

GAHC010139202022



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

Case No. : CRL.A(J)/75/2022

DEBLAL MALPAHARIA
S/O. LT. GANGALAL MALPAHARIA, R/O. NO.15 LINE JOYHING, P.S. NORTH
LAKHIMPUR, DIST. LAKHIMPUR.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. SANCHITA ROY(AMICUS CURIAE)

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

Dates of hearing : **05.12.2023 and 06.12.2023.**

Date of judgment : **06.12.2023**

JUDGMENT & ORDER (Oral)

(Suman Shyam, J)

Heard Ms. Sanchita Roy, learned Amicus Curiae appearing for the appellant.

We have also heard Ms. B. Bhuyan, learned senior counsel (Additional Public

Prosecutor, Assam) assisted by Ms. P. Bora, learned counsel appearing on behalf of the State of Assam. None has appeared for the informant.

2. This appeal, preferred from Jail, is directed against the judgment dated 26.04.2022 and order dated 27.04.2022 passed by the learned Special Judge, North Lakhimpur in Special (POCSO) Case No.118/2018 whereby, the sole appellant was convicted for committing offences punishable under sections 376/302/201 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for life for committing the offence punishable under Section 302 of the IPC; rigorous imprisonment for life for committing the offence punishable under Section 376(2)(f) of the IPC and rigorous imprisonment for three years for committing the offence under Section 201 of the IPC and also to pay fine separately for each of the offences with default stipulation.

3. The facts and circumstances, giving rise to filing of this appeal, briefly stated, are as follows. On 27.03.2018, dead body of a girl was recovered from the Koilamari Tea Estate Line No.15 pursuant where to, U/D Case No.13/2018 was registered. On the following day i.e. on 28.03.2018, Sri Jyoti Mili, Sub-Inspector of Police (SI) posted at the Jahing Police Outpost coming under the North Lakhimpur Police Station, had lodged an ejahar with the Officer-in-Charge of the North Lakhimpur Police Station stating that the dead body recovered on 27.03.2018 was that of the daughter of Sri Deblal Malpaharia, who had killed his own daughter by hacking her on the neck with a sharp weapon and the dead body was concealed in a drain of Koilamari Tea Estate by covering it with garbage and soil.

4. Based on the ejahar dated 28.03.2018, North Lakhimpur P.S. Case No.312/21018 was registered under sections 302/201 of the IPC and the matter was taken up for investigation. As per the case projected by the prosecution, during the course of investigation, it came to light that the victim was carrying a live foetus and that she was impregnated by her own father i.e. the appellant herein. On completion of investigation, charge-sheet was submitted against the appellant, based on which, charges under Sections 376/302/201 of the IPC read with Section 6 of the POCSO Act, 2012 was framed against the appellant. Since the accused/appellant had pleaded not guilty, he was subjected to trial.

5. The prosecution case is entirely based on circumstantial evidence. In order to bring home the charges framed against the accused, the prosecution had examined 14 witnesses including the doctor, who had conducted post-mortem examination on the dead body of the deceased (PW-9), the Investigating Officer (IO), who had conducted investigation and submitted charge-sheet in this case (PW-13) as well as the Junior Scientific Officer of the Directorate of Forensic Science, who had submitted the report on the forensic tests as well as the result of the DNA Fingerprinting analysis. While recording his statement under Section 313 of the Cr.P.C., the accused/appellant had denied all the incriminating circumstances put to him by the prosecution side. The defence side, however, did not adduce any evidence. Upon conclusion of trial the learned Special Judge (POCSO), Lakhimpur had passed by the impugned judgment dated 26.04.2022 convicting the appellant under Sections 376/302/201 of the IPC and sentenced him as aforesaid. However, the learned Special Judge has held that the prosecution has failed to bring home the charge

framed under Section 6 of the POCSO Act.

6. Assailing the impugned judgment dated 26.04.2022, Ms. S. Roy, learned *Amicus Curiae* has submitted that there is no evidence in this case to establish any of the charges brought against the appellant. According to the learned *Amicus Curiae*, the chain of circumstances so as to prove the charges could not be established in this case by the prosecution by adducing cogent evidence. As such, this is a fit case for acquittal of the accused/appellant, who is presently in jail.

7. Ms. B. Bhuyan, learned Additional Public Prosecutor (APP), Assam, on the other hand, has argued that although there might be some *lacuna* in the investigation conducted by the police in connection with the aforementioned police case, yet, the evidence on record are sufficient to establish the guilt of the appellant beyond reasonable doubt. Therefore, submits Ms. Bhuyan, the learned Special Judge has rightly convicted the appellant. Contending that this is a case of heinous offence committed upon a minor girl, Ms. Bhuyan has argued that no leniency be shown by the Court towards the accused/appellant.

8. We have considered the submissions made at the Bar and have also carefully gone through the materials available on record. As noted above, the prosecution case is entirely based on circumstantial evidence. Since the learned *Amicus Curiae* has argued that each link in the chain of circumstances so as to prove the guilt of the accused/appellant, could not be established by the prosecution by adducing cogent evidence thereby praying for acquittal of the appellant, it would be necessary for us to briefly discuss the evidence brought on record by the prosecution

side.

9. As has been mentioned herein above, an U/D case being Case No.13/2018 was initially registered. On the next day i.e. on 28.03.2018 ejahar was lodged, based on which, North Lakhimpur P.S. Case No.312/21018 was registered. In this case, none of the family members of the victim had lodged the ejahar but it was the Sub-Inspector of Police, viz., Sri Jyoti Mili, who had lodged the ejahar. Jyoti Mili was examined as prosecution witness No.1 (PW-1). During his deposition before the court, PW-1 has stated that on 28.03.2018, while he was working as the In-Charge of the Jahing Outpost, he had lodged a written ejahar with the North Lakhimpur Police Station in reference to U/D Case No.13/2018 dated 27.03.2018 after one dead body had been recovered. He has deposed that during investigation, it had come to light that the father of the deceased, viz., Sri Deblal Malpaharia had committed the murder of his daughter by inflicting injury on her neck by a sharp weapon and thereafter, he had thrown away the dead body in the Koilamari Tea Estate, near a tunnel. PW-1 has further stated that Ext-1 is the ejahar lodged by him and Ext-1(1) is his signature. In his cross-examination, PW-1 has stated that he did not conduct the investigation in the case.

10. Sri Filip Orang, a resident of the village and a neighbour of the appellant was examined as PW-2. This witness has deposed that after the police had arrested the accused he (PW-2) was called to the house of the accused. Upon reaching that place he had seen the police, an Executive Magistrate and the accused at that place. Police was interrogating the accused when he said that the deceased girl was

his daughter. When he was asked as to who had killed his daughter, the accused replied that he himself had killed her and the reason for doing so was stated to be on account of the fact that he had impregnated his daughter. That is why, he took her to No.15 Koilamari Tea Estate and killed her by cutting her neck with a dao. PW-2 has further deposed that the police had seized a "mit dao" produced by the accused from his house. One blood stained blue coloured half pant, one grey full sleeve shirt and one brown coloured "half vest" were also seized in his presence vide seizure-list Ext-2 which bears his signature. Later on, the accused had shown the police as well as the witnesses the place where accused had taken the victim and killed her. That location was a drain which served as garbage disposal site of the garden. PW-2 has also identified Material Ext- 'Ka' as the 'mitdao' in the court. During his cross-examination, PW-2 has stated that he had gone to the place of occurrence i.e. the place from where the dead body was recovered. This witness has denied the suggestion put to him by the defence counsel saying that the accused did not confess his guilt before the police and that the police had written the confessional statement on their own.

11. Sri Tara Bahadur Limbu was examined as PW-3. This witness has deposed that he knew the accused person present in the dock. The incident took place in the year 2018. One day, the police had called him to the house of the accused. When he went there he found the village headman, the public, an Executive Magistrate and the police along with the accused, present there. According to PW-3, the accused had confessed before everyone that he had killed his own daughter (victim) with a dao. The accused had produced the dao from his house. In his cross-examination

PW-3 has replied that he did not state before the police that the accused had produced the dao from his house which he had used in committing the offence.

12. PW-4, Barun Das is another seizure witness of Ext-2 by means of which the "mit dao" was seized by the police. This witness has also stated that on the day of the incident, police had come to the house of the accused. He also went there and saw the village headman, one person belonging to the Nepali community, Sona, Mili and others present there. The police had called him there. The accused confessed in his presence of having committed the crime. The police took the dao and seized it vide Ext-2 seizure-list which bears his signature.

13. Smti. Hiramai Malpaharia is the mother of the deceased and the wife of the appellant. She was examined as PW-5. She has deposed that the victim was her daughter and was aged about 10 years at the time of the incident. The incident took place about a year back. At that time, the victim was pregnant. When she went to the Police Station to make an enquiry, her husband had said that it was he who had impregnated her daughter and then killed her. Later, the accused had shown the place where he had killed her daughter and the dead body of the girl was recovered from there. One day the police came to their house along with the accused and he confessed in presence of Executive Magistrate and other people that he had committed the crime. The accused had produced the dao which was used in the incident. During her cross-examination, PW-5 has replied that she did not state before the police that the accused had confessed that he had committed the crime. When her daughter was alive, she did not tell her about any incident nor was

she aware of any such incident.

14. Sri Manohar Das is an employee of Koilamari Tea Estate. He was examined as PW-6. He has deposed before the court that on the date of the incident, while he was on duty, women from the Tea Estate were plucking tea leaves. At that time, they had noticed a dead body in the drain and raised hue and cry. On being informed, he along with the tractor driver, who used to carry the tea leaves and the 'Mohari' (supervisor) went near the dead body and found that the same was covered with leaves. Later on, he came to know that the dead body was of the victim but he did not know what actually had happened.

15. Sri Jiban Bawri was the driver of the tractor, who was present along with PW-6 when they found the dead body. This witness was examined as PW-7. He has also deposed before the court that while picking tea leaves at the Koilamari Tea Estate, the women who were plucking the leaves, called him and said that they had spotted something that appears to be like human leg. After spotting the same, which looked like human leg, he made a phone call to the Manager of the Tea Estate. Later on, he came to know that the dead body was of the victim who was the daughter of the appellant. This witness has also clarified during his cross-examination that he did not know as to how the incident had happened.

16. PW-8 Mongra Sabor is another seizure witness of Ext-3, who has merely deposed that the police had obtained his signature on a sheet of paper.

17. The dead body of the victim was taken to the North Lakhimpur Civil Hospital for conducting post-mortem examination. The post-mortem on the dead body was

conducted by Dr. Jayanta Saikia, who was serving as the Senior Medical & Health Officer at the North Lakhimpur Civil Hospital. Dr. Saikia was examined as PW-9. According to the doctor, the following injuries were found in the dead body :-

“A dead body of a young female of average built. Rigor mortis present in all limbs.

- 1) Cut wound over left side of neck with clean cut, everted margins of about 5 cm x 2 cm in size.*
- 2) Cut wound over front side of neck with clean cut, everted margins of about 7 cm x 2 cm x 1 cm in size.*
- 3) Cut wound over right side of neck with clean cut, everted margins of about 4 cm x 2 cm x 1 cm in size.*
- 4) Abrasion mark over right forearm of 1 cm x 1 cm in size.*
- 5) 2 Nos of abrasion mark over lateral aspect of left forearm with size of 2 cm x 1 ½ cm x ½ cm.*
- 6) Abrasion mark over posterior aspect of right elbow with size of 3 cm x ½ cm.*
- 7) 7 Nos of abrasion mark over lateral aspect of left thigh.*
- 8) Abrasion mark over medial aspect of right thigh.*

Kidneys were healthy. No injury seen in external or internal genitals. Uterine size was about 26-28 weeks of gestation. A female fetus of about 26-28 weeks found in uterine cavity. Fetus was sent for DNA analysis. Vaginal smear was taken and sent for spermatozoa examination.

Left external carotid artery was cut. Vessels of front neck were cut. The nails and clothes of dead body were sent for forensic analysis.”

The doctor has opined that the cause of death was due to shock and hemorrhage as a result of injury sustained. All the injuries were ante-mortem in nature and the time

since death was approximately 20-24 hours. PW-9 has also proved the post-mortem report Ext-4 by identifying his signature therein as Ext-4(1) as well as the signature of the Joint Director of Health Services, Lakhimpur, North Lakhimpur as Ext-4(2) which he could identify.

18. Sri Elarush Topno is a resident of Koilamari Tea Estate. He was examined as PW-11. This witness has deposed that on the date of the incident, he was at home. Seeing that a lot of people had gathered in Line No.15 of Koilamari Tea Estate he went there and spotted two legs of the deceased emerging out of the garbage and the remaining portion of the body was covered with leaves. Meanwhile, the police had reached the place of occurrence. On being instructed by the police, he had lifted the dead body and after removing the leaves, found that the neck of the deceased was cut. The accused arrived there and told that the deceased was his daughter. PW-11 has further stated that the police had seized a blue hair band, a blue and black woolen sweater and a pair of blue hawai chappals vide seizure-list Ext-3 and obtained his signature therein. The witness has proved his signature in the seizure list as Ext-3(2).

19. PW-12 Smti. Sushila Goraik is the elder daughter of the appellant and the sister of the victim. She is married to a person called Kanai Bagti. This witness has deposed that on the date of the incident she was in the house of her father. At around 4:00 p.m. on that day, her younger sister i.e. the victim went out of the house towards the garden. That day, her mother (PW-5) was at home. However, her younger sister did not return home. She and her mother searched for her but could not find her. At

around 9:00 a.m. in the following day, people, who were working in the tea garden, had noticed her dead body whereafter, they informed the members of the house. Then they went to the place of occurrence. The police took away the dead body and also arrested her father. Later on, she came to know from the public that her father had killed her younger sister. About 5/6 months back her younger sister had told her that she had missed her periods in the previous two months. She had informed the matter to her mother (PW-5) about it. This witness had, however, denied having stated before the police that at the Police Station, her father had confessed in her presence, that he had killed her younger sister as a result of which, she was declared as a hostile witness.

20. The investigation in connection with North Lakhimpur P.S. Case No.312/2018 was carried out by Sri Deep Jyoti Bharali, Sub-Inspector (S.I.), who was examined as PW-13. The I.O. has deposed that on 29.03.2018, while he was working as the Second Officer at the North Lakhimpur Sadar Police Station, one written ejahar lodged by S. I., Jyoti Mili was received and registered by the then Officer-in-Charge of the Police Station. Ext-1 is the original ejahar lodged by Sri Jyoti Mili and Ext-1 (2) is the signature of the Officer-in-Charge of North Lakhimpur Police Station, viz., Inspector Ghana Kanta Bhuyan which he could identify. PW-13 has further stated that upon being entrusted with the investigation in connection with the Police case, he had visited the place of occurrence, prepared a rough sketch map of the place, seized one dao and wearing apparels of the accused person by preparing seizure-list. Ext-2 was the said seizure-list. PW-13 has further deposed that another seizure list was prepared by the informant i.e. the PW-1, in presence of seizure witnesses and some articles were

found lying at No.15 Tea Garden vide seizure-list Ext-3. The I.O. has also stated that post-mortem examination was done on the dead body and he had collected the post-mortem report of the victim. On 29.03.2018, during the course of investigation, he had appeared before the court of Chief Judicial Magistrate, Lakhimpur, North Lakhimpur and prayed for preserving the blood sample, which would be required for conducting DNA test. PW-13 has deposed that Ext-8 is the prayer made before the court and Ext-9 is the report sent by the Directorate of Forensic Science, Kahilipara, Guwahati, Assam to the Superintendent of Police, Lakhimpur, North Lakhimpur. Ext-10(1) and Ext-10(2) are the continued pages of the report of the Directorate of Forensic Science, Kahilipara, Guwahati. In his cross-examination, PW-13 has stated that initially this case was registered as Unnatural Death (UD) case and Sub-Inspector Jyoti Mili of Joyhing Police Outpost was entrusted to investigate the U/D case. The Manager of Koilamari Tea Estate, where the occurrence took place, was not examined by him.

21. Dr. Jogananda Bori was working as Medical and Health Officer-I at North Lakhimpur Civil Hospital on 06.04.2018, who had collected 2 ml blood in EDTA, Nail and Dry blood in filter paper for DNA test of the accused. He was examined as PW-10. This witness has confirmed that the samples for DNA testing was sent to the Directorate of FSL vide Identification Form Ext-5. PW-10 has proved his signature Ext-5(1) in the Identification Form. Cross-examination of this witness was declined.

22. Sri Arup Manta was working as Junior Scientific Officer, DNA Typing Unit, Directorate of Forensic Science, Assam, Kahilipara on 07.04.2018 when the parcel

containing the samples connected with North Lakhimpur P.S. Case No.312/2018 was received through a messenger. He was examined as PW-14. This witness has deposed that he was entrusted to examine the articles contained in the parcel. On such examination, he found the following articles in the parcel :-

“Description of Articles:

- 1. One sealed airtight plastic container contains one foetus, which has been marked as Exhibit No.DNA 1575/18.*
 - 2. One sealed EDTA vial contains 2 ml (approx.) liquid blood of Sri Deblal Malpaharia collected by Doctor of North Lakhimpur Civil Hospital, with blood donor authentication card, which has been marked as Exhibit No.DNA 1576/18.*
 - 3. One airtight plastic vial contains nail scrap of the victim, which has been marked as Exhibit No.1577/18.*
 - 4. One airtight plastic vial contains nail scrap of the victim, which has been marked as Exhibit No.1578/18.*
 - 5. One torn and dirty skirt. The exhibit was found packed in a polythene packet in wet condition with growth of fungus and obnoxious smell, which has been marked as Exhibit No.1579/18.*
 - 6. One torn and dirty innerwear. The exhibit was found packed in a polythene packet in wet condition with growth of fungus and obnoxious smell, which has been marked as Exhibit No.1580/18.*
 - 7. One torn and dirty T. Shirt. The exhibit was found packed in a polythene packet in wet condition with growth of fungus and obnoxious smell, which has been marked as Exhibit No.1581/18.”*
23. PW-14 has deposed that after conducting DNA Fingerprinting Analysis, a report vide Exts-9 and 10 were prepared and submitted. PW-14 has proved his signature Ext-

10(3) in the said report. PW-14 has further stated that on the same day, another report was prepared by Mrs. R. Borah Handique, Scientific Officer, Serology Division, Directorate of Forensic Science, Assam, Kahilipara. The description of the Articles along with the corresponding forensic report of blood samples test results as appearing in the FSL reports, is reproduced herein below :-

“Description of Articles :

1. *One wooden handle dao contains stain of suspected blood, marked as ‘E’ (My No.Sero-3965/E). Moderately rusted. Total length of Dao with handle 45 cm approx. The exhibits seems to be washed.*
2. *One torn maroon coloured petticoat contains stain of suspected blood. Marked as ‘F’ (My No.Sero-3965/F). Heavy growth of fungus.*
3. *Black coloured torn blouse contains suspected blood. Marked as ‘F1’ (My No.Sero-3965/F1). The exhibits heavy growth of fungus.*
4. *One brown coloured half ganji contains stain of suspected blood. Marked as ‘F2’ (My No.Sero-3965/F2).*
5. *One Cheek full shirt and one blue coloured half pant contains stain of suspected blood. Marked as ‘G’ (My No.Sero-3965/G).*

Result of examination :

1. *Exh. No.Sero-3965/F, Sero- 3965/F1 and Sero- 3965/F2 gave positive test for human blood, but its group could not be determined due to disintegration of blood.*
2. *Exh. No. Sero – 3965/E and Sero- 3965/G gave negative test for blood.”*

PW-14 has also proved the signatures of Mrs. R. Borah Handique as Ext-10(4) and Ext-10(5) which he could identify. He has also proved Ext-10(6) as the forwarding letter sent to the Superintendent of Police, Lakhimpur, North Lakhimpur bearing the

signature of the then Director-cum-Chemical Examiner to the Government of Assam as Ext-10(7). Cross-examination of this witness was declined.

24. From the evidence brought on record by the prosecution side, it would be apparent that the prosecution had heavily relied upon alleged extra-judicial confession made by the appellant admitting his guilt in the matter. However, taking note of the provisions of Sections 25 and 26 of the Evidence Act and considering the fact that such confession of the accused was allegedly made in presence of the police and during the course of his interrogation, the learned Special Judge has rightly held that such confession would be inadmissible in evidence. Having held as above, the learned Special Judge was also of the view that by adducing evidence on record, the prosecution has succeeded in establishing the following circumstances which goes to prove the guilt of the accused/appellant. The relevant observations and findings of the learned Special Judge as regards chain of circumstances proved by the prosecution, as appearing from the impugned judgment, is reproduced herein below for ready reference :-

- “a) That the accused A1 and the deceased X lived in the same house till the night on which the occurrence took place and on the next day, the deceased was found lying dead in the tunnel/drain inside the Tea Estate with multiple cut injury over her neck.*
- b) That the mitdao used in commission of the crime was recovered from the house on being produced by the accused from his house.*
- c) That the medical evidence supports the ocular evidence of the witnesses regarding the injury sustained by the X.*
- d) That the deceased daughter of A1 was pregnant as corroborated by*

the ocular as well as medical evidence.

- e) *The blood stained clothes were seized from A1 as reflected in the seizure list which is supported by the ocular evidence.*
- f) *That the blood sample of A1 matches with the foetus of the victim as per DNA Fingerprinting Analysis."*

25. From a careful analysis of the forensic report of blood samples Ext-10, we find that the blood stains found in black coloured torn blouse (marked as F₁), when connected with the suspected blood stains in the half vest (marked as F₂) of the deceased, could not be matched. Moreover, the blood samples found in the dao (marked as E) gave positive test for human blood but its group could not be determined. Therefore, there is no forensic test report of blood samples available on record to connect the blood samples found in the clothes of the deceased person with that in the seized wearing apparels of the appellant or the "dao." If that be so, it is apparent that the forensic test report of blood samples did not support the prosecution case.

26. In so far as the DNA Fingerprinting Analysis is concerned, the report of the expert, as available from the material on record is reproduced herein below for ready reference :-

"RESULT OF THE DNA FINGERPRINTING ANALYSIS

*DNA from the sources of the above exhibits were isolated by organic extraction method and subjected to multiplex PCR reaction using **AmpFLSTR Identifier Kit**. The amplified products along with controls were run on **Automated DNA Sequencer** and analysis was carried out using **Genemapper ID***

v3. Software with respect to standard ladder. The resultant allele distribution in different loci in the different exhibits were studied and it was observed.

1. That one of the allele of amplified loci exhibit no.DNA 1575/18 (as marked) is not matching with DNA profile of Exhibit No.DNA 1576/18 (as marked).

2. Exhibit No.DNA 1577/18, DNA 1578/18, DNA 1580/18 and DNA 1581/18 were subjected for DNA isolation but the DNA yield from the exhibit was fragmented and could not be amplified. Therefore its comparison with each other does not arise."

27. Here also, it is apparent from the DNA Fingerprinting Analysis that the samples in Exhibit No.DNA 1575/18 did not match with the DNA profile of Exhibit No.DNA 1576/18. Notwithstanding the same, as would be apparent from the facts alluded above, the learned Special Judge had found that the blood sample of A₁ matches with the foetus of the victim as per the DNA Fingerprinting Analysis. Such a conclusion, in our considered opinion, is not based on any evidence and hence, is clearly untenable in the eyes of law.

28. As regards the other circumstances noticed by the learned court below, we find that even if the same are taken in their face value, even then, in our considered opinion, that would be insufficient to even remotely bring home the charges brought against the appellant under Sections 376/302/201 of the IPC. Therefore, we are unable to agree with the decision and conclusion of the learned Special Judge that the prosecution has succeeded in establishing the charge brought against the accused/appellant beyond reasonable doubt by adducing circumstantial evidence.

29. In the above context it would further be pertinent to note herein that save and

except the fact that the accused had allegedly confessed of having committed the crime, there is practically nothing on record to even raise a suspicion about the involvement of the appellant in commission of a heinous offence of this nature alleged.

30. It has come out from the evidence available on record that it is the case of the prosecution that the accused had confessed to have killed the victim. However, such confession was admittedly made in the presence of the police. It appears that an Executive Magistrate was present when the accused is said to have confessed. However, after the decision of the Full Bench of this Court in the case of **Shri Kartik Chakraborty S/o Shanti Bhusan Chakraborty Vs. State of Assam** reported in **2017(5) GLT 144**, law is firmly settled that the expression "Magistrate" referred to in Section 26 of the Evidence Act would not include an Executive Magistrate but it would only mean a Judicial Magistrate. Therefore, confession by the accused persons in presence of police would not be admissible in law save and except, if the same is made in presence of a Judicial Magistrate.

31. In the instant case, there is no doubt or dispute about the fact that the alleged confession was made by the accused while in police custody and during the course of his interrogation by the police. At that time, an Executive Magistrate was apparently present. However, in view of the law laid down in the case of **Shri Kartik Chakraborty S/o Shanti Bhusan Chakraborty** (*supra*) such confession of the accused would be clearly hit by Sections 25 and 26 of the Evidence Act and therefore, would be inadmissible in law. By referring to the decision rendered in the case of **Shri Kartik**

Chakraborty S/o Shanti Bhusan Chakraborty (*supra*), the learned Special Judge has also rightly ignored the confession of the accused. However, the other evidence adduced by the prosecution side, in our opinion, was also insufficient to establish the charge brought against the appellant.

32. As noted above, the forensic test report of blood samples did not further the prosecution case and the DNA Fingerprinting report has physically disproved the prosecution story since it was opined that the blood sample of the foetus and that collected from the accused "did not match". In other words, in view of the FSL report, the prosecution story to the effect that the victim girl was impregnated by her father i.e. the appellant clearly stands disproved.

33. We also find that there are material inconsistencies and contradictions in the testimony of the prosecution witnesses. PW-2 is a seizure witness of Ext-2. PW-2 has mentioned about the seizure of the "mitdao" from the house of the accused. However, in so far as the seizure of brown coloured vest is concerned, it has not been clearly stated as to wherefrom, the seizure was made. Ext-2 seizure-list mentions that the seizure of the weapon, along with a pair of shirt-pant was made on being produced by the accused. However, there is no mention as wherefrom the brown colour half vest was seized.

34. PW-4, who is the other seizure witness of Ext-2 has not mentioned about seizure of any apparels but has merely mentioned about seizure of a dao by the police.

35. In his examination-in-chief, the I.O., i.e. PW-13 has stated that he had seized the dao and wearing apparels of the accused from the place of occurrence. From

the evidence available on record it is established that the place of occurrence is where the dead body was recovered and not the house of the accused person. It is to be noted herein that a "mitdao" is a weapon, which is commonly found in every household in a village set up in the State and therefore, mere seizure of the dao, would not be of any significance in a matter of this nature unless the same is connected with the occurrence by adducing cogent evidence. As would be apparent from the forensic test report of blood samples, as indicated above, the prosecution has failed to connect the seized dao with the incident. It is also not clear as to whether the police had seized the dao from the house of the accused or from the place of occurrence.

36. In her deposition, PW-5 has stated that her husband had confessed at the Police Station which she had heard when she went to the Police Station. However, according to PWs-3 and 4, the confession was made by the accused in his own house and in the presence of the police. PW-5, who is the wife of the accused and was present in the house but she did not depose about confession of the accused made in his house.

37. PW-5 has stated that she had no knowledge about the incident when her daughter was alive and that she did not state before the police that the accused had confessed that he had committed the incident. Moreover, in her deposition PW-5 has stated that the age of the victim at the time of the incident was about 10 years. According to PW-12, the PW-5 was aware of the condition of the victim long before the occurrence. However, medical evidence indicates that she was above 18 years

old on the date of the occurrence. In view of the above, we find that the evidence adduced by PW-5 was full of contradictions and hence not reliable.

38. Finally, although an attempt has been made to project that the place of occurrence was figured out on being shown by the accused, such an assertion also appears to be wholly contrary to the evidence adduced by the prosecution witnesses. PWs-6 and 7 have categorically deposed that the dead body was first noticed by some women who were plucking tea leaves in the garden whereafter, they had informed the management of the Tea Estate. Thereafter, police came there. PW-11 has also deposed that the accused had arrived at the place of occurrence after the police reached there and the dead body was lifted. Therefore, it is not possible for this Court to conclude that the dead body was discovered on being led by the accused person or that the police had come to know about the place of occurrence on being shown by the accused leading to discovery within the meaning of Section 27 of the Evidence Act. As such, although it is undoubtedly a case of heinous crime leading to the unfortunate death of the deceased girl, yet, we are of the view that there is no evidence to establish the charge brought against the accused/appellant. Rather, it appears that the entire allegation brought against the appellant is based on a rumour spread in the tea garden that it is the appellant who had committed the murder of his daughter under the circumstances narrated herein above. If the accused had in fact confessed of having committed the crime, there is no reason as to why his confessional statement under Section 164 Cr.P.C. could not be recorded before the Magistrate.

39. The homicidal death of the victim is established. It has also been established that she was pregnant at the time of the occurrence. However, there is no legal evidence to show that the accused/appellant had impregnated the victim or that he had committed the murder of the victim girl. The prosecution has also failed to lead any evidence to show that the accused was not present in his house on the day of the incident. PWs-5 and 12 have also not stated that the accused was not at home on the day of the incident. Therefore, although Ms. Bhuyan, learned APP has argued that the appellant/accused has not taken the plea of alibi, yet, we are of the view that absence of accused from home during the relevant time was an important circumstance in the case which ought to have been proved. It was the duty of the prosecution to establish the said fact by leading cogent evidence that the accused was not present in his house on the day of the incident and at the relevant time. However, the prosecution has failed to establish such an important link in the chain of circumstances which would further weaken the prosecution case.

40. For the reasons stated herein above, we are of the view that the impugned judgment and order passed by the learned Special Judge is unsustainable in the eyes of law. The same is accordingly set aside. The appellant is hereby acquitted of the charge brought against him.

41. We are informed that the appellant is presently in Jail. As such, we direct that the appellant, viz., Deblal Malpaharia be forthwith released from Jail unless his custodial detention is required in connection with any other case.

42. The appeal stands allowed.

43. Before parting with the record, we put on record our appreciation for the valuable services rendered by Ms. Sanchita Roy, learned *Amicus Curiae* and recommend that the Registry may make payment of notified remuneration to the learned *Amicus Curiae* as per the existing norms.

Send back the LCR.

JUDGE

JUDGE

T U Choudhury/Sr.PS

Comparing Assistant