

GAHC010104342018



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

Case No. : CRL.A(J)/58/2018

BIJIT SAIKIA @ KEN
S/O. LT. GHANA SHYAM SAIKIA, R/O. LAHING GAON, P.S. MARIANI, DIST.
JORHAT.

VERSUS

THE STATE OF ASSAM
REP. BY P.P., ASSAM.

Advocate for the Petitioner : MR. S D PURKAYASTHA, AMICUS CURIAE

Advocate for the Respondent : MS. B BHUYAN(ADDL.PP, ASSAM)

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

JUDGMENT & ORDER (CAV)

Date : 03-05-2023

(*Kardak Ete, J*)

Heard Mr. S. D. Purakayastha, learned Amicus Curiae. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor and Ms. M. Chakraborty, learned counsel for the respondents.

2. This criminal appeal has been preferred by the appellant Sri. Bijit Saikia

@ Ken assailing the judgment and order dated 04.04.2018 passed by the Court of Sessions Judge, Jorhat in connection with Sessions case no 71(J-J)/2015 corresponding with GR case no. 318/2014 wherein the appellant has been convicted under section 302/201 of IPC, 1860 for committing murder and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 10,000/- (ten thousand) in default of payment of fine, to undergo rigorous imprisonment for another six months under Section 302 of IPC and also rigorous imprisonment for four years with fine of Rs. 5,000/- (five thousand) in default of payment of fine, to undergo rigorous imprisonment for another three months under section 201 of IPC. Both the sentences to run concurrently.

3. The prosecution story in brief is that Ejahar dated 02.07.2014 was lodged before the Officer-in-Charge, Mariani Police Station by the informant, Sri. Deben Gogoi alleging that on 01.07.2014, there was a quarrel between the husband and wife in the house of Bijit Saikia @ Ken, a resident of Lahing Village and following that quarrel Bijit Saikia killed his wife by assaulting her repeatedly. Thereafter, the dead body was cremated inside the compound in presence of few persons of Lahing Village. The matter was informed to the informant by one Sri Soni Kachari, a resident of the same village. On receipt of the ejahar by the Officer-in-Charge, Mariani Police Station, FIR was registered as Mariani P.S. Case No. 139/2014 under Section 302/201/120(B) of IPC, 1860. On completion of the investigation, the Police filed a charge-sheet against the accused Bijit Saikia @ Ken and two co-accused Gonaram Baruah and Golap Gogoi under Section 302/201/120(B) of IPC vide charge-sheet No. 174/2014 dated 30.11.2014.

4. Vide order dated 07.05.2015, charge was framed against the accused, Bijit Saikia under Section 302/201 of IPC and separate charges were framed against co-accused Gonaram Baruah and Golap Gogoi under Sections 201/34 of

IPC. The charges were read over and explained to the accused persons, to which, all of them pleaded not guilty and claimed to be tried.

5. During the course of investigation, Police on the basis of confidential information to the effect that the accused Bijit Saikia @Ken committed murder of his wife late Dipali Saikia and cremated her dead body, made search of suspects and arrested Bijit Saikia @ Ken and as per disclosure statement of accused Bijit Saikia @Ken the decomposed dead body of the deceased was recovered. Police also seized one meat dao vide seizure-list (Exhibit-6) and some clothes, i.e., one yellow colored sporting ganji and one light white coloured long pant vide seizure-list (Exhibit-7) on 03.07.2014 as reflected from the aforesaid Seizure-lists.

6. During the investigation, (as per records) three witnesses namely, Sri. Ratul Saikia, Sri. Babul Saikia and Sri. Ritu Saikia were examined under section 164 CrPC, 1973. Sri. Ratul Saikia and Sri. Ritu Saikia are the sons of the accused Sri. Bijit Saikia @Ken and the deceased Dipali Saikia.

7. To bring home the charges framed against the accused persons, the prosecution had examined as many as 15 witnesses including the informant, two sons of the accused Bijit Saikia @ Ken and the deceased Dipali Saikia, Executive Magistrate, Forensic Expert and Investigating Officer.

8. On completion of the prosecution evidences, statements of all the accused were recorded under Section 313 of CrPC. All the accused persons stated that they were innocent and had been falsely implicated in the case thereby defence plea is of total denial. No evidence/witness was adduced by the accused in their defence.

9. Upon consideration of the entire evidences adduced on record, the

learned Trial court come to the conclusion that the evidences have a definite tendency pointing towards the guilt of the accused Bijit Saikia @ Ken and in their totality unerringly lead to the conclusion that within all human probability, the offence of murder was committed by the accused Bijit Saikia @ Ken and none else and the circumstances are not at all compatible with the innocence of the accused and in view of that proved circumstances, it is proved beyond reasonable doubt that accused is guilty of offence under Sections 302/201 of IPC and convicted the accused Bijit Saikia @Ken and sentenced him as aforesaid. However, the learned Trial Court held that prosecution has not been duly able to prove the charge under section 201/34 of IPC against the co-accused, therefore, Sri. Gonaram Baruah and Sri Golap Gogoi were accordingly acquitted under the benefit of doubt.

10. Mr. S. D. Purkayastha, learned Amicus Curiae submits that there is no disclosure statement under Section 27 of the Evidence Act, 1872. PW-4 & 5 did not depose that the appellant led to discovery of bones and ashes vide Exhibit-4. The PW-12, the Circle Officer also did not say anything about leading to discovery. PW-5 again did not depose that the appellant led to discovery of dao vide Exhibit-6 and wearing apparels vide Exhibit-7. In his cross-examination, he particularly stated that he does not know whose wearing apparels police had seized from the house of the accused. Hence, any of the seizures cannot be concluded unerringly and beyond reasonable doubt that these were recovered on being led by the appellant. In absence of a disclosure statement and further, without any corroboration by the PW-4, Pw-5 and PW-12 in respect of leading to discovery by the appellant as stated by I.O and the failure of the prosecution to discharge the burden to establish a close link between discovery of material object and its use in the commission of the

offence, the findings of the learned Trial Court that information received from the accused, being in Police custody, leading to the discovery of the bones and ashes of the deceased wife Dipali Saikia is admissible in evidence, is erroneous, perverse and as such liable to be interfered with.

11. The learned Amicus Curiae submits that examination of dao by PW-8 categorically stated that it was tested negative for human blood. Since there is no disclosure statement, written or oral, which can be held admissible in evidence, therefore, there is a probability that this was the reason that there was no human blood in the seized dao because it was not used for any assault, which creates grave doubt on the prosecution case. Further, evidence of PW-10 shows that on biological examination of the bones and ashes, determination of sex is inconclusive which creates further doubt on the prosecution case though the seizure of wearing apparels although proved by the PW-8 to have human blood, but it was not proved that the wearing apparels belong to the appellant, for the PW-5 particularly stated in cross-examination that he does not know whose wearing apparels were seized. No attempt was made to match the human blood found in the apparels with the blood group of the appellant. The prosecution has failed to prove the case to the standard as laid down by the Hon'ble Supreme Court that the incriminating facts and circumstances are found to be incompatible with the innocence of the accused.

12. Mr. S. D. Purkayastha further submits that as no recovery has been proved to be made in accordance with the provisions of Section 27 of the Indian Evidence Act, 1872 nor it was proved to be done at the behest of the appellant, the alleged conduct was not relevant under Section 8 of the Indian Evidence Act, 1872.

13. Mr. S. D. Purkayastha, submits that PW-3 and PW-6 are the children of

the appellant and the deceased. They are child witnesses. Their statement was recorded under Section 164 Cr.PC, 1973 but while deposing before the Court, they did not support their previous version. They have not been declared hostile by the prosecution. Therefore, the only statement recorded under Section 164 Cr.PC of the PW-3 was exhibited as Exhibit 3 without proving its contents. But the learned trial court reproduced their statements recorded under Section 164 Cr.PC in the judgement and held that these two child witnesses told a different story before the court. Thereafter, in a choose and pick manner discarded their deposition which is favourable to the appellant and took into account their version recorded in the 164 Cr.PC statement without the same being on record or proved as per law. The learned Amicus Curiae submits that it is settled law that the statement recorded under Section 164 Cr.PC is not a substantive piece of evidence. It can be used for contradiction and corroboration only. For the purpose of proving the contradiction and corroboration of any previous statement, same should be brought on record and then should be proved through the author of the statements. It is further a settled law that a statement recorded by a Magistrate under section 164 Cr.PC becomes usable to corroborate the witness as provided in section 157 of the Evidence Act or to contradict him as provided in section 155 thereof. Since, PW-3 & PW-6 were not cross-examined according to Section 154 of the Evidence Act, 1872 and they were not confronted with such previous statement recorded under section 164 Cr.P.C., 1973 it is not available to the prosecution and/or the learned Trial Court to rely upon to record conviction. Unless the contradiction is brought on record and then confronted the same with the official, it cannot be taken to be as proved. The learned Trial court suo moto used the statements recorded under Section 164 Cr.PC of the PW-3 and 6 without the same being proved as per law.

It is settled law that mere production and marking of a document as exhibit by the Court cannot be held to be proof of its contents. Therefore, the findings of the Trial court basing on the evidence of PW-3 and PW-6 and their statements recorded under Section 164 Cr.PC and conveniently picking and choosing from their evidence before the Court is not sustainable in law.

14. Mr. S. D. Purkayastha, submits that the learned Trial Court has erroneously come to conclusion basing wrongly on the evidence of the child witness PW-3 and 6 in a convenient manner. The child witness, in the present case deposed that their father was not at home at the time of incident and their mother committed suicide. This evidence remained in toto without being subjected to any cross-examination by the prosecution for they were not declared hostile

15. Mr. S. D. Purkayastha, learned Amicus Curiae, has submitted that the prosecution has failed to prove that the recovery was in terms of the provision of Section 27 of the Evidence Act. There is no disclosure statement. There is no other evidence to connect the appellant with the incident. The factors which the learned Trial Court has taken into consideration to convict the appellant are not at all legally tenable.

16. The learned Amicus Curiae, to buttress his points has relied on the following judgments of the Hon'ble Supreme Court:

(i) ***Mustkeem alias Sirajuddin vs. State of Rajasthan***, reported in (2011) 11 SCC 724,

(ii) ***Niranjan Panja vs. State of West Bengal***, reported in (2010) 6 SCC 525,

(iii) ***R. Shaji vs. State of Kerala***, reported in (2013) 14 SCC 266,

(iv) ***Ram Prasad vs. State of Maharashtra***, reported in (1999) 5 SCC 30,

(v) ***V.K. Mishra & Anr vs. State of Uttarakhand & Anr***, reported in (2015) 9 SCC 588,

(vi) ***State of Uttar Pradesh vs. Mohd. Iqram and Anr***, reported in (2011) 8 SCC 80,

(vii) ***Nivruti Pandurang Kokate vs. State of Maharashtra***, reported in (2008) 12 SCC 565,

(viii) ***Mousam Singha Roy & Ors vs. State of West Bengal***, reported in (2003) 12 SCC 377, and

(ix) ***Satye Singh & Anr vs. State of Uttarakhand***, reported in (2022) 5 SCC 438.

17. Ms. B. Bhuyan, learned Additional PP refuting the submissions made by the learned Amicus Curiae, submits that the State would rely on the evidences of PW-3, PW-6, and PW-9 along with the evidences of Official witnesses. She submits that PW-3 who is aged about 12 (twelve) years at the time of giving substantive evidence and who is the son of the deceased and the accused, his 164 statement was recorded on 04.07.2014 prior to giving substantive evidence before the Court. In his 164 statement, PW-3 has specifically stated that the accused Bijit Saikia assaulted his mother with a split bamboo used for construction of bamboo wall and cut his mother's hand with a dao. On being cut in the hand the bone in his mother's hand got exposed and his mother died. In his 164 statement, he has also stated that after his mother's death the accused sat down near her and was uttering incoherent speeches. He has also stated that he and his brother Ritu Saikia have witnessed the incident.

Although, PW-3, PW-6 who is also a relevant witness to the incident in his 164 statement which is recorded on 04.07.2014 has disclosed that the accused assaulted his mother with a dao as a result of which their mother died. Afterwards, the accused/appellant hanged his mother's body with the help of chador. 164 statements of PW-3 and PW-6 were duly recorded by the Magistrate and the prosecution duly exhibited the same vide Exhibit-3 and Exhibit-8 respectively. Although the prosecution brought it on record in the Examination-in-Chief of PW-3 and PW-6 as regards 164 statements. So, the exhibit 164 statements which the defence did not confront with remain admissible in the eye of law.

18. Ms. B. Bhuyan, learned Additional PP submits that PW-9 who is also a relevant witness of the prosecution who was very much present just before the occurrence has specifically in her Examination-in-Chief has stated that accused person was very much present in the residence at the time when the victim was sleeping on the bed. The presence of accused person is well proved from the evidence of PW-9. Even the accused person in his statement made under Section 313 of Cr.PC as against the question put to him as question No. 1 has admitted as regards his presence in his residence. PW-15 who is the Investigating Officer of the case has stated that he had seized one meat dao as shown by the accused from his house which is exclusively within the knowledge of the accused although there was no written disclosure statement in the Case Diary as per Section 27 of the Evidence Act. He also had seized one long pant and sporting of the accused along with other materials. PW-15 sent the seized articles to the forensic laboratory. PW-15 also deposed that he sent PW-3, PW-5, PW-6 and PW-7 to the Magistrate for recording their 164 statements. To buttress her point, she relied on the case of ***Rajiv Phukan vs. State of***

Assam, reported in 2009 (2) GLT 414.

19. The learned Additional PP further submits that PW-8 who is the Scientific Officer who examined four Exhibits deposed that on opening a sealed parcel which consists of half burnt bones, one cream coloured pant containing stain of suspected blood marked as "B" which is marked by him as Sero 3361/B and one yellow coloured sporting contains stain of suspected blood marked as "B" which was marked by him as Sero 3361/C along with other two exhibits which contained half burnt bones with ashes and charcoal and one iron handle dao containing stain of suspected blood. On analysis, Sero 3361/B and Sero 3361/C gave positive test for human blood of Group B.

20. Ms. B. Bhuyan submits that PW-5 who is a seizure witness also has stated that Police also seized one dao from the upper side of the tin of the house of the accused. So, police discovered the dao as disclosed by the accused from a place in his house, i.e., from the upper side of the tin of the house which is within the exclusive knowledge of the accused.

21. Ms. B. Bhuyan further submits that in the instant case, two witnesses PW-3 and PW-6 although in their 164 statement which were exhibited and these two witnesses in their Examination-in-Chief have deposed about giving 164 statement before the Magistrate but in the substantive evidence they deposed that their mother has committed suicide. Relying on the case of ***R.Shaji vs. State of Kerala, reported in (2013) 14 SCC 266***, the learned Additional PP has submitted that the Hon'ble Supreme Court has observed that during the investigation, the Police Officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 Cr.PC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced.

22. Ms. B. Bhuyan submits that in the instant case, the appellant might have influenced PW-3 and PW-6, for which PW-3 and PW-6 have given a completely different version in their substantive evidence. It is to be stated that 164 statements of PW-3 and PW-6 were recorded on 04.07.2014 whereas they gave their substantive evidence before the Hon'ble Court on 08.03.2016 and 28.04.2016 respectively. So, a natural corollary can be drawn that the accused had influenced PW-3 and PW-6 as in their substantive evidence both these PWs have deposed that at the time of giving their substantive evidence they were staying along with the accused and the accused is taking care and custody of their health and education.

23. Ms. B. Bhuyan, learned Additional PP submits that PW-8 in his substantive evidence have deposited that exhibit C which is one iron handle dao which contain stain of suspected blood and which was marked as Sero 3361/D gave negative test for human blood. It may be so due to haematological changes and plasmatic coagulation, that a Serologist may have failed to detect an origin of the blood in question. However, in such a case unless the doubt is of a reasonable dimension which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group(s) loses significance, by relying on the observation made at para 31 of ***R. Shaji*** (supra).

24. The learned Additional PP submits that from the evidence of PW-15 who is the I.O. has deposed before the Court that he seized one meat dao as shown by the accused. The accused in his statement under Section 313 more particularly his answers to question no. 10 stated that the PW-10 has noticed the accused and his two sons besides his wife and when she noticed the wife of

the accused sleeping on the bed and his answer to such question was affirmative which shows that at the time when the victim died, the accused as well as his two sons were besides the victim. Under 106 of the Evidence Act, a burden is on the accused to narrate the facts and circumstances which is within his knowledge under which the victim died but nothing could be discerned from the accused as to under what circumstances the victim died.

25. Ms. B. Bhuyan, learned Additional PP submits that the conduct of the accused person after the commission of the crime is also suspicious as he cremated the dead body of the victim after commission of the crime and have given a false plea in question no. 15 that he has not committed the crime. PW-9 can also be taken as *res gestae* witness who just before the commission of the crime met the accused person in his residence and as per Section 6 of the Evidence Act, her evidence is relevant to the facts and circumstances of the instant case. Although one Phoni Kachari, who has informed the informant namely PW-1 was not cited as a witness in the charge sheet but such non-examination is not material for the prosecution case. That the defect as regards investigation of the case is not fatal to the prosecution case as it will not affect the root and core of the prosecution. Therefore, the learned Additional PP submits that this Court would take out the chaff from the grain to come to a conclusion after going into the materials on record and upheld the conviction dated 04.04.2018 passed by the Session Judge, Jorhat in Session Case No. 71(J)/2015.

26. We have considered the submissions advanced by the learned counsel for the parties and have also carefully gone through the materials available on record.

27. PW-1 is Sri Deben Gogoi who happened to be the VDP Secretary of

the aforesaid locality. It is the version of this witness that on the date of occurrence at about 6:00 P.M. while he was tying cows in the cow-shed at the time, one Phoni Kachari came to his house and shouted from outside that one accused Bijit Saikia @ Ken had assaulted his wife with dao blows and thereafter committed murder of his wife Dipali Saikia and hanged her body in his house. After receipt of information he went to Mariani P.S. and informed the matter to police vide ejahar (Exhibit-1) wherein Exhibi-1(1) is his relevant signature. The aforesaid ejahar was written by one Md. Zamal Ahmed as per his version who read over the contents to him and finding it to be correct he put his signature in the aforesaid ejahar.

During cross-examination, this witness divulged that he does not know who cremated the dead body of the wife of accused Bijit Saikia @ Ken. He also could not say under what circumstances the incident took place.

28. PW-2 is Md. Makbul Hussain, who, at the relevant time was a videographer by profession. During his evidence, he disclosed that on 01/07/2014 police requested him to visit the house of accused Bijit Saikia @ Ken where he took video footage of one meat dao and wearing apparel/garments which were seized by police in his presence. It is his further version that his Sony camera, DVD writer and all other necessary equipments were seized by police vide seizure-list (Exhibit-2) wherein Exhibit-2(1) is his signature.

During cross-examination by the defence, he stated that the original disk of his camera has not been submitted by him before police in connection with the instant case. He further admitted that he took photograph of the dead body which was kept concealed in the earth and he also recorded the statement of witnesses. PW-2, however, admitted that he had deleted the recording after giving one copy to police in the form of CD.

29. PW-3 is Ratul Saikia who is the son of accused Bijit Saikia @ Ken and the deceased. During his deposition in Court this witness stated that on the date of incident his mother Dipali Saikia after consuming alcohol chased all of them from the house. At the time of incident he was present in the Namghar. When he returned back home, he noticed cut injury on the body of his mother. It is his further version that his statement was recorded by Magistrate vide Exhibit-3 wherein Exhibit-3 (1) is his signature.

During cross-examination by accused Bijit Saikia, he stated that his mother was in the habit of consuming alcohol and she committed suicide by hanging herself in the house. He specifically stated that the accused who is his father had not tutored him to give false evidence in connection with the case.

30. PW-4 is Sri Mangal Gorait who was the VDP Secretary, Katonibari Tea Estate at the relevant time and during his deposition in Court stated that on the date of incident he visited Mariani P.S. and noticed accused Bijit Saikia @ Ken being interrogated by police. Thereafter, police requested him to accompany them to the house of accused Bijit Saikia @ Ken. This witness accompanied police to accused house where he noticed smoke in the house compound of accused Bijit Saikia @ Ken. It is his further version that police exhumed the earth in presence of Magistrate and he noticed some bones beneath the earth. He came to know that the dead body which was cremated in the house compound of accused Bijit Saikia @ Ken was that of his wife Dipali Saikia. He came to know from the villagers that accused Bijit Saikia @ Ken has murdered his wife and thereafter cremated her body in his house compound. It is his further version that he also notice co-accused namely Sri Golap Gogoi and Sri Gonaram Baruah in the house compound of accused Bijit Saikia @ Ken. Police seized some bones from accused house compound vide seizure-list (Exhibit-4)

wherein Exhibit-4(1) is his signature. This witness was not cross-examined by the defence.

31. PW-5 is Sri Babul Saikia who is the brother-in-law of accused Bijit Saikia @ Ken. During his deposition in Court he stated that on the date of incident at night hour, police arrived at his house and thereafter took him to the house of accused Bijit Saikia @ Ken where he noticed smoke in accused's house compound. Police directed him to dig the earth of the house compound of accused Bijit Saikia @ Ken and then he noticed bones of human being beneath the earth. He was produced before the Magistrate who recorded his statement under Section 164 Cr.PC vide Exhibit-5 wherein Exhibit-5(1) is his signature. Police also seized some bones vide seizure-list (Exhibit-4) wherein Exhibit-4(2) is his signature. It is his further version that police seized one dao from the upper side of the tin of the house of accused Bijit Saikia @ Ken vide seizure-list (Exhibit-6) wherein he put his signature as Exhibit-6(1). The witness further stated that accused Bijit Saikia @ Ken also put his signature as Exhibit-6(2). It is his further version that police seized one sporting being worn by accused Bijit Saikia @ Ken which was stained with blood and one long pant vide seizure-list (Exhibit-7) wherein Exhibit-7(1) is his relevant signature. He also exhibited the dao as Material Exhibit-1 and the sporting alongwith long pant vide Material Exhibit-2.

This witness during cross-examination admitted that he did not state before police that he was directed by police to accompany them to the house of accused Bijit Saikia @ Ken and thereafter as per direction of police he dugged the earth of the house compound of accused Bijit Saikia @ Ken and thereafter noticed some bones of human being beneath the earth. It is his further version that he does not know whose wearing apparels were seized by police from the

house of accused Bijit Saikia @ Ken.

Evidence of this witness to the effect that the sporting which was seized by police from the house of accused Bijit Saikia @ Ken was stained with blood remained intact during cross-examination.

32. Sri Ritu Saikia (PW-6) is another son of accused and deceased. This witness during his evidence stated that he gave statement before the Magistrate vide Exhibit-8 wherein Exhibit-8(1) is his relevant signature. It is his further version that on the date of incident he was studying in Class-VII. Incident happened in the day hour. This witness further stated that his father, i.e, the accused, came out of the house towards his work place and in absence of his father, his mother committed suicide by hanging herself. It is also stated by this witness that he gave statement before the Magistrate voluntarily. Defence declined to cross-examine this witness.

33. Evidence of Smti. Anima Saikia (PW-7) who is the mother of accused Bijit Saikia @ Ken is to the effect that her daughter-in-law, i.e., wife of accused used to consume alcohol everyday. It is further stated by this witness that on the relevant day the accused came out of the house for his respective work place.

She was declared hostile by prosecution and during cross-examination by prosecution she denied to have stated before police that "her son Bijit Saikia @ Ken used to quarrel with his wife regularly; that on the relevant day in the morning hour, she heard quarrel in the house of her son; that after assaulting his wife her son (accused) hanged her on a tree with a view that it was a case of hanging; that the two sons of her son Bijit Saikia @ Ken noticed the incident of assault and hanging and they informed her about the incident; that with the

help of villagers her son cremated the body of his wife and that to screen the offender her son Bijit Saikia burn the cloths of his wife.”

This witness admitted during cross-examination that her son with the help of villagers had cremated his wife.

This witness was cross-examined by defence side for accused Bijit Saikia and during cross-examination she stated that she did not witness the incident and also does not know anything about the incident.

34. Pw-8 is Dr. Renu Bora Handique who at the relevant point of time was posted as Scientific Officer, Serology Division, Directorate of Forensic Science, Kahilipara, Guwahati and she performed certain tests on the articles which were sent to her through the S.D.P.O. Titabar, Jorhat. On examination of the articles which were marked by her as Exhibit Nos. Sero-3361/A, 3361/B, 3361/C and 3361/D, she stated that Exhibit Nos. Sero 3361/B & 3361/C, i.e., one long pant and sporting gave positive test for human blood of Group “B”; Exhibit No. Sero 3361/D, i.e., one iron handle dao gave negative test for human blood and Exhibit No. Sero 3361/A was done by Biology Division and the original report copy was enclosed.

She exhibited her report as Exhibit-9 and her signature thereon as Exhibit-9(1). Exhibit-10 is the Forwarding Report of the then Director Sri. M.N. Bora wherein Exhibit-10(1) is the signature of the then Director which she knows.

This witness was not cross-examined by the defence.

35. PW-9 is Smt. Sharmila Koch who was working as Asha Karmi, Mariani PHC, Bahani Sub-Centre deposed that on the date of incident while she was going for her duty she noticed gathering of people near the house of accused Bijit Saikia @ Ken. Accordingly, she visited the house of accused and noticed his

wife sleeping in the bed, also noticed the accused and his two sons beside his(accused) wife. She touched the hand of the wife of accused and noticed that she had already expired as she was not breathing. She asked the accused about the cause of death but the accused did not say anything before her. This witness categorically stated that she did not witness co-accused Golap Gogoi and Gunaram Baruah. It is her further version that the dead body of the wife of accused was cremated in the courtyard of the house of accused Bijit Saikia @ Ken.

During cross-examination, she disclosed that she was not present at the time of cremation of the dead body of the wife of accused Bijit Saikia @ Ken so she cannot say as to who were present at the time of cremation.

36. PW-10 is Dr. Manash Das who was serving as Junior Scientific Officer, Biology Division, Directorate of Forensic Science, Kahilipara, Guwahati. According to him, on 18/07/2014 some articles were sent to the In-charge, Serology Division with reference to Mariani P.S. Case No. 139/2014 under Sections 302/201/120(B) of IPC which was entered in their office as Biology Case No. 704/2014. This witness stated that one brown coloured envelope containing few pieces of small burnt bone and bone ash alongwith charcoal was marked by him as Bio. 2605. The result of examination was osteological and morphological examination reveals that these are few pieces of completely burnt bone of human in origin. However, determination of sex is inconclusive due to insufficient material exhibits. He exhibited his report as Exhibit-10 and his signature thereon as Exhibit-10(1).

Defence side declined to cross-examine this witness.

37. Dr. Puberun Banikya (PW-11) who was serving as Medical & Health

Officer, Mariani PHC during his evidence disclosed that on 03/07/2014 accused Bijit Saikia @ Ken was produced before him for medical examination alongwith police. In his opinion, no clinically significant wound was found on the body of the accused at the time of medical examination. He exhibited his report as Exhibit-11 and his signature thereon as Exhibit-11(1).

This witness was also not cross-examined by defence side.

38. Evidence of Miss Tarali Das (PW-12) who was working as Circle Officer, Mariani Revenue Circle, during her evidence disclosed that on 03/07/2014 police seized some bones and ashes of the deceased in her presence as well as in presence of other witnesses vide seizure-list (Exhibit-4) wherein she put her signature as Exhibit-4 (3).

This witness was also not cross-examined by defence side.

39. Sri. Manu Bhuyan (PW-13) who is neighbour of accused stated that on the date of incident she returned from Namghar at about 10:00 P.M. On the next day he heard that wife of accused Bijit Saikia @ Ken had expired. It is stated by this witness that she came to know that the dead body of the wife of accused Bijit Saikia @ Ken was cremated in his (accused's) house compound.

This witness turned hostile and during cross-examination by prosecution side he admitted to have stated before police that he came to know that wife of accused Bijit Saikia @ Ken had expired and the accused had cremated his wife in his house compound and at that time co-accused Golap Gogoi & Gonaram Baruah who were the officials of VDP were also present there. It is further admitted by this witness that accused often assaulted his wife.

During cross-examination by defence side, this witness stated that he was not present at the time of cremation of the dead body of Dipali Sailia who

happened to be the wife of accused Bijit Saikia @ Ken.

40. Sri. Sebiram Baruah (PW-14) who is neighbour of accused Bijit Saikia @ Ken divulged during his testimony that on the date of incident he was not present at his residence. Later on, he came to know from the villagers that wife of Bijit Saikia @ Ken died at about 12:00 P.M. night on the date of incident. This witness further stated that he came to know from the villagers that after death of deceased both co-accused(s) namely Golap Gogoi and Gunaram Baruah went to the house of accused Bijit Saikia @ Ken and he attended the cremation of the deceased at the house of accused.

This witness was declared hostile by prosecution and during cross-examination by prosecution, he admitted to have stated before police that on 01/09/2014 the dead body of the wife of accused Bijit Saikia @ Ken was cremated in the courtyard of the house of accused Bijit Saikia @ Ken and he also attended the cremation.

This witness during cross-examination by defence side stated that he does not have any personal knowledge about the incident.

41. Syed Taibur Rahman (PW-15) who was the Investigating Officer, deposed about the routine steps taken by him during investigation of the case. It is his further version that he arrested all the three accused persons in connection with the instant case. He also seized one document containing signatures of public vide Exhibit-13 wherein Exhibit-13(1) is his relevant signature thereon. He also sent witnesses namely Sri. Ritul Saikia, Smt. Anamika Saikia, Sri. Babul Saikia and Sri. Ratul Saikia to the court for recording their respective statements by the then Magistrate under Section 164 Cr.PC. After finding sufficient materials against the accused persons he submitted charge-

sheet against them under Sections 302/201/120(B) of IPC.

During cross-examination, he denied that he had submitted false charge-sheet against the accused persons; that the accused persons did not try to cause disappearance to the evidence of this case.

42. On perusal of the judgment and order of the learned Trial Court, conviction of appellant is based on circumstantial evidence after consideration of the evidence/testimonies of PW-3, PW-4, PW-5, PW-6, PW-13 and PW-14 as there was no eye witness to the occurrence and also on the 164 statements. We have also noted that the learned Trial court examined all the accused under section 313 of the Cr.PC.

43. We will now proceed to scrutinize the testimonies of the prosecution witnesses. The PW-4, Sri Mangal Gorait and the PW-5, Sri. Babul Saikia are the two seizure witnesses examined by the prosecution to prove the recovery of ashes and dao from the house of the accused/appellant. Exhibit-4 is the seizure memo through which residue of bones and ashes were seized in presence of PW-4 & 5. PW-4 deposed that Bijit Saikia also accompanied police to his house and the police exhumed the earth in presence of the Magistrate and he noticed some bone beneath the earth. PW-5 deposed that he was taken by the police to the house of the accused, he does not know anything about the incident, that he dug the earth as per the direction of the police in the night of the next day of the incident, that he found the accused Bijit Saikia in his residence along with the Police. He further stated that Exhibit-4 is the seizure memo through which bones of human was seized and he also deposed that the police also seized one dao from the upper side of the tin of the house of accused vide Exhibit-6. He

also deposed that Police seized one sporting which was worn by the accused at the time of incident, being stained with blood and one long pant vide Exhibit-7. In cross-examination, he stated that he does not know who was wearing the apparels, police had seized from the house of the accused. Then, it is seen that PW-4 & 5 did not depose that the appellant led to discovery of bones and ashes vide Exhibit-4. The PW-12, the Circle Officer also did not say anything about leading to discovery. PW-5 again did not depose that the appellant led to discovery of dao vide Exhibit-6 and wearing apparels vide Exhibit-7, he only stated that the police had seized it. In his cross-examination, he specifically stated that he does not know whose wearing apparels police had seized from the house of the accused. Therefore, we are of the view that any of the seizures cannot be concluded unerringly and beyond reasonable doubt that these were recovered on being led by the accused/appellant as there is no disclosure statement in terms of section 27 of Evidence Act, 1872.

44. In the case of ***Mustkeem alias Sirajudeen vs. State of Rajasthan*** reported in (2011) 11 SCC 724, the Hon'ble Supreme Court held as under:

”25. With regard to [Section 27](#) of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under [Section 27](#) of the Act is the information leading to discovery and not any opinion formed on it by the prosecution. “

45. We may also profitably rely on the decision of the Hon'ble Supreme Court in the case of ***Niranjan Panja vs. State of West Bengal***, reported in (2010) 6 SCC 525 wherein the Hon'ble Apex Court held that, '*if for effecting a discovery, a statement has to be recorded on the part of the accused showing his readiness to produce the material object and it is only the part of the statement which is not incriminating and leads to discovery which becomes admissible*'.

46. In the instant case, in the absence of a disclosure statement and further without any corroboration by the PW-4,5 & 12 in respect of leading to discovery by the appellant as stated by the PW-15, i.e., the I.O. and the failure of the prosecution to discharge the burden to establish a close link between discovery of material object and its use in the commission of the offence, the findings of the learned Trial Court that information received from the accused, being in Police custody, leading to the discovery of the bones and ashes of the deceased wife Dipali Saikia is admissible in evidence, is erroneous.

47. The examination of dao by PW-8 categorically stated that it was tested negative for human blood. The learned Additional PP has relied upon the decision in the case of ***R.Shaji*** (supra) and submits that testing negative for human blood in the weapon does not discredit the prosecution case of leading to discovery or its linkage with the murder since for many reason, it may give result of negative human blood. That once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group(s) loses significance'. However, we find that there was a disclosure statement of the accused in the aforesaid case. In the instant case, there is no

disclosure statement written or oral which can be held admissible in view of the observation in the case of ***Mustkeem alias Sirajudeen (Supra)***.

48. PW-9 in her deposition deposed that she did not see any injury or blood on the person of the deceased. Therefore, there is a probability that this was the reason that there was no human blood in the seized dao because it was not used for any assault, which creates grave doubt on the prosecution case. Further, the testimony of PW-10 shows that on biological examination of the bones and ashes, determination of sex is inconclusive which creates further doubt on the prosecution case.

49. The seizure of wearing apparels although proved by the PW-8 to have human blood, but it was not proved that the wearing apparels belonged to the accused/appellant, in cross-examination PW-8 stated that he does not know whose wearing apparels were seized. No attempt was made to match the human blood found in the apparels with the blood group of the accused/appellant.

50. We may gainfully again make reference to the case of ***Mustkeem alias Sirajudeen (Supra)*** wherein the Hon'ble Supreme Court held which is reproduced herein below:

“23. 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.”

51. In the present case, the prosecution has failed to prove the laid down standard in the above referred case to prove that the incriminating facts and circumstances are found to be incompatible with the innocence of the accused.

52. We find that no recovery is proved in terms of the provision of Section 27 of the Indian Evidence Act, 1872, nor it was proved to be done at the behest of the appellant, we are of the view that the conduct of the appellant was not relevant under Section 8 of the Indian Evidence Act, 1872, therefore, the findings of the learned Trial Court holding that the conduct of the accused is relevant and the fact of discovery of the bones and ashes of the deceased as led by the accused is a circumstance appearing against the accused which is proved is absolutely erroneous as the prosecution has failed to prove any recovery in accordance with Section 27 of the Evidence Act, as there is no disclosure statement, no evidence of assault by the appellant is proved and no prove that the ashes and bones are of any female and the recovery was made at behest of the appellant.

53. PW-3 and PW-6 are the sons of the appellant and the deceased. They are child witnesses. Their statements were recorded under Section 164 Cr.PC, 1973 but while deposing before the Court, they did not support their previous version despite they have not been declared hostile by the prosecution, the only statement recorded under Section 164 Cr.PC of the PW-3 was exhibited as Exhibit 3 without proving its contents and relying on the statements under Section 164 of Cr.PC of the PW-3 and PW-6 by refuting the statements, the learned Trial Court held that these two child witnesses told a different story

before the court thereby discarded their deposition which is favourable to the appellant and took into account their version recorded in the 164 Cr.PC statement without the same being on record or proved as per law.

54. It is settled law that the statement recorded under Section 164 Cr.PC is not a substantive piece of evidence. It can be used for contradiction and corroboration only. For the purpose of proving the contradiction and corroboration of any previous statement, same should be brought on record and then should be proved through the author of the statements, i.e., the I.O. or the Magistrate (in case of 161 and 164 of Cr.PC respectively). There is also settled law that a statement recorded under section 164 Cr.PC becomes usable to corroborate the witness as provided in section 157 of the Evidence Act or to contradict him as provided in section 155 thereof. Since, PW-3 &PW-6 were not cross-examined according to Section 154 of the Evidence Act, 1872 and they were not confronted with such previous statement recorded under section 164 Cr.P.C.,1973 it is not available to the prosecution and/or the learned Trial Court to rely upon to record conviction.

55. We may also gainfully make a reference to the case of ***R. Shaji vs. State of Kerala (Supra)*** wherein it has been held that, '*evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statement under Section 161 Cr.PC can be used only for the purpose of the contradiction and statements under section 164 Cr.PC can be used for both corroboration and contradiction*'.

56. In the case of ***V.K. Mishra & Anr vs. State of Uttarakhand & Anr*** reported in (2015) 9 SCC 588, the Hon'ble Supreme Court has held that, '*court*

cannot suo moto make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the Court.' Further it has laid down the procedure how a contradiction has to be proved. Unless the contradiction is brought on record and then confront the same with the Officer who has recorded the statement, it cannot be taken to be as proved. It appears that learned Trial court has taken suo moto the statements recorded under Section 164 Cr.PC of the PW-3 and 6 without the same being proved as per law. In this regard, the law is that mere production and marking of a document as exhibit by the Court cannot be held to be proof of its contents. In this regard, the decision of the Hon'ble Apex Court in the case of ***State of Uttar Pradesh vs. Mohd. Iqram & Anr***, reported in (2011) 8 SCC 80 can be relied upon which are reproduced herein below:

“21. Undoubtedly, the post-mortem report had been proved but that does not mean that each and every content thereof is stood proved or can be held to be admissible. Such observations cannot be termed to be a substantive piece of evidence. Dr. G.R. Sharma (PW.1) did not even whisper about the same in his statement made in the court which is the only substantive piece of evidence in law. The court cannot place reliance on incriminating material against the accused, unless it is put to him during his examination under [Section 313](#) Cr.P.C. Thus, the High Court committed an error by taking into consideration the inadmissible evidence for the purpose of deciding the criminal appeals and holding the person guilty who had already been acquitted by the trial court. The post-mortem report had been examined at the time of framing of the charges. The trial court did not frame any charge under [Section 376](#) IPC or [Section 376](#) read with [Section 511](#) IPC. More so, no witness had ever mentioned anything in this respect. Thus, it is beyond any stretch of imagination of any person, how such observations could be made by the High Court.

23. *In State of Bihar and Ors. v. Radha Krishna Singh & Ors.*, AIR 1983 SC 684, this Court dealt with the issue of prohibitive value of the contents of an admitted document and held as under :-

"Admissibility of a document is one thing and its probative value quite another- these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil....."

Therefore, in view of the facts of the present case we are of the view that the findings of the learned Trial Court based on the findings of PW-3 and PW-6 taking into account the statement recorded under Section 164 is not sustainable.

57. PW-3 and PW-6 sons of the accused and the deceased deposed that their father was not at home at the time of incident and their mother committed suicide. This evidence remained intact without being subjected to any cross-examination by the prosecution nor they were declared hostile, needless to say that it is no longer *res integra* that if two view is possible then the view favourable to the accused should be upheld. If the child witnesses are not trustworthy, their entire evidence has to be discarded. Therefore, the conclusion by the learned Trial Court based on the evidence of child witnesses, i.e., PW-3 and PW-6 in a selected manner is erroneous. The law regarding testimonies of child witnesses has been dealt with by the Hon'ble Supreme Court in the case of ***Nivruti Pandurang Kokate vs. State of Maharashtra***, reported in (2008) 12 SCC 565, which are reproduced herein below:

" 9. The age of the witness during examination was taken to be about 12 years.

10. *The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has*

intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States .The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See [Suryanarayana v. State of Karnataka](#))

7. *In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341] it was held as follows: (SCC p. 343, para 5):*

"5....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under [Section 118](#) of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

The above position was highlighted in [Ratansingh Dalsukhbhai Nayak v. State of Gujarat](#) SCC pp. 67-68, paras 6-7). Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference."

58. In the present case on a scrutiny of the testimonies of the PWs, we are of the view that prosecution has failed to prove that recovery was in terms of the provision of Section 27 of the Evidence Act. There is no disclosure statement. No witness has supported the story of leading to discovery and absence of human blood in dao, which the prosecution has failed to prove to be recovered at behest of the accused/ appellant. Non identification of wearing

apparels as the PW-5 has deposed that he does not know to whom it belong shows that the prosecution has failed to prove incriminating circumstances against the appellant.

59. In the case of ***Satye Singh & Anr vs. State of Uttarakhand***, reported in (2022) 5 SCC 432, the Hon'ble Supreme Court has reiterated that the prosecution having failed to prove the basic facts as alleged against the accused, the burden could not be shifted on the accused by pressing into the service of the provisions contained in Section 106 of Evidence Act. The accused/appellant has answered all the questions put to him by the Court. The prosecution has failed to prove their case, but the learned Trial court has also failed to appreciate the evidence on record in legal perspective and erroneously came to conclusion to convict the appellant.

60. The submissions of the learned Additional PP that PW-15 who is the Investigating Officer of the case has stated that he had seized one meat dao as shown by the accused from his house which is exclusively within the knowledge of the accused although there was no written disclosed statement in the Case Diary. But, same is as per Section 27 of the Evidence Act and the decision of the Hon'ble High Court in the case of ***Rajiv Phukan vs. State of Assam***, reported in 2009 (2) GLT 414.

61. In the decision relied by the learned Additional PP in the case of ***Rajiv Phukan (Supra)***, the Hon'ble High court has held as under:

“54. In Bodhraj vs. State of J and K, reported in (2002) 8 SCC 45 the court dealing with this subject, observed thus, “the statement which is admissible under Section 27 is the one, which the information leading to the discover. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the

exact information given by the accused while in custody which led to the recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information given must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes reliable information.

55. *From the emphasised portion of the observations made above, in Bodhraj (supra), it becomes clear that though the information(which the prosecution relies upon to show that the accused gave the information, which led to the discovery of a fact) should be recorded and proved but if it is not so recorded the exact information must be adduced through evidence. Obviously, such evidence would mean oral evidence or some other evidence in the form of audio visuals or tape Nonetheless, what clearly transpires from the decision, in Bodhraj(supra) is that even when a statement, leading to discovery of fact, has not been reduced into writing, such a statement is still admissible in evidence, though the probative value thereof would depend on the facts and circumstances of a given case."*

62. On careful perusal of the case of **Rajiv Phukan (Supra)**, we are of the view that same would be of no help to the prosecution case.

63. With regard to the two witnesses, i.e., PW-3 and PW-6, the submission of the learned Additional PP that although in 164 statement which were exhibited in their cross-examination have deposed about giving 164 statement before the Magistrate but in the substantive evidence they deposed that their mother have committed suicide. The learned Additional PP placed

reliance on Para 29 of the case of ***R. Sheji (Supra)*** and submitted that the appellant might have influenced PW-3 and PW-6, for which they have given a completely different version in their substantive evidence as the 164 statements of PW-3 and PW-6 were recorded on 04.07.2014 whereas they gave their substantive evidence before the Hon'ble Court on 08.03.2016 and 28.04.2016 respectively. So, a natural corollary can be drawn that the accused had influenced PW-3 and PW-6 as in their substantive evidence both these PWs have deposed that at the time of giving their substantive evidence they were staying along with the accused and the accused is taking care and custody of their health and education.

64. As we have observed above, the statement recorded by a Magistrate under Section 164 Cr.PC becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof. Since, PW-3 & 6 was not cross-examined according to Section 154 of the Evidence Act, 1872 and they were not confronted with such previous statement recorded under Section 164 Cr.PC, 1973 it is not available to the prosecution and the learned trial court to rely upon to record conviction. In the case of ***R. Sheji (Supra)***, as relied on by the learned Additional PP, the Hon'ble Apex Court held that the evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statement under Section 161 Cr.PC can be used only for the purpose of the contradiction and statements under section 164 Cr.PC can be used for both corroboration and contradiction. In the present case PW-3 and PW-6 were neither confronted nor there is any contradiction and corroboration by the other witnesses at the same time there was no cross-examination nor were they declared hostile.

65. The Hon'ble Supreme Court in the case of ***Mousam Singha Roy and Others vs. State of West Bengal***, reported in (2003) 12 SCC 377, which is reproduced herein below:

“ 27. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In a similar circumstance this Court in the case of [Sarwan Singh Rattan Singh v. State of Punjab](#) [AIR 1957 SC 637] stated thus :

"It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted."

28. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

66. In the case of ***R. Shaji vs. State of Kerala (Supra)***, the Hon'ble Supreme Court has held as under:

“40. 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. (Vide: [Sharad Birdhichand Sarda v. State of Maharashtra](#), and [Paramjeet Singh @ Pamma v. State of Uttarakhand](#), ”

67. In the case of ***Mustkeem alias Sirajuddin(Supra)*** the Hon'ble Supreme Court postulated some cardinal principles regarding the appreciation of circumstantial evidence as under:

“24. 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".

28. *The doctrine of circumstantial evidence was once again discussed and summarised 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".

68. As noted above in the case of Sarwan Singh Rattan Singh v. State of Punjab [AIR 1957 SC 637] Hon'ble Apex Court held that it is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused.

69. The Hon'ble Supreme Court recently in the case of ***Narendrasinh Keshubhai Zala v. State of Gujarat*** reported in (2023) SCC Online SC 284, reiterated that it is a settled principle of law that doubt cannot replace proof. Suspicion, however great it may be, is no substitute of proof in criminal jurisprudence. Only such evidence is admissible and acceptable as is permissible in accordance with law.

70. For the sake of repetition, on a scrutiny of the testimonies of the PWs, we are of the view that prosecution has failed to prove that recovery was in terms of the provision of Section 27 of the Evidence Act. There is no disclosure statement. No witness has supported the story of leading to discovery and absence of human blood in dao, which the prosecution has failed to prove to be

recovered at behest of the accused/ appellant. Non identification of wearing apparels as the PW-5 has deposed that he does not know to whom it belong shows that the prosecution has failed to prove incriminating circumstances against the appellant.

71. For all the above reasons, the evidence of PWs 3, 4, 5, 6, 7, 8, 9, 14 and 15 to which we have scrutinised hereinabove in our considered opinion does not inspire confidence in us so as to accept for the purpose of basing a conviction on circumstantial evidence. We also take note of the fact that one Phoni Kachari who informed the informant about the occurrence was not cited as a witness. As submitted by the learned APP, that this Court would take out the cheff from the grain, we are unable to accept the same in the fact and circumstances of the presence case.

72. From an analysis of the evidence available on record in its entirety and law laid down by the Hon'ble Supreme Court as aforesaid, we are of the opinion that prosecution has failed to establish the guilt of the accused/appellant beyond reasonable doubt. As such, giving the benefit of doubt, the conviction of the appellant Sri. Bijit Saikia @ Ken is hereby set aside and quashed of the charges brought against him. Consequently, we direct the accused Bijit Saikia @ Ken be released from jail forthwith.

73. The appeal is accordingly allowed.

74. We extend our appreciation to the learned Counsels for their able assistance.

Sent back the LCR.

JUDGE

JUDGE

Comparing Assistant