Nandu Rastogi vs. State of Bihar](#), with regard to the inference for common intention this Court observed as follows : "17.... They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract [Section 34](#) IPC it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse....[In Surender Chauhan vs. State of Madhya Pradesh](#), (2000) 4 SCC 110, it was noticed that absence of a positive act of assault was not a necessary ingredient to establish common intention observing :....."11. Under [Section 34](#) a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of [Section 34](#) is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them....A similar view was taken in [Nand Kishore vs. State of Madhya Pradesh](#).

57. In the case of **Suresh & Anr V. State of U.P** (supra), the Hon'ble Supreme Court held that *as the section speaks of doing "a criminal act by several persons" we have to look at section 33 IPC which defines the "act". As per it, the word "act" denotes as well as series of acts as a single act. This means a criminal act can be a single act or it can be the conglomeration of a series of acts. How can a criminal act be done by several persons?. In this context, a reference to sections 35, 37 and 38 IPC in juxtaposition with section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with mens rea is liable for the act "in the same manner as if the act were done by him alone with that knowledge or intention". The section differs from section 34 only regarding one postulate. In the place of common intention of all such persons (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required mens rea...Section 37 deals with the commission of an offence "by means of several acts". The section renders anyone who intentionally cooperates in the commission of that offence "by doing any one of those acts" to be liable for that offence. Section 38 also shows another facet of one criminal act being done by several persons without connecting the common bond i.e. "in furtherance of the common intention of all". In such a case would be guilty of different offence or offences but not for the same offence. Among the above four provisions the common denominator is the participation of several persons (more than one person) in the commission of a criminal act. The special feature of section 34 is only that such participation by several*

persons should be "in furtherance of the common intention of all". Hence, under section 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed....Obviously section 34 is not meant to cover a situation which may fall within the fictitiously concocted section caricatured above. In that concocted provision the co-accused need not do anything because the act done by the principal accused would nail the co-accused also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act... Thus, to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person, (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

58. In the case of **Sahadevan and Anr vs. State of Tamil Nadu** (supra), the Hon'ble Supreme court held that –

“14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

15. Now, we may examine some judgments of this Court dealing with this

aspect.

15.1. *In Balwinder Singh v. State of Punjab* [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15.2. *In Pakkirisamy v. State of T.N.* [(1997) 8 SCC 158], the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

15.3. Again in *Kavita v. State of T.N.* [(1998) 6 SCC 108], the Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

15.4.. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of *State of Rajasthan v. Raja Ram* [(2003) 8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

15.5. In the case of *Aloke Nath Dutta v. State of W.B.* [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

“87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite

that for the said purpose the court has to satisfy itself in regard to:
(i) voluntariness of the confession; (ii) truthfulness of the confession;
(iii) corroboration.

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

15.6.. Accepting the admissibility of the extra-judicial confession, the Court in the case of [Sansar Chand v. State of Rajasthan](#) [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide [Thimma and Thimma Raju v. State of Mysore](#), [Mulk Raj v. State of U.P.](#), [Sivakumar v. State](#) (SCC paras 40 and 41 : AIR paras 41 & 42), [Shiva Karam Payaswami Tewari v. State of Maharashtra](#) and [Mohd. Azad v. State of W.B.](#)]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by [Section 24](#) of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of [Rameshbhai Chandubhai Rathod v. State of Gujarat](#) [(2009) 5 SCC 740], held as under :

"It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. [Sk. Yusuf v. State of W.B.](#) and [Pancho v. State of Haryana](#).]

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law."

59. We have considered the submissions advanced by the learned counsels for the parties and have also gone through the materials available on record.

60. In the present case, it transpires that the conviction is on the basis of circumstantial evidence, the last seen theory and extra-judicial confession by the accused persons Habibur Rahman and Azizul Hoque leading to discovery of the dead body of the deceased.

61. On the scrutiny of the evidence of the prosecution witnesses, it shows that the entire case of the prosecution implicating the accused persons namely Md. Abdul Hekim, Miya Hussain, Sahed Ali, Azizul Haque @ Aijul Haque and

Abdul Rahim and appellant Habibur Rahman as perpetrators of the crime is based on the last seen theory, circumstantial evidence and extra-judicial confession and the evidence of PW-2 substantiated by the PW-1, PW-3, PW-4, PW-5, PW-6 and PW-7, PW-8 and PW-9. The evidence on record has established that before the arrival of police, the accused persons, appellant Habibur Rahman and Azizul Hoque were caught by the villagers and had confessed to the murder of deceased which was recorded by the police. The dead body of deceased was recovered by the police in presence of Magistrate and villagers. All the PWs have substantiated this fact. The dead body was buried and it was recovered after digging the earth on being shown by the appellant and one Azizul Hoque which clearly indicates that after killing the deceased the dead body was buried and it was within the knowledge of accused persons, including the appellant Habibur Rahman and Azizul Hoque. It can thus be seen that chain of circumstance is complete.

62. To appreciate, we would refer to the deposition by the PWs.

63. PW 1, Md. Nurul Islam had deposed that he knows the complainant Rumena Khatoon who has filed the written ejahar with the Dhing Police Station on 01-01-2008 for the death of her husband. On that day at 6 a.m., Rumena Khatoon went to his house and informed him that the accused persons took her husband to Roumari village about the matter of earth digging discussion. She informed that her husband was called out by the accused and he did not return till morning. She informed him that she had already reported the matter to other villagers and she requested him to go to her house. Accordingly, he went there and on the way while he reached the market, he saw that some villagers caught hold of and cordoned accused persons Habibur Rahman and Azizul Hoque. When he saw this, he immediately informed Dhing Police Station over

telephone. Then, the O/C of Dhing Police Station came there and took over the above two persons. When police interrogated them before the public, they admitted that they had killed the deceased Azibur Rahman. The above two accused persons made statement before the Investigating Officer that they had concealed the dead body on the ground in the neighbouring shore situated at a distance of 1 1/2 kms. away on the northern side of the house of complainant Rumena Khatoon. After hearing this statement of the accused, the villagers along with the police and the above named two accused persons went to the site where the dead body was buried and on being shown by the accused the exact spot, the villagers cordoned the area along with the accused. The police officer told them that he would inform the Magistrate and they should await till arrival of the Magistrate. After a while the Magistrate arrived. The place was dug with the help of accused persons, appellant Habibur and Azizul Hoque. Then the dead body was dug out from the ground. Ext.1 is the seizure list and Ext.1(1) is his signature. Thereafter the police and the Magistrate took away the dead body as well as the accused persons. In his cross examination PW1 had stated that it is not a fact that the two accused persons detained there made any statement confessing their guilt.

64. PW 2, Musstt. Rumena Khatoon had deposed that the occurrence took place on 14-04-2008. On the day of occurrence at around 6 O'clock in the afternoon, her husband Azibur was taken away from their house by the accused persons informing her that they had a discussion regarding earth cutting towards Roumari. Accordingly, her husband went with the accused persons. She was waiting in her house but her husband did not return till morning. During night hours, some co-villagers came to her house and she informed about the fact to Ajjar Ali, one of her uncles, who has already expired. In the morning,

she informed the co-villagers, the VDP and the village headman Nurul Islam (PW-1). Then she went to the police station at around 7-7:30 a.m. The police detected the bicycle, sandals and muffler of her husband at the place of occurrence and she was also present there at that time. The police were waiting for the Magistrate and when the Magistrate came, the dead body of her husband was dug out from the spot. The dead body was taken by the police for post-mortem examination. Later, the dead-body was handed over to them and they cremated the dead body as per their rites. The place of digging the dead body was spotted by accused persons appellant Habibur and Azizul. Ext. 2 is the FIR and Ext.2(1) is her signature.

65. PW 3, Jahed Ali had deposed that occurrence took place some 3-4 years ago on the day of 1st Bohag. After the morning prayer at Masjid he was sitting in a tea stall and at that time some villagers along with VDP and the Gaonbura came there and informed him that one Azibur (Deceased) was called on by the accused last night and since then he has been missing. They also told him that some articles like a comforter, a pair of slippers and a bicycle was lying on the river bank. Then he along with others went there and found the same. There he saw that the accused persons Azizul and another Habibur altercating with villagers, when they were asked by the villagers to find out the deceased. Thereafter both of them were taken to the market and after interrogation by the villagers and VDP, they confessed before them that they (Azizul, Habibur, Fakaruddin and Sahed Ali) killed the deceased and buried the dead body in the Char. After some time the Officer-in-Charge of Dhing Police Station, Sushil Dutta arrived there and along with him, they proceeded to the place where the dead body was buried as led by the accused. Both the accused persons, Azizul and Habibur dug out the dead body in front of the villagers and took back the dead

body. Police made a seizure list of the articles found in the river bank vide Ext 1 and he put his sign vide Ext1(2) on it.

66. PW 4, Abul Kasem had deposed that incident took place on last 14-04-2008. On the day of incident in the morning he was standing in-front of his house. At that time he heard from Jahangir that Azibur was murdered and two men were caught by the public at Matkhula bazar. After getting the information, he went there and had seen Azizul and Habibur Rahman confined in the pharmacy of VDP Secretary Afjal Khan. Around 200 people were gathered there. While Azizul and Habibur were asked about the incident, they told that including them, accused Abdul Karim, Fakaruddin, Taibur Rahman, Sahed Ali and few others had murdered Azibur. While both the accused persons were confessing the offence, at that time Jahed Ali, Javed Ali, Hasmat Ali, Jaynal Abedin, Majibur Rahman, Sarkari Gaonbura Nurul Islam, Abul Kashem Faraji and many other were present there. Police came there on being informed and the accused persons were handed over to police. Police again asked the accused persons about the incident before the public, then also, the accused persons gave the same statement. Police along with the accused persons went to the place where Azibur was murdered and seized the muffler, sandal and bicycle which were lying at the place of occurrence. They noticed blood stains in the drain at the place of occurrence. Thereafter Azizul and Habibur led the police to the place where Azibur was buried, the place was sowed with jute seeds. After coming of the Magistrate, it was unearthed and the dead-body of Azibur was recovered. Police recorded his statement during investigation.

67. PW 5, Afzal Hussain Khan had deposed the he knows the complainant Rumena Khatoon and also knew the deceased Azibur Rahman. Deceased was the husband of the complainant. The incident took place on 14-04-2008. At the

time of incident, he was in his Pharmacy located at 2 No. Kandulimari and was VDP Secretary. On the day of incident while he was coming to open his pharmacy, then Rumena told him that on the previous day at about 8 p.m. Azizul Hoque and Habibur took her husband Azibur from their house. Her husband was taken out to bring his wage money on that night Azibur did not come back to the house. At that time many people gathered at the bazar. Thereafter their VDP and the villagers went to the house of Azizul and Habibur. On finding them at their house, they were brought to the bazar at his pharmacy and asked about Azibur. Then Azizul and Habibur confessed that they in associated with Kasem Ali and Fakaruddin had murdered Azibur and dug him. Therefore he informed the Police of Dhing P.S. about the incident. After coming of police, Azizul and Habibur were handed over to police and the police took both the accused persons to the place where Azibur was buried. Subsequently, it is told that both the accused persons took the police to the place where Azibur was buried. The accused persons took the police to the other side where jute seeds were sowed and they showed the place where dead body of Azibur was buried. The Officer-in -Charge then told that the dead-body would be unearthed after coming of the Magistrate. When the Magistrate came there the dead body of Azibur was unearthed from the place and police took the dead body.

68. PW 6, Abul Kasem Faraji had deposed that the incident took place in the year 2007. On the day of incident in the morning time he was in shop at Matkhula. At that time Rumena Khatoon came to the market and sobbingly told the people that on the previous night Azizul and Habibur called out her husband from her house and thereafter her husband did not come back. Thereafter they along with the VDP Secretary, Afjal Hussain Khanm, Abdul Kasem Master and

many people from the market went to Roumari village by embankment route. While they were proceeding by the embankment, they noticed on the side of the embankment, a bicycle, sandal and muffler lying and also noticed blood stain. At that time Azizul and Habibur came there. Thereafter the VDP Secretary and other people brought Azizul and Habibur to the Pharmacy of VDP Secretary, Afzal Hussian Khan. While people asked Azizul and Habibur, they confessed that after they had murdered Azibur Rahman they buried him at another place. The VDP Secretary informed the police and then police came there. When police asked Azizul and Habibur, they confessed the guilt and they led the police to the place where they have buried the dead-body. PW 6 along with many other people also went to the place. The place was ploughed for sowing jute seeds and is a shore area. Police called Magistrate and after the Magistrate reached at the place, the police unearthed the spot and brought out the dead body of Azibur. Police recorded his statement.

69. PW 7, Ikbal Hussain Kabir had deposed that the incident was of 2008. On the day of incident in the morning at about 6 a.m. while he was coming from Masjid after offering Namaz, Rumena Khatoon sobbingly told him that on the previous night Habibur Rahman and Azizul called our her husband but till morning he has not returned home. At that time other people were also present at Matkhula bazar where Masjid is located. After listening to Rumena, when they asked her where her husband was called out, then she told them that her husband was taken towards the embankment. People went towards the embankment and noticed one blood stained shirt, a pair of sandal and a bicycle. Thereafter they went to the house of Habibur and Azizul and on finding them, they brought both of them to bazar at the medicine shop of VDP Secretary Faraji. When Habibur and Azizul were asked about Azibur, they confessed

that they have buried Azibur after committing his murder and Fakaruddin, Abdul Karim and one another were also with them. Thereafter, they informed Dhing Police about the incident over phone and police came there. Habibur and Azizul also confessed about the incident before the police and told that they would show the spot where the dead body was buried. Police called the Magistrate and after Magistrate came there, the dead body of Azibur was dug out from one side of shore. During investigation, police recorded his statement.

70. PW 8, Dr. M R Matabbar had deposed that on 15-04-2008 he was on duty as SMO at the B P Civil Hospital, Nagaon and on that day he conducted post-mortem examination on the dead body of Azibur Rahman, male aged about 35 years No. 1 Kandolimari, on 14-04-2008 with the following findings:-

1. Jugular vessels of the right side of the neck were bisected with incised wounds of size 1"×1/2"×1/2" on the right side of the neck. 2. 3 other incised cut marks with deep intracranial perforation are found respectively of size 1"×1/2"×1/2", 1 1/2"×1/2"×1/2, 1"×1/2"×1/2. Brain matters were coming out through the incised wounds. Membranes of the brain were pierced and brain matters were coming out through incised wounds. The injuries described were ante-mortem in nature.

He had opined that the death is due to shock and haemorrhage as a result of injury sustained. All the injuries are sufficient to cause the death of a person. Ext. 3 is the post-mortem examination report and Ext 3(1) is his signature.

71. PW 9, Anil Bora, the Investigating Officer had deposed that on 14.04.2008, he was the SI of Police at Dhing Police Station. At around 7:55 am,

VDP Secretary of Village No. 2 Kandhulimari informed the P.S. over phone that a person was killed and the dead body was kept buried and that they detained two persons. He deposed that the then O/C S.K. Dutta and he along with the staff started off to No. 2 Kandhulimari and he made Dhing P.S. GD Entry 219 dated 14.04.2008 in that regard. Ext. 4 is the GD Entry Book and Ext.4(1) is the said GD Entry No. 219 dated 14.04.2008. When they arrived at Kandhulimari, Matikhula Bazar, they saw that many people had gathered there and that two persons were detained. The VDP Secretary and the Village Headman handed over those two persons to the police. He deposed that the O/C entrusted him with the investigation of the matter, he interrogated the accused persons and they said that they had killed a person named Azibur Rahman and buried his dead body in the field and that they could show the place. The names of the accused persons were Habibur and Azizul. When they were taking along the accused duo to the field, they saw an old hero cycle, a pair of leather sandal and a violet colour muffler lying near the embankment. Then Rumena Khatun, the wife of the deceased identified all these things to be of her husband and he seized those items in presence of the witnesses. Ext. 1 is the seizure list and Ext. 1(3) is his signature. M. Ext. 1 is a pair of sandal and Mat. Ext. 2 is the muffler. Thereafter, the accused persons showed them the place where the dead body was buried. He further deposed that Ex.5 is the statement of Azizul Hoque made before him. Ext. 5(1) is the statement of Azizul Hoque in such terms that he went with the police and showed them the place where the dead body was buried. Ext. 6 is the statement of Habibur Rahman made before him. Ext. 6(1) is the statement of Habibur Rahman in such terms that he led the police and showed the place where the dead body was buried.

72. He deposed that thereafter he informed the Magistrate. After the arrival

of Ranveer Bora, the Magistrate and Circle Officer, Dhing Circle, the dead body was exhumed as shown by the accused persons and later on inquest was held on the body of the deceased. Ext. 7 is the inquest report. Ext. 7(1) is the signature of Ranveer Bora, the Circle Officer which he was familiar with. He examined the witnesses. Later on he sent the dead body for post-mortem examination and he prepared a sketch map of the place where the dead body was recovered. Ext. 8 is the sketch map and Ext. 8(1) is his signature. He stated that he prepared a sketch map of the place where cycle, sandals, etc were recovered. Ex. 9 is the sketch map and Ext. 9(1) is his signature.

73. He stated that he brought both the two accused persons to the police station. Rumena Khatun lodged an ejahar that day itself. On the basis of the ejahar, Dhing P.S. case no. 61/08 under sections 302/201/34 IPC was registered and the O/C entrusted him with the investigation. Ext. 2 is the FIR and Ext. 2(2) is the signature of the O/C Sushil Kr. Dutta which he was familiar with. Taking the charge of investigation, he questioned the complainant at the police station. He examined other witnesses also. He went searching for the other accused persons involved in the case but he could not find them out. He arrested the accused Habibur Rahman @ Habi and Azizul Haque and forwarded them to the court. Thereafter, as he was transferred he handed over the diary to the O/C. He also deposed that the Sweeper exhumed the dead body at about 1:30. pm. The ejahar was lodged at about 3:00 pm that day. On the basis of the GD Entry, he visited the place of occurrence, he did everything, i.e., going to Matikhula Bazaar, taking the accused persons into custody, preparing the sketch map at the embankment, seizing the items, exhuming the dead body, holding inquest on the dead body and sending the dead body for post mortem examination on the basis of the GD Entry. He did not sent accused persons

Habibur and Azizul to court for getting their confessional statement recorded in connection with their confession and their assertion that they would be able to produce the dead body that day. He did not record statements of independent witnesses at that time when the accused persons said that they would show the place where the dead body was buried. He states that he had sent the dead body to the Court for post-mortem examination before he returned to the police station. He did not see the bicycle in the court that day which was seized vide Ext. 1. He did not seize the lamp in the gleam of which the wife of the deceased recognized the accused persons. He further states that PW-5, Afzal Hussain Khan did not state to him that Azizul's dead body was recovered from the jute field at the other side of the dead channel of the river. PW-6, Abul Kasem Faraji did not state to him that in the market, Rumena Khatun cried and said that her husband had not returned home. PW-6 did not state to him that Kasem Master, he and many others came to village Roumari and that Azizul and Habibur came near the embankment. PW-7, Ikbal Hussain Kabir did not state to him that when he was coming out from the Masjid, Rumena cried and said before the public that in the previous night Habibur and Azizul had called away her husband. PW-7 did not state to him that after hearing Rumena, they went to the embankment and found shirt, a pair of sandal and a bicycle lying there and that thereafter they went to the house of Habibur and Azizul and having found them there, they brought them to the market. He further states that Rumena Khatun was present there at the time of the recovery of the dead body. At 2:50 p.m. they took the accused persons to the police station. Thereafter, the accused persons were not taken to the place of occurrence. The time for preparing Ext. 1 is not mentioned in it, but in case diary it is mentioned as 9:20 a.m. He did not maintain any other memorandum except the case diary for investigation. He

wrote the Ext.6 (1) after the recovery of the dead body, thought the case no. is mentioned in Ext. 1 but the case was not registered till that time.

74. On careful scrutiny of the evidence it transpires that prior to lodging of the FIR GD entry was made by the O.C. Dhing Police Station on 14.04.2008 at 7:55 AM. On the basis of information over telephone made by the VDP Secretary No. 2 village that a person was murdered and his dead body was kept buried and in this connection they had apprehended two boys. On the basis of the said GD entry police proceeded to Kandhulimari and started investigation of the case. During the course of investigation PW-9, stated that he interrogated the apprehended accused persons and they have stated that they killed Azibur Rahman and buried his dead body and they could show the place. They found one old hero cycle, a pair of leather sandal and a violet colour muffler lying near the embankment. The wife of the deceased identified all these things to be of her husband and in presence of the witnesses, the materials were seized. Thereafter, the accused persons showed the place where the dead body was buried. The disclosure statement of the accused persons namely Habibur Rahman and Azizul Hoque were recorded thoroughly. The accused persons made the statement that they led the police and showed the place where the dead body was buried. Thereafter the Investigating Officer informed the Magistrate and after arrival of the Magistrate dead body was exhumed as shown by the accused persons and inquest was made on the dead body. The IO prepared the sketch map and examined the witnesses. Thereafter the police registered the FIR lodged by Rumena Khatoon and registered the case under section 302/201/34 IPC. Police examined other witnesses and went searching for the other accused persons involved in the case but could not find them out. He arrested the accused persons Habibur and Azizul and forwarded them to the

Court. In cross examination, he reiterated that on the basis of the GD Entry he visited the place of occurrence i.e., going to Matikhula Bazar, taking the accused persons into custody, preparing the sketch map at the embankment, seizing the items, exhuming the dead body, holding the inquest and sending the dead body for Post Mortem examination.

75. PW 1, had deposed that the complainant Rumena Khatoon who has filed the written ejahar with the Dhing Police Station on 01-01-2008 for the death of her husband. On that day at 6 a.m., Rumena Khatoon went to his house and informed him that the accused persons took her husband to Roumari village about the matter of earth digging discussion. She informed that her husband was called out by the accused and he did not return till morning. She informed him that she had already reported the matter to other villagers and she requested him to go to her house. Accordingly, he went there and on the way while he reached the market, he saw that some villagers caught hold of and cordoned accused persons Habibur Rahman and Azizul Hoque. When he saw this, he immediately informed Dhing Police Station over telephone. Then, the O/C of Dhing Police Station came there and took over the above two persons. When police interrogated them before the public, they admitted that they had killed the deceased Azibur Rahman. The above two accused persons made statement before the Investigating Officer that they had concealed the dead body on the ground in the neighbouring shore situated at a distance of 1 1/2 kms. away on the northern side of the house of complainant Rumena Khatoon. After hearing this statement of the accused, the villagers along with the police and the above named two accused persons went to the site where the dead body was buried and on being shown by the accused the exact spot, the villagers cordoned the area along with the accused. The police officer told them

that he would inform the Magistrate and they should await till arrival of the Magistrate. After a while the Magistrate arrived. The place was dug with the help of accused persons, appellant Habibur and Azizul Hoque. Then the dead body was dug out from the ground. Ext.1 is the seizure list and Ext.1(1) is his signature. Thereafter the police and the Magistrate took away the dead body as well as the accused persons.

76. PW-2 who is the wife of the deceased deposed that she knew all the accused persons and they are from her village. The occurrence took place on 14.04.2008. On the day of occurrence at around 6 O'clock in the afternoon, her husband Azibur was taken away from their house by the accused persons informing her that they had a discussion regarding earth cutting towards Roumari. Accordingly, her husband went with the accused persons. She waited in their house but her husband did not return till morning. During night hours, some co-villagers came to her house and she informed them that her husband had not returned. She informed about the fact to Ajgar Ali. Following morning, she informed the co-villagers, the VDP and the village head man Nurul Islam PW-1. Thereafter, she went to the police station at around 7-7:30 am.

77. PW 3, had deposed that occurrence took place some 3-4 years ago on the day of 1st Bohag. After the morning prayer at Masjid he was sitting in a tea stall and at that time some villagers along with VDP and the Gaonbura came there and informed him that one Azibur (Deceased) was called on by the accused last night and since then he has been missing. They also told him that some articles like a comforter, a pair of slippers and a bicycle was lying on the river bank. Then he along with others went there and found the same. There he saw that the accused persons Azizul and another Habibur altercating with villagers, when they were asked by the villagers to find out the deceased. Thereafter both of

them were taken to the market and after interrogation by the villagers and VDP, they confessed before them that they (Azizul, Habibur, Fakaruddin and Sahed Ali) killed the deceased and buried the dead body in the Char.

78. PW4 had deposed that the incident took place on 14.04.2008 on the day of occurrence, he heard from Jahangir that Ajibur had been killed and two persons were detained by the public at Matkhula Bazar. On getting the information, he went and saw that Azizul and Habibur were kept detained in the pharmacy of VDP Secretary Afzal Khan, and saw around 200 people gathered there. On being asked about the incident Azizul and Habibur said that both of them along with Abdul Karim, Fakaruddin, Taibur Rahman, Sahed Ali and some other had killed Ajibur. Both the accused confessed their guilt. PW- 4 had also deposed that Azizul and Habibur led the police to the place where Ajibur was kept buried.

79. PW5 is the VDP Secretary, on the basis of whose information, Police had made GD entry. PW-5 also deposed that Rumena Khaton PW-2 told him at about 8:00 PM that on the previous night Azizul Hoque and Habibur called his husband away from home, PW-5 has also deposed that Azizul and Habibur confessed that they both along with Sahed Ali and Fakaruddin had killed Azibur and buried his body. Accordingly, he informed the police about the incident over phone. PW-5 had also reiterated that the police took the two accused and went to the place where Azibur was buried. The accused persons led the police to the place where jute seeds were sown on the other side of the dead channel of the river and showed the place where the body of Azibur was buried.

80. PW6 and 7 are the witnesses who had deposed that Azizul Hoque and Habibur Rahman admitted that they had killed Azibur and buried the body. They had deposed before the Court that Hajibur and Azizul had admitted that they had killed Ajibur and buried his body and that Fakaruddin, Abdul Karim and

another person were with them. Habibur Rahman and Azizul Hoque admitted their guilt and stated that they would show the place where the dead body was buried.

81. It is clear that the accused persons Habibur Rahman and Azizul Hoque disclosed before the police and the witnesses mentioned above that for some days Habibur, Azibur, Fakaruddin, Sahed Ali, Abdul Barek etc including the accused Azizul were doing earth cutting work at village Roumari. Fakaruddin, Abdul Rahim, Sahed Ali, Abdul Hekim had old dispute with Azibur and out of that grudge, on 13.04.2008 the said persons asked Habibur Rahman and Azizul Hoque that they would kill Azibur that very night and that Habibur Rahman and Azizul Hoque had to call out Azibur from his residence. The other accused persons made a threat that they would kill them too if they didn't do so. The other accused persons told that after calling Azibur, they had to take him to the embankment of village Roumari, and that they would be in hiding and as soon as they reach near the embankment of village Roumari, the other accused persons would attack and kill Azibur. After Azibur had died, they took his dead body to the land of Fakaruddin's brother and buried it there. When Azibur didn't come back to his house till morning, people searched for him and people recovered his bicycle and sandal near the embankment. When Habibur Rahman and Azizul Hoque were coming towards the market, people apprehended and questioned them and they confessed before the public that they killed Azibur and kept his body buried. Later they led the police and showed the place where the dead body was kept buried. The people of the village dug out the dead body. The bicycle, sandal and muffler belongs to deceased lying at the place of occurrence were recovered.

82. In the case of **Mustkeem alias Sirajudeen Vs. State of Rajasthan** reported in

(2011) 11 SCC 724, the Hon'ble Supreme Court held that *it is too well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by this Court... In a most celebrated case of this Court reported in 1984 (4) SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated...Whenever the case is based on circumstantial evidence following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under:-*(i) *The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established, (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (iii) The circumstances should be of a conclusive nature and tendency, (iv) They should exclude every possible hypothesis except the one to be proved, and (v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused"..... the doctrine of circumstantial evidence was once again discussed and summarized in 2008 (3) SCC 210, Sattatiya @Satish Rajanna Kartalla Vs. State of Maharashtra in the following terms: "10. ..It is settled law that an offence can be proved not only by direct evidence but also*

by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstance from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances".

83. In the case of **R. Shaji vs. State of Kerala** reported in **(2013) 14 SCC 266** the Hon'ble Supreme Court has held that *it is a settled legal proposition that the conviction of a person accused of committing an offence, is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances, such conviction may also be based solely on circumstantial evidence. For this to happen, the prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused. However, a false defence may be brought to notice, only to lend assurance to the Court as regards the various links in the chain of circumstantial evidence, which are in themselves complete. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be of a conclusive nature, and must exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability the said offence must have been committed by the accused.*

84. In the case of **Bodhraj alias Bodha and Ors v State of Jammu and Kashmir**

reported in **(2002) 8 SCC 45** the Hon'ble Supreme Court has held that *it has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence. the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other persons.. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.* [In Bhagat Ram v. State of Punjab](#), AIR (1954) SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt..... There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952. In **Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh**, AIR (1952) SC 343, wherein it was observed thus: "It is well to remember that in cases where the evidence is of a circumstantial nature....the circumstances from which the conclusion of guilt is to be drawn the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words. there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the

accused.".....A reference may be made to alter decision in [Sharad Birdhichand Sarda v. State of Maharashtra](#), AIR (1984) SC 1622. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established, (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused. that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude very possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

85. In the case of **Nizam & Anr v. State of Rajasthan** reported in **(2016) 1 SCC 550**, the Hon'ble Supreme Court held that *undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede*

and follow the point of being so last seen.

86. In the case of **State of Rajasthan V. Kashi Ram** reported in **(2016) 12 SCC 254** the Hon'ble Supreme Court has held that *it is not necessary to multiply with authorities. The principle is well settled. The provisions of [Section 106](#) of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by [Section 106](#) of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. [Section 106](#) does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Re. Naina Mohd.**

87. In the case of **Shankar V. State of Maharashtra** reported in **(2023) SCC Online SC 268** the Hon'ble Supreme Court after consideration of the earlier cases has held that *the five golden principles would constitute the Panchsheel of the proof of a case based on circumstantial evidence and conviction could be*

sustained on the basis of last seen, motive and recovery of incriminating articles in pursuance of the information given by the accused if those five golden principles of the proof of a case based on circumstantial evidence are satisfied.

88. In the case of **Ramanand alias Nandlal Bharti V. State of Uttar Pradesh**, reported in **(2022) SCC Online 1389** corresponding to **AIR Online 2022 SC 5273**, the Hon'ble Supreme Court has held that *an extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.*

89. We may profitably refer to the recent judgment of the Hon'ble Supreme

Court in the case of **Ram Gopal V. State of Madhya Pradesh** reported in (2023) **5 SCC 534** which held that *it cannot be gainsaid that when the entire case of the prosecution hinges on the circumstantial evidence, the entire chain of circumstances has to be completely proved, which unerringly would lead to the guilt of the accused and none else.....It may be noted that once the theory of "last seen together" was established by the prosecution, the accused was expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution, however in view of [Section 106](#) of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon him. Of course, [Section 106](#) is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within his special knowledge, in view of [Section 106](#) of the Evidence Act, such failure on the part of the accused may be used against the accused as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non-furnishing of the explanation by the accused would be a very crucial fact, when the theory of "last seen together" as propounded by the prosecution was proved against him..... In view of the afore-stated legal position, it is discernible that though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close*

proximity of time, the accused does owe an explanation under [Section 106](#) of the Evidence Act with regard to the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon etc. forming a chain of circumstances is established, the conviction could be based on such evidence.

In the case in hand, the entire chain of circumstances has been proved against the appellants which unerringly led to guilt of the appellants and none else.

90. Regarding the submission that there are lapses in the prosecution case as to non-seizing of lamp used by PW2 and not sending the material discovered to FSL, we find that there is lapse on the part of investigating authority. Regarding TIP, we find that the accused persons are the resident of same village and are close relatives of the deceased. PW-2 clearly identified the accused persons Habibur Rahman and Azizul Hoque while they took her husband away, so there is no requirement to send the accused persons for test identification parade. Since the accused persons were known to PW1, the holding of a test identification parade, on the facts of the case, would have been wholly unnecessary. The accused persons were involved in taking away the deceased on the previous day of the lodging of the FIR, although motive is not a prime factor to be taking into account in a case of circumstantial evidence but if the disclosure statement of accused persons Habibur Rahman and Azizul Hoque is read, the motive of killing is clearly established as there was a dispute between the deceased and accused/appellants, Azizul Hoque and Sahed Ali.

91. We find that that there is no explanation on behalf of the accused persons under section 313 Cr.PC statements which has given additional link to the

circumstantial evidence. It would be correct that although inculpatory part of the disclosure statement made by Habibur Rahman and Azizul Hoque would not be admissible but exculpatory part made in the disclosure statement would be admissible in evidence. We find that the accused persons had common intention to kill the deceased because of the dispute.

92. From the analysis of the evidence on record in its entirety and the law enunciated by the Hon'ble Supreme Court, we are of the view that the prosecution has been able to establish the guilt of the appellant beyond reasonable doubt.

93. From a careful examination and scrutiny of the testimony of PW-1, 2, 3, 4, 5, 6, 7, 8, and 9 and in the light of law laid down as referred to above, we are of the view that the evidences of these witnesses which resulted in the death of the deceased are credible, reliable and trustworthy and conviction of the appellant by the Court can be based on the testimony of PW-2 which is corroborated by other evidences which warrants no interference. We have, therefore, no incertitude in holding that the evidence led by the prosecution establishes the charges brought against the appellants Sahed Ali and Azizul Hoque @ Aijul Hoque beyond reasonable doubt. Therefore, the learned Trial court had rightly convicted them.

94. Consequently, conviction and sentence of the appellants Sahed Ali and Azizul Hoque @ Aijul Hoque vide the judgement and order dated 13.05.2019 passed by the Sessions Judge, Nagaon is upheld.

95. Appeal stands dismissed accordingly.

96. We appreciate the able assistance rendered by the learned counsel for the parties.

97. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant