

GAHC010077692020



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

Case No. : CRL.A(J)/28/2020

BALIA MURA
S/O. LT. LAKHANIA MURA, VILL. NO.1 KATHKATIA, P.S. BOKAJAN, DIST.
KARBI ANGLONG, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR A AHMED, AMICUS CURIAE

Advocate for the Respondent : MS S JAHAN(ADDL.PP, ASSAM)

BEFORE
HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR
HON'BLE MR. JUSTICE KARDAK ETE

Date of Hearing	: 25.05.2023
Date of Judgment	: 02.06.2023

JUDGMENT & ORDER (CAV)

(*Kardak Ete, J*)

Heard Mr. A. Ahmed, learned *Amicus Curiae* representing the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor appearing for the respondent State.

2. This criminal appeal has been preferred by the convict accused of murder under Section 302 IPC, 1860 against the judgment and order dated 27.06.2019 passed by the Sessions Judge, Karbi Anglong in Sessions Case No. 10 of 1999, wherein the appellant has been convicted and sentenced to undergo Rigorous Imprisonment for life with a fine of ₹2000/- (Rupees Two Thousand) and in default, to undergo Simple Imprisonment for 6 (six) months.

3. The case of the prosecution in brief is that on 14.07.1997, one Shri Nagen Saikia lodged an *Ejahaar* before the Borpathar Police Outpost under Bokajan Police Station stating that on 13.07.1997 at about 7:00 PM the accused, Shri Balia Mura hacked his nephew, Manik Saikia to death at his paddy field in No. 1 KathKatiya Village field over the issue of blocking an irrigation channel to the paddy field. The accused after committing the offence surrendered at Borpathar Police Outpost. On receipt of the *Ejahaar*, the I/C, Borpathar Police Outpost made G.D. Entry *vide* No. 214 dated 14.07.1997 and forwarded the same to the Officer-in-Charge, Bokajan Police Station. On receipt of this *Ejahaar*, the Officer-in-Charge, Bokajan Police Station registered FIR being PS Case No. 125 of 1997 under Section 302 of IPC. On completion of the investigation, the Investigating Officer submitted the Charge-Sheet against the accused Shri Balia Mura under Section 302 IPC *vide* No. 70 dated 21.08.1997.

4. The concerned Magistrate has committed the matter to the Court of Sessions (to the then Deputy Commissioner, Karbi Anglong) for trial *vide* dated 26.02.1999. Accordingly, following the procedure the Sessions Court framed the charge against the appellant Shri Balia Mura on 26.05.2000.

5. During investigation confessional statement of accused appellant was recorded under section 164 of CrPC, 1973.

6. In the course of the trial and to bring home the charge against the accused, the prosecution examined as many as 10 (ten) witnesses including the Investigating Officer and the Doctor. On completion of prosecution evidence, statement of the accused was recorded under Section 313 of the CrPC, 1973. Defence had declined to adduce any evidence and the plea of the defence was of only denial.

7. Upon consideration of the evidences and the materials available on record, the Sessions Court has found the appellant Shri Balia Mura guilty under Section 302 of the IPC and convicted him and sentenced to undergo Rigorous Imprisonment for life with a fine of ₹2000/- (Rupees Two Thousand) and in default Simple Imprisonment for 6 (six) months.

8. Mr. A. Ahmed, learned *Amicus Curiae* submits that the learned Trial Court rightly discarded the statement of the accused allegedly recorded under Section 164, CrPC as the said statement cannot be relied on due to the reasons that the statement of the accused was not recorded by following the provision of section 164, CrPC. Therefore, the said statement can neither be basis of conviction nor any facts stated therein can be used to form chain of

circumstances. The said statement was recorded on 16.07.1997 but the formalities, which is required to be followed as per Section 164 (2), CrPC was done on 17.07.1997 which was apparent from the dates mentioned therein. The learned *Amicus Curiae*, while referring to the provision of Section 164 (2), CrPC submits that the said provision is very clear about the requirement to be followed before recording the confessional statement and non-compliance of the same goes to the root of the matter of jurisdiction in recording such statement by the Magistrate. He submits that there is no order in the record of the case to show that the accused was produced for recording his confessional statement on 17.07.1997, which is clearly admitted by Jyoti Prasad Bordoloi/PW-10, who exhibited the alleged statement of the accused.

9. The learned counsel also submits that the accused was not provided with legal assistance before recording his statement under Section 164, CrPC and as such, same is violative of right granted under Article 21 of the Constitution of India.

10. The learned *Amicus Curiae*, while referring to paragraph 22 of the judgment and order dated 27.06.2019, submits that the learned Trial Court has rightly discarded the evidence of wife of deceased/PW-2 as eye-witness by observing that, in her statement recorded under Section 161, CrPC during investigation she did not state that she had seen the accused running over from the place of occurrence. Deposition of PW-2 clearly shows her unnatural conduct and there are certain unexplained circumstances, which makes the witness unreliable.

11. The learned *Amicus Curiae* further submits that the other

circumstance relied on by the prosecution is that weapon was recovered but it does not connect the appellant/accused with the crime as the same was not proved to be weapon of crime and there is no other material to connect the appellant with the alleged commission of crime or to complete the chain of circumstances in as much as the learned Sessions Judge has based the conviction on circumstantial evidence. Therefore, the conviction and sentence of the appellant is liable to be set aside and the appellant deserves acquittal.

In support of the aforesaid submission, the learned *Amicus Curiae* placed reliance on the following judgments:

- (i) 2007 (3) GLT 697 (**State of Assam -versus Anupam Das**)
- (ii) 1982 Cr.L.J. 216 (**State of Assam -versus Rabindra Nath Guha**)
- (iii) Criminal Appeal No. 1179/2012 (**Narendrasinh Keshubhai Zala -versus State of Gujarat**).

12. Ms. S. Jahan, learned Additional Public Prosecutor, while taking us throughout the record, submits that the appellant on 13.07.1997 at around 11.30 PM appeared in the Police Station carrying a machete and stated that he inflicted cut injury on the deceased with the said machete for which PW-6 and 7 had deposed to that effect. The Investigating Officer, examined as PW-9, had entered the information in the General Diary which has been exhibited as Exhibit-5. At 12.20 AM on the next day, *i.e.* on 14.07.1997 the Investigating Officer along with PW-6 and PW-1, took the appellant, as led by appellant, to the place where the body was lying. PW 1, the uncle of the deceased deposed

that he was at home and the Police came and informed him that the appellant had killed the deceased, as told by the appellant and he accompanied the Police to the place where the body was lying. In the meantime, the wife of the deceased/PW-2, upon hearing her husband shouting, rushed following the sound, and found her husband lying on the ground senseless and further saw the appellant running away with the machete. She submits that no contradiction has been proven so far on her seeing the appellant running away.

13. Learned Additional Public Prosecutor further submits that since the body was recovered late at night so it was kept under the vigil of Police personnel. On the next day inquest was done and the body was sent for Post Mortem examination. The Police recovered the machete and a torch from the place of occurrence. The Doctor, who conducted the autopsy on the body of the deceased found deep cut injury on left leg, deep cut injury on left thigh, as well as deep cut injury on the temporal region and opined that the death was due to the third injury. The autopsy report is substantiated by the evidence of PW-2 and 3, who submitted in their depositions that they had seen injuries on legs and head of the deceased.

14. The learned Additional Public Prosecutor further submits that motive is writ large in the evidence on record that there was initially a quarrel over the issue of water being drained into the field, which the deceased was not allowing, and following the quarrel, the appellant hit the victim. This fact has been entered both in the *Ejahaar* as well as in the G.D. Entry.

15. Ms. S. Jahan, learned Additional Public Prosecutor further submits that on 17.07.1997 the appellant was produced before the EAC-cum-Magistrate 1st

Class for recording his confessional statement. PW-10, who was working as Confidential Assistant deposed to that effect. The confessional statement was exhibited as Exhibit-8. It was recorded in the year 1997 when the judiciary was not separated in the district of Karbi Anglong. While placing reliance on the judgment of the Hon'ble Apex Court in the case of **State of Nagaland Versus Ratan Singh**, reported in AIR 1967 SC 212, submits that the spirit of CrPC was to be only followed. Therefore, the minor discrepancies in following the provision of Section 164, CrPC would not be fatal in the present case.

16. She further submits that taking cue from the Hon'ble Apex Court's decision, the flaw in the confessional statement, *i.e.* non-mentioning of the exact time of reflection would not render the confession bad. It is otherwise clearly mentioned in the confessional statement that reflection time was given and the appellant was placed in the custody of the peon. Another flaw alleged in the confessional statement to the effect is that at the foot of the statement the date written was 16/07 whereas in the body of the confessional statement itself it was written that the appellant was produced on 17.07.1997 at 12.45 PM. Further, PW-10 has also stated that the statement was recorded on 17.07.1997. Therefore, the date 16/07 can be nothing more than a clerical mistake and the same, in the facts and circumstances of the case may be read down by this Hon'ble Court.

17. The learned Additional Public Prosecutor further submits that all other requirements for a confessional statement is complied with while recording the same. In the confessional statement, the appellant stated that they first quarrelled over the issue of irrigation channel and then when the deceased attacked him with his machete he hit him with his own machete and went to the

Police Station and surrendered. It is crystal clear that the statement had both exculpatory and inculpatory statement. Exculpatory in the sense that he did in self-defense and inculpatory in the sense that he hit on his legs. If the exculpatory and inculpatory part can be separated from each other, then the conviction can be granted on the inculpatory part. However, in the present case whether the exculpatory part is not so improbable since the machete was recovered from the place of occurrence and the inculpatory part did not lead to the conclusion that the appellant had killed the deceased. Therefore, she submits that confession in the facts and circumstances of the instant case may be taken only as a corroborative evidence to the other evidences on record and the conviction may be upheld.

18. We have considered the submissions advanced by the learned Counsels for the parties and have also carefully gone through the materials available on record. Now we proceed to analyse and scrutinise the testimony/evidences.

19. PW-1, Shri Nagen Saikia has deposed in his evidence that he knows the accused Balia Mura and the deceased Manik Saikia. The accused belongs to the same village and the deceased is his nephew. On 13.07.1997 the incident took place at the paddy field of Village Kathkatia. On that day while he was sleeping at about 10/11 PM, the I/C of Borpathar Police Out-Post along with his staffs came to his house and informed him that the accused Balia Mura appeared before Borpathar Police Out-Post and stated that he has killed Manik Saikia by means of a dao and that he was taken by the I/C to Thana for identification of the dead body. Accordingly, coming there he found the accused, Balia Mura in Police Lock-up. He told the I/C that the deceased is his nephew.

Then he talked with the accused person who told him that he had killed Manik Saikia with a dao. Police seized one dao from the accused. Exhibit-1 is the seizure list and Exhibit-1(1) is his signature. Material Exhibit-A is the seized dao. Then he went to the place of occurrence where he saw the dead body of Manik Saikia lying and he found him completely dead. He saw the injuries on the head and feet. The accused led him and police to the place of occurrence and showed the dead body, which was identified by him. Police also seized one eveready torch light and one dao with long bamboo handle of about 2 feet. Exhibit-2 is the seizure list and Exhibit-2(1) is his signature. Material Exhibit -B is the seized torch light and Material Exhibit -3 is the seized dao. Police held inquest over the dead body of Manik Saikia. Exhibit-3 is the inquest report and Exhibit-3(1) is his signature. As it was midnight, the dead body was kept on the spot under his vigil and police guard. On the next morning, dead body was taken to police station and he accompanied the dead body. He submitted the written ejahar on 14.07.1997. Police recorded his statement and sent the dead body to Diphu Civil Hospital for post mortem examination. He did not know the reason of occurrence, but he knows that Manik Saikia went to the field for catching fish. In his cross he stated that he was informed by police and not informed from the house of deceased.

20. PW-2, Smti Bakuli Saikia who is the wife of the deceased, deposed that she knows the accused, Balia Mura as her co-villager. The informant is the uncle of the deceased. The incident took place in the evening hour in the paddy field while she was in the house with her son. The deceased went to the paddy field to place "Khoka" (fishing instrument). He shouted "Bakuli, Bakuli" after half an hour of his going to paddy field for placing "Khoka". Then she ran towards

the place of occurrence. She heard the sound and saw that her husband was lying senselessly on the ground and saw injuries on his feet and head. Then she saw the accused, Balia Mura running towards his house with a dao. Thereafter, she ran to the house of a neighbour. She told that her husband was lying senselessly in the paddy field. The house owner took her to her house. The police and uncle of the deceased told her the description of the accused, Balia Mura. She did not go to the place of occurrence at night. On the next day, police came at her residence and recorded her statement. She also told that there was no quarrel between them and accused, Balia Mura. In her cross she stated that the accused Balia Mura killed her husband with a dao as she had seen the accused on the spot.

21. PW-3, Shri Ajit Phukan told that he knows the accused, the informant and the deceased. The incident took place about 6/7 years back in the evening hours. He got the information of the incident on the next day. One Haren Saikia told him that Manik Saikia was murdered by Balia Mura at the paddy field. He went to the paddy field of Manik Saikia and witnessed the deceased with the injuries on head and legs. At that time, the accused was not there and he got information that he had surrendered before the police. Police seized one dao and a torch light in his presence. Exhibit-2 is the seizure list and Exhibit- 2(1) is his signature. M.Exhibits- B and C are the seized articles. This witness is a hearsay witness but witness to the dead body and injury and seizure.

22. PW-4, Shri Moni Gogoi, who told that he knows the accused as he is co-villager also knows the informant and the deceased, Manik Saikia. The incident took place in the year 1997. After getting the information of the occurrence, he on the next day went to the paddy field of Manik Saikia. He saw

the dead body of Manik Saikia, but he did not see the injuries as the police had already covered the dead body. Accused, Balia Mura was not present at the spot and he was reportedly at police station. Exhibit-3 is the inquest report and Exhibit- 3(3) is his signature. Police recorded his statement. This witness is a witness to the inquest report and is a hearsay witness to the occurrence but saw the dead body of deceased.

23. PW-5, Shri Shakradhar Bora who told that he knows the accused, Shri Balia Mura is his co-villager. He also knows the deceased, Manik Saikia. The occurrence took place 6/7 years back. He heard about the incident on the next day from the uncle of the deceased. He went to the place of occurrence and saw Manik Saikia was lying injured in the paddy field and he was found dead. He saw Ajit Phukan, Nagen Saikia and Moni Gogoi at the place of occurrence. Police had reached the place of occurrence before he reached there. He did not see the accused person at the place of occurrence. Police seized one eveready torch light, a dao having bamboo handle in his presence. Exhibit- 2 is the seizure list and Exhibit- 2(2) is his signature. Material Exhibits- B and C are the seized articles. Exhibit- 3 is the inquest report and Exhibit- 3(2) is his signature. The incident took place for letting out water in the paddy field.

24. PW-6 Shri Gunaram Kalita, who has stated in his evidence that on 13.7.1997, while he was working at Borpathar Out-Post, the accused appeared there and the I/C asked him to accompany him to the place of occurrence. As it was night, inquest could not be done and he guarded the dead body that night at the place of occurrence at No. 1 Kathkathia. On the next day, I/C came back to the place of occurrence, held inquest over the dead body in the presence of local people and the dead body was taken to Diphu Civil Hospital for post

mortem examination. In his cross he stated that he did not see killing of deceased by Balia Mura.

25. PW-7/Shri Kamal Bora deposed that on 13.7.1997 while he was working as Sentry at Borpathar Police Out-Post, the accused, Balia Mura appeared there at about 11.30 PM with a dao. He informed the I/C about the appearance of the accused and as per the direction of the I/C, he detained the accused in the lock-up. In his cross he stated that the accused came in an indecent manner and did not ask about the incident.

26. PW-8 Dr. Mridul Bharali, who deposed that on 14.7.1997 while he was working at Diphu Civil Hospital as Medical and Health Officer, conducted post mortem examination over a dead body of male person. On examination, he found cut injuries on left leg, left thigh and right temporal region of head. According to his opinion, death was caused due to acute sudden collapse of brain matter and deep cut injury over right temporal region. The post mortem report revealed the following injuries, which is reproduced herein below:

Wounds- position and character:

Deep cut injury Lt. leg 10 x 5 cm in size # tibia. Deep cut Lt. thigh 12 x 12 cm # dislocation of lower end of femur. Deep cut injury Rt. Lower temporal region 8 x 2 x 2 cm in sized. Rt. Ear also severed.

Mark of ligature on neck dissection, etc.:

No

CRANIUM AND SPINAL CANAL

1. Scalp, Skull, Vertebrae: Deep cut injury Rt. Lower temporal region 8 x 2 x 2 cm in size prolapse of brain matter. Rt. ear also severed.

2. Membrane: Severed at Rt. Lower temporal region

3. Brain and spinal cord: Brain matter prolapsed through. Deep cut injury of Rt. Temporal region. Spinal cord normal.

MUSCLES, BONES AND JOINTS

1. Injury: Deep cut injury Lt. leg. Deep cut injury Lt. thigh. Cut injury Rt. temporal region.

2. Disease or deformity: No

3. Fracture: #Lt. tibia. # dislocation lower end Lt. femur.

4. Dislocation: Dislocation of Lt. lower end of femur.

27. PW-9/Md. Sabirul Hussain deposed that on 13.7.1997 he was working as I/C, Borpathar Police Out-Post. On that day at about 11.30 PM, one Balia Mura appeared there with a dao in his hand and told that he came there after inflicting cut injury to Manik Saikia. He made GDE No. 202, which was marked as Exhibit-5. At about 11.50 PM he seized one Naga Dao having bamboo handle in front of the witnesses, which was brought by the accused person. Exhibit-1 is the seizure list and Exhibit-1(1) is his signature. At about 12 midnight, he went

to the place of occurrence with his staffs. At about 12.30 AM, they reached the place of occurrence and the accused showed the dead body of Manik Saikia in the paddy field with cut injuries. Shri Nagen Saikia, uncle of deceased Manik Saikia also went to the place of occurrence along with them. At that time, they found Manik Saikia dead. PW-1 Nagen Saikia identified the dead body. As it was dead of night, inquest could not be done over the dead body. After making arrangement for guarding the dead body, they came back to the police station. On the next day, he went to the place of occurrence and held inquest over the dead body. Exhibit-3 is the inquest report and Exhibit-3(4) is his signature. Exhibit- 2 is the seizure list whereby a dao and a torch light were seized. Exhibit- 2(4) is his signature. He visited the place of occurrence and recorded the statements of the witnesses. He drew the sketch map. Exhibit-6 is the sketch map and Exhibit-6(1) is his signature. On 14.7.1997, Shri Nagen Saikia, the uncle of the deceased lodged the *ejahar*. Getting the *ejahar*, he made GD Entry vide No. 214 and forwarded the same to Bokajan Police Station. O/C of Bokajan Police Station registered PS Case No. 125/1997 under section 302 of IPC. Exhibit-4 is the *ejahar* and Exhibit-4(2) is his signature. Exhibit-4(3) is the signature of the then O/C of Bokajan Police Station. Thereafter, he sent the accused for medical examination and forwarded him to the Court. As the accused confessed the fact of murder, he prayed before the Court for recording his confessional statement. On 16.07.1997 the Court recorded the confessional statement of the accused. Then he collected the post mortem report. On completion of his investigation, he submitted Charge-sheet under section 302 IPC against the accused person on 21.08.1997. Exhibit-7 is the charge-sheet and Exhibit-7(1) is his signature.

28. PW-10, Shri Jyoti Prasad Bordoloi, who had deposed that on 17.7.1997 he was working as Confidential Assistant to the Deputy Commissioner, Karbi Anglong, Diphu told that he was acquainted with the hand-writing and signature of Bibhu Mohon Teron who was working as EAC-Cum-Magistrate 1st Class. On scrutiny of the case record, he did not find the page containing the order dated 17.7.1997 along with the case record. Exhibit-8 is the confessional statement of the accused, Balia Mura and Exhibit- 8(1) to 8(5) are the signatures of Shri Bibhu Mohon Teron.

From Exhibit-8, it appears that on 17.7.1997, the accused was produced before Shri Bibhu Mohon Teron for recording the confessional statement of the accused, but in the footnote the date is 16/07 on which date he appears to have recorded the statement of the accused, of course after giving mandatory warning to him.

29. From the record we find that Exhibit-1 is the seizure list, which was prepared by I/C Borpathar Out-Post SI Sabirul Hussain on 13.07.1997 in connection with GDE No. 202 dated 13.07.1997, whereby one dao having bamboo handle was produced by the accused at the outpost at 11.50 PM in presence of Shri Gobindo Das and Shri Nagen Saikia. Exhibit-5 is the abstract copy of the G.D. Entry No. 202 dated 13.07.1997, which shows that on 13.07.1997 at about 11.30 PM the accused appeared before the Borpathar Police Out-Post with a dao and verbally informed that on the same night at about 7:00 PM for obstruction of flow of the water of irrigation into the land of the accused there was a quarrel between him and the deceased, and that during the quarrel he hit the deceased with a dao as a result of which he

succumbed to injury on spot. Exhibit-6 is the sketch map of the place of occurrence which shows that house of the accused is situated nearby the place of occurrence and the house of the deceased is also a little away from the place of occurrence.

30. The testimony of PW-7 Shri Kamal Bora, a constable reveals that on the fateful night at about 11.30 PM the accused appeared in the outpost with a dao in his hand while he was on Sentry duty and thereafter he informed the matter to I/C Borpathar Out-Post. His evidence is that the accused came to the outpost with a dao.

31. PW-9, the investigating officer, who had deposed that on the fateful night at about 11.30 PM accused appeared before the outpost with a dao and informed him that after inflicting cut injury to the deceased with a dao he came there. Thereafter, after making the GD Entry, which is marked as Exhibit-5, he seized the dao having bamboo handle with whom the accused appeared *vide* Exhibit-1 in presence of witnesses. PW-1 has also stated in his evidence the Police seized one dao from the possession of the accused *vide* Exhibit-1 and Material Exhibit-A is the seized dao. During the cross-examination of PW-7 the defence has not challenged his evidence that the accused came to the Police outpost with a dao rather it has been confirmed that the seized dao belonged to the accused.

32. PW-8 is the Medical Officer. Exhibit-A is the Post Mortem report. The post mortem report marked as Exhibit -A shows that he sustained a deep cut injury on left leg having size of 10 x 5 with depth of 3 cm, a deep cut injury on left thigh having size of 12 x 12 with depth of 4 cm, dislocation of lower end of

the femur and a deep cut injury over the right temporal region having size of 8 x 2 x 2 cm in prolapsed of brain matter. These cut injuries normally can be caused by sharp object like a dao.

33. The confessional statement is exhibited as Exhibit -8. Testimony of investigating officer shows that during investigation he got confessional statement of the accused recorded by the Magistrate. The prosecution could not examine the Magistrate, B.M. Teron who recorded confessional statement as during trial he reportedly expired. However, the prosecution has examined an official who is conversant with hand-writing and signature of the aforesaid Officer as PW-10. Confessional statement shows that prior to the recording confessional statement, accused was cautioned that he was a Magistrate but not a Police Officer, that he would not be remanded to Police custody if he refrained from giving confessional statement and that he was not bound to give confessional statement, if did so it would be used as evidence against him. It shows the date as 16/7 in one page and 17.7.97 in another page of the statement. That apart, order sheets containing order dated 17.07.1997 is not available with the case record. There is also no evidence on record showing that prior to the recording of the confessional statement adequate time for reflection was given to the accused. In this regard, confessional statement marked as Exhibit-8 is also silent. Confessional statement of accused Balia Mura shows that during the quarrel over the water used in irrigation for cultivation between the accused and deceased, the accused hit him with a dao with which he came out from the house as result of which he fell down on the ground and then he left the place of occurrence. The accused has further admitted that he surrendered before the Borpathar Police Outpost with dao used in commission of the alleged

occurrence and the same was seized from him. For accepting confessional statement the court needs to ascertain whether the accused was given adequate time for reflection or not. We find that there is no evidence on record showing that the accused was given adequate time for reflection as such same cannot be accepted as confessional statement, however, in our opinion, same can be used as corroborative piece of evidence.

34. On scrutiny of the testimony of PW-2, we find that she had rushed to the place of occurrence after hearing shouting by deceased and she saw the accused running towards his house. On perusal of the statement of PW-2 recorded under Section 161, CrPC it appears that while reaching the place of occurrence she saw one person going towards the house of the accused, though it is silent that that man was the accused. However, in her deposition before the court she clearly mentioned the name of the accused Balia Mura.

35. On scrutiny of testimony of PW-2 it shows that just before the occurrence, the deceased went from the house to his paddy field for placing a Khoka (an instrument for catching of fish). Exhibit-2 is the seizure list by which a torch light of two cells of the eveready torch and one dao having bamboo handle were seized from the place of occurrence in presence of Rohit Bora, Ajit Phukan, Shakradhar Bora and Nagen Saikia. The defence has not disputed contents of Exhibit-2. From the contents of Exhibit-2 it can be presumed that the deceased came out to the paddy field from the house. There is no evidence on record to show that the accused sustained any injury.

36. From the discussion and analysis made above, it is clear that there is no evidence on record to show that anyone saw the accused person assaulting

the deceased or fleeing away from the place of occurrence with a dao. The entire prosecution case lies on circumstantial evidence. Now we proceed to consider whether the circumstances have formed a complete chain of circumstances from which inference can be drawn towards the guilt of the accused as concluded by the Sessions Judge.

37. It is well settled that in a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover, all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

38. We have noticed that on being led by the accused, dead body was recovered. From the statement of the accused recorded by the investigating officer during investigation it appears that he surrendered before the Police station with a dao used in commission of the alleged occurrence and disclosed that he assaulted the deceased with a dao. It also appears from his statement that on the basis of his disclosure, dead body was recovered.

39. We find that on the fateful night PW-2 saw a person going towards house of the accused from the place of occurrence immediately after occurrence. On the same night at about 11 O'clock the appellant surrendered before the Borpathar Police Out-Post with a dao and disclosed the Officer-in-Charge that he came there after inflicting cut injuries to the deceased with dao

and that the Police seized the said dao from him. It reveals from the evidence of PW-7 and PW-9 that on the fateful night PW-9 seized a dao from the possession of the accused person and the evidence of PW-2 that she saw a person going towards the house of the accused from the place of occurrence. It is also found that on being shown and led by the accused, dead body of the deceased was recovered. It is difficult on the part of the prosecution to prove motive of the accused with direct evidence in all cases. Motive of the accused regarding causing the death of the deceased reflects in his conduct. Medical evidence shows that there are 3 (Three) deep cuts injuries on the deceased out of which one is in the temporal region as a result of which his brain matter prolapsed. According to Medical Officer PW 8, cause of death was due to acute sudden collapse of brain matter and deep cut injury over right temporal region. There is no evidence on record showing that the accused was attacked or hit with an object like dao. Evidence shows that there was a dispute between the deceased and the accused over share of the water for using irrigation purpose. Thus, in our considered opinion there is a complete chain of circumstances from which guilt of the accused person can be inferred. In view of the discussion made above, we find that the prosecution has succeeded in establishing its case against the accused person/appellant for commission of offence under section 302 of the IPC.

40. Having regard to the submission made by the learned *Amicus Curiae* on the confessional statement under Section 164 CrPC, it appears from the confessional statement/ Exhibit-8, as noted above, we find that the Magistrate who had recorded the statement did not follow faithfully the procedure established by law for recording the confession and the same has been

discarded and ignored by the Trial Court. We note that the date of confessional statement appears to have been done on 16.07.1997 and the requirements for recording the confessional statement under Section 164 (2) was done on 17.07.1997; therefore, there is no question of convicting the appellant on the basis of the said confessional statement which has rightly been discarded by the learned Trial Court. We also take note that, no doubt, there was a confession of guilt by the appellant to the extent of inflicting injury on the deceased; however, if it is taken to be a confessional statement, the appellant went back on the confession during the time of trial by pleading not guilty in his examination and also in his statement recorded under Section 313 of CrPC, specifically at question No. 10 of the 313 statement.

41. In the case of case of **Kehar Singh Versus State (Delhi Admn.)** reported in AIR 1988 SC 1883, the Hon'ble Supreme Court had examined the purport of Section 164 CrPC and also the effect of non-compliance with any one of the requirements of Section 164(2) which are reproduced herein below:

“117. On a consideration of the above decisions it is manifest that if the provisions of S.164 (2) which require that the Magistrate before recording confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. The compliance of the sub-sec. (2) of S. 164 is therefore, mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub-section (2) of S. 164 read with S. 281 have been complied with. If the Court comes to a finding, that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under S. 463 (S. 533 of the Old Criminal Procedure Code) but when there is non-compliance of the mandatory requirement of S. 164 (2) Criminal Procedure Code and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate this

substantial defect cannot be cured under S. 463 Criminal Procedure Code."

42. Having viewed above that the confessional statement alone cannot form a basis for conviction as the requirement under the law has not been followed by the Magistrate concerned, while recording the confessional statement as aforesaid, we are in agreement with the learned Additional Public Prosecutor in the facts and circumstances of the present case that the said confession can be taken as a corroborative evidence to the other evidence on record in as much as in the statement the appellant had stated that they had first quarrel over the issue of irrigation when the deceased attacked the appellant with his dao. He hit him on his leg with dao and went to the Police Station and surrendered, which is supported by the testimonies of PW-1, 6, 7 and 9. However, on the submission of the learned Additional Public Prosecutor that the date, 16.07.1997, is nothing but a clerical mistake may be read down by this Court, we are unable to accept the said submission in view of the settled position of law that the provision of 164 (2) has to be complied with, else it is not a confession at all.

43. So far as the applicability of provisions of Code of Criminal Procedure in Karbi Anglong District, we are of the view that once the provision of 164 of CrPC has been invoked by the concerned Magistrate it is to be followed with and its requirements are to be applied in its letter and spirit. It is not the case that in the present case some other law regulating such confessional statement applicable in those areas like the district of Karbi Anglong was followed for which the spirit of CrPC would have been accepted. However, in the present case, admittedly, the provisions of Section 164 CrPC was invariably invoked; therefore, the question of applying only the spirit of Code of criminal procedure

cannot be countenanced.

44. Having viewed that in the present case there is a complete chain of circumstances from which guilt of the accused person can be inferred, we placed reliance on few cases of Hon'ble Supreme Court herein under.

45. In the case of the **State of Himachal Pradesh Versus Raj Kumar** reported in (2018) 2 SCC 69, the Hon'ble Apex Court held that it is well settled that in the case based on circumstantial evidence, the circumstances from which an inference of guilt sought to be drawn must be cogently and firmly established, and that those circumstances must be conclusive in nature unerringly pointing towards the guilt of the accused. Moreover, all the circumstances taken cumulatively should form a complete chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

46. In the case of **Sharad Birdhichand Sarda Versus State of Maharashtra** reported in (1984) 4SCC 116, the Hon'ble Supreme Court enunciated 5 golden principles which constitute the *Panchsheel* of the proof of a case based on circumstantial evidence which is reproduced herein below:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra(') where the following observations were made:

"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."

47. The aforesaid principle of law has been reiterated by the Hon'ble Apex Court in the case of **Ramanand alias Nandlal Bharti Versus State of Uttar Pradesh**, reported in 2022 SCC OnLine SC 1396, which is reproduced herein below:

"48. A three-Judge Bench of this Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court on a large number of later decisions up-to-date, for instance, the cases of Tufail (Amias) Simmi v. State of Uttar Pradesh [3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]:

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 should in 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.

...

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

50. *Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused."*

48. As noted above, the Hon'ble Apex Court clearly enunciated that in a case based on circumstantial evidence, the inference of guilt can be drawn only when all the incriminating facts and circumstances are bound to be incompatible with the innocence of the accused. We take note that in the questioning under Section 313 CrPC to the appellant, he simply denied the evidence of incriminating circumstance put to him and pleaded that it is false and he has been falsely implicated and innocent, except the retraction of his confession without there being any explanation to that effect and declined to adduce any evidence.

49. As noted above, in a long line of judgments, the Hon'ble Apex Court held that when a conviction is based on circumstantial evidence, there should not be any gap in the chain of circumstances; else, the accused is entitled to the

benefit of doubt.

50. After careful examination and scrutiny of the testimonies/evidence and the materials available on record, we are of the view that the prosecution has established the circumstances by cogent and convincing evidence in the following circumstances:

- (i) The quarrel regarding the sharing of irrigation water (Evidence of PW-2);
- (ii) Running over from the place of occurrence with dao (Evidence of PW-2);
- (iii) Surrender before the Police Out-Post at Borpathar with dao with the statement before the police stating that he hit the deceased person with the sharpened side of the dao and the deceased fell to the ground (Evidence of PW-7 and PW-9);
- (iv) Seizing of one Naga dao having bamboo handle in front of the witnesses, which was brought by the appellant (Evidence of PW-9);
- (v) Taking the police and other witnesses by the appellant to the place of occurrence and shown the dead body of the deceased lying on the ground (Evidence of PW-9);
- (vi) The Post Mortem report, which shows deep cut injuries on left leg, deep cut injuries at left thigh and deep cut injury over right temporal region causing prolapse of brain matter (Evidence of PW-8); and
- (vii) Absence of explanation from the accused as to the incriminating circumstances put to him.

51. The circumstances relied upon by the prosecution, in our opinion are proved by cogent and reliable evidences and taken cumulatively, form a complete chain pointing out that the murder was committed by the accused and none else.

52. The evidence of the PW, 1, 2, 6, 7, 9 and 10 to whom we have scrutinised herein above, in our considered view does inspire confidence so as to accept for the purpose of basing the conviction on circumstantial evidence.

53. From an analysis of the evidence available on record in its entirety, we are of the opinion that prosecution has been able to establish the guilt of accused/appellant beyond reasonable doubt based on circumstantial evidence. In view of the above, the conviction of the appellant under Section 302 IPC and the sentence of life imprisonment by the Trial Court *vide* judgment and order dated 27.06.2019 is affirmed.

54. In the result, the appeal is dismissed.

55. We extend our appreciation to the learned counsels for rendering able assistance to the Court.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant