

GAHC010088182020



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

CRIMINAL APPEAL [I] NO. 38/2020

Pandey Munda,
Tinsukia, Assam

.....Appellant

-VERSUS-

The State of Assam
Rep. by Public Prosecutor, Assam

.....Respondent

Advocates :

Appellant	: Ms. M. Barman, Amicus Curiae
Respondent	: Ms. B. Bhuyan, Senior Counsel & Additional Public Prosecutor, Assam.

Date of Hearing, Judgment & Order : 27.05.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

This criminal appeal from Jail is directed against a Judgment and Order dated 14.08.2019 passed by the Court of learned Additional Sessions Judge no. 2 [FTC], Tinsukia in Sessions Case no. 101[T] of 2018. By the Judgment and Order dated 14.08.2019, the accused-appellant has been convicted for the offence of murder under Section 302, Indian Penal Code [IPC] and he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo rigorous imprisonment for another 1 [one] year. It has been ordered that the period of detention already undergone by the accused-appellant shall be set-off against the sentence of imprisonment under Section 428, Code of Criminal Procedure, 1973 ['CrPC' or 'the Code', for short].

2. We have heard Ms. M. Barman, learned Amicus Curiae for the accused-appellant and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the respondent, State of Assam.
3. Ms. Barman, learned Amicus Curiae appearing for the accused-appellant has submitted that there was no eye-witness to the incident of alleged murder and the case was based on circumstantial evidence. It is the contention of the learned Amicus Curiae that the prosecution had miserably failed to prove all the circumstances by cogent evidence, thereby, leaving a number of missing links in the chain. But despite such failure, the learned trial court has convicted the accused-appellant for the charge of *uxoricide*. There was nothing in evidence that the accused-appellant was last seen with the

deceased and as such, the accused-appellant is entitled to be acquitted of the charge of murder. The learned Amicus Curiae has referred to the decision in *Sharad Birdhichand Sarda vs. State of Maharashtra*, reported in [1984] 4 SCC 116, to contend that the principles laid down therein to prove a case based on circumstantial evidence are not found established in the present case and even if it is found that the plea of alibi taken by the accused is not acceptable then also such failure on the part of the accused-appellant is not to be taken into account as such failure would not strengthen the case of the prosecution in any manner.

4. Ms. Bhuyan, learned Additional Public Prosecutor appearing for the State has submitted that the learned trial court had considered all the circumstances and finding the chain of circumstances complete, the accused-appellant has been convicted for the offence of murder. The learned Additional Public Prosecutor has further submitted that the accused-appellant took a plea of alibi but he failed to adduce any evidence to substantiate the plea of alibi. The learned trial court had rightly discarded the plea of alibi, taken by the accused-appellant. To buttress such submission, the decision in *Shaikh Sattar vs. State of Maharashtra*, reported in [2010] 8 SCC 430, has been referred to. It has been contended that the medical evidence has clearly pointed towards a homicidal death. The accused-appellant had failed to offer any explanation as to how the death of his wife had occurred when it was his duty to offer plausible explanation. It is the contention of the learned Additional Public Prosecutor that if the entire facts and circumstances are taken into account, then no other hypothesis other than the hypothesis of guilt of the accused-appellant is deducible. With such contentions, the learned Additional Public Prosecutor has supported the Judgment and Order of conviction and sentence of the accused-appellant.
5. We have given due consideration to the rival submissions advanced by the learned counsel for the parties and have also perused the evidence/materials

available in the case records of Sessions Case no. 101[T] of 2018, in original. We have also gone through the decisions referred to by the learned counsel for the parties at the time of argument.

6. The case, Sessions Case no. 101[T] of 2018 arose out of Doomdoooma Police Station Case no. 174/2018 and G.R. Case no. 1372/2018. The case, Doomdoooma Police Station Case no. 174/2018 came to be registered on the basis of a First Information Report [FIR] lodged by one Nibas Rajput as the informant. The informant, Nibas Rajput lodged the FIR before the In-Charge, Talap Police Out Post, Doomdoooma on 07.07.2018. On receipt of the FIR, the In-Charge, Talap Police Out Post registered the same vide Talap O.P. General Diary Entry no. 126 dated 07.07.2018 and after so registering the FIR, the original FIR was forwarded to the Officer In-Charge, Doomdoooma Police Station for registering a case under proper sections of law. One Sub-Inspector of Police, Someswar Bora, attached to Talap Police Out Post, took up the investigation of the case, in the meantime. On receipt of the FIR, the Officer In-Charge, Doomdoooma Police Station registered the same as Doomdoooma Police Station Case no. 174/2018 for the offence under Section 302, IPC.
7. In the FIR, the informant had *inter alia* alleged that at around 04-00 p.m. on 06.07.2018, the accused, who was his brother-in-law, had killed his elder sister, Geeta Munda by assaulting her and by tying a rope around her neck. He stated that he knew the incident well.
8. The Investigating Officer [I.O.] of the case, P.W.6 during the course of investigation, visited the place of occurrence [P.O.] after receiving the FIR at 12-10 p.m. on 07.07.2018 vide Talap O.P. General Diary Entry no. 126. At the P.O., the I.O. prepared one Sketch Map [Ext.-5]. Finding the deadbody of the deceased, Geeta Munda at the P.O., the inquest on the deadbody was carried out by an Executive Magistrate, Pankaj Kumar Nagbangshi. The I.O.

of the case, P.W.6 also recorded the statements of a number of witnesses under Section 161, CrPC. As darkness descended, the I.O. of the case, P.W.6 brought the deadbody to the Talap Police Out Post for keeping it for the night. The accused was also arrested on 07.07.2018. After his arrest, the accused was medically examined at Dangari CHC and thereafter, forwarded to the jurisdictional Magistrate at Tinsukia for production on 08.07.2018. On 08.07.2018, the deadbody of the deceased was forwarded to the Civil Hospital at Tinsukia for post-mortem examination. Accordingly, the post-mortem examination on the deadbody of the deceased was performed at the Civil Hospital, Tinsukia on 08.07.2018. After collecting the Post-Mortem Examination [PME] Report [Ext.-3] and on completion of investigation into Doomdooma Police Station Case no. 174/2018 [corresponding G.R. Case no. 1372/2018], the I.O. of the case, P.W.6 submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 110/2018 on 31.08.2018 finding *a prima facie case* established against the accused for the offence under Section 302, IPC.

9. On submission of the charge-sheet, the learned Additional Chief Judicial Magistrate, Tinsukia upon causing production of the accused from the Jail custody, furnished copies to him in compliance of the provisions of Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Additional Chief Judicial Magistrate, Tinsukia as the committal court transmitted the case records of G.R. Case no. 1372/2018, arising out of Doomdooma Police Station Case no. 174/2018, to the Court of Sessions following the provisions of Section 209, CrPC by an Order of Commitment dated 29.09.2018. The learned Public Prosecutor was directed to be notified accordingly. On receipt of the case records of G.R. Case no. 1372/2018, pursuant to the Order of Commitment dated 29.09.2018, the Court of Sessions registered the same as Sessions Case no. 101[T] of 2018 and thereafter, transferred the case to the Court of learned

Additional Sessions Judge, Tinsukia [‘the trial court’, for short] for trial and disposal.

10. On appearance of the accused before the learned trial court from Jail hazot, the learned trial court appointed a Legal Aid Counsel, on 12.10.2018, to represent the accused. On 29.10.2018, the learned trial court after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials on record, framed the following charge against the accused :-

That on 06.07.2018 at 04-00 p.m. you had committed murder of Smt. Geeta Munda, the sister of the informant intentionally or knowingly by causing her death by assaulting and using rope on her neck and thereby committed an offence punishable under Section 302 of the IPC and within the cognizance of this Court.

11. When the charge was read over and explained to the accused, he pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined 6 [six] nos. of witnesses and exhibited 7 [seven] nos. of documents to bring home the charge against the accused. The witnesses examined by the prosecution side were :- [i] P.W.1 – Nibas Rajput, the informant; [ii] P.W.2 – Dharmeswar Sonowal; [iii] P.W.3 – Dr. Manjit Singh; [iv] P.W.4 – Jibon Munda; [v] P.W.5 – Dibakar Tirki; and [vi] P.W.6 – Someswar Bora, Sub-Inspector of Police & I.O. of the case. The documents exhibited were :- [i] Ext.-1 – FIR; [ii] Ext.-2 – Inquest Report; [iii] Ext.-3 – Post-Mortem Examination Report; [iv] Ext.-4 – G.D. Entry no. 126 dated 07.07.2018; [v] Ext.-5 – Sketch Map; [vi] Ext.-6 – Deadbody Challan; and [vii] Ext.-7 – Charge-Sheet. After closure of the prosecution evidence, the accused was examined under Section 313, CrPC and the incriminating circumstances appearing in the testimonies of the prosecution witnesses

were put to him during such examination. The plea of the accused was denial. During such examination, the accused took a plea of alibi. However, the accused did not adduce any defence evidence.

12. P.W.1, Nibas Rajput was an younger brother of the deceased, Geeta Munda and the informant of the case. The accused was the husband of the deceased, Geeta Munda and is the brother-in-law of the informant, P.W.1. P.W.1 in his examination-in-chief, deposed that at around 04-00 p.m. on the date of the incident, the accused made a telephone call to him to tell that his elder sister, Geeta Munda had consumed medicine. Then, he [P.W.1] went to the house of the accused and noticed sign of strangulation on the neck of his already dead elder sister, apart from one blackened eye. P.W.1 further deposed that later, his uncle, Ajay Rajput [not an witness] and his grandmother [not an witness] came to the P.O. and one VDP official, Amar Teli [not an witness] informed the matter to the Police. P.W.1 stated that the Police personnel visited the P.O. and took the deadbody of his elder sister to the Civil Hospital, Tinsukia for post-mortem examination. The witness further stated that he also visited the Civil Hospital at Tinsukia. P.W.1 also stated that his statement was recorded by the Police and he lodged the FIR [Ext.-1]. P.W.1 further stated that he had no idea how his elder sister died.
- 12.1. In his cross-examination, P.W.1 told that Dharmeswar Sonowal [P.W.2] was the Gaonburah of the Village – Rabatoli and he did not inform the Gaonburah [P.W.2] regarding the incident. P.W.1 admitted that he did not state before the Police that at around 04-00 p.m. on the date of the incident, the accused had called him over phone to tell that his elder sister, Geeta Munda had consumed medicine; and that then, he went to the house of the accused and saw sign of strangulation on the neck of his dead elder sister, apart from one blackened eye. He also admitted that he did not state before the Police that later, his uncle, Ajay Rajput and his grandmother came to the P.O. and the VDP official, Amar Teli informed the matter to the Police.

- 12.2. In view of the kind of admission made by the informant – P.W.1, his testimony to the effect that on the date of the incident, he was called by the accused over phone to tell him that his elder sister consumed medicine and after he went to the house of the accused, he saw sign of strangulation and one blackened eye on the deadbody of his elder sister were apparently in the nature of embellishments.
13. P.W.2, Dharmeswar Sonowal who was the Gaonburah of the village, knew both the informant and the accused. As regards the incident, P.W.2 deposed to the effect that the incident took place on 06.07.2018 and at that time, he was at his house. He stated that he was called to the P.O. and on reaching the P.O., he saw the deadbody lying inside the house. P.W.2 admitted that he had written the FIR [Ext.-1] on the basis of the informant's statement. He further stated that he read out the contents of the FIR [Ext.-1] to the informant, P.W.1. The FIR [Ext.-1] contained an endorsement of its scribe [P.W.2] to the effect that the same was written as per the version of the informant, P.W.1. P.W.2 identified his signature and the thumb impression of the informant in the FIR [Ext-1] as Ext.-1[1] and Ext.-1[2] respectively. P.W.2 also exhibited the Inquest Report, Ext.-2 and his signature therein as Ext.-2[1]. P.W.2 stated that his statement was recorded by the Police.
- 13.1. During his cross-examination, P.W.2 deposed that he stated before the Police that in the morning hours of 07.07.2018, the informant [P.W.1] came to his house and thereafter, he went to the P.O. P.W.2 testified that the family members informed him that the deceased died due to illness but, the informant [P.W.1] raised objection and asked him to write the FIR [Ext.-1] against his brother-in-law. P.W.2 stated that as per version of the informant [P.W.1], he scribed the FIR. P.W.2 further stated that he did not know the contents of the Inquest Report [Ext.-2] and it was as demanded by the Police, he put his signature therein as Ext.-2[1].

14. P.W.3, Dr. Manjit Singh was working as the Medical & Health Officer – I at the Civil Hospital, Tinsukia on 08.07.2018. In his testimony, P.W.3 stated that on 08.07.2018, he performed post-mortem examination on the deadbody of Geeta Munda on Police requisition in connection with Talap Police O.P. General Diary Entry no. 126 dated 07.07.2018. He deposed that on examination of the deadbody, he *inter alia* found the following :-

External appearance :

*A deadbody of an adult female, 26 years of age, average built, sworthy complexion *****, *****, eyes closed, mouth open and tongue protruded out. Rigor mortis present.*

Injuries over both side of neck were observed. Bruises were observed along with both side the neck, the shape was oval and round around [1.5 to 2 cm] produced by tip of fingers. Irregular marks were also observed along the jaw margin and chin. The bruises appears brown, dry and parchment like. Crecentic marks of fingers nail were present along both side of neck.

Examination of cranium and spinal canal :

Congested & Healthy.

Examination of Thorax :

Healthy & congested.

Dissection of the neck :

On dissection of the neck, the soft tissue of the neck are compressed and forced upward and backward against cervical vertebrae. Bruises were present in the dermis, superficial fascia and deep fascia, strenocledoid muscle and substance of thyroid gland. The platysma muscle is bruised and deep haemorrhage in neck tissue sounding the bifurcation of common carotid artery present.

Fracture of the superior cornu of thyroid cartilage at it base is observed.

P.W.3 had opined that the death was due to asphyxia as a result of strangulation [throttling] along with occlusion of carotid arteries. P.W.3 exhibited the Post-Mortem Examination [PME] Report as Ext.-3 with his signature therein as Ext.-3[1].

14.1. In the cross-examination, P.W.3 stated that as per his Report, the death occurred at about 02-50 a.m. on 07.07.2018, that is, within 36 hours. He stated that usually, the wounds change to brownish colour after eight hours of occurrence and the brownish colour change to blackish colour within eighteen hours of occurrence. He stated that on going through the shape of the marks, he opined that the marks appearing on the neck were of fingers. He stated to have found nail marks on the neck but he did not mention the age and colour of the bruises found on the neck of the deceased.

15. P.W.4, Jibon Munda knew both the informant and the accused. In his examination-in-chief, P.W.4 stated that the distance between his house and the accused was about 600 meters. On the date of the incident, he was in his house. It was at about 04-00 p.m. on that day he heard that the wife of the accused had died. It was the father of the accused [not examined as a witness], who told him that his daughter-in-law took poison. P.W.4 deposed that he did not go to the P.O. on that day. It was on the next day, the Police who visited the P.O., called him to the house of the accused and obtained his signature on a paper.

15.1. P.W.4 was not cross-examined by the defence.

16. P.W.5, Dibakar Tirki was an inhabitant of the village of the accused. P.W.5 deposed that he knew the accused, the deceased and the informant [P.W.1], who was a resident of another village, Lukhrung Pathargaon. P.W.5 deposed that his house was situated at a distance of less than 1 kilometer from the house of the accused. As regards the incident, P.W.5 deposed that he came

to know about the death of Geeta Munda when he came back from his duties at 02-00 p.m. He further stated that the father and the mother of the accused used to reside with the accused in the same house. P.W.5 further deposed that when he went to the house of the accused, he saw the deadbody of the deceased, which was lying on the floor with a round circle injury mark on her neck. By that time, the Police personnel had already arrived at the P.O. and performed the inquest on the deadbody of the deceased. P.W.5 exhibited the Inquest Report as Ext.-2 with his signature therein as Ext.-2[2].

16.1. When P.W.5 was cross-examined, he stated that he did not know the contents of the Inquest Report [Ext.-2] and it was as per the demand of the Police personnel, he put his signature in it. He stated that the deadbody of the deceased was covered with a cloth.

17. The I.O. of the case, Someswar Bora deposed as P.W.6. He deposed as regards the receipt of the FIR [Ext.-1] from the informant [P.W.1]; registration of Talap O.P. General Diary Entry no. 126 dated 07.07.2018 [Ext.-4]; his visit to the P.O. and preparation of the Sketch Map [Ext.-5], holding of the inquest through an Executive Magistrate and preparation of the Inquest Report [Ext.-2]; and recording of the statements of witnesses – P.W.1, P.W.2, P.W.4 & P.W.5 – under Section 161, CrPC, as have already mentioned hereinabove. The I.O. [P.W.6] also exhibited the Deadbody Challan as Ext.-6.

17.1. During his cross-examination, P.W.6 stated that he did not visit the house of the informant [P.W.1], who hailed from another village. P.W.6 testified that the FIR [Ext.-1] was received at Talap Police Out Post at 12-10 p.m. on 07.07.2018. He stated that neither the source of knowledge of the informant [P.W.1] regarding the incident was disclosed in the FIR [Ext.-1] nor he investigated as regards the source of information of the informant [P.W.1].

P.W.6 also stated that he did not find any rope during the investigation. He confirmed about the embellishment, mentioned hereinabove, made by the informant [P.W.1] in his evidence-in-chief and admitted, later on, in the cross-examination. P.W.6 further stated that during the conduct of the inquest the report of which was prepared in his own handwriting vide Ext.-2, Inquest Report, no injury mark and no nail mark were found on the deadbody of the deceased.

18. From a reading of the testimonies of the prosecution witnesses, it is apparent that there was no eye-witness to the incident of death of the deceased. The prosecution had relied upon circumstantial evidence to bring home the charge of murder against the accused.
19. The deceased was the wife of the accused. The informant [P.W.1] was an younger brother of the deceased and is the brother-in-law of the accused. Other than the informant [P.W.1], no other relative of either the accused or the deceased was examined by the prosecution. From an examination of the evidence/materials on record, it can be noticed that there was no evidence that the marital relationship between the accused and the deceased was a strained one. The informant [P.W.1] had not highlighted anything as regards the kind of relationship that existed between the accused and the deceased prior to the death of the deceased/the date of occurrence. In a case of direct evidence, motive may not be relevant. But in a case of circumstantial evidence, motive is considered to be a link in the chain of circumstances. But it is also true that absence of proving the motive cannot be the sole ground to discard the prosecution case altogether. It is settled that if/when a motive is proved then it would supply a link in the chain of circumstantial evidence but absence of motive cannot be a ground to discard the prosecution case. It is also a proposition that absence of motive in a case of circumstantial evidence is a factor that weighs in favour of the accused. From the nature of evidence led by the prosecution in the case in hand, it is found that the

prosecution has not been able to establish any motive on the part of the accused.

20. From whatever evidence led by the prosecution in the present case, it has emerged that the deadbody of the deceased was found in the house of the accused, which was the matrimonial home of the deceased. It has also emerged that other than the deceased, the accused was not the only inmate of the house. Apart from the accused, the parents of the accused also used to reside in the same house. The incident of death came to be known during the day-time of 06.07.2018 as it was at about 04-00 p.m. on 06.07.2018, the informant [P.W.1] came to know about the death of the deceased. The prosecution has not led any cogent evidence to establish that the deceased prior to her death, was last seen with the accused to bring in the '**last seen theory**' into action. The '**last seen theory**' is an important link in the chain of circumstances that could point towards the guilt of the accused with some degree of certainty. The situation of last seen together can be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution through cogent and reliable evidence that the time-gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased can be completely discarded.
21. The '**last seen theory**' is considered to be an important link in the chain of circumstances as the same would be a pointer towards the guilt of the accused with some degree of certainty. In *Rambraksh vs. State of Chhattisgarh*, reported in [2016] 12 SCC 251, the Hon'ble Supreme Court on the '**last seen theory**' has observed as under :-

12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other

words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

22. In the case in hand, the prosecution has not brought any evidence on record to establish, **firstly**, as to when and where the deceased was last seen alive; and **secondly**, as to when and where the accused and the deceased were last seen together. In the absence of any evidence on the above two aspects, it is also difficult to decide about the time-gap so as to reach any finding on the basis of the '**last seen theory**'. As such, the '**last seen theory**' which would have been a vital link in the chain of circumstances for the case, is not found established here.
23. The Autopsy Doctor [P.W.3], who conducted the post-mortem examination on the deadbody of the deceased at 02-25 p.m. on 08.07.2018, had reported in the Post-Mortem Examination Report [Ext.-3] that on dissection of the neck, the soft tissues were found compressed and there were bruises present. On the basis of those and other findings, he opined that the death was due to asphyxia as a result of strangulation [throttling] along with occlusion of carotid arteries. It is found that the inquest on the deadbody of the deceased was conducted by an Executive Magistrate on 07.07.2018. As per the Inquest Report [Ext.-2], the inquest was completed by 02-30 p.m. on 07.07.2018. In the part - '**Description of Injuries found on dead body [if any]**' in the Inquest Report [Ext.-2], it was reported that no injury

marks were seen. The I.O. [P.W.6] in his testimony, stated that the Inquest Report [Ext.-2] was written in his handwriting. The I.O. [P.W.6] had deposed that no injury mark was found on the deadbody of the deceased, Geeta Munda and in the Inquest Report [Ext.-2], there was no mention of any nail marks in the neck of the deceased. In view of admission by the informant [P.W.1] as regards embellishments, as have been discussed hereinabove, his testimony regarding existence of sign of strangulation is not trustworthy enough for acceptance. P.W.2, the Gaonburah, who also went to the P.O. and saw the deadbody lying inside the house, did not depose anything as regards presence of injury on the body of the deceased. The witness, P.W.4 also did not visit the P.O. on the date of the incident, 06.07.2018. The witness, P.W.5 had deposed that when he went to the P.O., he noticed round circle injury mark on the neck of the deceased. The Doctor [P.W.3] also deposed that in the Post-Mortem Examination Report [Ext.-3], he reported that the death had occurred at about 02-50 a.m. on 07.07.2018, that is, within 36 hours. Noticeably, as per the FIR [Ext.-1], it was at around 04-00 p.m. on 06.07.2018, the informant [P.W.1] became aware about the death of his elder sister, that is, the wife of the accused. If one goes by such opinion of the Doctor [P.W.3], the death of the deceased could not have occurred on 06.07.2018, as reported by the witnesses – the informant [P.W.1], P.W.2 and P.W.5. As regards existence of any injury marks on the body/neck of the deceased, the Inquest Report [Ext.-2] is found at variance with the Post-Mortem Examination Report [Ext.-3]. As regards the time of death of the deceased, the testimonies of the witnesses and the FIR [Ext.-1] were found to be at variance with the opinion of the Doctor [P.W.3]. In view of such evidence/materials on record, there is no definitiveness as regards the existence of the injury marks on the body/neck of the deceased and the resultant cause of death.

24. The decision of the Hon'ble Supreme Court of India in *Sharad Birdhichand Sarda vs. State of Mahashtra*, reported in 1984 [4] SCC 116, is referred

to repeatedly when a case is found to be based on circumstantial evidence. In the decision, the Hon'ble Supreme Court has laid down five golden principles terming them to constitute the Panchsheel of the proof of a case based on circumstantial evidence. For ready reference, the relevant excerpts of the decision in *Sharad Birdhichand Sarda* [supra] are extracted hereinunder :-

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra, [1973] 2 SCC 793, where the following observations were made :

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

[2] the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be

explainable on any other hypothesis except that the accused is guilty,

[3] the circumstances should be of a conclusive nature and tendency,

[4] they should exclude every possible hypothesis except the one to be proved, and

[5] there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

** * * * **

158 It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in Deonandan Mishra vs. State of Bihar, AIR 1955 SC 801, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the Learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus :-

But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the

appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,. such absence of explanation or false explanation would itself be an additional link which completes the chain.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied : -

- [1] various links in the chain of evidence led by the prosecution have been satisfactorily proved,*
- [2] the said circumstance points to the guilt of the accused with reasonable definiteness, and*
- [3] the circumstance is in proximity to the time and situation.*

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case, [1981] 2 SCC 35, where this Court observed thus :

Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false

plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

25. It is true that when the accused was asked, during his examination under Section 313, CrPC whether he would like to say anything in his defence, he stated that at the time of the incident, he was not in his home as he was at Chennai at that time and he did not know how his wife had died. By stating so, the accused appeared to have taken a plea of alibi. But such plea of alibi is belied by the factum of arrest of the accused on the date of registration of the case, Doomdoo Police Station Case no. 174/2018 itself, that is, on 07.07.2018. From the case records of G.R. Case no. 1372/2018 it is found that after his arrest the accused was produced before the Court of learned Chief Judicial Magistrate, Tinsukia on 08.07.2018 vide a forwarding report and the memo of arrest and on being so produced, the learned Chief Judicial Magistrate, Tinsukia by Order dated 08.07.2018 remanded the accused to judicial custody till 21.07.2018. Furthermore, while cross-examining the prosecution witnesses, it was never suggested by the defence that the accused was in Chennai on the date of the incident.
26. It has been observed in *Shaikh Sattar* [supra], referred to by the learned Additional Public Prosecutor, that the burden of establishing of the plea of alibi lay upon the accused. The appellant therein who was the accused, was found to have miserably failed to bring on record any facts and circumstances which would make the plea of his absence, let alone, being proved beyond reasonable doubt. It has been held that the plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused at the place of incident. When the plea of alibi is raised by an accused, it is for the accused to establish the said plea by positive evidence. The Hon'ble Supreme Court has gone on to observe as under :-

36. *But it is also correct that, even though the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt. Being aware of the aforesaid principle of law, the trial court as also the High Court examined the circumstantial evidence to exclude the possibility of the innocence of the appellant.*
27. Reverting back to the facts of the case in hand, it is found that except making a bald assertion that he was not present in his house on the date of the incident, the accused did not lead any evidence to substantiate that he was present, on the date of the incident, at any other place. He examined no one who had vouched about his presence at any other place, other than at the P.O. In such obtaining fact situation, the plea of alibi which was taken by the accused only during the stage of his examination under Section 313, CrPC belatedly, is not believable and such plea, therefore, does not deserve acceptance.
28. While making analysis and appreciation of circumstantial evidence, a cautious approach is required to be adopted and a conviction can be recorded in a case based on circumstantial evidence if and only if all the links in the chain of circumstances are found to be complete pointing towards the guilt only of the accused, thereby, excluding any possibility of involvement of any other person in the perpetration of the offence. In a case based on circumstantial evidence, the various links in the chain of circumstance, led by the prosecution, have to be satisfactorily proved pointing only to the guilt of the accused with reasonable definitiveness. It was then only, a false

explanation or a false defence on the part of the accused can be added as an additional link to lend an assurance and not otherwise.

29. It is true that the death of the deceased who was the wife of the accused, in her matrimonial home in an unnatural manner definitely gave rise to a suspicion against the accused. But suspicion, however grave it may be, cannot take the place of proof. The prosecution has to travel the long distance between 'may be true' and 'must be true' by leading cogent and clinching evidence. From the discussion made and in view of the reasons recorded above, it is found that there are many missing links in the case of the prosecution. Because of such missing links, the circumstances relied upon by the prosecution are found to be not sufficient to establish fully that it was the accused only who was responsible for the death of the deceased. The chain of circumstances are not of a conclusive nature consistent only with the hypothesis of the guilt of the accused. In other words, the chain of evidence is found to be incomplete so as to reach a definite conclusion that in all possibility the act must have been done only by the accused. In such obtaining fact situation, this Court is of the unhesitant view that the principle in criminal jurisprudence that any benefit of doubt, other things being equal, at all stages, goes in favour of the accused is applicable in the present case.
30. For all the aforesaid reasons, the accused-appellant is entitled to the benefit of doubt. As a result, this criminal appeal succeeds. Therefore, the Judgment and Order dated 14.08.2019 of conviction and sentence passed in Sessions Case no. 101[T] of 2018 is to be set aside. It is ordered accordingly. As a consequence, the accused-appellant is to be set at liberty forthwith, if the detention of the accused-appellant is not required in connection with any other case.
31. Before parting with the record, we wish to place our appreciation on record as regards the services rendered by Ms. M. Barman, learned Amicus Curiae

appearing for the accused-appellant and direct the Registry to make available to her just remuneration as per the notified fee structure applicable to the Amicus Curiae.

32. The records of the learned trial court are to be sent back immediately.

JUDGE

JUDGE

Comparing Assistant