

GAHC010212132019



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

Case No. : CRL.A(J)/79/2019

KRISHNA BISWAS
S/O. LT. TARANI BISWAS, VILL. KALIABOR TINIALI, P.S. KALIABOR, DIST.
NAGAON, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. A AHMED

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 16-10-2023

(K.R. Surana, J)

Heard Mr. A. Ahmed, learned Amicus Curiae appearing for the appellant as well as Ms. S. Jahan, learned Addl. P.P. for the State.

Judgment impugned in this appeal:

2. This appeal by the appellant-convict from jail has been filed under section 374(2) Cr.P.C. read with section 383 Cr.P.C. The appeal is directed against the judgment and order of conviction dated 18.03.2019, passed by the learned Addl. Sessions Judge No.1, Nagaon in Sessions (T1) Case No.51(N)/2017, under section 302/201/34 IPC by which the appellant was held to be guilty of committing offence under section 302 IPC and was sentenced to undergo RI for life and to pay fine of Rs.1,000/- with default stipulation and he was also convicted for committing offence under Section 201 IPC and was sentenced to undergo RI for 5 years and to pay a fine of Rs.1000/- with default stipulation.

Case of the prosecution:

3. The prosecution case is that on 17.03.2017, Smt. Juma Bora, wife of Jaan Bora informed the Kaliabor Police Station that her husband was missing since 13.03.2017, and that his mobile was switched off. Accordingly, a G.D. Entry No. 316 dated 17.03.2017 was recorded at 8.00 a.m. ASI Pinaki Acharya (PW-1) was entrusted to take a preliminary investigation. In course of investigation, on 22.03.2017 at about 11 a.m., the headless dead body of the missing person was found on Kolong River by the side of the house of his parents-in-law, namely, Krishna Biswas and Anita Biswas in a decomposed state. Thereafter, the police arrested the appellant, Krishna Biswas and his wife (i.e. the mother-in-law of the deceased).

4. It was projected that on being led by the appellant, the severed head of the deceased was recovered on 23.03.2017. Thereafter on 22.03.2017, the PW-1, who was a police personnel, had lodged an FIR with the Officer-in-

Charge of Kaliabor Police Station, alleging that on 13.03.2017 at about 7.00 p.m., the deceased Jaan Bora had gone to the house of his father-in-law, Krishna Biswas (appellant) and there was a quarrel between the appellant and the deceased over monetary issues and then the appellant had assaulted the deceased on his head as a result of which the deceased had died. The appellant with the help of his wife then dragged and threw the dead body of the deceased in Kolong River and the appellant had severed the head of the deceased by cutting it with a knife and the head was concealed under *meteka* in the river.

5. On the basis of the FIR (Ext.2), Kaliabor P.S. case no.39/2017 was registered under section 302/201/34 IPC and investigation was carried out by the PW8, who was then a Circle Inspector. In course of investigation, the IO had visited the site and examined the witnesses and recovered and seized a knife from the house of the appellant with which he had allegedly chopped off the head of the deceased. The dead body was then sent for post-mortem and then the IO had recorded the statement of the witnesses, prepared the sketch map, and at his request the Executive Magistrate had prepared the inquest report.

6. On charge-sheet being filed, case was committed for trial before the Sessions Court. A legal-aid counsel was appointed to defend the appellant. Charges were framed against the appellant under section 302/201/34 IPC.

Evidence in trial:

7. In support of the case of the prosecution, 8 witnesses were examined, viz. Sri Pinaki Acharya (PW-1), Sri Kailash Hazarika (PW-2), Sri Dhan Bora (PW-3), Sri Joy Kanta Bora (PW-4), Sri Gajen Bora (PW-5), Dr. Bhupen Ch. Borah (PW-6), Sri Nitumoni Borah (PW-7) and Insp. Rajen Bora (PW-8). The

following were exhibited during trial, viz., GD Entry (Ext.1), *ejahar* (Ext.2), video cassette (Ext.3), seizure list (Ext.4, Ext.5 and Ext.6), post-mortem report (Ext.7), inquest report (Ext.8), Format of FIR (Ext.9), statement of appellant made before PW-8 (Ext.10), sketch map (Ext.11 and Ext.12), charge-sheet (Ext.13), video cassette (M.Ext.A), *chappal* and rope (M.Ext.B), *kotari* (knife) (M.Ext.C).

8. On conclusion of recording of evidence, the appellant was examined under section 313 Cr.P.C. and the appellant had taken a plea of denial and had declined to adduce evidence in support of defence. As stated herein before, the appellant was convicted by the learned trial Court.

Hearing the appearing counsel:

9. Heard and considered the submissions of the learned *amicus curiae* as well as the learned Addl. P.P. As the hearing was lengthy, we refrain from burdening this order with the submissions. We have carefully examined the LCR.

Appreciation of evidence:

10. In this case, there is no eye witness to the offence of murder and the conviction of the appellant is based on circumstantial evidence. Therefore, the evidence on record is required to be examined. Although the witnesses have made similar depositions, the evidence is being elaborately discussed herein because of minor variations, which would have some bearing in their appreciation.

11. In his examination-in-chief, the PW-1, an ASI of Police had stated that on the basis of information, the O/C of the Kaliabor P.S. had made GDE No.

316 dated 17.03.2017 (Ext.1) and that in course of investigation, the decomposed dead body of the deceased with its severed head was recovered from Kolong river on 22.03.2017 at around 11.00 am near Kaliabor and that after the Executive Magistrate had made inquest of the dead body, it was sent for post-mortem. He had also stated that during investigation, it was found that immediately before the occurrence, the deceased had a quarrel with his father-in-law (i.e. appellant) and his mother-in-law at their house, which is situated on the bank of Kolong River and that the appellant had assaulted the deceased on his head by a branch of a tree as a result of which he fell down and succumbed to his injuries. Thereafter, the appellant and his wife had dragged away the dead body of the deceased and threw the dead body in Kolong River and covered it with *meteka*. They also had severed the head of the deceased with a knife and covered the head under the *meteka*. During investigation, the O/C., Kaliabor P.S. had taken the appellant and his wife into custody and on the basis of their statement and being led by them, the dead body of the deceased was recovered from Kolong river under *meteka* and the knife (*kotari*) used in crime was also recovered from the appellant's house. He had also stated that after the accused were taken into custody, and before recovery of the dead body of the victim and the knife, the statement of the accused persons were recorded under section 161 CrPC. He had exhibited the GD entry (Ext.1) and his signature and also the *ejahar* (Ext.2) and his signature. In his cross-examination, the I.O. (PW-1) had stated, *inter alia*, that the dead body was recovered at around 12.30 and 1.00 pm, when he was present and the knife was recovered at about 1.30 pm. He had stated that at the time of recovery of dead body and knife used in crime, Gajen Bora (PW-5), Joy Kanta Bora (PW-4) and one Kamal Bhuyan were present. He had stated that the wife of the victim had stated to him that on

13.03.2017, her husband was missing and he came to the house of the appellant. PW-1 had also stated that on the basis of information received from the appellant, he had mentioned in the *ejahar* that Jaan Bora, his son-in-law had visited his house and that while quarrelling with the victim, he had assaulted him on his head and he died on spot. He had stated that he did not see the knife in the Court on that day and that the size of knife was 6 (six) inches in length. He had also stated that while in police custody and before recovery of the dead body, the accused persons had stated before them that having murdered the victim, they had dragged his dead body to Kolong River, severed the head from the body and covered it with *meteka*. It was stated that at first the dead body upto neck was recovered and then the severed head was recovered at around 3.00 pm. on the same date after lodging of the *ejahar*. He had stated that the dead body was recovered one furlong away from the house of the accused persons. He had also stated that there were other houses and a poultry firm behind the house of the accused. He had also stated that the dead body was identified by Constable Padma Bora and then by the wife of the deceased. He had also stated that the police did not take any photography of the dead body and that he did not observe any blood stain on the seized knife. He had also stated that the public present at the time of recovery of dead body had not stated that the accused persons had committed the crime.

12. Kailash Hazarika, who was dealing in computer hardware and software, was examined as PW-2. In his examination-in-chief, he had stated that with the villagers Dhan Bora, the younger brother of deceased had noticed the dead body in Kolong River on the backside of the house of the accused persons and informed the police and police went to the spot and that he had also arrived there. He had stated that the police with the help of sniffer dog

discovered the wearing *chappal* of the deceased near the dead body. A rope was found near the dead body. The sniffer dog after getting the smell of the *chappal* of the deceased straightaway went to the house of the accused persons and recognized one sandal box in the house of the accused persons. He had further stated that in the meantime before taking the sniffer dog to Kolong River on the backside of the house of the accused persons, the police had already arrested the accused persons and taken them into custody. He had also stated that the dead body of Jaan Bora was found first without his head. On the next date, on being led by the appellant, in their presence, the head of the deceased was recovered at a distance of 3 (three) metres away from the place from where his dead body was recovered, and that it was covered by *meteka* floating on the river and that the dead body had almost started decomposing. The police had prepared a seizure list and he had put his signature thereon. He had stated that he went to see the dead body only after coming to know that dead body had been noticed in the Kolong river on the backside of the house of the accused persons. He had also stated that he had made the video recording of the statement of the accused persons through his mobile phone in the presence of the witnesses and they had confessed committing the crime. Thereafter, he had prepared the cassette in the presence of the O/c. of Kaliabor P.S. and handed over the said cassette (M.Ext.A) to the police. At this juncture, the learned Trial Court had recorded a note in the statement of PW-2 that the M.Ext.A video cassette was played and exhibited with the help of the Presiding Officer's laptop and that the Court had found it to be genuine. The PW-2 had stated that the police had seized his mobile phone by which he had made the initial video recording of the statement of the accused persons and later on the police had handed over his mobile phone after preparing the video cassette. The

seizure list of the mobile phone was marked as Ext.4 and his signature thereon was also exhibited. In his cross-examination, the PW-2 had stated that he had passed Higher Secondary in Arts stream and he had got training in Hardware and Software computer workings from Join Computer in Tezpur. He had stated that from a mobile video recording a video cassette may be made with the help of laptop. He had also stated that the audio-video mobile recording of the statements of the accused persons with the help of his mobile phone was done in the campus of Kaliabor police station and at that time other persons and police personnel were present. He had also stated that the "audio recording" of the sound of a person may be made in a video recording with the help of another person by tempering (sic. Should have been "tampering") the process. He had stated that his house was at Kuwarital, which was at a distance of five miles away from Kaliabor police station. He also stated that at the time of recovering of the dead body about 100/150 people were gathered. His statement was recorded before and after preparing the audio-video cassette (M. Ext.A). PW-2 had further stated that he was present when the dead body of the deceased was recovered without the head, but he was not present when the head was recovered on the next day. He had also stated that as there was no photographer the police had engaged him for making audio-video recording of the statements of the accused persons.

13. One Dhan Bora, a Tempo driver was examined as PW-3. He stated that he knows the complainant Pinaki Acharya (PW-1) of Kaliabor Police Station and that the deceased Jaan Bora was his own elder brother. He has stated that in the event of 13.03.2017 his elder brother was missing from their house and they started to search for him at several places and after inquiry he came to know that the deceased elder brother had gone to the house of his

father-in-law i.e. the appellant between 7.00 and 9.00 p.m. on the next date, he along with his two tempo-driver friends went to the house of the appellant and enquired about his deceased brother and when he asked Anita Biswas, the mother-in-law of the deceased, she had replied that his brother had visited their house on previous date and he left after collecting money from her. PW-3 had stated that he became suspicious and his family members and all the villagers started searching for his brother in the jungle by the side of Kolong River and his brother's beheaded dead body was found after 7-8 days in Kolong River, covered by *meteka* and that he had identified the dead body of his brother from physical appearance and wearing clothes. He had stated and one *chappal* and one rope were found near the dead body. He had stated that the sniffer dog, which the police had brought, after smelling the *chappal* and the rope nearby the dead body, straightway went to the house of the accused persons with villagers following it and thereafter the police arrested both the accused persons and their son. The said witness had stated that immediately after their arrest, the accused persons had stated that they had killed Jaan Bora at their house between 7.00 pm. to 9.00 pm. on 13.03.2017 and that on the next day of arrest at around 9.00/10.00 am., the appellant had stated before the police that after killing, he had severed the head of Jaan Bora and concealed it by covering with *meteka* at a distance of about 10-15 feet away from the place where the dead body was found. It was also stated that in their presence, the accused had led the police to Kolong river and he had fished out the severed head of Jaan Bora which was concealed in the water by covering it with *meteka*. He had also stated that the appellant had stated in front of the police and them that he had severed the head of Jaan Bora by cutting with a *kotari* (knife), and then on being led by the appellant, the knife was recovered from his house. He had

stated that the police had seized the *kotari* (knife) in their presence from the house of the appellant and he had proved the seizure list (Ext.5) and the signature thereon and that Material Ext.B, i.e. *chappal* and the rope were seized from the place of occurrence in his presence and has stated that the *chappal* belonged to the appellant. He had stated that the police had arrested the accused-persons after seizure of the *chappal* and the plastic rope and his statement was recorded during investigation.

14. In his cross examination, the PW-3 had stated, *inter alia*, that the deceased was his brother and residing in their joint family with their parents and that he came to know his brother was missing in the night of the day of occurrence. He had stated that the Kuworital P.S. was informed that his brother was missing, but he did not remember if any written *ejahar* was lodged. He had stated that on the following morning the police came to their house and asked him about his missing brother. He had stated that 8-9 days after his brother was missing his dead body was recovered and he had lodged an FIR at Kuworital P.S. after getting it drafted through a clerk of SDO Office, Kaliabor. He had stated that on the next morning after his brother went missing, the police had recorded his statement. He had denied the suggestion that in his previous statement before the IO, he did not state that on the next day after his brother went missing, he had gone to the house of the accused persons and Anita Biswas had told him that Jaan Bora had come to their house to collect money. He had led the suggestion that it was not a fact that in his previous statement before the police he had not stated that the neighboring people had stated to him that a noisy situation was created in the house of the accused person in the previous night. He had also stated that at the night of the recovery of the dead body two police personnel were present and that when he along with villagers

went to trace out his brother, two police persons went with them. He also stated that, at first, he saw the dead body of his brother under *meteka* with his head severed and at that time the dead body had started decomposing but could be recognized. It was also stated that the head was found on the next day at around 11.00/12.00 o' clock. He had also stated that the sniffer dog after smelling the *chappal* and rope led the police to the house of the accused persons and then they were arrested. He had also stated that on the next day of the recovery of the dead body without head, the appellant was brought by police from the police station to the place and that the sniffer dog came on the day of recovery of the dead body without head. He had stated that his deceased brother had gone to jungle to collect firewood. PW-3 had also stated that at the time of recovery of head, the eye balls were not there.

15. One Joy Kanta Bora, who was a cultivator by profession, was examined by the prosecution as PW-4. The deceased Jaan Bora was his nephew. He had stated in his examination-in-chief that on *fakuwa* (Holi), his nephew Jaan Bora was missing from his house and accordingly, Kaliabor Police Station was informed and that after 3 (three) days he had heard from his neighbours that there was a quarrel between Jaan Bora and his father-in-law, the appellant herein. The said witness had stated that after 3 (three) days of the occurrence he along with villagers and police went to the house of the appellant but Jaan Bora was not found. After 6/7 days, when he along with villagers and police went in search of Jaan Bora to the bank of Kolong River, they noticed the dead body of Jaan Bora which was covered with *meteka* and one rope and one pair of *chappal* (sandal) were lying near the dead body. He had also stated that thereafter, police immediately brought sniffer dog to the said spot. The sniffer dog having smelled the rope and the *chappal*, went to the

house of Krishna Biswas (appellant), which led to the arrest of the appellant and his wife. He had also stated that the police took the headless dead body of Jaan Bora to Kaliabor Police Station. PW-4 had also stated that he along with villagers went to the police station and that on interrogation, the appellant revealed in front of them and before the police that he had beheaded the dead body and kept his head at a little distance from the place where the dead body was found. Because of the jungle on the river side and darkness of night, the search for head was not carried out at night. He also stated that in the next morning at about 9.00/10.00 am., he along with police, many other people and media persons went to the side of Kolong river in search of the head of the victim. Upon being shown by the appellant, the head was found slightly floating and was covered with *meteka*. He had also stated that the appellant had confessed in front of all that he had severed the head of Jaan Bora by cutting with a knife. The said knife was also seized by the police and he had exhibited the seizure list as Ext.6, and his signature thereon. In the cross-examination, PW-4 had stated that on the day of *fakuwa* itself, he came to know about the missing of Jaan Bora and that after two days of *Fakuwa*, the father and the wife of Jaan Bora had lodged FIR at Kuworital Police Station. He stated that he saw the appellant on the last occasion in police custody at the time of recovery of the head of Jaan Bora and that a section of Battalion also accompanied the police at the relevant time of recovery of the dead body. The said witness had also stated that on the day of recovery of the headless dead body of Jaan Bora, the appellant was arrested. He had also stated that on the basis of the *ejahar* lodged by the father and the wife of Jaan Bora, the police had registered the case. PW-4 had also stated that when the headless dead body of Jaan Bora was spotted, the police and about 6/7 other persons and the Magistrate were

present. He had stated that he could recognize the headless dead body of Jaan Bora from the mark on his back. The downside of the dead body was in decomposed stage and that when the dead body was searched by public, the shirt was sticking with the dead body. He stated that he did not see police taking photograph of the dead body nor did he see police making videography of the occurrence leading to recovery of the dead body of Jaan Bora. He had denied the suggestion that the appellant did not show the head of Jaan Bora or that he did not confess that he had severed the head of Jaan Bora from the dead body. He had also stated that although the appellant previously did not confess anything, however, at the time of recovery of the head of Jaan Bora, the appellant came with police and battalion with one handcuff on one hand and recovered the head. He had stated that on the day of recovery of the headless dead body, about 200/300 people had gathered. He had also stated that he accompanied the police at around 9.00 pm on the date of recovery of dead body.

16. Sri Gajen Bora was examined as PW-5. The deceased Jaan Bora was his nephew. He had stated in his examination-in-chief that after 4/5 days of occurrence, he came to know that Jaan Bora was killed by his parents-in-law and after 4/5 days of the date of occurrence, he along with other villagers had gone to the house of the appellant and the police showed them a knife and seized it in his presence at the house of the accused. He had stated that he can recognize the said knife which the police had seized in his presence. He had exhibited the *kotari* (knife) as M. Ext.C as well as the seizure list as Ext.6. In his cross-examination, he had stated that his deposition was based on information. He had also stated that he had gone to the place of occurrence at around 9.00/ 10.00 am, and could not state the names of persons who were present with him

when the knife was recovered. He had also stated that this type of knife is found in everybody's house and that the police had not recorded his statement. He did not know the contents of the seizure list.

17. The Doctor who had conducted the post-mortem examination of the dead body of Jaan Bora was examined as PW-6. As per his examination-in-chief, he had conducted the post-mortem examination at 2.30 pm on 23.03.2017. On examination, he found (1) one decapitated male putrefied dead body with whole body swelling and skin peeled off in places; and (2) a decapitated head with loss of hair and eyes and most of the facial muscle with putrefaction. He had also found that brain and other viscera's are putrefied and loss of third cervical vertebrae and that as regards the head and body, both the parts were putrefied and the stage of putrefaction was in same stage and he had opined that death was due to shock and hemorrhage as a result of decapitation which was ante mortem in nature. In his cross-examination, PW-6 had denied that the head received on 23.03.2017 was not of the dead body received on 22.03.2017. He had also stated that he did not find any injury on the dead body except decapitation on the neck and explained that decapitation means cut on the neck by heavy sharp cutting weapon and that putrefaction starts after 72 hours and that the process is slow when the body is under water.

18. One Nitumoni Borah was examined by the prosecution as PW-7. He had stated in his evidence-in-chief that the deceased Jaan Bora was his friend and that on the date of *Holi* in the year 2017, they were playing *holi* and Jaan Bora told him that he would visit the house of his parents-in-law. On the next day of Holi, Nila Kanta Bora, father of Jaan Bora had come to his house and asked him on the whereabouts of Jaan Bora and on that he informed that

Jaan Bora had told him that he would visit the house of his parents-in-law in Kaliabor Tiniali. For 3/4 days, Jaan Bora was missing and his mobile phone was found switched off. He had stated that he had visited the house of the accused and asked them on the whereabouts of Jaan Bora and then Anita Biswas told him that Jaan Bora had visited their house and he had gone away after collecting money from them and that after 9/10 days of *Fakuwa*, they found the headless dead body of Jaan Bora in Kolong river covered by *meteka* and that at the time of recovery two police personnel were present with him. The headless dead body was identified by Dhan Bora on the basis of his wearing cloth. Thereafter, the police brought sniffer dog near the dead body and the sniffer dog led the police and them inside the house of the appellant, and then the appellant and his wife Anita Biswas were arrested and taken to the police station. They also came to the police station and the police interrogated the appellant in front of them. At first, he denied murdering Jaan Bora but subsequently, he disclosed in front of them that he had beheaded Jaan Bora and kept the head at a certain distance from his body. At that time, it was night and the police did not go to the place of occurrence and on the next morning, the police took the appellant to the place of occurrence at the bank of Kolong river and they also accompanied them and then the appellant recovered the head of Jaan Bora covered under *meteka* at a distance of about 10/15 feet from the place where the headless body was found. It was stated that on interrogation, the appellant went to his house and in their presence he showed the knife with which he severed the head of Jaan Bora. PW-7 had stated that he was present at the time of inquest and he had exhibited the Inquest Report as Ext.8 and his signature thereon under objection of the defence. He had also stated that in the evening following recovery of headless body, Kailash Hazarika had prepared the

audio-video of the statement of the appellant at Kaliabor P.S., where he was present and the police seized the video cassette in his presence. The video cassette was exhibited as Ext.3 and his signature thereon was also exhibited and he had exhibited the C.D. as M. Ext. A, seized in his presence. He had also stated that the police had recorded his statement on three occasions at the time of recovery of headless dead body and another after recovery of head. In his cross-examination, the PW-7 had stated that he acts as witness of any case under Kaliabor P.S., and later on stated that he acted as witness of those occurrences that had taken place during his presence. He had stated that the police had recorded his statement when the headless dead body was recovered and again on the next date when the head was recovered and also stated that the appellant and his wife were arrested on the date of recovery of headless dead body of Jaan Bora and were kept in police lock-up. He does not know if the police had taken both the accused before the Magistrate for recording their confessional statement. He had named Kailash Hazarika, Paran Pachani, Nipen Baruah and Dhan Bora were present with him when the appellant had made the statement before the police. He had further stated that at the time of recovery of dead body, he along with many other villagers were present and two policemen had accompanied them. He had stated that Lila Kanta Bora and Dhan Bora were present at the time when headless dead body of Jaan Bora was recovered. He had stated that on the day of recovery of dead body the police had taken the handcuffed accused persons to police station and on the next day the head was recovered on being shown by the appellant and at that time he along with policemen were present. He had stated that in his statement before the police, he had not stated that on the day of *Fakuwa*, Jaan Bora had told him that he would visit the house of his father-in-law because the police did not ask

him and that he did not state before the police in his previous statement that he met Jaan Bora for the last time on the day of *Fakuwa*. He had also admitted that he did not state before the police in his previous statement that he went to the house of the appellant and Anita Biswas told him that Jaan Bora had visited their house and he had gone away after taking money from them. He had stated in his cross-examination that the headless dead body was recovered by the public and police persons were present. He had further stated that in his statement before the police he had not told that the police came with sniffer dog which ran directly to the house of the appellant from the place where headless dead body of Jaan Bora was recovered.

19. Rajen Bora, Inspector of Police was examined as PW-8. In his examination-in-chief, the said witness had stated that on 17.03.2017, Juma Bora, wife of Jaan Bora had informed him that since 13.03.2017, her husband was missing and accordingly, GDE No. 316 dated 17.03.2017 was registered and ASI Pinaki Acharya was entrusted with the matter. He had also stated that on 22.03.2017, ASI Pinaki Acharya had lodged the FIR (Ext.2), which was registered as Kaliabor PS Case No. 39/2017 dated 23.03.2017 under sections 302/201/34 IPC and that he had taken up the investigation himself. He had also deposed that before lodging of the formal *ejahar*, on 22.03.2017, at about 11.00 am., he could come to know from Constable Padma Kt. Bora that the dead body of Jaan Bora was floating on Kolong River near Kaliabor Tiniali. He had exhibited the *ejahar* (Ext.2) and the Form of FIR (Ext.9) and his signatures thereon. He had stated that thereafter, the headless dead body of Jaan Bora was recovered from under the *meteka* in presence of his relatives and other public, but his head was not found and that the dead body was identified by his younger brother Dhanmoni Bora. He had also stated about inquest being conducted by

Executive Magistrate Rituparna Boruah at the place of occurrence and about the seizure of one piece of *chappal* along with a plastic rope at the place of occurrence in the presence of witnesses and he had exhibited the seizure list (Ext.5) and his signature thereon. He had also stated that he had recorded the statement of witnesses. He had also referred to the statement made by the appellant, a part of which was recorded in the evidence-in-chief and the said statement was exhibited as Ext.10, but under protest from the defence. He had also deposed to the effect that on being shown by the appellant, the head of the deceased Jaan Bora was recovered, which was identified by Dhan Bora and that the inquest on the head was done by Executive Magistrate Rituparna Boruah and thereafter, the head was sent to Nagaon B.P. Civil Hospital for post-mortem examination. He had also exhibited the *chappal* and the rope (M.Ext.B), and the knife used by the appellant to sever the head of the deceased (M.Ext.C), sketch map (Ext.11 and 12), charge-sheet (Ext.13) and his signatures on Ext.11, 12 and 13.

20. During his cross-examination, the I.O. (PW-8) had stated that he had arrested both the accused (including the appellant) on 22.03.2017 for the purpose of interrogation and that they were arrested on 23.03.2017 and forwarded before the Magistrate on the same day. He had further stated that on the date of recording the statement of the accused persons, the dead body of Jaan Bora was not recovered and that on 23.03.2017, at about 12.00 noon, the accused persons were formally arrested. He could not find the challan by which the severed head of Jaan Bora was sent to B.P. Civil Hospital, Nagaon in the case diary. He had further stated in his cross examination that in Ext.10, the appellant, Krishna Biswas did not state before him that he would show the severed head of Jaan Bora and that after recording of the statement of the

appellant, he was kept at Kaliabor P.S. He had further stated that when he had recorded the statement of appellant (Ext.10), he did not record that he would show the head of Jaan Bora and that on 23.03.2017, before recovery of the severed head, he did not record the statement of the appellant. It was further stated that on the intervening night of 22.03.2017 and 23.03.2017, no public was present when the appellant had stated that he would be able to show the severed head of Jaan Bora. He had denied that on 23.03.2017, before they had proceeded to the place of occurrence for recovery of the head of Jaan Bora, large number of public were already present there and he had also denied that the public had already recovered the head of Jaan Bora before they had reached. He had further stated that he did not find blood stain on M.Ext.C for which it was not sent for serological examination. He had also stated that the statement of the accused was recorded in video in police station. He had also stated that Dhan Bora (PW-3) in his previous statement had not stated that while he visited the house of the accused, Anita Biswas had stated to him that Jaan Bora came to their house to collect money, or that the neighbouring people had disclosed to him that there was a noisy situation at the house of the accused in the previous night. He had also stated that in his previous statement, Nitumoni Bora (PW-7) did not state that on the next day of *Fakuwa*, the father of Jaan Bora visited his house and asked him about Jaan Bora.

Analysis of evidence:

21. On a perusal of the LCR, it is seen that in the form of FIR (Ext.9), reference is made to GD Entry no. 421 at 8.30 AM. Date of occurrence was Thursday, 22.03.2017 at 11.00 AM. Information receipt date has been mentioned as 23.03.2017 at 8.30 PM in reference to GD entry no.421. In the FIR lodged by ASI Pinaki Acharya (PW-1), reference was made to Kaliabor PS

GDE No. 316 dated 17.03.2017. From the contents of the FIR (Ext.2), it appears that after recovery of the dead body on 22.03.2017, the severed head was searched allegedly on being shown by the appellant. However, from the cross-examination of PW-8, it appears that neither the headless dead body nor the severed head of the deceased Jaan Bora were recovered on the basis of confession of the appellant. The *kotari* (knife) allegedly used for severing the head of the dead body was recovered, from the appellant's house which was seized in the presence of the witness. In the cross-examination, the PW-1 had stated that at first the dead body up to neck was recovered and then the severed head was found at 3.00 PM on the said date, but after lodging of the *ejahar* (Ext.2). As per the evidence of PW-2, the dead body of the victim without head was found first and on the next date on being led and shown by the appellant, the head of the deceased was recovered.

22. As per the evidence of PW-3, he had lodged a written FIR at Kuworital PS 8-9 days after Jaan Bora went missing. The said FIR by the PW-3 was not exhibited by the prosecution.

23. PW-2, PW-3 and PW-4 had stated in their respective examination-in-chief about the police using sniffer dog. However, PW-1 and PW-8, who was the I.O. of the case had neither exhibited any memo of entry regarding use of sniffer dog for investigation nor did they gave any such statement in their respective examination-in-chief. The sandal box, which as per the evidence of PW-2 was recovered from the house of the appellant was not exhibited by the prosecution.

24. The PW-3 had exhibited the *chappal*, allegedly of the appellant as well as rope (M.Ext.B), which were purportedly seized from nearby the place

where the dead body was recovered. But the appellant was not confronted with the said circumstances when he was examined under Section 313 Cr.P.C.

25. It appears that there is apparent contradiction in the evidence of the PW-2 and 3. As per PW-2, the *chappal* was of the deceased person. But as per the PW-3, the seized *chappal* belonged to the appellant. The PW-4, who allegedly saw the sniffer dog smelling the rope and chappal and leading them to the house of the appellant, is silent regarding the ownership of the recovered chappal.

26. There are three witnesses of the recovery of one *chappal* and the sandal box, out of which the prosecution had examined two witnesses, namely, Kailash Hazarika (PW-2) and Dhanmoni Borah. The third witness, namely, Dulal Borah, was not examined by the prosecution.

27. In light of the discussions in the foregoing paragraphs, it would be unsafe to accept that the *chappal* (M.Ext.B) had belonged to the appellant. It is equally difficult to accept that the said *chappal* belonged to the deceased.

28. The PW-2 is the person who had recorded the video of alleged confessional statement of the accused in his mobile and with the help of a computer, it was recorded in a video cassette. Thus, as per PW-2, admittedly there are two stages of copying the video, one from mobile to laptop and then from laptop to video cassette. Out these three recording devices, two devices were not exhibited, the mobile and the laptop.

29. As per the note of the learned Addl. Sessions Judge, the video cassette (M.Ext.A) was played by using laptop, which is just unbelievable firstly, because video cassette was an outdated technology in the year 2017. Moreover,

the information about a laptop which can play video cassette is not available in the internet.

30. The prosecution had not exhibited any certificate issued under Section 65-B of the Evidence Act for the video recorded in mobile phone, which is an electronic document. In this regard, with profit, we may refer to the decision of Supreme Court of India in the case of *Shafhi Mohammad v. The State of Himachal Pradesh*, AIR 2018 SC 714, where it has been held that the applicability of procedural requirement under Section 65-B (4) of the Evidence Act of furnishing certificate is to be applied when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device.

31. The video, having not seen by the learned Trial Court on the seized mobile phone, the recording contained in the video cassette would not be "primary evidence", but would only be "secondary evidence". Therefore, the video cassette (M.Ext.A), being secondary evidence is not admissible in the absence of satisfactory proof that the mobile is lost or destroyed.

32. In light of the discussions in the foregoing paragraphs, the opinion of the learned Trial Court to the effect that the material Ext.A video cassette was played and exhibited with the help of laptop in his presence at the Court and that the Court had found it to be genuine and correct, which is recorded in the evidence of the PW-2, is liable to be discarded and rejected.

33. In the said context, the Court is also inclined to hold that the opinion expressed by the learned Trial Court about the genuineness and correctness of the contents of M.Ext.A would not be enough to dispense with the primary evidence, which was recorded in a mobile phone seized vide Ext.4.

Such an opinion cannot be an alternative and/or a substitute to a legal requirement of a electronic record being admissible only if it is accompanied by a certificate as envisaged under Section 65-B of the Evidence Act. In this regard, it would be appropriate to refer to the provisions of the second proviso to Section 165 of the Evidence Act, 1872, which does not give any discretion to the Court to dispense with primary evidence of any document, except in the cases excepted in the Act. The said provision reads as follows:-

165. Judge's power to put questions or order production - *The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:*

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.
(emphasis supplied)

34. Although, the I.O. (PW-8) had exhibited the statement of the appellant made on 22.03.2017 as Ext.10, but the said statement is inadmissible by virtue of the provisions of Section 25 and 26 of the Evidence Act. It may be mentioned that in the case of *Saher v. State of Karnataka, (2010) 7 SCC 263*, the Supreme Court of India had held that the statement made in police custody is unreliable unless the appeal subjected to cross-examination or judicial

scrutiny. Therefore, in view of the provisions of Section 25 and 26 of the Evidence Act, the alleged confession made by the appellant before the police cannot be proved against him. Therefore, the conviction of the appellant cannot be based on his alleged confession.

35. The learned Addl. P.P. had submitted that even if the confessional statement of the appellant made before the police is not relied upon, as the appellant had led the police to the recovery of the head of Jaan Bora (deceased) from Kolong River, which was hidden under water hyacinth (*meteka*). In this regard, it was submitted that although the place from where the head was recovered was a public place, but the place where it was hidden was not having easy access to the public and the place could only be within his special knowledge. Hence, it was submitted that the conviction of the appellant can be made on the basis of his post crime conduct of knowing the place where the head was concealed. In the said regard, there is no dispute with the learned Addl. P.P. on the legal principle. But in the present case in hand, from the evidence of PW-4, 200/300 people had gathered when the headless dead body was recovered. As per the evidence of PWs, the PW nos. 2, 3, 4 and 7 were present when the head of the deceased was recovered. As per PW-1, who is the writer of FIR and also the I.O. of the case, when the missing report was given, the headless dead body and the severed head of the deceased were recovered on the same day, i.e. 22.03.2017, but PW-2, PW-3, PW-4, PW-7 and PW-8, have deposed to the effect that the headless dead body was recovered on 22.03.2017, and the head was recovered on 23.03.2017. Therefore, when the prosecution had introduced two versions of the recovery of headless dead body and the severed head, it would not be safe to affirm the conviction of the appellant by applying Section 8 of the Evidence Act, 1872 in respect of

subsequent conduct.

36. In this case, the prosecution has not exhibited any memo and/or entry made of the statement of the appellant recorded on 22.03.2017 under Section 161 Cr.P.C. (Ext.10) regarding "leading to recovery". We have carefully considered the case of *Rajiv Phukan & Anr. v. The State of Assam*, (2009) 2 GLT 414; 2009 0 Supreme (Gau) 185, cited by the learned Addl. P.P., and even after considering the same, the Court is unable to accept the submission of the learned Addl. P.P because it is seen that Ext.10 does not contain any statement by the appellant which can be construed to be an evidence that he had volunteered to lead the police to the recovery of either the headless dead body or the severed head of the deceased. Therefore, Ext.10 cannot be read to be admissible evidence within the meaning of Section 27 of the Evidence Act regarding alleged statement of the appellant leading to recovery.

37. As per the FIR, it is the case of the prosecution that the appellant had attacked the head of Jaan Bora, the deceased with a "branch of a tree" whereupon he fell down on the ground and died on the place of occurrence. In the alleged statement of the appellant vide Ext.10, he had stated that he had hit the head of the deceased with a wood. Therefore, the severance of the head could only be after the deceased had died. But, the prosecution had not proved that the deceased had suffered any head injury. As per the contents of the *ejahar* (Ext.2), the appellant had dragged the dead body to the Kolong River and thereafter, severed the head of the dead body. Therefore, as per the FIR it was not the knife (M.Ext.C) which was used for the crime. Hence, there is no evidence to show that the appellant had given the fatal blow to the deceased on his head with a branch of a tree.

38. As per the statement made by PW-1 in his cross-examination, the size of the knife was 6 (six) inch in length. The seizure witness of *kotari* (knife) are PW-3, PW-4 and PW-5. In his cross-examination, PW-5 has stated that the height of iron portion of the *kotari* (knife) was six inch and the wooden handle was four inch. The PW-4 and PW-5, in their cross-examination had stated that the type of knife seized is found in everybody's house. However, as per the entry made in the seizure list (Ext.6), the description of the seized article is mentioned as "one knife (*kotari*) length about 2 fit (sic. should have been feet) with wooden handle, written as 'N'. Therefore, the evidence of the seizure witnesses and PW-1 regarding the size of the *kotari* (knife) does not match with the description of material Ext.C as mentioned in the seizure list (Ext.6).

39. As per the examination-in-chief of PW-1, the appellant had hit the deceased with a tree branch and the deceased had fell down and as a result succumbed to his injuries. However, the tree branch was not seized and sent for serological examination.

40. As per the version of PW-8, the Inspector of Police and the I.O. of Kaliabor PS Case No. 39/2017, during interrogation, the accused (i.e. appellant and his wife) had stated that the appellant had assaulted Jaan Bora with a *lathi* and that Jaan Bora fell down and died on the spot. As per the so called confessional statement of the appellant (Ext.10), he had assaulted Jaan Bora two times with a wooden stick, which he found nearby. The I.O. did not make any effort to search and seize the said *lathi* and send it for serological examination.

41. Though along with a *chappal*, a rope (M. Ext.B) was also seized, but the said rope was not sent for serological examination to ascertain if traces

of human blood could be found. Therefore, the prosecution could not prove that the rope was used to drag the dead body.

42. In connection with the recovery of *chappal*, it is seen that the prosecution had failed to prove that the *chappal* (M.Ext.B) either belonged to the appellant or was of the deceased. In the absence of clear evidence, the recovery and seizure also appears to be doubtful.

43. The alleged *kotari* (knife) used for the crime, though seized and exhibited as M.Ext.C, was not sent for serological examination. There are three versions of the size of the said seized knife. As per the seizure list (Ext.6), the alleged knife was 2 feet in length with wooden handle. The said seizure list (Ext.6) was prepared by PW-8 and there were three witnesses to the said Ext.6, namely, Joy Kanta Bora (PW-4), Gajen Bora (PW-5) and Amal Bhuyan (not examined by prosecution). In his cross-examination, the PW-1 had stated that the knife was 6 (six) inch in length. The PW-2, who was engaged by police to do video recording, did not make any statement regarding recovery of *kotari* (knife). The PW-5 had identified the *kotari* (M.Ext.C) in Court, which was seized in his presence.

44. The time of arrest of the appellant has different versions. The PW-3 had stated in his cross examination that the accused persons were arrested after seizure of the *chappal* and the plastic rope. PW-4 had stated in his examination –in-chief that one rope and a pair of *chappal* were lying near the dead body and that after getting their smell, the sniffer dog had led them to the house of the appellant then the police had arrested the appellant. In his examination-in-chief, PW-8 had stated that on 23.03.2017, at about 10.20 am, the severed head of Jaan Bora was searched at Kolong River in the presence of

the appellant and the severed head was recovered on being shown by the appellant. In his cross-examination, the PW-8 had stated that on 23.03.2017, at about 12.00 noon, the accused persons were formally arrested.

45. The I.O. (PW-8), had stated in his cross examination that in Ext.10, the appellant, Krishna Biswas did not state before him that he would show the severed head of Jaan Bora and that after recording of the statement of the appellant, he was kept at Kaliabor P.S. He had further stated that when he had recorded the statement of appellant (Ext.10), he did not record that he would show the head of Jaan Bora and that on 23.03.2017, before recovery of the severed head, he did not record the statement of the appellant.

46. It is reiterated at the cost of repetition that the alleged confession (Ext.10) made by the appellant cannot be accepted as the said statement was made before the police. Moreover, there is no evidence of previous statement of the appellant before the police, within the scope of Section 27 of the Evidence Act, 1872 which led to the recovery of the headless dead body or the severed head of the deceased Jaan Bora.

47. In this case, the I.O. had made no attempt to produce the appellant and his wife before the nearest Judicial Magistrate for recording of their confessional statement.

48. As per the evidence of PW-2, the video cassette (M.Ext.A) was prepared when the accused persons had allegedly confessed their crime. As per the confessional statement of the appellant (Ext.10), the same was made on 22.03.2017. As per the examination-in-chief of PW-2, he had recorded the statements of the accused persons through his mobile phone and thereafter, the cassette was prepared by him in Kaliabor P.S. and he had handed over the audio

and video cassette to the police. The police had also seized his mobile phone. However, the I.O. has not explained why seizure list of the seized cassette was prepared and signed on 26.03.2017 at 6.00 pm. The PW-2 had not stated that he had signed the seizure list after 4 (four) days. The failure of the I.O. to seize the video recording and the phone of the PW-2 immediately after it was recorded creates a doubt regarding motive and purpose of the I.O. to keep the video recording in his custody for 4 (four) unexplained days and therefore, apart from lack of certificate under Section 64 of the Evidence Act, 1872, it would otherwise not be safe to accept the contents of the video recording as an un-doctored evidence because the I.O. had not exhibited the original video from the phone which was used for recording the statement of the accused persons, though it was seized.

49. The learned Addl. P.P. had strenuously argued that the chain of circumstances is unbroken and it leads to the only conclusion that none other than the appellant had killed Jaan Bora and severed his head from the dead body to conceal the crime. It was also submitted that the PW-3 and PW-7 had stated in their respective evidence that the deceased had told them that he would visit the house of the appellant, his father-in-law, which was also a clinching circumstances because immediately thereafter, the deceased went missing. It was also submitted that the PW Nos. 2, 3, 4 and 7 had all corroborated that the appellant had led the police to the recovery of the head of Jaan Bora, the deceased. It was also submitted that non-recording of the disclosure statement would not be always fatal, and in support of the statement, reliance was placed on the case of *Rajiv Phukan (supra)*. The relevant observation of the Full Bench of this Court was as follows:-

1. *Whether a statement, which is popularly known as 'disclosure statement',*

must be reduced into writing in order to make such a statement admissible in evidence, under Section 27 of the Evidence Act, is the question, which this reference has to answer.

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40. *What emerges from the above discussion is that Section 27 does not provide for writing the information, which may have been given by an accused; hence, the information can be verbal and also be proved against the accused, who gives the information; but when the verbal information given by the accused is not deposed to by the Investigating Officer or when the Investigating Officer does not depose as to what exactly the accused had stated before him, Section 27 would not apply as there would be, strictly speaking, no proof of disclosure state-merit. Section 27, in such a case, becomes inapplicable not because of the fact that no written record has been proved as regards the disclosure statement, but because of the fact that the Court does not know as to what the accused had stated, which led to the discovery of the fact.*

41. *In Arjun Biswas (2005 Cri LJ 554) (supra), a Division Bench of this Court, in a given fact situation, observed, and we are of the view that the Division Bench, correctly so observed,*

18. When a statement made by an accused is sought to be introduced into the evidence on record by taking recourse to Section 27, the Court shall, first, determine what fact was really discovered in consequence of the statement made by the accused and, then, the Court shall split up the statement into different components in order to enable the Court to shift the admissible portions of the statement from the inadmissible ones. Only that component or portion of the statement, which was the immediate cause of the discovery, would be the legal evidence and not the entire statement. What is, now,, required to be noted is that a fact discovered shall not be treated as equivalent to the object produced. The fact discovered, in fact, embraces, within its ambit the place from where the object is produced and the knowledge of the accused as to whether the object produced was lying See State of Rajasthan v. Bhup Singh reported in (1997) 10 SCC 675.

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52. *From the observations, so made, in Abdul Hafiz (supra), it becomes clear that though Section 27 does not make it mandatory to record the disclosure statement, the fact remains that when more than one accused is involved in a given case, the investigating Officer, who records the statement, which leads to the discovery of the fact, must depose in the Court, as to which accused person, amongst the accused persons facing the trial, was the one, who had made the statement first and had, thereby, led to the discovery of the fact.*

53. In *Bhup Singh (supra)*, it has been pointed out that when a fact is found to have been discovered as a result of disclosure statement made by a person, who was accused of an offence and was, at the time of making the statement, in police custody, such statement can be used in connection with another case. The Supreme Court has observed that it is immaterial as to whether the information was supplied in connection with the same crime or a different crime. Thus, it is possible, in the light of the law, laid down in *Bhup Singh (supra)*, that a disclosure statement, made by an accused in one case, be used as disclosure statement in another case.

54. In *Bodhraj v. State of J & K*, reported in (2002) 8 SCC 45: 2002 Cri LJ 4664, 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 discovery. 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 must be adduced through evidence. The basic idea embedded in Section v 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 emphasized portion of the observations made above, in *Bodhraj (2002 Cri LJ 4664) (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.

56. Because of what have been discussed and pointed out above, we conclude that a 'disclosure statement', to be admissible under Section 27 of the Evidence Act, is not statutorily required to be reduced into writing, though prudence demands that such an information should be reduced into writing in order to

enable the Court to know exactly as to what the accused is allegedly to have stated and the extent to which the information given by him is admissible. The reference shall stand answered accordingly.

50. From the discussions made herein before, the chain of circumstances as narrated below, do not appear to be complete.

51. In the present case in hand, there are no eye witnesses to the murder. Therefore, only if the chain of circumstances leads to the only conclusion that the appellant was guilty of committing the offence, his conviction can be affirmed. However, from the discussions above, the Court is of the considered opinion that the chain of circumstances is found to be broken on all fronts, i.e. (i) evidence by PW-2, 3 and 4 regarding use of sniffer dog to catch the appellant and his wife was not corroborated by the evidence of the two I.O.'s in the case, PW-1 and PW-8; (ii) the recovery of *kotari* (knife) from the house of the appellant does not prove anything because the PW nos. 1 and 4 and Ext.6 give different size and description of the said knife (M.Ext.C); (iii) use of the *kotari* (knife) by the appellant as a weapon for dismembering the head of the deceased could not be proved as it was never sent for serological examination and moreover, the Doctor (PW-6), who had conducted the post-mortem examination had stated in his cross examination that "decapitation means cut on the neck by heavy sharp cutting weapon" and there is no evidence that the seized *kotari* (knife) could have been used for the decapitation of head; (iv) use of *lathi* (stick) or branch of tree by the appellant to give fatal blow to the deceased was not proved as the same was not collected as material evidence; (v) the confessional statement cannot be accepted to be a legal evidence in view of the provisions of Section 25 and 26 of the Evidence Act, 1872; (vi) from the appellant's statement (Ext.10), the prosecution could not

show that the appellant gave any statement from which it can be said that he had led the police to recovery of the head of Jaan Bora, the deceased; (vii) moreover, the prosecution could not prove that the *chappal* and rope (M.Ext.B), recovered from nearby the headless dead body belonged to the appellant; (viii) although the PW-2 had introduced in his evidence that a sandal box was recovered from the house of the appellant by use of sniffer dog, the prosecution did not prove that any such recovery was made; (ix) the alleged video recording (M.Ext.A) is not an admissible evidence because the video contained in the mobile, where it was originally recorded was not exhibited and the video cassette played before the learned trial Court was not accompanied with a certificate as required under Section 65-B of the Evidence Act.

52. The prosecution did not prove that inquest was held in respect of the recovered severed head of the deceased.

53. The so called recovery of rope, *chappal* and *kotari* (knife) cannot be the basis to convict the appellant. No evidence was led by the prosecution to prove the recovery memos.

54. The prosecution had failed to prove that the *chappal* belonged to whom and also it could not be proved that the *kotari* (knife) was the instrument of severing the head from the dead body. The place from where the said *chappal* and the rope (M.Ex.B) were recovered is not indicated in the sketch map (Ext.11 and Ext.12) and therefore, the so called recovery does not lead the Court either to the place of occurrence or to the place from where the dead body was recovered. In this case, on rejection of Ext.10 as an admission by the appellant leading to recovery coupled with the fact that both the I.O., i.e. the PW-1 and PW-8, had not led any evidence about use of sniffer dog to led the

I.O. to the house of the appellant after sniffing the *chappal* and rope. Therefore, the recovery of rope, *chappal* and *kotari* (knife), in this case, is a very weak evidence. In this regard, the Supreme Court of India had observed in the case of *Mani v. State of Tamil Nadu*, (2009) 17 SCC 273 as follows:-

26. *The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case. We have already held that the prosecution has failed to prove that the house where alleged blood stains were found belonged exclusively or was possessed exclusively by the appellant, we have further pointed out that the discovery was absolutely farcical. There is one other very relevant factor ignored by both the courts that the prosecution never made any attempts to prove that the clothes belonged to the appellants. There is literally no evidence to suggest anything to that effect. Therefore, even if we accept the discovery, it does not take us anywhere near the crime. Both the Courts below have ignored this very important aspect. Once these two important circumstances are disbelieved, there is nothing which would remain to support the prosecution theory.*

55. In the case of *Mustkeem @ Sirajudeen v. State of Rajasthan*, AIR 2011 SC 2769: (2011) 11 SCC 724, relied upon by the learned amicus curiae, the Supreme Court of India had held as follows:-

25. *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.*

* * *

27. *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.

28. *If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity as held by this Court in Varun Chaudhary v. State of Rajasthan, reported in AIR 2011 SCC 72.*

29. *The scope and ambit of Section 27 were also illuminatingly stated in Pulukuri Kotayya & Ors. v. Emperor, AIR 1947 PC 67, reproduced hereinbelow:-*

“... it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’ these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

The same were thereafter restated in another judgment of this Court reported in (2004) 10 SCC 657: AIR 2004 SC 2865, Anter Singh v. State of Rajasthan.

30. *The doctrine of circumstantial evidence was once again discussed and summarised in (2008) 3 SCC 210: AIR 2008 SC 1184, Sattatiya @ Satish Rajanna Kartalla v. 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”.

56. In the case of *Anjan Kumar Sarma & Ors. v. State of Assam*, (2017) 14 SCC 359, relied upon by the learned amicus curiae, the Supreme Court of India, had observed as follows:-

14. *Admittedly, this is a case of circumstantial evidence. Factors to be taken into*

account in adjudication of cases of circumstantial evidence laid down by this Court are:

- (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;*
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (3) The circumstances should be of a conclusive nature and tendency;*
- (4) They should exclude every possible hypothesis except the one to be proved; and*
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. [See: Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 (para 153); M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 (para 18)]*

* * *

16. *It is no more res integra that suspicion cannot take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true." But there is a long mental distance between "may be true" and "must be true" and the same divides conjunctures from sure conclusions. [See: Jaharlal Das v. State of Orissa, (1991) 3 SCC 27 (para 11)]*

57. One of the important chain in a case where conviction is made on circumstantial evidence is the motive of the appellant- accused, which in this case has not been proved. If the prosecution case is to be believed, the deceased was in the habit of demanding money from the appellant for which the appellant had warned Jaan Bora, the deceased who was his son-in-law. The wife of the deceased, who had given information to the police about her missing husband could have been examined by the prosecution to prove motive. The PW-2, PW-3, PW-4 and PW-5, were all related to the deceased, but they also did not give evidence that the appellant had warned the deceased of dire consequences if he demanded money from them.

58. Hence, the Court is of the considered opinion that the prosecution had failed to prove beyond reasonable doubt that the appellant had killed the deceased, Jaan Bora, by giving a fatal blow with a *lathi* (stick) or branch of tree, and then severing the head from the dead body.

59. In light of the discussions above, the Court is inclined to hold that the prosecution had failed to prove that the appellant had committed the murder of Jaan Bora beyond reasonable doubt and therefore, the appellant deserves to get the benefit of doubt. Hence, the Court is unable to agree with the decision of the learned trial Court of convicting the appellant and sentencing him to life imprisonment. Accordingly, this appeal deserves to be allowed, which we hereby do.

60. Resultantly, the conviction of the appellant, namely, Krishna Biswas for committing offence punishable under Section 302/201 of the I.P.C. is set aside by giving him the benefit of doubt. He shall be liable to be released forthwith, if not wanted in any other case.

61. However, before being released, the appellant, Krishna Biswas shall be required to submit an undertaking in form of an affidavit that he shall surrender before the District Jail, Nagaon, in the event he is ordered by any Court to surrender in connection with any proceeding including appeal against this judgment and order. The said undertaking shall be submitted before the Superintendent/ Jailer, District Jail, Nagaon, where he is presently detained. The said undertaking shall be valid for a period of 6 (six) months from the date of its submission.

62. The effort put in by the learned amicus curiae is appreciated. He shall be entitled to his usual honorarium/ fees.

JUDGE

JUDGE

Comparing Assistant