

GAHC010165232021



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2024:GAU-AS:8226-

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

CRIMINAL APPEAL [I] NO. 30/2021

Hiranya Kandha @ Hiren Kandha

.....***Appellant***

-VERSUS-

The State of Assam

.....***Respondent***

Advocates :

Appellant	:	Ms. R.D. Mazumdar, Amicus Curiae
Respondent	:	Ms. B. Bhuyan, Senior Counsel & Additional Public Prosecutor, AssamMs. M. Chakrabarty, Advocate
Date of Hearing	:	19.07.2024
Date of Judgment & Order	:	20.08.2024

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

JUDGMENT & ORDER

[*M. Choudhury, J*]

This criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 [‘the Code’ or ‘CrPC’, for short] is directed against a Judgment and Order dated 11.01.2021 passed

by the learned Sessions Judge, Udalguri in Sessions Case no. 83 of 2018. By the Judgment and Order dated 11.01.2021, the accused-appellant on being found guilty of the offence of matricide under Section 300 of the Indian Penal Code [IPC], has been sentenced under Section 302, IPC to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo simple imprisonment for further three months. It has been ordered that the period of detention, if any, already undergone by the accused-appellant during the course of investigation, inquiry or trial shall be set-off against the term of imprisonment in terms of Section 428, CrPC.

2. The investigation into the alleged crime of matricide was started on institution of a First Information Report [FIR] before the Officer In-Charge, Panery Police Station on 30.08.2017 by one Binoy Deka as the informant naming the accused as the perpetrator of the crime. In the FIR [Ext.-1], the informant had inter alia stated that in the morning hours on that day, that is, on 30.08.2017, the accused entered into an altercation with the elder sister of the informant, Dharmeswari Kandha who was the mother of the accused, over some domestic matter. The accused had, in the process, caused severe injury on her neck by hacking with a *dao* inside their house itself and as a result, the informant's elder sister met instantaneous death on the spot itself.

3. On receipt of the FIR, the Officer In-Charge, Panery Police Station registered the same as Panery Police Station Case no. 68/2017 [corresponding G.R. Case no. 1013/2017] for the offence under Section 302, IPC and entrusted the investigation of the case to one Prabin Chandra Deka [P.W.13], a Sub-Inspector of Police attached to Panery Police Station.

4. It has emerged from the materials on record that prior to lodgment of the FIR [Ext.-1], the accused, a resident of Line no. 13, Village – Bhutiachang Tea Estate surrendered himself in Panery Police Station at around 06-30 a.m. on 30.08.2017 allegedly stating that he had murdered his mother, Dharmeswari Kandha in their house by cutting her neck by means of a *dao* [machete] and that the *dao* by means of which he committed the act of matricide was lying on the bed beside the deadbody of his mother. According to the I.O. [P.W.13], a general diary entry being General Diary Entry no. 603 dated 30.08.2017 was registered by the Officer

In-Charge, Panery Police Station on the basis of such information. As the accused surrendered himself in the Police Station in the afore-stated manner, he was taken into custody immediately on such surrender and his statement was also recorded.

5. As the task of preliminary investigation was entrusted to him after the registration of General Diary Entry no. 603, the I.O. [P.W.13] proceeded to the place of occurrence [P.O.] with the accused. On reaching of P.O., that is, the house of the deceased, the I.O. [P.W.13] stated to have recorded the statements the available witnesses available at the P.O. under Section 161, CrPC. The I.O. [P.W.13] also drew up a Sketch Map of the P.O. [Ext.-5]; and seized a blood stained *dao* which was lying by the side of the deadbody, vide a Seizure List [Ext.-4] on 30.08.2017 in presence of witnesses. Thereafter, the deadbody of Dharmeswari Kandha was brought to the Police Station for post-mortem examination. Prior to sending the deadbody for post-mortem examination, the I.O. [P.W.13] got the inquest proceeding conducted on the deadbody of the deceased by the Executive Magistrate, Udalguri at around 09-30 a.m. on 30.08.2017 and the Executive Magistrate, Udalguri prepared an Inquest Report [Ext.-2] recording his findings therein. After the inquest proceeding, the deadbody of Dharmeswari Kandha was forwarded to the Udalguri Civil Hospital for post-mortem examination vide a Deadbody Challan at around 01-00 p.m. on 30.08.2017. The post-mortem examination on the deadbody of the deceased was performed at Udalguri Civil Hospital and in course of time, the Autopsy Doctor, P.W.3 prepared a Post-Mortem Examination [PME] Report [Ext.-3] recording his findings therein.

6. It was at around 05-00 p.m. on 30.08.2017 the formal FIR was lodged by the informant-brother of the deceased [P.W.1], Binoy Deka, which led to registration of the case, Panery Police Station Case no. 68 of 2017. After registration of the case, the I.O. [P.W.13] recorded the statement of the informant [P.W.1] under Section 161, CrPC. The I.O. [P.W.13] stated to have recorded a confession containing a full and true account of the statement of the accused, who was found purportedly in a fit state of mind. The accused was thereafter, forwarded to the court for recording of the confessional statement of the accused.

7. After initial appearance of the accused before the Court on 01.09.2017, the confessional

statement under Section 164, CrPC was recorded on 04.09.2017 after remanding him to judicial custody vide an Order dated 01.09.2017. The statement of the accused under Section 164, CrPC [Ext.-6] was recorded by the Additional Chief Judicial Magistrate, Udalguri on 04.09.2017.

8. Completing investigation into the case, Panery Police Station Case no. 68 of 2017, the I.O. [P.W.13] submitted a charge sheet under Section 173[2], CrPC vide Charge Sheet no. 7/2018 on 31.03.2018 finding a prima facie case for the offence under Section 302, IPC well established against the accused. Upon submission of the Charge Sheet, the Court of learned Chief Judicial Magistrate, Udalguri secured appearance of the accused from Jail custody on 09.05.2018 and furnished copies to him in compliance of the procedure laid down in Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the Court of learned Chief Judicial Magistrate, Udalguri committed the case records of G.R. Case no. 1013/2017 to the Court of Sessions, Udalguri by an Order of Commitment dated 09.05.2018, as per Section 209, CrPC, by notifying the learned Public Prosecutor. The accused was directed to be produced before the Court of Sessions, Udalguri on 17.05.2018. On receipt of the case records of G.R. Case no. 1013/2017, the Court of Sessions, Udalguri registered the same as Sessions Case no. 83 of 2018.

9. Upon securing appearance of the accused from Jail custody; after hearing the learned Public Prosecutor and the learned defence counsel; and after perusal of the materials available in the case records; the learned Court of Sessions, Udalguri [‘the trial court’, for short] framed the following charge against the accused, on 05.07.2018, :-

That you on or about 30.08.2017 in the morning time at Village - Bhootiachang Line no. 13 under Panery Police Station caused death to Dharmeswari Kandha by intentionally causing her death and thereby committed an offence punishable under Section 302, IPC and within my cognizance.

10. When the charge was read over and explained to the accused, the accused abjured guilt

and claimed to be tried. Accordingly, the case proceeded to the stage of trial. During the course of the trial, the prosecution side in order to bring home the charge examined sixteen nos. of witnesses viz. [i] P.W.1 – Binoy Deka; [ii] P.W.2 – Nilamoni Deka; [iii] P.W.3 – Dr. Arindam Bora; [iv] P.W.4 – Ashok Sarma; [v] P.W.5 – Gola Munda; [vi] P.W.6 – Jeevan Induwar; [vii] P.W.7 – Dadhiram Deka; [viii] P.W.8 – Ramu Kurmi; [ix] P.W.9 – Birsia Orang; [x] P.W.10 – Philip Tete; [xi] P.W.11 – Sanika Kheria; [xii] P.W.12 – Pradip Munda; [xiii] P.W.13 – Prabin Chandra Deka; [xiv] P.W.14 – Sujit Kheria; [xv] P.W.15 – Dr. Ankur Bhuyan; and [xvi] P.W.16 – Sohrab Ali. The prosecution side also exhibited seven nos. of documents viz. [i] Ext.-1 : FIR; [ii] Ext.-2 : Inquest Report; [iii] Ext.-3 : Post-Mortem Examination [PME] Report; [iv] Ext.-4 : Seizure List; [v] Ext.-5 : Sketch Map of the P.O.; [vi] Ext.-6 : Confessional Statement of the accused recorded under Section 164, CrPC; and [vii] Ext.-7 : Charge Sheet.

11. After closure of evidence from the prosecution side, the accused was examined under Section 313, CrPC and the accused was asked to explain the circumstances appearing in the prosecution evidence against him. The case of the accused was of denial. The accused did not adduce any defence evidence. After hearing the learned counsel for the parties and appreciation of the evidence/materials on record, the learned trial court finding the accused guilty of the offence of murder [matricide], convicted him under Section 300, IPC. The accused was heard on the point of sentence under Section 235[2], CrPC. Thereafter, he has been sentenced in the manner, mentioned hereinabove.

12. We have heard Ms. R.D. Mazumdar, learned Amicus Curiae appearing for the accused-appellant and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor assisted by Ms. M. Chakrabarty, learned counsel for the respondent State.

13. Ms. Mazumdar, learned Amicus Curiae appearing for the accused-appellant has, at first, pointed out that the case is based on circumstantial evidence as there is no eye-witness. Learned Amicus Curiae has contended that one of the basis on which the learned trial court has returned a finding of guilt against the accused was an alleged confessional statement, which was retracted by the accused subsequently. Even if the aspect of retraction is left aside, then also the confessional statement is inadmissible in evidence. Ms. Mazumdar has

contended that the mandatory procedure required to be followed in recording the confessional statement was not adhered to. Moreover, there was failure on the part of the prosecution to establish all the circumstances by cogent evidence so as to compete the chain pointing unerringly that it was only the accused, who was the assailant. There was no evidence led as regards any motive on the part of the accused to commit a heinous offence like matricide. As there are many missing links resulting in breaks in the chain at many places, the conviction of the accused for the offence of murder is not sustainable in law. The prosecution had even failed to send the alleged blood stained weapon of assault, claimed to have recovered, for serological examination at least to establish a connecting link between the alleged weapon of assault with the alleged homicidal death of the deceased. Contending so, learned Amicus Curiae has submitted that the criminal appeal deserve to be allowed.

14. Ms. Bhuyan, learned Additional Public Prosecutor appearing for the State has supported the finding of guilt recorded against the accused by the learned trial court. It has been contended that a conviction can be made on the basis of a confessional statement of an accused and in the present case, the accused in his confessional statement, had admitted his guilt regarding killing his mother. In so far as adherence to the procedure in recording such confessional statement is concerned, learned State counsel has submitted that the Magistrate who recorded the confessional statement, had himself deposed as a witness. Thus, no doubt can be expressed in this regard and the commission or omission, if any, was insignificant in nature. As it has been established that the deceased and the accused used to reside together in the same house and the incident appeared to have occurred at around midnight, the accused clearly owed an explanation as to how the incident had occurred. In the absence of any explanation from the accused, a presumption adverse to the accused can be clearly drawn therefrom. Not sending the weapon of assault for serological examination cannot be a factor to weaken the case of the prosecution, learned State counsel has contended. Submitting that the criminal appeal is bereft of any merits, learned State counsel has called for its dismissal.

15. We have given due consideration the rival submissions of the learned counsel for the parties. We have also perused the materials/evidence on record including the testimonies of

the witnesses and the documentary evidence, available in the case records of Sessions Case no. 83 of 2018, in original, apart from the decisions referred to by the learned counsel for the parties in support of their respective submissions.

16. Before turning to the ocular evidence of the prosecution witnesses, it is apt to refer to the medical evidence, at first, which are in the forms of the testimony of the Autopsy Doctor, P.W.3 and the Post-Mortem Examination [PME] Report, Ext.-3.

16.1. P.W.3, Dr. Arindam Bora who was serving as the Medical & Health Officer no. 1 at Udalguri Civil Hospital at the relevant point of time, performed the post-mortem examination on the deadbody of the deceased, Dharmeswari Kandha, on being identified [i] UBC, Riful Ali; [ii] Dadhi Ram Deka [P.W.7]; [iii] Binoy Deka [P.W.1]; and [iv] Pradip Modak. In the evidence-in-chief, P.W.3 mentioned about the findings recorded by him in the PME Report [Ext.-3] after autopsy. He stated that in the PME Report [Ext.-3], he opined that the death was due to shock and haemorrhage. He further stated that the injury sustained by the deceased was sufficient to cause death of a person in ordinary course of nature. He exhibited and proved the PME Report as Ext.-3 with his signature therein as Ext.-3[1]. In cross-examination by the defence, P.W.5 admitted that he did not mention the measurement of the cut mark in the PME Report [Ext.-3]. P.W.5 further stated that the injury sustained by the deceased was ante-mortem but the same did not find mention it in the PME Report [Ext.-3].

16.2. In the PME Report, which was exhibited as Ext.-3, the following findings were recorded :-

EXTERNAL APPEARANCE :-

Rigor mortis present. Wearing blue blouse and white mekhela.

* * * * *

THORAX :-

1. Walis ribs and cartilages : Intact
2. Pleurae : Intact

3. Larynx and trachea : Dissection of neck right lateral part.

* * * * *

MUSCLES, BONES AND JOINTS

1. Injury : There is cut mark on the right side of the neck.

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MORE DETAILED DESCRIPTION OF INJURY OR DISEASE :-

Deep cut mark present on the neck from right side of the neck. There is sign of profuse bleeding from the cut injury.

OPINION OF ASSISTANT SURGEON AS TO CAUSE OF DEATH

SUB – ASSISTANT SURGEON

In my opinion Pt. is death due to shock and haemorrhage.

16.3. From the testimony of Autopsy Doctor, P.W.3 and the PME Report [Ext.3], it has emerged that the deceased sustained a deep cut injury on the right side of the neck and there was profuse bleeding from the cut injury. As per the medical evidence, the death of the deceased was due to shock and haemorrhage and the cut injury sustained by the deceased was ante-mortem in nature. The Autopsy Doctor, P.W.3 testified to the effect that the injury sustained by the deceased was sufficient to cause death of a person in the ordinary course of nature. This part of testimony of the Autopsy Doctor was not contested in any manner by the defence during cross-examination.

16.4. The offence of culpable homicide is defined in Section 299, IPC. As per Section 299, IPC, whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commit the offence of culpable homicide. As per Section 300, IPC, except in the cases therein specifically excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient to the ordinary course of nature to cause death, or, fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

16.5. As the death of the deceased was caused due to the cut injury sustained on the neck and the cut injury sustained by the deceased was found to be sufficient to cause death in the ordinary course of nature, it can be safely concluded that the death of the deceased, assuming arguendo there was the necessary intention, was an act of murder.

17. The issue which would arise, therefore, is who was the assailant of the crime of murder. For reaching a finding on the said issue, the other evidence/materials on record are required to be referred to.

18. The prosecution witnesses – P.W.1, P.W.2 & P.W.7 – were brothers of the deceased with the informant–P.W.1 being elder of P.W.2. P.W.1, P.W.2 & P.W.7 were not residents of Line no. 13 of Village – Bhutiachang, Police Station – Panery where both the deceased and the accused used to reside. They [P.W.1, P.W.2 & P.W.7] are residents of Village – Balipota, Police Station – Mangaldai.

18.1. P.W.1, Khiteswar Deka was the informant. He deposed about the relationship of the accused who is his nephew, and the deceased who was his [P.W.1] elder sister. P.W.1 stated that the deceased, at first, entered into a marital relationship with one Dilip Chauhan and out of the said wedlock, the accused was born. As the first husband of the deceased, Dilip Chauhan deserted her and the accused, the deceased, Dharmeswari Kandha entered into marital relationship once again with one Jiten Kandha about fourteen years earlier and the accused who was begotten by the deceased from her first husband, remained with her along with her second husband, Jiten Kandha. Jiten Kandha expired about five years earlier to the

incident. Thereafter, the deceased and her son, that is, the accused were living together at Village – Bhutiachang, Police Station – Panery.

18.2. On the incident, P.W.1 deposed to the effect that on the date of the incident, he was at his residence at Balipota. P.W.1 was informed by the accused on that day that he [the accused] had killed his mother, that is, the elder sister of the informant-P.W.1. P.W.1 stated that he also came to know that the accused after committing the murder, surrendered at Panery Police Station. Then, on receipt of the information, he [P.W.1] came to the house of his sister, Dharmeswari Kandha and saw the deadbody of his sister lying on her bed with a deep cut mark on her throat with blood oozing out therefrom. P.W.1 further stated that when he was in the house of his sister, Police personnel from Panery Police Station came there and they took the deadbody to the hospital. He stated that he filed the FIR in that connection before the Officer In-Charge. He exhibited the FIR as Ext.-1 with his signature therein as Ext.-1[1]. P.W.1 further stated that the inquest proceeding on the deadbody of the deceased was conducted in his presence. P.W.1 exhibited the Inquest Report as Ext.-2 and his signature therein as Ext.-2[1]. In cross-examination, P.W.1 stated that his house was at a distance of 21 km from Bhutiachang and he did not remember the person who informed him over telephone as regards the incident. P.W.1 stated that he reached the place of occurrence only on the morning hours on the next day. When Police came to the place of occurrence, that is, the house of the deceased, he was present but the accused was at the Police Station as he surrendered before the Police after committing the offence. P.W.1 further stated that the FIR [Ext.-1] was written as per his version.

18.3. P.W.2, Harkanta Deka is a younger brother of P.W.1-informant. The accused is his nephew and the deceased, Dharmeswari Kandha was his elder sister. Stating that he was informed about the incident by his elder brother, P.W.1, P.W.2 deposed in a similar manner like P.W.1 as he along with P.W.1, came to the house of his deceased sister at Bhutiachang together. Like P.W.1, P.W.2 deposed that he saw the deadbody of his sister lying on the bed with a deep cut mark injury on the throat. Police personnel came to the place in the meantime and took the deadbody of the deceased for post-mortem examination. P.W.2 further stated that he and P.W.1 also went to Panery Police Station. Going there, he saw that

the accused was kept detained in the Police Station. The people from the neighbourhood of his sister's house told him [P.W.2] that the accused confessed that he had killed his mother and thereafter, surrendered himself before the Police. In cross-examination, P.W.2 stated that he did not have any conversation with the accused in the Police Station.

18.4. P.W.7, Dadhiram Deka deposed that on the date of the incident, that is, 30.08.2017, when he was in his residence, he was apprised by his brother, Binoy Deka [P.W.1] at around 09-00 a.m. that one telephone call from one Line Chawkidar of Bhutiachang Tea Estate was received whereby it was informed that an incident had taken place in the house of their sister. He [P.W.7] along with his brother, P.W.1 proceeded immediately to the house of their sister at Bhutiachang Tea Estate. P.W.7 deposed that after reaching there, they saw that their sister was lying dead on the bed. By the time they reached their sister's house, many persons from the neighbourhood including Police personnel had already gathered there. He [P.W.7] came to know that the accused committed the murder of his mother by cutting her neck. They could not find the accused as he had voluntarily surrendered before the Police after commission of the murder. P.W.7 further stated that inquest on the deadbody of his sister was conducted in his presence. Thereafter, the deadbody was taken to Udalguri Civil Hospital for post-mortem examination. In cross-examination, P.W.7 stated that his statement under Section 161, CrPC was not recorded by Police. It was the persons from the neighbourhood who gathered at the place of occurrence, told them that the accused after committing the murder of his mother surrendered before the Police. He did not, however, remember the name of the person who told him about the killing of his deceased sister.

18.5. The testimonies of the above prosecution witnesses – P.W.1, P.W.2 & P.W.7 – show that all of them reached the place of occurrence, that is, the house of the deceased after they were informed that their sister, Dharmeswari Kandha was found dead inside her house. By the time they reached the place of occurrence after receiving the news of death of their sister, there was already gathering of persons at the place of occurrence. From the testimonies of these witnesses, it has emerged that they saw the deadbody of their sister, Dharmeswari Kandha lying on her bed with a deep cut mark injury on her neck/throat. It was during their presence in the house of the deceased, Police personnel from Panery Police

Station arrived at the place of occurrence and took the deadbody for post-mortem examination on 30.08.2017. The informant-P.W.1 was a witness to the inquest proceeding and it was the informant-P.W.1 who had lodged the FIR on that day at around 05-00 p.m. None of these prosecution witnesses, that is, P.W.1, P.W.2 & P.W.7 was witness to any event connected with the incident which led to the death of the deceased. They did not depose anything about the alleged weapon of assault. Their testimony to the effect that at the place of occurrence, they were told by other persons from the neighbourhood that it was the accused who had killed the deceased is only hearsay evidence. P.W.1, P.W.2 and P.W.7 did not depose anything on the alleged weapon of assault.

19. P.W.4, Ashok Sarma knew both the accused and the deceased, but did not know the informant-P.W.1. P.W.4 stated that his house was near to the house of the deceased. On the date of the incident, he was in his house. Police personnel came to his house and enquired from him whether the deceased, Dharmeswari Kandha was known to him. P.W.4 further deposed that he replied that he knew the deceased. Thereafter, he accompanied the Police personnel to the house of the deceased. Going there, he found the deadbody of the deceased lying on her bed with cut mark on her throat. Police personnel recovered one 'kalam katari' [one long dagger like knife] and the same was seized in his presence by Police by preparing a Seizure List, Ext.-4 wherein he subscribed his signature as Ext.-4[1]. During cross-examination, P.W.4 stated that he subscribed his signature in the Seizure List in the house of the deceased after he was shown the long knife by Police. He further stated that the accused was not present at the time of seizure of the long knife. P.W.4 claimed to have seen blood stains in the long knife so seized, but, he was not shown the seized long knife at the time of his testimony.

19.1. It has emerged from the testimony of P.W.4 that when he along with the Police personnel went to the house of the deceased he found the deadbody of the deceased lying on her bed with cut mark on her throat. It has further emerged that it was in presence of P.W.4 the Police personnel seized one 'kalam katari' [one long dagger like knife] vide the Seizure List, Ext.-4. When the 'kalam katari' [one long dagger like knife] with bloodstains on it, was seized the accused was not present in the house. Noticeably, at the time of recording

the testimony of P.W.4 before the Court, the seized weapon was not shown to him.

20. The prosecution witnesses – P.W.5, P.W.6, P.W.8, P.W.9, P.W.10, P.W.11, P.W.12 & P.W.14 – were all employees of Bhutiachang Tea Estate.

20.1. P.W.5, Gola Munda who was a Night Watchman [chawkidar] in Bhutiachang Tea Estate, stated that he knew the deceased and the accused but did not know the informant. In his evidence-in-chief, P.W.5 stated that the occurrence took place on 30.08.2017. On that day, he went to the office of the Tea Estate at around 06-00 a.m. At around 06-30 a.m., a police officer from Panery Police Station had a telephonic talk with the Line In-Charge of Bhutiachang Tea Estate, Hitesh Bora. After the telephonic call, Hitesh Bora asked him [P.W.5] to go to Line Quarter no. 332 of the Tea Estate and to see there as to what incident had occurred. Accordingly, he [P.W.5] went to the said quarter and saw the deadbody of Dharmeswari Kandha lying on the bed with cut mark injuries on her neck. Then, he [P.W.5] returned to his office and informed the Line In-Charge about the situation seen by him there. He [P.W.5] also informed that there was a blood stained dao lying the side of the deadbody. When the Line In-Charge came to know about the incident from him [P.W.5], the Line In-Charge informed the police officer of Panery Police Station accordingly. P.W.5 further stated that at around 08-00 a.m., he again went to the place of occurrence which was located nearby his house. That time, before his reaching Line Quarter no. 332, Police personnel had already arrived. The blood stained dao was seized by the Police personnel in his presence by preparing a Seizure List, Ext.-4 wherein he gave his signature as Ext.-4[2]. P.W.5 also identified the blood stained dao which was seized by the Police personnel vide the Seizure List, Ext.-4 as Mat. Ext.-1. P.W.5 further stated that after the incident, the accused voluntarily appeared before the Panery Police Station. During cross-examination, P.W.5 stated that when he first went to Line Quarter no. 332, no one was present there except the deadbody of the deceased along with the dao by the side of her in the bed. But when he went to the place of occurrence subsequently, he saw the Secretary of the Village Defence Party [VDP] of their village along with the Police personnel. P.W.5 stated that he did not know who had inflicted the cut mark injuries on the deadbody of the deceased. He came to learn about the surrender of the accused in the Police Station on that very day after the commission of the incident

from the Line In-Charge of the Tea Estate, Hitesh Bora.

20.1. P.W.6, Jeevan Induwar like P.W.5, knew the deceased and the accused and he did not know the informant. He stated that the incident occurred on 30.08.2017. At around 08-30 a.m., he was in his duty at the Tea Garden. At that time, the Line In-Charge of the Tea Estate, Hitesh Bora enquired from him [P.W.6] whether any murder took place in their quarter line. When he replied that he had no knowledge, the Line In-Charge asked him to enquire about it. Accordingly, he [P.W.6] along with Gola Munda [P.W.5] went to Line Quarter no. 332. Going there, he found the deadbody of Dharmeswari Kandha lying on the bed with a blood stained dao by her side. He [P.W.6] stated to have noticed cut mark injuries on the neck of the deceased. P.W.6 further stated that he came to learn that after commission of the murder by the accused, the accused surrendered before the Panery Police Station. Police personnel came to the house of the deceased and seized the blood stained dao in his presence by preparing a Seizure List, Ext.-4 wherein he gave his signature as Ext.-4[3]. P.W.6 also identified the dao seized vide the Seizure List, Ext.-4 as Mat. Ext.-1. In his cross-examination, P.W.6 stated that he went to the place of occurrence after coming to know about the incident from Line In-Charge, Hitesh Bora. By the time he reached the place of occurrence, there were already around ten persons including the Police personnel present there. He was told by the Line In-Charge that after commission of the incident, the accused surrendered before the Police. P.W.6 stated that he was not an eye-witness to the incident.

20.2. P.W.8, Ramu Kurmi knew both the deceased and the accused as they were his close neighbours. P.W.8 stated that in the morning hours on the date of the incident, that is, on 30.08.2017, he was at Bhutiachang Tea Estate in connection with his duties. At around 10-00/10-30 a.m., he heard from the other labours that the accused killed his mother by inflicting dao blows on her person. On receipt of such information, he went to the house of the accused along with Gola Munda [P.W.5]. Going there, they saw the deadbody of Dharmeswari Kandha lying on her own bed with deep cut injuries on her neck. They came to learn that after commission of the crime, the accused surrendered in the Panery Police Station. P.W.8 deposed that when they reached the place of occurrence, they found the village people including the Police personnel there. During cross-examination, P.W.8 stated

that he went for his duties at around 05-00 a.m. on the date of the incident. Before coming for his duties in Bhutiachang Tea Estate, he did not hear any hue and cry from the house of the accused. P.W.8 further stated that the accused sometimes used to stay for the night in the house but sometimes he used to stay also at some other places. P.W.8 also stated that he did not witness the incident.

20.2. P.W.9, Birsa Orang knew the deceased, the accused and the informant. P.W.9 stated that at around 10-00 a.m. on 30.08.2017, he was in his duties at Bhutiachang Tea Estate. At that time, the workers of the Tea Estate informed him that the accused had killed his mother by inflicting dao blows on her person. On getting the information, he along with other labours of Bhutiachang Tea Estate went to the place of occurrence and found the deadbody of the deceased lying on her bed in a pool of blood with cut mark injuries on her neck. In the meantime, Police personnel had also arrived at the place of occurrence. P.W.9 further stated that he came to know that the accused after committing murder of his mother, surrendered at Panery Police Station. In cross-examination, P.W.9 stated that his house was adjacent to the house of the accused. On the date of the incident, 30.08.2017, he [P.W.9] came out for his works at Bhutiachang Tea Estate at about 07-30 a.m. P.W.9 testified to the effect that he did not hear hue and cry till his leaving for works in the Tea Estate. P.W.9 did not find the accused in his house as he surrendered before the Police after commission of the offence.

20.3. P.W.10, Philip Tete who knew both the deceased and the accused, stated in his evidence-in-chief that at the material time, he was discharging his duties as a Sardar at Bhutiachang Tea Estate. P.W.10 further stated that at around 06-00 a.m., he received information from some labourers in the Tea Estate that someone had committed murder of the mother of the accused in her house. On receipt of the informant, he [P.W.10] stated to have proceeded to the house of the accused immediately. Going there, he came to know that the mother of the deceased was lying dead in her bed. He did not enter into the house out of fear. It came to his knowledge in the meantime that the accused had surrendered himself before the Police. During his presence there, Police personnel along with the VDP Secretary and other people, came to the place of occurrence. Thereafter, he [P.W.10] returned to his duties and subsequently, he came to know that the Police brought the accused to the place of

occurrence. In cross-examination, P.W.10 stated that the deceased was staying with the accused at the place of occurrence. P.W.10 further stated that the deceased was staying with the accused at the time of occurrence. During cross-examination, P.W.10 stated that when he reached the place of occurrence, the accused was not available there. As regards the distance of his house and the house of the accused, P.W.10 stated that the distance was about 250 metres from the place of occurrence and there were other houses near to the house of the accused.

20.4. P.W.11, Sanika Kheria used to know the deceased and the accused. P.W.11 stated that one day prior to the date of the incident, the deceased came to her house and told her that she had a quarrel with the accused and at that time, accused told her that he would cut her into pieces. The deceased by telling him so, also sought his [P.W.11] help. Then he [P.W.11] told the deceased that as it was night, he would not be able to help her. He [P.W.11] advised Dharmeswari Kandha to return to her home. P.W.11 also deposed that on the following morning, he went for his duties at Bhutiachang Tea Estate at around 08-00 a.m. and it was at that time, he heard from the other labours that the accused committed murder of his mother in her house and thereafter, surrendered before the Police. On getting his news, he [P.W.11] stated to have gone to the house of the deceased. When P.W.11 was cross-examined by the defence, he stated that his house was situated adjacent to the house of the deceased. P.W.11 further stated that as he was deaf of hearing, he could not say whether any hue and cry took place in the house of the deceased on the previous day. P.W.11 further stated that his father and other family members used to reside with him in his house and when the deceased came to his house on the previous night, all his family members were present. P.W.11 further stated that he did not meet the accused in the night previous to the date of the incident. P.W.11 also stated that he did not know who had caused the murder of the deceased.

20.5. P.W.12, Pradip Munda also used to know the deceased and the accused. P.W.12 deposed to the effect that at around 07-00 p.m. in the night previous to the date of the incident, the accused came to his house and played Ludo game with him. Thereafter, the accused had his meal along with him. When he [P.W.12] felt sleepy at around 09-00 p.m., he [P.W.12] asked the accused to go back to his home. Accordingly, the accused left for his

home, which was located adjacent to the house of P.W.12. P.W.12 also stated that in the morning on the next day, he heard commotion occurring in front of the house of the accused at around 08-30 a.m. Hearing noise, he [P.W.12] came out of his home and saw gathering of people in the house of the accused. He [P.W.12] also then proceeded for the house of the accused. Going there, he saw the deadbody of the mother of the accused lying on the bed with deep cut mark injuries on her neck with blood oozing out from the injury. P.W.12 further stated that he came to know that the accused after killing his mother, surrendered himself before the Police. Police personnel coming to the place of occurrence, took away the deadbody for post-mortem examination. In cross-examination, P.W.12 stated that his house from the house of the accused was intervened by another house. He further stated that on the previous night of the incident, he did not hear any halla in the house of the accused.

20.6. P.W.14, Sujit Kheria used to know the deceased and the accused. P.W.14 deposed that in the morning on the date of the incident, he went for his duties at Bhutiachang Tea Estate. At that time, line Chowkidar, Gola Munda [P.W.5] told that the accused after killing his mother, surrendered before the Police. Then, he [P.W.14] went to the house of the accused. Going there, he [P.W.14] saw the deadbody of the deceased lying on the bed in a pool of blood with cut mark injuries on the neck. Then, he [P.W.14] returned to his house. In cross-examination, P.W.14 stated that he heard about the incident from line Chowkidar, Gola Munda [P.W.5].

20.7. From the testimonies of the above prosecution witnesses – P.W.5, P.W.6, P.W.8, P.W.9, P.W.10, P.W.11, P.W.12 & P.W.14, it is evident that none of them had witnessed the incident which resulted into the death of the deceased. On evaluation of their testimonies, it has emerged that it was P.W.5, Gola Munda who made a visit to the house of the deceased, Line Quarter no. 332 first in point of time in the morning hours of the date of the incident after he was asked to go there by the Line In-Charge of Bhutiachang Tea Estate after receiving an information from Panery Police Station. When P.W.5 went alone to Line Quarter no. 332, he saw the deadbody of Dharmeswari Kandha lying on the bed with cut mark injuries on her neck and a bloodstained dao lying by the side of the deadbody. This witness, P.W.5 – Gola Munda again went the place of occurrence, Line Quarter no. 332 for the second time along with few of the afore-mentioned witnesses. When P.W.5 went to the place of occurrence for

the second time he found the presence of Police personnel there. Like P.W.4, P.W.5 and P.W.6 were witnesses to the Seizure List, Ext.-4 whereby the bloodstained dao lying by the side of the deadbody was seized by the Police personnel. P.W.5 and P.W.6 also identified the seized dao as Mat. Ext.-1. From the testimonies of the afore-mentioned witnesses, it has emerged that they had the knowledge that the accused had, in the meantime, appeared in the Police Station. Their evidence to the effect that they had learnt that the accused had appeared in the Police Station after killing his mother by inflicting dao blow on her person was only hearsay evidence. Their visits to the house of the deceased were subsequent to the death of the deceased and none of them had deposed as regards the time of commission and manner of committing the murder. From a testimony of P.W.11, Sanika Kheria it is noticed that the deceased visited the house of P.W.11 on the night previous to the date of the incident to tell him [P.W.11] that the deceased had a quarrel with the accused and she was threatened by the accused. P.W.11 testified that when the deceased disclosed those facts to him, his other family members were also present. From the testimony of P.W.12, Pradip Munda, it is found that in between 07-30 p.m. and 09-00 p.m. on the previous night to the incident the accused was present in the house of P.W.12 and during that period of stay, the accused played ludo game with him and had his meal with the members of the family of P.W.12. When accused was asked by P.W.12 at around 09-00 p.m. to go home, the accused left the house of P.W.12. Neither P.W.11 had testified specifically that after leaving his house the deceased had returned to her house for the night nor P.W.12 had testified specifically that after leaving his house the accused had returned to his house at any time after leaving his [P.W.12's] house after 09-00 p.m. on the previous night. From P.W.11, it has only emerged that the deceased and the accused used to stay in the same house. But it has not emerged with any certainty that in the night intervening 29.08.2017 and 30.08.2017, the deceased and the accused were staying together in the same house.

21. On scrutiny of the evidence of the prosecution witnesses – P.W.5, P.W.6, P.W.8, P.W.9, P.W.10, P.W.11, P.W.12 & P.W.14 – it is found that like the prosecution witnesses, P.W.1, P.W.2 & P.W.7, these prosecution witnesses had reached the place of occurrence, that is, the house of the accused only after the incident was over. What is common in the testimonies of these prosecution witnesses is that they heard from others either at the place of occurrence or at

some other place that the accused had committed the murder of the deceased and after committing the murder, surrendered at the Police Station. The testimonies of these prosecution witnesses that they were informed by some other persons as to how the incident had occurred or as to who had committed the incident after they arrived at the place of occurrence, etc. is not to be treated as a piece of evidence to add weight to the case of the prosecution as such nature of evidence ex-facie is in the realm of hearsay.

22. One of the aspects which has been urged on behalf of the prosecution is the last seen together theory. It is a settled proposition that once the theory of 'last seen together' is established by the prosecution, the accused is expected to offer some explanation as to when he had parted company with the deceased. To bring in the theory of last seen together, the prosecution is required to establish with certainty by cogent and credible evidence that prior to the death of the deceased the accused was seen in the company of the deceased and the time gap from the point of time when they were seen together to the point of time when the deceased was found dead was in close proximity. It is true that in the case in hand the prosecution has been able to establish that the deceased and the accused used to live together in one house. On revisit of the evidence on record, we find from the evidence of P.W.12, Pradip Munda that the accused visited his house at around 07-00 p.m. in the night previous to the date of the incident and spent time with him [P.W.12] playing Ludo game and after having meal with him [P.W.12], the accused left the house of P.W.12 purportedly for his home at around 09-00 p.m. On the other hand, it has emerged from the testimony of P.W.11, Sanika Kheriya that one day prior to the date of the incident, the deceased came to her [P.W.11] house and told her [P.W.11] that she [the deceased] had a quarrel with the accused and there was a threat from the accused. But from the evidence of P.W.8, Ramu Kurmi, it has emerged that the accused sometimes used to stay for the night in the house and sometimes he used to stay at some other places. There is no further evidence that the accused had returned to his house that night. From the above evidence, it would not be safe to conclude that after leaving the house of P.W.12 the accused had gone to his house and stayed there during the night. As there is no credible evidence that the deceased and the accused were last seen together prior to the death of the deceased, it cannot be said that the last seen together theory would be applicable to the instant case.

23. The Investigating Officer [I.O.] of the case, Robin Chandra Deka who, on 30.08.2017 was posted as the Second Officer at Panery Police Station, was examined as P.W.13. P.W.16, Sohrab Ali who was posted as the Officer In-Charge, Panery Police Station, during the time of investigation, had completed the remaining part of the investigation of the case as its Investigating Officer [I.O.].

23.1. P.W.13 deposed to the effect that at around 06-30 a.m. on 30.08.2017, the accused, Hiranya Kandha, a resident of Line no. 13 of Village – Bhutiachang Tea Estate, surrendered before Panery Police Station informing that he had murdered his mother, Dharmeswari Kandha at their house by cutting her neck by means of a dao [machete]. The accused also informed that the dao by means of which he had cut the neck of his mother, was lying on the bed beside the deadbody. P.W.13 stated that on the basis of such information, the Officer In-Charge, Panery Police Station viz. Sohrab Ali recorded a general diary entry, General Diary Entry no. 603 dated 30.08.2017 and entrusted him [P.W.13] with the investigation of the case. As the accused had already surrendered before the Police Station, his statement was recorded after taking him into custody. Thereafter, he [P.W.13] proceeded to the P.O. along with the accused. At the P.O., statements of the available witnesses were recorded under Section 161, CrPC. P.W.13 further stated that he drew up a Sketch Map of the P.O. and the same was exhibited by him as Ext.-5. He identified his signature therein as Ext.-5[1]. P.W.13 also stated that the blood stained dao which was lying by the side of the deadbody, was seized by him in presence of witnesses, by a Seizure List, M.R. no. 29/2017 [Ext.-4]. He identified his signature therein as Ext.-4[4]. He conducted inquest on the deadbody of the deceased and prepared an Inquest Report. Thereafter, the deadbody was brought to Panery Police Station for post-mortem examination. On the same day, that is, on 30.08.2017, one formal FIR was lodged by Binoy Deka [the informant-P.W.1] who was the brother of the deceased, at around 05-00 p.m. It was on the basis of the said FIR, the Officer In-Charge, Panery Police Station registered the case, Panery Police Station Case no. 68/2017 under Section 302, IPC and entrusted him [P.W.13] with the investigation of the case as he had

already taken up the preliminary investigation of the case vide General Diary Entry no. 603. He [P.W.13] then recorded the statement of the informant under Section 161, CrPC and produced the accused before the Court for recording his confessional statement. P.W.13 further stated that he also collected the PME Report of the deceased. As he [P.W.13] retired on superannuation during the pendency of the investigation, he had handed over the case diary to the Officer In-Charge, Panery Police Station for further necessary action. During cross-examination, P.W.13 stated that he proceeded to the P.O. on the basis of the general diary entry recorded by the Officer In-Charge, Panery Police Station. P.W.13 admitted that he did not send the blood stained dao to the Forensic Science Laboratory [FSL] for serological examination. He further admitted that he did not seize the blood stained clothes of the deceased. P.W.13 stated that the accused was arrested at 09-00 p.m. on 30.08.2017 and the accused was sent for recording his confessional statement at 11.00 a.m. on 30.08.2017. P.W.13 denied a suggestion that the accused did not surrender before the Police after the murder of his mother.

23.2. P.W.16, Sohrab Ali deposed to the effect that on 20.03.2018, he was posted as the Officer In-Charge, Panery Police Station and on that day, he received the case diary of Panery Police Station to investigate into the same. P.W.16 stated that on scrutiny of the case diary, he found that the earlier part of the investigation was done by Prabin Chandra Deka [P.W.13], Sub-Inspector of Police attached to Panery Police Station and that only the charge sheet of the case remained to be laid. P.W.16 further stated that finding a prima facie case, he submitted the Charge Sheet [Ext.-7] against the accused for the offence under Section 302, IPC and identified his signature therein as Ext.-7[1]. In cross-examination, P.W.16 stated that he laid the charge sheet against the accused.

23.3. The part of the testimony of the I.O., Robin Chandra Deka [P.W.13] that on 30.08.2017, the accused surrendering in Panery Police Station informed him that he [the accused] had murdered his mother, Dharmeswari Kandha at their house by cutting her neck with a dao is not admissible in evidence because of the restriction contained in Section 25 of the Evidence Act. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a Police Officer under no circumstance is admissible in evidence against an accused. The

restriction deals not only with confession made when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression, 'accused of any offence' appearing in Section 25 of the Evidence Act covers the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not.

23.4. The I.O., P.W.13 had also testified that the accused also informed that the dao by means of which he had cut the neck of his mother, was lying on the bed beside the deadbody. As the said dao was seized by the I.O. by the Seizure List [Ext.-4] on the date of the incident, that is, on 30.08.2017 itself, it has been urged on behalf of the prosecution that such information given by the accused led to the discovery of the alleged weapon of assault, which is relevant under Section 27 of the Evidence Act and it is a link in the chain of circumstances. Under Section 27 of the Evidence Act, if an information given by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be evidence. But when the fact has already been discovered evidence could not be led in respect thereof. In the present case, it has clearly emerged from the evidence/materials on record that it was P.W.5, Gola Munda who visited to the house of the deceased at first in point of time and on going there, he saw the deadbody of the deceased lying on the bed and a blood stained dao lying by the side of the deadbody. The place of occurrence was visited by the Police personnel much thereafter. In view of presence of such evidence, it cannot be said that the information given by the accused to the I.O. [P.W.13] led to discovery of any fact regarding the alleged weapon of assault, dao to be treated as evidence under Section 27 of the Evidence Act.

24. If, for arguendo, an accused discloses to the Police Officer the fact as a result of which, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused. It has been admitted by the I.O. [P.W.13] that he did not send the blood stained dao, seized vide the Seizure List [Ext.-4], to the Forensic Science Laboratory [FSL] for serological examination. But, he [P.W.13] did not provide any explanation as for what reason

the alleged weapon of assault, dao was not sent for serological examination. In a case resting on circumstantial evidence, not sending the weapon used in crime for serological examination may turn out to be an important missing link for the reason that only recovery of a weapon of assault as a circumstantial evidence may not lead to the only irresistible conclusion that the accused was the perpetrator of the crime and none else and in the absence of any report of a serologist as to the presence of human blood on the weapon may make the conviction on the accused unsustainable [Ref : Akhilesh Hazam vs. State of Bihar, 1995 Supp (3) SCC 357].

25. Dr. Ankur Bhuyan was serving as an Assistant Sessions Judge at Hailakandi when his testimony was recorded as P.W.15 on 28.05.2019.

25.1. In his deposition-in-chief, P.W.15 stated that on 01.09.2017, he was posted as Additional Chief Judicial Magistrate at Udalguri. On that day, the Chief Judicial Magistrate, Udalguri directed him to record the confessional statement of the accused. Accordingly, the accused was produced before him on that day. P.W.15 testified that the accused was explained by him [P.W.15] that he [the accused] was not bound to make a confession and that if he would make any confession, the same might be used as evidence against him. The accused was, then, remanded to judicial custody till 04.09.2017 for reflection. Accordingly, on 04.09.2017, the accused was produced by the I.O. and he was again explained that he was not bound to make a confession and if he did so, it might be used as evidence against him. The accused had, however, stated that he wanted to make the confession. P.W.15 also stated that the accused was placed under supervision of a Bench Assistant for reflection in the room of the stenographers. P.W.13 stated that on the same date, the accused was once again asked as to whether he wanted to make a confession or not and when the accused answered in the affirmative indicating his voluntariness, his statement was recorded. After recording the statement, the statement was read over to the accused and the accused admitted that the statement was correct. P.W.15 stated that the confessional statement contained a full and true account of the statement made by the accused in a fit state of mind. P.W.15 exhibited the confessional statement as Ext.-6 and also identified his signature therein as Ext.-6[1], Ext.-6[2] and Ext.-6[3] respectively.

25.2. In cross-examination, P.W.15 stated that the accused was first produced before him for recording his confessional statement on 01.09.2017. When the accused was asked the accused mentioned that he was suffering from ailment. P.W.15 stated that he [P.W.15] did not record the confessional statement on 01.09.2017 though the accused was willing to make such confessional statement. It was accordingly directed that the accused was to be produced again on 04.09.2017. P.W.15 deposed that when the accused was produced before him on 04.09.2017 again, the confessional statement of the accused was recorded on that day. P.W.15 further deposed that he was not bound to provide legal aid at the time of recording statement of an accused. P.W.15 also deposed that he did not take the signature of the accused in any of the pages of the confessional statement recorded by him vide Ext.-6.

26. The contestation between the prosecution side and the defence side is also on the point of admissibility or otherwise of the confessional statement of the accused recorded under Section 164, CrPC. While the prosecution has contended that the confessional statement of the accused was recorded with due compliance of the procedure laid down in Section 164, CrPC and therefore, is admissible as evidence. The defence side has, on the other hand, contended that there was violation of the mandatory procedure in recording the alleged confessional statement of the accused and therefore, is inadmissible as evidence.

26.1. It is not in dispute that confession ordinarily is admissible in evidence and it can be acted upon. Before acting on a confession, satisfaction has to be reached as regards, firstly, voluntariness of a confession; secondly, truthfulness of a confession; and thirdly, corroboration. It has been held in *Shankaria vs. State of Rajasthan*, [1978] 3 SCC 435, that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case, the prosecution demands a conviction on the accused, primarily on the basis of his confession recorded under Section 164, CrPC, the court must apply a double test : [i] whether the confession was perfectly voluntary?; and [ii] if so, whether it is true and trustworthy? Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the confession appears to the court to have been caused by an inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test does

not arise. If the first test is satisfied, the court must before acting upon the confession has to reach at a finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence there is not rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession, is to carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test. It has been held by a long line of decisions that if a confession is retracted later on, then the ordinary rule is to exercise caution and prudence before accepting a retracted confession. It is all the more necessary to arrive at a finding that the confession at the first instance was voluntary and truthful.

26.2. Recording of confession of an accused under Section 164 of the Code is considered to be a very solemn act. It has been said time and again that in discharging his duties under Section 164, the Magistrate must take care to ensure that the procedures prescribed in Section 164 of the Code are fully adhered to. The Magistrate has to fully satisfy himself that the confessional statement which the accused wants to make is in fact and in substance voluntary. It is a requirement on the part of the Magistrate to ensure that the accused who has offered to confess, is not influenced or compelled by any inducement, threat or promise of the nature mentioned in Section 24 of the Evidence Act. It is utmost necessary on the part of the Magistrate to ensure that the accused is completely free from any possible influence and there is no fear of the police, more particularly, the investigating officer before recording the confessional statement.

26.3. Before going into the aspect of admissibility or otherwise of the statement recorded under Section 164, CrPC, it is also appropriate to refer to the relevant provisions governing the procedure of recording of confessions and statements, as contained in Section 164, CrPC and Section 281, CrPC. For the purpose of the issue contended herein, the provisions contained in sub-section [1] of Section 164, CrPC and sub-section [5] of Section 281, CrPC are of import and relevance.

26.4. The heading of Section 164, CrPC is 'recording of confessions and statements'. Sub-section [4] of Section 164, CrPC read as under :-

[4] Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect –

“I have explained to [name] that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

26.5. Section 281, CrPC is under the heading, 'record of examination of accused'. It has been prescribed therein that whenever the accused is examined by a Magistrate, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under this direction and superintendence by an officer of the court appointed by him in that behalf. The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable in the language of the court. The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and the accused shall be at liberty to explain or add to his answers. A prescription is contained in sub-section [5] of Section 281, CrPC to the effect that the record shall thereafter be signed by the accused and by the Magistrate, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

26.6. When by keeping the above prescriptions in mind the testimony of P.W.15, the Magistrate who recorded the confessional statement [Ext.-6] of the accused is looked at, it would emerge that the I.O. produced the accused before him by the first time on 01.09.2017 for recording the confessional statement of the accused. After the accused was explained by P.W.15 that he was not bound to make a confession and that if he did make any confession the same might be used against him, P.W.15 remanded the accused to judicial custody till 04.09.2017 for the accused to reflect as to whether he would make any confession when he would appear before P.W.15 on 04.09.2017. The main purpose for remanding the accused to judicial custody was to eliminate the spectre of police influence from his mind so that the confession would be voluntary. But, it has emerged from the testimony of P.W.15 itself that when on 04.09.2017 the accused was produced before him again, the accused was produced by the I.O. only and none else. Thus, when the accused was produced on 04.09.2017 by the I.O. it cannot be accepted that the spectre of police influence was eliminated from the mind of the accused, as at least 24 hours of reflection time is considered to be reasonable for an accused to decide as to whether he should make a confession or not and such minimum period of time is also necessary so that the mind of the accused is completely free from any influence and fear of the police.

26.7. In *Dhanajaya Reddy vs. State of Karnataka*, reported in [2001] 4 SCC 9, the necessity to comply with all the provisions of Section 164, CrPC, more particularly, sub-section [4] thereof and the conditions prescribed in sub-section [5] of Section 281, CrPC and the consequence of non-compliance of those provisions and conditions came up for consideration. In that case, four accused persons – A-1, A-2, A-3 and A-4 - faced a charge of murder under Section 302, IPC read with Section 34, IPC as it was alleged that the four of them in furtherance of their common intention, committed murder of the husband of A-1. The accused-appellants challenged the legality and admissibility of the confessional statement made by A-4 under Section 164, CrPC. The said statement was recorded by the then learned Chief Judicial Magistrate, Bangalore, who deposed in the trial as P.W.50. Admittedly, the confessional statement of A-4 which was recorded by P.W.50, was not signed by A-4. In such backdrop, the Hon'ble Supreme Court has held in the following manner :-

20. The function of the Magistrate in recording confession under Section 164 of the Code is a very solemn act which he is obliged to perform by taking due care to ensure that all the requirements of Section 164 are fully satisfied. The Magistrate recording such a statement should not adopt a casual approach as appears to have been shown by Shambulingappa [PW 50] in this case. Besides ensuring that the confessional statement being made before him is voluntary and without pressure, the Magistrate must record the confession in the manner laid down by the section. Omission to comply with the mandatory provisions, one of such being as incorporated in sub-section [4] of Section 164 is likely to render the confessional statement inadmissible. The words 'shall be signed by the person making the confession', are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal.

21. Dealing with a case where the Magistrate was found to have not complied with the mandate of sub-section [2] of Section 164 of the Code, this Court in *Kehar Singh v. State [Delhi Admn.]* [(1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883] held that the compliance with the sub-section being mandatory and imperative, its non-compliance renders the confession inadmissible in evidence. Such a defect cannot be cured under Section 463 CrPC. We have no hesitation to hold that compliance with sub-section [4] of Section 164 of the Code is mandatory and its non-compliance renders the confession not admissible or reliable. It is a settled position of law that if a part of confession is excluded under any provision of law, the entire confessional statement in all its parts, including the admission of minor incriminating facts must be excluded unless proof of it is permitted by some other section, such as Section 27 of the Evidence Act. After referring to a judgment in *Neharoo Mangtu Satnami v. Emperor* [AIR 1937 Nag 220 : 38 Cri LJ 642] a Division Bench of the Bombay High Court in *Abdul Razak Shaikh v. State of Maharashtra* [1988 Cri LJ 382 : (1987) 89 Bom LR 408 (Bom)] held :

“7. It is to be considered whether non-obtaining of signature of the accused on the confessional statement recorded by the

Magistrate under Section 164 CrPC is an irregularity which can be cured by invoking the provisions of Section 463 CrPC reproduced above. The language used in sub-clause [4] of Section 164 and sub-section [5] of Section 281 CrPC reproduced above indicates that it is mandatory on the part of the Magistrate recording confession to obtain signature of the person whose confession he has recorded. The omission in that behalf cannot be cured by examining the Magistrate under Section 463 CrPC. The Magistrate when examined touching the confession he has recorded, can only say that he has recorded the confession, but by such examination the omission to obtain his signature cannot be supplied. It appears to us that the provision that the Magistrate after recording confession should obtain the signature of the accused thereon is a salutary provision and has been specially provided for, for safeguarding the interest of the accused and, therefore, it is mandatory.”

22. To the same effect is the judgment in *Shamla Hardeo Teli v. Emperor* [AIR 1941 Nag 17 : 42 Cri LJ 117] with a rider that mere inadvertent omission to obtain signature of the accused to statement under Section 164 would not vitiate confession where the accused himself has admitted that he made that particular statement.

23. It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. This Court in *State of U.P. v. Singhara Singh* [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] : (AIR p. 361, para 8) held “A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down.”

24. Looking to the facts of the case we are at pains to note that Shambulingappa [PW 50] failed in the performance of his statutory obligations which has resulted in excluding the otherwise voluntary confessional statement Exhibit P-77 made by A-4. Had the said Magistrate taken due care and applied his mind by referring to

the bare provisions of Section 164 of the Code, such a glaring illegality in recording the confessional statement would have been avoided. In view of this finding, no reliance can be placed upon the judicial confession Exhibit P-77, allegedly made by A-4, particularly against A-1.

25. We examined the matter from a different angle as well by considering to see the admissibility of the said confessional statement not as a judicial confession but as extra-judicial confession made to PW 50. We found it difficult to treat Exhibit P-77 as extra-judicial confession of A-4 made to PW 50. Confessions in criminal law have been categorised to be either judicial or extra-judicial. The prosecution is obliged to refer and rely on the alleged confession of the accused in any one of the aforesaid categories. As extra-judicial confession cannot be treated as judicial confession, similarly an alleged judicial confession proved to have not been legally recorded cannot be used as extra-judicial confession. Otherwise also such an approach would result in dragging the judicial officers into uncalled for and unnecessary controversies. In *Nazir Ahmad v. King Emperor* [AIR 1936 PC 253 (2) : 37 Cri LJ 897] it was observed, which we approve, that: (AIR p. 258) “[I]t would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under Section 162 of the Code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under Section 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever.”

26. Relying upon *Nazir Ahmad case* [AIR 1936 PC 253 (2) : 37 Cri LJ 897] and applying the principles laid down in *Taylor v. Taylor* [(1876) 1 Ch D 426] this Court in *Singhara Singh case* [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] held: (AIR p. 361, para 8)

“8. The rule adopted in *Taylor v. Taylor* [(1876) 1 Ch D 426] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has

laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.”

27. In the absence of the legal proof of Exhibit P-77, inadmissibility of the statement of A-4 before Shambulingappa [PW 50] to prove the contents of that document as extra-judicial confession and the circumstance of A-1 being last seen with the deceased not being incriminatory, there is no evidence to hold that she has been proved to be guilty beyond any reasonable doubt. Doubt and suspicion of her involvement in the ghastly crime cannot be ruled out but suspicion, however strong it may be, cannot take the place of proof. Lapses in investigation, failure of the judicial officer to record the confessional statement in accordance with law and absence of corroborative evidence leaves us with no option but to give A-1 the benefit of doubt. Moral conviction regarding the involvement of an accused in the commission of crime cannot be a substitute for a legal verdict based upon facts and law. Though with regret, but bound by law, we have no option but to set aside the judgments of the trial as well as the High Court to the extent by which A-1 has been convicted and sentenced for the commission of the offence of murder of Amar Nath, her husband.

26.8. The prosecution witness, P.W.15 during his cross-examination, had clearly admitted that he did not take the signature of the accused in any of the pages of the confessional

statement recorded by him vide Ext.-6. Thus, when the confessional statement of the accused Ext.-6 is tested against the mandatory procedure laid down in Section 164[4] r/w Section 281[5], CrPC and the law laid down in *Dhanajaya Reddy* [supra], there is no option but to hold that P.W.15 failed to follow the mandate contained in Section 164[4], CrPC r/w Section 281[5], CrPC and the glaring omission on his part to obtain the signatures from the accused in the confessional statement recorded under Section 164, CrPC has made the confessional statement inadmissible altogether the voluntary nature of which had already become doubtful otherwise, for the reasons discussed hereinabove. When the accused was examined under Section 313, CrPC in reference to his confessional statement [Ext.-6] recorded under Section 164, CrPC, the accused replied that the Police coerced and tutored him to make the confessional statement. Though the retraction was made by the accused belatedly at the stage of his examination under Section 313, but the fact remains is that the confession stood retracted. Because of [i] the glaring illegality committed in recording the confessional statement, thereby, violating the mandatory procedure laid down in Section 164[4], CrPC r/w Section 281[5], CrPC in not obtaining the signatures of the accused in the confessional statement so recorded; [ii] existence of spectre of police influence emerging from the fact that on the date of recording the confessional statement the accused was produced before the Magistrate by the I.O.; and [iii] retraction of the accused from the confessional statement, thereby, making the confessional statement a retracted one; the confessional statement [Ext.-6] of the accused is to be excluded from consideration altogether as such confessional statement is inadmissible in evidence.

27. Admittedly, the case in hand is based on circumstantial evidence. The law with regard to the appreciation of evidence when the case of the prosecution is based on circumstantial evidence is well settled by a long line of decisions. One of the leading case on the issue is *Sharad Birdhichand Sarda vs. State of Maharashtra*, reported in [1984] 4 SCC 116. The Hon'ble Supreme Court therein has observed as under :-

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 Sahebrao Bobade v. 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.

28. Thus, the law is well settled that in a case based on circumstantial evidence, each and every incriminating circumstance must be clearly established by reliable and credible evidence and the circumstances so proved must form a chain of events from which the only irresistible

conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. It has been emphasized time and again that in a case depending on circumstantial evidence, a possibility always looms in that conjecture or suspicion may take the place of legal proof. Therefore, the court has to exercise due care and caution to reach satisfaction that the various circumstances in the chain of events have been established convincingly and such completed chain of events should be such that it rules out a reasonable likelihood of the innocence of the accused. When one or more important links in the chain of circumstances is or are found missing and the chain resultantly gets broken at places, then the other circumstances cannot establish the guilt of the accused beyond all reasonable doubts. The eventuality of allowing suspicion to take the place of legal proof has to be avoided at all stages. In this connection, the following observations made in the case of *Sujit Biswas vs. State of Assam*, reported in [2013] 12 SCC 406, can be referred to :-

13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: *Hanumant Govind Nargundkar & Anr. v. State of M.P.*, AIR 1952 SC 343; *State*

through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979).

29. Reverting back to the facts of the case in hand, we find that the retracted confessional statement of the accused is to be excluded out of consideration as the same is inadmissible in law. The principle enshrined in Section 27 of the Evidence Act, as contended by the prosecution, does not come in as evidence as the alleged disclosure statement of the accused did not result in any discovery of fact regarding the alleged weapon of assault, that is, the dao. The prosecution did not establish that the alleged weapon of assault, that is, the blood stained dao which was found beside the deadbody of the deceased was used in assaulting the deceased. To establish the same, the prosecution ought to have sent the blood stained dao for serological examination at least to find out as to whether the blood group of the blood found in the said dao had matched with the blood group of the deceased as the injury sustained by the deceased resulted in profuse bleeding. There was also failure on the part of the prosecution to establish the last seen together theory. Had the last seen together circumstance been established, then only, a situation would have arisen requiring the accused to provide a plausible explanation. Motive for commission of an offence assumes greater importance in cases based on circumstantial evidence than the cases based on direct evidence. It is true that failure to prove motive in cases resting on circumstantial evidence is not fatal by itself and, at the same time, absence of motive in a case based on circumstantial evidence is a factor which weighs in favour of the accused. In our considered view, the prosecution here has not been able to establish such facts wherefrom a motive for the accused to commit the offence of matricide could be reasonably inferred and the same becomes an additional missing link in the chain of circumstances. A conduct on the part of a suspect subsequent to the commission of an offence is relevant under Section 8 of the Evidence Act. But, it is also true that different persons react differently to the same situation. The appearance of the accused at the Police Station in the morning hours on the date of the incident is though relevant under Section 8 of the Evidence Act but, such appearance by itself is not a circumstance indicating guilt on the part of the accused.

30. In the light of the discussion made above and for the reasons mentioned therein, we are

of the unhesitant view that there are many missing links in the case of the prosecution and the prosecution has not been able to complete the chain of circumstances by evidence of reliable and conclusive nature. No doubt the needle of suspicion would point towards the accused but doubt and suspicion, however strong it may be, cannot take the place of proof. It is one of the fundamental principles of criminal jurisprudence that if two views are possible on the evidence adduced in the case, one pointing towards the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This fundamental principle of criminal jurisprudence assumes more significance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. As there are missing links in the chain of circumstances in the case in hand, the accused was clearly entitled to the benefit of doubt and in such view of the matter, the Judgment and Order of conviction and sentence passed by the learned trial court against the accused is found not sustainable in law. Therefore, the Judgment and Order dated 11.01.2021 passed by the learned trial court in Sessions Case no. 83 of 2018 is set aside and quashed. Resultantly, this criminal appeal succeeds.

31. The accused-appellant is to be released forthwith, if his detention is not required in connection with any other case/purpose.

32. Before parting with the record, we wish to place our appreciation on record as regards the serves rendered by Ms. R.D. Mazumdar, 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.

33. The records of the trial court are to be sent back forthwith.

JUDGE

JUDGE

Comparing Assistant