

GAHC010143432018



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

Criminal Appeal No.229/2018

1. Sri Punya Mazumdar,
S/o Babul Mazumdar,
Village- Uttar Puthimari,
P.S.-Boko, District –Kamrup,(Assam)
2. Sri Govinda Mandal,
S/o Biren Mandal,
Village-Kahibari,
P.S.-Boko, District–Kamrup, (Assam)

.....Appellants

-Versus-

1. The State of Assam,
Represented through the Public Prosecutor,
Assam
2. Hanu Mohan Sakharu,
S/o Late Jaru Sakharu, Village-Kahibari,
District –Kamrup, (Assam) 78112

.....Respondents

For Appellant(s) : Mr. A. Ahmed, Advocate

For Respondent(s) : Ms. B. Bhuyan, Additional Public Prosecutor,
Mr. J. Das, Advocate, (R-1)
Mr. M. Mahanta, Advocate, (R-2)

Date of Judgment : 03.05.2024

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT

(Mridul Kumar Kalita, J)

1. Heard Mr. A. Ahmed, learned counsel for the appellants. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, for the State of Assam and Mr. M. Mahanta, learned counsel for the respondent No. 2.
2. This Appeal under Section 374(2) of the Code of Criminal Procedure, 1973, has been filed by the appellants, namely, Punya Mazumdar and Govinda Mandal, impugning the judgment and order dated 08.05.2018, passed by the learned Sessions Judge, Amingaon in Sessions Case No. 163/2014, whereby the appellants were convicted under Section 302/34 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- (Rupees Two Thousand only) each and in default of payment of fine to suffer rigorous imprisonment for 2(two) months each.
3. The facts relevant for consideration of the instant appeal, in brief, are as follows:-
 - i. That on 01.03.2007, one Hanu Mohan Sakharu lodged an FIR before the In-Charge of Chamaria

Police Patrolling Post under Boko Police Station, *inter-alia*, alleging that on the day prior to lodging of the FIR, at about 8:00 PM, the accused persons, namely, Punya Mazumdar and Govinda Mandal (present appellants) called the nephew of the first informant, namely, Sri Amrit Sakharu from his house saying that they had some works and thereafter, they killed him at Kahibari College Road and threw his body into the nearby drain. It is also alleged in the FIR that when some local people saw it and made a hue and cry, many people assembled at the place of occurrence and the accused persons fled away from that place.

- ii. On receipt of the said FIR, the In-Charge of Chamaria Police Patrolling Post made a G.D. Entry No. 3 dated 01.03.2007 and forwarded the said FIR to the Officer-In-Charge of Boko Police Station for registering a case. Accordingly, Boko P.S. Case No. 35/2007 was registered under Section 302 of the Indian Penal Code and Shri N. Sharma, S.I. of Police was entrusted to conduct the investigation.
- iii. During the investigation, the Investigating Officer visited the place of occurrence, examined the witnesses and prepared a sketch-map of the place

of occurrence. He also conducted an inquest over the dead body. The Investigating Officer also seized two bicycles and sent the dead body of the deceased for post-mortem examination. The Investigating Officer, Sadananda Sarma was transferred during the course of the investigation and thereafter, he handed over the case diary to one Gauri Kanta Lahkar, who laid the charge-sheet against both the appellants, under Section 302 of the Indian Penal Code.

- iv.** The appellants faced the trial remaining on bail. On 11.08.2011, after hearing the learned counsel for both sides as well as after considering the materials available on records, the learned Sessions Judge, Kamrup, Amingaon framed the charges under Section 302/34 of the Indian Penal Code against both the above-named appellants. When the said charges were read over and explained to the appellants, they pleaded not guilty to the said charges and claimed to be tried.
- v.** On the basis of the charges framed against the present appellants, the Trial Court framed the following points for determination: -

"Whether the accused persons, on 28.02.2027, at about 8.00 PM, at Kahibari, within the jurisdiction of Boko P. S., in furtherance of their common intention, committed murder with an intention to cause the death of Amrit Sakharu and thereby committed an offence punishable under Section 302/34 of the Indian Penal Code."

- vi.** During the course of the trial, the prosecution side examined as many as 12 prosecution witnesses and exhibited 10 documents, which were marked as Exhibit-1 to Exhibit-10.
 - vii.** Both the above named appellants were examined under Section 313 of the Code of Criminal Procedure, 1973, during which they denied the truthfulness of the evidence of the prosecution witnesses and pleaded their innocence. Both the appellants declined to adduce any evidence in their defence.
 - viii.** However, by the judgment and order, which has been impugned in this appeal both the appellants were convicted and sentenced in the manner already described in Paragraph No. 2 hereinbefore.
- 4.** Before considering the submissions made by learned counsel for both the sides, let us go through the evidence, which is available on record.

- 5.** PW-1, Sri Nitai Mandal, has deposed that about four years ago, the dead body of Amrit Sakharu was found in a pitch in Kahibari village and at about 8:00 PM, he went to see the dead body. Then police came and asked him as to whether he had seen anybody with the deceased on that day and in reply he informed the police that he saw both the accused persons along with the deceased in the afternoon. He deposed that two bicycles were found lying in the place of occurrence and police seized the same. He exhibited the seizure list as Exhibit-1 and his signature as Exhibit-1(1).
- 6.** During cross examination, he has stated that he saw the deceased along with the accused persons at about 4:00 PM. He deposed that he did not know where they proceeded thereafter. He has stated that he saw the seized bicycle on the road from where police seized the same. He has also stated that he does not know as to who had kept the bicycles there.
- 7.** PW-2, Smt. Chinta Moni Mandal, has deposed that few years ago, one day when she was sleeping in her house at night, she heard some sound outside. She has deposed that when she came out she saw a person was running through her courtyard and she could identify the person as Govinda. She stated that on the next day morning, she came to know that deceased Amrit Sakharu was lying in a pitch. During cross examination,

she has stated that she had not seen who ran away through her courtyard.

- 8.** PW-3, Sri Dipak Kalita, has deposed that Amrit Sakharu had expired in the year 2007. He deposed that while he was coming from broiler farm at about 8:30 PM, he saw two bicycles- one lying on the road and the other lying in the field. He stated that he called the people and then they saw some foot mark and after going ahead they saw two persons fled away from the pitch. He stated that they could not identify the two persons and in the light of the torch they found the dead body of Amrit Sakharu. He stated that they saw an injury on the penis of the deceased and his neck was tied with belt. During cross examination, he stated that he had not stated before the police about the injury sustained by the deceased.
- 9.** PW-4, Chakradhar Kalita, has deposed that the place of occurrence is nearby Basti land. He has deposed that in the year 2007, on one night, his son Manjit Kalita informed him after returning home at about 8:00 PM, that he saw two persons fleeing away from the pitch of their house and one person was lying dead in the pitch. His cross examination was declined by the defence side.
- 10.** PW-5, Sri Nagen Karmakar, has deposed that about two years ago, Amrit Sakharu had expired. He has deposed that his house is situated at a distance of 1 km. He stated that after hearing

hue and cry, he along with some villagers proceeded towards the place from where sound was coming and they found one dead body lying in a pitch. He exhibited the inquest report as Exhibit-2 and his signatures thereon as Exhibit-2(1). He has also deposed that the police seized two bicycles (old) from the place of occurrence. He exhibited the seizure list as Exhibit-1 and his signature thereon as Exhibit-1 (1). He has deposed that he had heard from the villagers that the deceased and the two accused persons were proceeding on two bicycles on the day of occurrence.

- 11.** During cross examination, he has deposed that he was reported by one Nitai Mandal about the fact that the accused persons went with the deceased in two bicycles.
- 12.** PW-6, Niranjan Das, a co-villager, has deposed that about five to six years ago, one morning, he came to know that one person was lying dead at Kahibari, near a college and he did not know the deceased or how he had died. PW-6 was re-examined by the prosecution side. During re-examination, he has stated that he was present while police recorded the statement of accused Punya Mazumdar in presence of Executive Magistrate. He had exhibited the statement of the accused Punya Mazumdar as Exhibit-3 and his signature thereon as Exhibit-3(1).

- 13.** During cross examination, PW-6 has stated that he could not remember as to who recorded the statement and whether it was read over to him. He also could not clearly say as to whether he was present at the time of recording of the statement.
- 14.** PW-7, Sri Jiten Mandal, has deposed that about four to five years back, one day, he heard that Amrit Sakharu had been killed and there was a hue and cry in their village. PW-7 was declared hostile by the prosecution. During cross examination by the prosecution side, PW-7 has answered in negative to a suggestive question that he had stated before the police that after coming out from his house, he saw Govinda and Punya @ Ranjit run through the cultivation with clay on their body and pass through one road and after sometime he came to know that the said two persons had killed Amrit Sakharu.
- 15.** During cross examination by the defence side, PW-7 has deposed that there was a huge gathering of people in the village and it was about 8:30 to 9:00 PM when the incident took place. He had also stated that he knew the village people who gathered at the place of the incident at that time but he did not see the accused persons at that time. He has also stated that he does not know when the police came to the place of occurrence. He deposed that he had no knowledge about the

involvement of the accused persons with the occurrence and he did not see them.

- 16.** PW-8, Sri Jantu Biswas, another witness from the locality, has deposed that about five years ago at about 7:00 PM, he was watering his cultivation, then somebody made hue and cry "*thief, thief*" and he saw one person running through his paddy field. He thought that the person might be a thief and after coming home, he came to know that one person had died on the road, namely, Megha @ Amrit. He has also deposed that he could not identify the person, who ran through the paddy field and police did not record his statement. PW-8 was also declared hostile by prosecution side. During cross examination by the prosecution side, PW-8 had denied that he had stated before police that two accused persons, namely, Govinda and Punya came running with mud on the body and arrived in their courtyard and as he asked them as to why they were running, they replied that son of Samiran had tried to kill them. PW-8 had also deposed that later on, he came to know from people that the accused persons had killed Amrit. He also denied that he had given false evidence out of favour only to save local boys.
- 17.** During cross examination by defence side, PW-8 had stated that the police did not take his statement. He also deposed that at the time of hearing hue and cry, he was not at his home. He

has deposed that he could not say from whom he had heard that the accused persons had killed the deceased.

- 18.** PW-9, Sri Dasarath Das, the Circle Officer, has deposed that on 03.03.2007, he was working as Circle Officer at Chamaria Revenue Circle and on that day statement of Govinda Mandal, son of Biren Mandal, was recorded by S.I. Sadananda Sarma at Chamaria Police Outpost in his presence and he put his signature on the statement recorded by S.I. Sadananda Sarma. He exhibited the statement of Govinda Mandal as Exhibit-4 and his signature thereon as Exhibit-4 (1). He has also deposed that the statement of another accused Punya Mazumder was also recorded in his presence. He exhibited the statement of Punya Mazumder as Exhibit-3 and his signature thereon as Exhibit-3 (1).
- 19.** During cross examination, PW-9 has deposed that Exhibit-3 and Exhibit-4 were written by S.I. Sadananda Sarma in his office. He has also deposed that he did not know how to record the extra judicial confession and he signed on Exhibit-3 and Exhibit-4 as witness. He has also deposed that there was no signature of accused Govinda Mandal on Exhibit-4 and he did not remember whether signature of the appellant was taken in his presence or not. PW-9 has answered in negative to a suggestion put by the defence counsel that Exhibit-3 and Exhibit-4 were not legally admissible.

- 20.** PW-10, Hanu Mohan Sakharu, the informant of this case, has deposed that the deceased was the son of his elder brother and he died in the year 2007. He stated that at the time of occurrence he was at his residence. He has deposed that at about 4:00 PM, on the date of occurrence, both the accused persons called out Amrit from his house and he was present in the house at that time. He has also deposed that there is a college situated away from his house and he heard hue and cry near the college at about 7:00 PM, on the date of occurrence. He has also deposed that after hearing hue and cry, he rushed to the place where the hue and cry was coming, i.e., near the college and there he heard that Amrit was murdered. He has deposed that, on being asked by the people gathered there, he told him that at about 4:00 PM the accused persons were with the deceased. He has also deposed that the deceased was found dead by the side of the village road at Kahibari. He has also deposed that the dead body was in the drain by the side of the road. He has also deposed that the college and the place are adjacent. He has also deposed that the villagers searched for both the accused persons, but could not find them. He has also deposed that the FIR was lodged by him and the same was written by one Niranjan Das as per his version and was also read over to him after which he had put his signature. He has exhibited the FIR as Exhibit-5, his signatures thereon as

Exhibit-5 (1) and the signature of the scribe Niranjan Das as Exhibit-5 (2) with which he is familiar. He also exhibited the inquest report as Exhibit-2 and his signature thereon as Exhibit-2 (2).

- 21.** During cross examination, PW-10 has deposed that he has studied up to class-VI and has mentioned in the FIR that the accused persons had called out the deceased at about 8:00 PM on the date of occurrence. He has also stated that the fact that the accused persons called out the deceased at 4:00 PM is true. He also deposed that he did not remember stating to the police that at 8:00 PM on the date of occurrence, the deceased came to his house and then he was called out by both the accused persons. He has also stated that he did not state before police that after hearing hue and cry, at 7:00 PM, he went to the place of origin of the hue and cry and on being asked by people gathered there, he told them that at about 4:00 PM, on that day, the deceased was called out by the accused persons. He has also deposed that he did not narrate this fact in the FIR. He has also deposed that he has not witnessed the murder of the deceased. PW-10 has also deposed that his house and that of the accused was intervened by distance of about 5 bighas of land. He has also deposed that his wife also knew that the accused persons had called out the deceased from his house, however, he did not state this fact to the police. The defence

put suggestion that the accused persons did not call out the deceased from his house which was answered in negative by PW-10. The defence side also put suggestion that the FIR was lodged in this case against the accused persons only on suspicion which was answered in negative by PW-10.

- 22.** PW- 11, the Medical Officer, Dr. R. Chaliha, has deposed that on 01.03.2007 the post-mortem examination was done over the dead body of deceased, Amrit Sakharu and post-mortem was done by Dr. Ditiman Nath, a Post Graduate Student on duty, Department of Forensic Medicine, GMCH along with Dr. Pradip Thakuria, Medical Officer on duty, Department of Forensic Medicine, GMCH and he concluded with the opinion. According to him, the following injuries were found over the dead body-

(i) A transverse continuous ligature mark present around neck just below the thyroid cartilage 31 x 1.5 cm in size, base dry and parchments. On dissection, underlying tissues are pale and glistening. Surrounding tissue contused. Thyroid bone fractured near right cornu. In the thorax thoracic organs are congested and the abdomen organs are healthy. Stomach is congested and empty. No suspicious smell is detected. In cranium and spinal canal membrane and brain are congested.

- 23.** As per the opinion of the doctor, the death was due to asphyxia resulting from ante-mortem ligature strangulation and homicidal

in nature. PW-11 has exhibited the post-mortem examination reports as Exhibit-6, signature of Dr. D. Nath as Exhibit- 6(1), the signature of Dr. Pradip Thakuria as Exhibit-6(2) and his own signature as Exhibit-6(3). During cross examination, he has deposed that he was not present at the time of post-mortem examination and he had only concurred on the records.

- 24.** PW-12, Gouri Kanta Lahkar, who is the Investigating Officer, has deposed that on 16.06.2007, he was posted at Chamaria Outpost and he received the case diary on 16.06.2007 as endorsed by Officer-In-Charge to complete the investigation. He has stated that the predecessor Investigating Officer SI Sadananda Sarma had already been expired. He has deposed that as per the case diary Sadananda Sarma investigated the case from the date of occurrence and the FIR was lodged by one Hanu Mohan Sakharu. He has also deposed that Sadananda Sarma visited the place of occurrence, examined the witnesses and prepared a sketch map and did inquest over the dead body. He has also deposed that during investigation, accused Punya Mazumdar was produced by former Investigating Officer before Executive Magistrate named Dasarath Das of Chamaria Revenue Circle where the accused made Extra Judicial Confessional statement. He has also deposed that accused Punya Mazumdar signed on the said confessional statement. He has also deposed that the former

Investigating Officer during investigation seized two numbers of bicycle and during investigation the former Investigating Officer sent the dead body for post-mortem examination. He has also deposed that on transfer of the previous Investigating Officer, he received the case diary and from the case diary he found that during investigation the previous Investigating Officer examined one witness, namely, Jantu Biswas and this witness made a statement before the earlier Investigating Officer that two accused persons, Govinda and Punya came running with mud on their body and arrived in their courtyard and as he asked them as to why they were running, then they run though they replied that some people were chasing them to kill them. He has also deposed that witness Jantu Biswas has stated before the earlier Investigating Officer that these two boys had killed Amrit.

- 25.** During cross examination, PW-12 has deposed that he had not examined any witness nor he visited the place of occurrence. He stated that two bicycles were seized by the previous Investigating Officer, but ownership of the bicycles had not been ascertained. He stated that apart from the bicycles, no other articles were seized from the place of occurrence to substantiate the fact that the accused persons were involved. He stated that he did not know the distance of the place of occurrence from the house of the accused persons. He stated

that the incident took place on 28.02.2007 and the FIR was lodged on 01.03.2007. He stated that before receiving the FIR there was a preliminary enquiry as per MCD (Miscellaneous case diary). He stated that the time of calling the deceased by the accused has been recorded as 8:00 PM. He further stated that the exact time of killing was not recorded in the FIR. He stated that while PW-10 was examined by the previous Investigating Officer and he made the same statement that the deceased was called on by the accused at around 8:00 PM, and thereafter, he was killed and laid down in a drain near the college road. He has also deposed that that he did not know the distance of the residence of PW-2, Cintamani Mandal from the place of occurrence and had also no idea about the distance of residence of PW-4 from the place of occurrence. He admitted that one person, namely, Niranjan Das was shown as a witness in the extra judicial confessional statement made by the accused, but there was no such note on the case diary and as such he could not say wherefrom he was brought by the Investigating Officer to put his signature on the statement made by the accused. He has also deposed that he could not say at what distance from the place of occurrence the house of PW-7 Jiten Mandal was situated and on the case diary she found no such note to state that where from this witness was called by the Investigating Officer to appear as a witness in the

Confessional Statement. The defence side put suggestion that the Investigating Officer had not examined PW-6, PW-7 and PW-8 during the investigation under Section 161 of the Code of Criminal Procedure, 1973, which is denied by PW-12. He stated that the extra judicial confessional statement was recorded by the previous Investigating Officer Sadananda Sarma in presence of the Executive Magistrate. He admitted that in the statement recorded on 03.03.2007 had no attesting witness, buton the statement recorded on 10.03.2007 contains name of witness Niranjan Das and Mohat Bayan. He has also deposed that the witness shown on Exhibit-3, namely, Mohat Bayan was not examined as a witness under Section 161 of the Code of Criminal Procedure, 1973, as revealed from the case diary. He has also deposed that no eye witness of the occurrence could be found during the investigation.

- 26.** As already stated herein above, the appellants, during their examination under Section 313 of the Code of Criminal Procedure, 1973, have pleaded their innocence and have denied the truthfulness of the testimony of prosecution witnesses. However, they did not adduce any evidence in their defence.
- 27.** Mr. A. Ahmed, learned counsel for the appellants has submitted that in the instant case, there is no eyewitness to support the prosecution's case and entire edifice of the

prosecution case is built on circumstantial evidence. Learned counsel for the appellants has submitted that when a case is entirely based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully established. However, the prosecution side has failed to fully establish the circumstances from which the conclusion of the guilt of the present appellants has been drawn by the Trial Court. To fortify his submission, learned counsel for the appellants has cited a ruling of the Apex Court in the case of "***Sharad Birdhichand Sarda Vs. State of Maharashtra***" reported in ***(1984) 4 SCC 116***.

28. Learned counsel for the appellants has also submitted that the Trial Court has enumerated the circumstances, in Paragraph No. 41 of the impugned judgment, on the basis of which, it arrived at the finding of guilt of the present appellants. However, learned counsel for the appellants has submitted that the said circumstances are not fully established and moreover, they are not consistent only with the hypothesis of the guilt of the present appellants.
29. Learned counsel for the appellants has also submitted that the Trial Court has heavily relied on last seen theory to come to the conclusion of guilt of the present appellants. He has submitted that the evidence of PW-1 shows that the deceased was seen along with the appellants at about 4.00 PM, whereas, in the FIR,

which is exhibited as Exhibit-5, by the PW-10, it has been mentioned that the deceased was called by the accused persons at 8.00 PM only, hence, if the deceased was alive at 8.00 PM, and if he was in his residence at that time, the fact that the appellants were seen with him at 4.00 PM is not of any relevance. He has submitted that there is no evidence on record to suggest that the appellants were seen with the deceased at 8.00 PM. He has also submitted that though, PW-10 has deposed before the Court that the fact that the appellants called the deceased at 4.00 PM is true, however, PW-12, who is the Investigating Officer has stated in his cross examination that when PW-10 was examined by the previous Investigating Officer, he made a statement that the deceased was called by the appellants at around 8.00 PM. It is, therefore, submitted by the learned counsel for the appellants that the testimony of PW-10 being contradicted by his previous statement given before the Investigating Officer is not reliable and as from the FIR (Exhibit-5) as well as from the testimony of PW-12, it appears that the deceased was alive when he was called by the appellants in the evening, hence, the fact that the appellants were seen with the deceased at 4.00 PM on that day, lose its relevance.

- 30.** Learned counsel for the appellant has also submitted that even if it is assumed that the appellants were seen with the

deceased at 4.00 PM, however, mere seeing the appellants with the deceased is not sufficient to convict them for his murder unless there is something more than that which unmistakably points towards the guilt of the present appellants. Learned counsel for the appellants has submitted that in the instant case, the prosecution side has failed to establish any other fact, which is consistent only with the hypothesis of the guilt of the appellants. To fortify the submission, learned counsel for the appellants has cited a ruling of the Apex Court in the case of "**Rambraksh Vs. State of Chhattisgarh**", reported in **(2016) 12 SCC 251**. He has also cited the ruling of a Division Bench of this Court in the case of "**Jiarul Haque Vs. State of Assam and Another**", reported in **2020 (2) GLT 151**.

- 31.** Learned counsel for the appellants has also submitted that though police has seized two bicycles from near the place where the dead body was found, however, there is no evidence to show that the seized bicycles belongs to any of the appellant. He has also submitted that there is no admissible evidence on record to the effect that the appellants were seen on bicycle. Learned counsel for the appellants has also submitted that the evidence of PW-5 to that effect that he had heard from villagers that the deceased and the two appellants were proceeding on that day on two bicycles is hearsay evidence only, which is not admissible and which cannot be relied upon.

- 32.** Learned counsel for the appellants has also submitted that the extra judicial confession of the appellants which has been exhibited as Exhibit-3 and Exhibit-4 have rightly been discarded by the Trial Court, as the same were recorded by the S.I. of Police and thus, hit by Section 25 and Section 26 of the Indian Evidence Act. Learned counsel for the appellants has also submitted that in the instant case, the confessional statement was recorded by police in presence of the Circle Officer-cum-Executive Magistrate, however, the reference to the word "Magistrate" in Section 26 of the Indian Evidence Act refers to a Judicial Magistrate only and not an Executive Magistrate. To fortify his submission learned counsel for the appellants has cited a ruling of a full bench of this Court in the case of **"Kartik Chakraborty Vs. State of Assam"** reported in **2017 (5) GLT 144**.
- 33.** Learned counsel for the appellants has also submitted that there is also no evidence on record to show that the appellants were seen at the place of occurrence or anywhere near that place. He has submitted that though, the PW-2 had deposed, during his examination-in-chief, that on hearing sound outside his residence when he came out he found one person running to his courtyard, who he identified as Govinda (Appellant No.2), however, during his cross examination, he had stated that he has not seen as to who ran away through his courtyard. He has therefore, submitted that the testimony of PW-2 is not reliable.

Learned counsel for the appellants has also submitted that there is no other evidence on record to suggest that the appellants were seen at the place of occurrence.

- 34.** Learned counsel for the appellants has also submitted that in a case based entirely on circumstantial evidence, motive has important role to play and it is an important link in the chain of the incriminating circumstances. It is submitted by the learned counsel for the appellant that failure to prove motive would be a missing link in the chain of circumstances, however, in the instant case, the prosecution side has not alleged or prove any motive for killing of the deceased by the appellants. To fortify his submission, he has cited a ruling of the Apex Court in the case of **"Indrajit Das Vs. The State of Tripura"**, reported in **2023 Live Law (SC) 152**.
- 35.** Learned counsel for the appellants has also submitted that as there is no eye witness to the commission of the crime in the instant case, the circumstances by which the prosecution intends to prove its case should be of definite tendency unerringly pointing towards the guilt of the appellants. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellants and that such circumstances should be incapable of any explanation on any hypothesis other than the guilt of the

appellants and inconsistent with their innocence. However, it is submitted by learned counsel for the appellants that in the instant case, the circumstances enumerated by the Trial Court for arriving at the guilt of the appellants are not fully established and they do not form a chain so complete which only points towards guilt of the appellants. He has submitted that the prosecution side has failed to prove the guilt of the appellants beyond all reasonable doubt and they are thus, entitled to get benefit of doubt and acquitted of charge under Section 302/34 of the Indian Penal Code.

- 36.** On the other hand, Ms. B. Bhuyan, has submitted that the Trial Court has correctly arrived at the finding of guilt of the present appellants on the basis of evidence available on record, therefore, the impugned judgment is not liable to be interfered with and this appeal may be dismissed.
- 37.** Learned Additional Public Prosecutor has submitted that in the instant case, though there is no eye witness to the commission of the alleged offence, however, the testimony of PW-11 (Dr. R. Chaliha) as well as from Exhibit-6, i.e., the post-mortem examination report shows that the death of the deceased was due to asphyxia resulting from ante mortem ligature strangulation and is homicidal in nature. She submits that the death of the deceased being homicidal in nature, and the evidence on record shows that the appellants were last seen

with the deceased when he was alive, the burden is cast on the appellants to show as to where they were, after they were seen with the deceased till the dead body of the deceased was recovered. She has also submitted that the appellants have confessed to their guilt before an Executive Magistrate and this should also be treated as an incriminating circumstance against them for arriving at the finding of the guilt. She has also submitted that the appellants were seen riding two bicycles which were recovered of the place of occurrence. She has also submitted that PW-2 has seen the appellant No. 1 running through their courtyard, when he came out of his house on hearing hue and cry. She has also submitted that PW-3 also saw two persons fleeing away from the place where the dead body was found. Learned Additional Public Prosecutor has submitted that the aforesaid circumstances only indicate towards the guilt of the present appellants and hence, the impugned judgment should not be interfered with.

- 38.** Mr. M. Mahanta, learned counsel for the respondent no. 2 made submissions on similar lines to that of learned Additional Public Prosecutor. He has submitted that the circumstantial evidence against the present appellants, on record, forms a complete chain of evidence which unerringly points only towards the guilt of the present appellants and therefore, the impugned

judgment should not be interfered with and the conviction and sentence imposed on the appellants should be upheld.

39. We have considered the rival submissions made by the learned counsel for both the sides. We have also gone through the materials available on record meticulously, as well as the rulings cited by the learned counsel for both the sides.
40. For arriving at a finding of guilt of the present appellants under Section 302/34 of the Indian Penal Code, there has to be admissible as well as reliable evidence on record to arrive at such a finding.
41. As there is no eye witness to the incident of killing of deceased Amrit Sakharu and as the prosecution case is entirely based on circumstantial evidence, following observation made by the Supreme Court of India in the case of "***Sharad Birdhichand Sarda Vs. State of Maharashtra***" (*supra*) becomes very relevant in the instant case:-

"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 v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC(Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] "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".

- 42.** Thus, it may be seen that the Apex Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It is also held that the said circumstances "must or should" and not "may be" established.

It is also a settled principle of law that however, strong a suspicion may be, it cannot take place of proof beyond reasonable doubt in a criminal trial. In light of said principle, let us examine as to whether the circumstances enumerated by the learned Trial Court in Paragraph No. 41 of the impugned judgment are fully established and are of conclusive nature and tendency and exclude every possible hypothesis except the guilt of the present appellants.

- 43.** For the sake of convenience, the circumstances enumerated in Paragraph No. 41 of the impugned judgment are quoted herein below:

- (i) It was around 4 P.M. in the evening, both the accused came to the house of Sunu Mohan Shakaru, the uncle of the deceased and called out the deceased with them. On that day a co-villager saw both the accused along with the deceased in the afternoon of the date when the dead body of Amrit Shakaru was found in a pitch at Kahibari village at around 8 P.M.*
- (ii) One of the co-villagers, a woman of the neighbouring area (P.W. 2) heard noise outside and saw a person running through her courtyard at the time of incident and initially claimed that he was accused Govinda.*
- (iii) Some of the villagers saw two bi-cycles on that fateful evening lying on the road and in the field*

which were seized by police. The villagers detected the dead body of Amrit Shakaru near the college from a pitch.

(iv) One of the co-villagers heard from the villagers that deceased and two accused persons were seen proceeding on two bicycles on the date of occurrence which infers that no bicycle was there with the deceased and he was carrying by the accused in their bicycle.

(v) The accused persons were produced at the police station and their statements were recorded by police in presence of Executive Magistrate and also in presence of prosecution witness (P.W.6). The accused persons were arrested.

(vi) The P.M. report of the deceased was collected and on completion of investigation police submitted charge sheet against the accused u/s 302/34 IPC.

44. As regards the circumstance enumerated at sub-para (i) of Paragraph No. 41 of the impugned judgment is concerned, it appears that PW-10, who is the first informant of the case, has stated in the FIR which has been exhibited as Exhibit-5 that the appellants called the deceased at about 8.00 PM on the date of occurrence of the alleged offence. It also appears that though, he has stated before the Court while deposing as prosecution witness, that the appellant called the deceased at 4.00 PM, however, from the testimony of PW-12, it appears that the PW-

10 had stated before the Investigating Officer, during investigation, that the appellants had called the deceased at 8.00 PM. Thus, it appears that it was for the first time, while deposing before the Trial Court, the PW-10 mentioned the time, when the appellants called the deceased, as 4.00 PM, instead of 8.00 PM. It is also pertinent to note that PW-10, in his evidence, has also deposed that the FIR was written as per his version and same was read over to him after which he had put his signature thereon. PW-10 has given no clarification regarding the discrepancy with regard to the time when the appellants have called the deceased. It would therefore, not be safe to rely on that portion of the testimony of PW-10 where he mentions that the appellants had called the deceased at 4.00 PM on the date of the incident. The assertion of PW-10 to the effect that the appellants called the deceased at 4.00 PM on the date of the incident is not established. Only the second part of the circumstance enumerated at sub-para (i) of Paragraph No. 41 of the impugned judgment is established as PW-1 has deposed that he had seen the appellants along with the deceased at 4.00 PM on the date of the incident.

- 45.** As regards the circumstance enumerated at sub-para (ii) of Paragraph No. 41 of the impugned judgment is concerned, though, PW-2 has deposed that he could identify the person running through his courtyard as Govinda (Appellant No. 2),

however, during cross examination, he has deposed that he had not seen who ran through his courtyard. In view of demolition of the testimony of PW-2, to the effect that he saw Govinda running through his courtyard, during his cross examination, the said circumstance cannot be regarded as fully established.

- 46.** As regards circumstance enumerated at sub-para (iii) of Paragraph No. 41 of the impugned judgment is concerned, the seizure of two bicycles from near the place of occurrence of offence, in itself cannot be regarded as an incriminating circumstance against the appellants, as no material was produced before the Trial Court to show that the appellants are the owner of the said bicycles or that the same were used by the appellants on the date of alleged incident.
- 47.** As regards circumstance enumerated at sub-para (iv) of Paragraph No. 41 of the impugned judgment is concerned, no prosecution witness has deposed of having seeing the appellants proceeding on bicycles. Only PW-5 has deposed that he had heard from villagers that the deceased and the appellants were proceeding on two bicycles. During cross examination, PW-5 had stated that he was reported by Nitai Mondal about the fact that the deceased went along with the appellants in two bicycles, however, the said Nitai Mondal who was examined as PW-1 has not deposed that he had seen the

appellants and the deceased on two bicycles, therefore, the testimony of PW-5 is only hearsay evidence, which is not admissible. The circumstance of the deceased being carried by the appellants in two bicycles cannot be regarded as fully established, due to lack of evidence.

- 48.** As regards circumstance enumerated at sub-para (v) of Paragraph No. 41 of the impugned judgment is concerned, the confessional statements of the appellants have been recorded by the Sub-Inspector of Police, though, in presence of Executive Magistrate. In the case of **"Kartik Chakraborty Vs. State of Assam"** (*supra*), a Full Bench of this Court while answering a reference made to it, i.e., "*whether the expression Magistrate appearing in Section 26 of the Evidence Act would mean a Judicial Magistrate or an Executive Magistrate*" has held that the expression "Magistrate" appearing in Section 26 of the Evidence Act, would mean only a Judicial Magistrate and not an Executive Magistrate. As in the instant case, the confessional statements of the appellants which are exhibited as Exhibit-3 and Exhibit-4 were recorded by the police, while the appellants were in the custody of police, in presence of an Executive Magistrate and not a Judicial Magistrate, hence, the said confessional statements are hit by Section 25 and Section 26 of the Indian Evidence Act. For the said reasons, the circumstance enumerated at sub-para (v) of Paragraph No. 41 of the

impugned judgment cannot be regarded as incriminating circumstance against the present appellants.

- 49.** In the instant case, though, the deceased was killed by strangulation and though, from the confessional statement recorded by the Investigating Officer (which is inadmissible in evidence) it appears that belt of appellant No. 1 which was stated to have been used for the purpose of strangulating the deceased, or any other object which was used for strangulating the deceased was not seized during investigation. Only the seizure of two bicycles was made, during investigation, however, the ownership of the same could not be ascertained. The prosecution side also failed to adduce evidence of any witness who had seen the appellants using the said bicycles on the date of incident. None of the prosecution witnesses has seen the appellants and the deceased going on bicycles. The only evidence available, in this regard, is the hearsay evidence of the PW-5 which has already been discussed and discarded in the foregoing paragraphs. The testimonies of two numbers of the prosecution witnesses, namely, PW-7 and PW-8 who turned hostile are of no use as they reveal nothing in favour of prosecution side even after cross examination by prosecution side. None of the witnesses or appellants was examined under Section 164 of the Code of Criminal Procedure, 1973 during the

course of investigation, which could have helped the prosecution side during trial.

- 50.** Moreover, prosecution side has also failed to impute any motive on the appellants for committing the crime of killing of Amrit Sakharu. In the case of “***Indrajit Das Vs. The State of Tripura***” (*supra*), the Apex Court has observed as follows:

"In a case of circumstantial evidence, motive has an important role to play. Motive may also have a role to play even in a case of direct evidence but it carries much greater importance in a case of circumstantial evidence than a case of direct evidence. It is an important link in the chain of circumstances."

The failure of the prosecution side to show any motive on the part of the appellants for committing the alleged offence which could have been very important link in the chain of circumstances in the instant case, has certainly weaken the prosecution's case.

- 51.** Thus, we have seen the circumstances which were enumerated in Paragraph No. 41 of the impugned judgment and relied upon by the Trial Court for arriving at the finding of guilt of the present appellants were not fully established. It also appears that the circumstances which were established in this case do not form a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellants. The evidence available on record

falls miserably short of what is required to conclusively arrive at the finding of the guilt of the appellants. We are, therefore, of the considered opinion that the prosecution side has miserably failed to prove the guilt of the appellants of this case beyond all reasonable doubt. The appellants are, therefore, entitled to get benefit of doubt which, under the facts and circumstances of this case, we hereby give to them. The appellants are accordingly, acquitted of charge under Section 302/34 of the Indian Penal Code on getting benefit of doubt.

- 52.** In view of the above discussions and reasons, this appeal is hereby allowed. The impugned judgment and order dated 08.05.2018, passed by the learned Sessions Judge, Amingaon in Sessions Case No. 163/2014, is hereby set aside.
- 53.** Let, the appellants be set at liberty forthwith if they are not required to be detained in connection with any other case.
- 54.** Return back the Trial Court Record.

JUDGE

JUDGE

Comparing Assistant