

GAHC010162872019



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

Case No. : Crl.A./101/2020

SRI BIDUL KALITA
S/O- HEMA KALITA,
VILL- MADARGURI PATAGUTI, P.S.- DHAKUAKHANA, DIST- LAKHIMPUR,
ASSAM, PIN- 784160.

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP, ASSAM.

2:MANOJ KAMAN
S/O- JOYCHANDRA KAMAN
VILL- KATHALGURI GOGAMUKH
P.S.- BOGINADI
DIST- NORTH LAKHIMPUR
ASSAM
PIN-787034

Advocate for the Petitioner : MR. P UPADHYAY

Advocate for the Respondent : PP, ASSAM

Linked Case : CRL.A(J)/96/2019

MINTU CHUTIA
S/O. NUMAL CHUTIA
VILL. MADARGURI GAON
P.S. DHAKUAKHANA
DIST. LAKHIMPUR
ASSAM.

VERSUS

THE STATE OF ASSAM

REP. BY PP
ASSAM.

Appearance:-

For the appellant, Shri Bidul Kalita	: Mr. P. Upadhayay, Learned Advocate;
For the appellant, Shri Mintu Chutia	: Mr. N. Deka, Learned Amicus Curiae;
Advocate for the respondents	: Mr. K.K. Das, Add. P.P. for respondent No.1.
Date of hearing	: 21.06.2024
Date of judgment	: 18.07.2024

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER (CAV)

[ROBIN PHUKAN, J.]

Heard Mr. P. Upadhaya, learned counsel for the appellant, Shri Bidul Kalita in Criminal Appeal No. 101 of 2020 and Mr. N. Deka, learned Amicus Curiae for the appellant Shri Mintu Chutia in Criminal Appeal (J) No. 96 of 2019. Also heard Mr. K.K. Das, learned Addl. P.P. for the State respondent.

2. These two criminal appeals, being Criminal Appeal No. 101 of 2020 and Criminal Appeal (J) No. 96 of 2019, preferred under Section 374(2) of the Code of Criminal Procedure, are directed against the common judgment and order, dated 13.05.2019, passed by the learned Sessions Judge, Dhemaji in

Sessions Case No. 36(DH) 2015. It is to be noted here that vide impugned judgment and order dated 13.05.2019, the learned Sessions Judge, Dhemaji had convicted both the accused/appellants, under Section 302/364 IPC and sentenced them to suffer rigorous imprisonment (R.I. in short) for life and also to pay fine of Rs.2,000/- in default R.I. for another 2 (two) months, each, u/s 302 of IPC, and also sentenced them to undergo R.I. for 5(five) years, and to pay a fine of Rs.2,000/-(two thousand), in default, to suffer R.I. for 2(two) months u/s 364 IPC. Further, the learned trial court had directed that the substantive sentences shall run concurrently. However, the learned Sessions Judge, Dhemaji had found that the charge under Section 379 IPC could not be proved by the prosecution side against both the accused/appellants and acquitted them of the said charge.

3. As both the appeals are directed against the same common judgment and order, dated 13.05.2019, and as agreed by learned Advocates of both sides, it is proposed to dispose of both the appeals together by this common judgment and order.

4. The background facts, leading to filing of the present appeals, are adumbrated herein below:-

“The informant/respondent No.2 of this case, namely, Shri Manoj Kaman is the owner of a Maruti Van, bearing Registration No. AS07F - 5055. He had engaged one driver, namely, Jogeswar Chutia @ Sonai Chutia, and used the same as Taxi. On 07.01.2014, at about 8.00 am, while the driver was waiting at the Taxi Stand, at Gogamukh Gerukamukh Road, two youths, who were familiar to the driver, wanted to hire the Van for a trip to Dhakuakhana. Then, on

being asked by the driver, he accorded him permission to go there. Then at around 8:00 p.m., the driver informed him over phone that they had crossed Champara Bridge at Ghilamara. Since then he could not be able to establish any communication with him and also he did not get any information even after the night. Next day morning, he went to the house of the driver. But, there also he did not get any information about him. Then he went to the police station and informed the police that the driver had not returned home along with the vehicle. In the meantime he got information about lying of a dead body at a place within the jurisdiction of Ghilamara Police Station. He then went there and identified the dead body of his driver. He then lodges one FIR (Ext.-1), with the Officer-in-Charge (O/C) Gogamukh P.S. on 08.01.2014.

Upon the said FIR, the Officer-in-Charge, Gogamukh P.S. had registered a case, being Gogamukh P.S. Case No. 05/2014, under Sections - 364/302/379/34 I.P.C., on 08.01.2014, and endorsed S.I. Dibyajyoti Dutta to investigate the case. The I.O. then visited the place of occurrence, examined the witnesses and prepared Sketch Map, (Ext.-7), of the place of occurrence. The I.O. then got the inquest held on the dead body of the deceased driver, by Executive Magistrate and collected the Inquest Report (Ext.2). Thereafter, the I.O. got the autopsy of the dead body conducted at North Lakhimpur Civil Hospital and collected the Post Mortem Report (Ext.-5). He also arrested the accused/respondents and forwarded them to the court. He also got the TIP of the accused persons conducted at District Jail, Dhemaji and collected the TIP Report (Ext.-10). Then

on completion of investigation, the I.O. laid Charge Sheet, (Ext.-6) against the accused/appellants, namely, Mintu Chutia and Bidul Kalita, before the Court of learned Judicial Magistrate 1st Class, Dhemaji, to stand trial, under Sections 364/302/379/34 I.P.C.

The learned Judicial Magistrate 1st Class, Dhemaji then complied with the provision of Section 207 Cr.P.C. Then, having found the case triable exclusively by the Court of Sessions, committed the case, to the Court of learned Sessions Judge, Dhemaji, vide commitment order, dated 02.04.2015. The learned Sessions Judge, Dhemaji, on production of the accused/appellants, and after hearing learned Advocates of both sides, had framed charges, under Sections 364/302/379/34 I.P.C., against both the accused/appellants. Then, on being read and explained over the charges, the accused/appellants pleaded not guilty to the same and claimed to be tried.

Thereafter, the prosecution side had examined as many as 15 (fifteen) witnesses, including the Doctor and the I.O. Then closing the prosecution evidence, the learned trial court had examined the accused/appellants under Section 313 Cr.P.C. Thereafter, hearing learned Advocates of both sides, the learned trial court had found that the prosecution side had succeeded in bringing home the charges under Section 302/364/34 IPC against both the accused/appellants and convicted them under the said Sections and sentenced them as aforesaid. However, the learned Sessions Judge, Dhemaji had found the charge under Section 379 IPC could not be

proved and acquitted them of the said charge.

5. Being highly aggrieved and dissatisfied, the accused /appellant Shri Bidul Kalita has preferred the Criminal Appeal No. 101/2020, contending to set-aside the impugned judgment and order, dated 13.05.2019, inter-alia, amongst others, on the following grounds:-

(i) That, the learned trial Court had passed the impugned judgment and order on wrong appreciation of evidence and also on wrong appreciation of law;

(ii) That, the learned trial court had convicted the accused/appellant, based on circumstantial evidence, but, the chain of circumstance is apparently remained incomplete. There was no evidence to establish that the accused were last seen in the place of occurrence along with the deceased. There was also no evidence to prove that the seized 'khamti dao' was used by the accused/appellant in commission of the alleged offence and the prosecution side had totally failed to link the chain of circumstance, and all the evidence, so brought on record, are hearsay and none of them were present at the place of occurrence.

(iii) That, the learned court below had failed to appreciate that the prosecution side had failed to examine any independent witness, despite the fact that the occurrence took place at a public place, and that non-examination of independent witness and eye witness is fatal to the prosecution case and on such

count the accused appellant is entitled to benefit of doubt.

(iv) That, the prosecution side had failed prove the motive behind commission of the offence and the motive, having not been proved the learned trial court ought not to have arrive at the finding that causing death of Jugeswar Chutia @ Sunai Chutia was an act of murder punishable under Section 302 IPC.

(v) That, the prosecution side had failed to prove the case beyond all reasonable doubt against the accused/appellant and convicted him wrongly.

(vi) That, the learned trial court had passed the judgment and order on surmise and conjecture and as such the same is not sustainable in law.

6. It is to be noted here that as Criminal Appeal (J) No. 96/2019 has been preferred from jail, no specific ground has been mentioned challenging the correctness or otherwise of the impugned judgment and order, except, however, a request to review the same.

7. Mr. Upadhayay, the learned counsel for the accused/appellant, Shri Bidul Kalita, at the time of hearing, besides reiterating the grounds mentioned herein above, has canvassed following points for consideration of this court:-

(i) That, there is no direct evidence to establish the complicity of the accused/appellant with the charges;

(ii) That, the entire prosecution case is based on circumstantial evidence, but, the prosecution side has failed to

link the circumstances so as to complete the chain and to establish the involvement of the accused/appellant;

(iii) That, finding of guilt so recorded by the learned trial court is contrary to the established legal principles;

(iv) That, the finding of guilt so arrived at by the learned trial court is based on surmise and conjecture and therefore, Mr. Upadhyay has contended to set aside the impugned judgment and order.

8. Whereas, Mr. Deka, learned Amicus Curiae for the accused/appellant Mintu Chutia, submits that the entire prosecution case is rested upon circumstantial evidence, as there was no direct evidence against him. Mr. Deka, further submits that the learned trial court had relied upon last seen together theory as one of the circumstance, but, this circumstance cannot be relied upon, in as much as the proximity of time between the last seen together and the recovery of the dead body of the driver of the vehicle, in the next day morning, near the Pucca- Bridge, in between Laokut and Singia, is more than 24 hours. Referring to two decisions of Hon'ble Supreme Court in (i) **State of Goa vs. Sanjay Thakaran**, reported in (2007) 3 SCC 755 and in (ii) **Anjan Kumar Sharma vs. State of Assam**, reported in (2017) 14 SCC 359, Mr. Deka submits that because of this big time gap, the last seen together theory cannot be relied upon, as in between many things can happen. Referring to the evidence of respondent No2/informant - Shri Manoj Kaman and the FIR, Ext.1, Mr. Deka submits that the vehicle was allegedly hired by the accused/appellants at about 8 am in the morning from the Taxi Stand of Gogamukh so as to go to Dhakuakhana, and the distance between Gogamukh and Dhakuakhana is

around 26 km, and it does not take 12 hrs to cover the same, and according to him, while the last call was made to the respondent No.2 by the deceased at 8 pm, informing that he had crossed Champara Bridge at Ghilamara, then he was, perhaps, on return journey, after dropping the accused/appellants on 07.01.2014.

8.1. Mr. Deka also submits that though the alleged weapon of offence, i.e. a 'Khamti dao' was recovered near the place of occurrence, yet, the same was not sent to forensic science laboratory for serological examination. It is the further submission of Mr. Deka that though the I.O. had got the TIP conducted here in this case and in the said TIP two witnesses had identified the suspects, yet, the same was not proved through the witnesses of the TIP, and that even though the TIP chart was proved by examining the conducting Magistrate, yet, the same would not improve the case of the prosecution in as much as the same relates to taking the vehicle on hire, not relates to commission of murder of the driver. And there was delay of more than 40 days in conducting the same. Referring to a decision of Hon'ble Supreme Court in **Manoj vs. State of M.P. reported in (2023) 2 SCC 353**, Mr. Deka submits that on account of delay in conducting the TIP, the same cannot be relied upon. Mr. Deka also submits that there is absence of clear and cogent materials to establish complicity of the accused/appellant with the charge and therefore, it is contended to allow the appeal by setting aside the impugned judgment and order.

9. Per contra, Mr. K.K. Das, the learned Addl. P.P. has supported the impugned judgment and order of conviction. Mr. Das submits that though motive has not been proved by direct evidence, yet, it can be inferred from the circumstances that the accused/appellants had committed the offence for

stealing the vehicle, which was recovered on the following day of occurrence from a different place namely, Abhoypur- Lachong Gaon. Mr. Das further submits that the evidence of P.W.9 and 10 had established clearly that the accused/appellants had taken the vehicle on hire from the Taxi Stand of Gogamukh and they had identified the accused/appellants during TIP, which had been proved by the conducting Magistrate. Under such circumstances, Mr. Das submits that the prosecution side has been able to establish the charges beyond all reasonable doubt, and therefore, it is contended to uphold the impugned judgment and order.

10. Having heard the submission of learned Advocates of both sides, we have carefully gone through the record of the learned trial court and also through the decisions, so referred by Mr. Deka, learned Amicus Curiae for the accused/appellant Mintu Chutia.

11. Indisputably, there is no direct evidence herein this case. The entire prosecution case rest upon circumstantial evidence. Therefore, we deemed it appropriate, to understand the governing principles, in respect of cases, based upon circumstantial evidence. In plethora of cases, Hon'ble Supreme Court had has, authoritatively, settled the governing principles in respect of cases based upon circumstantial evidence.

12. One of the reported cases, in this regard, is **Hanumat's v. State of M.P.**, reported in [1953] SCR 1091.

1. The circumstances, from which the conclusion of guilt is to be drawn, should be fully established;
2. The facts, so established should be consistent with the

hypothesis of guilt and 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 in 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.

13. Thereafter, in the case of **Sharad Birdhi Chand Sarda vs State Of Maharashtra, reported in 1985 SCR (1) 88**, Hon'ble Supreme Court has held that - before a case against an accused vesting on circumstantial evidence can be said to be fully established the conditions, as laid down in the case of **Hanumat's** (supra) must be fulfilled. It is also held that these five golden principles constitute the 'panchsheel' of the proof of a case based on circumstantial evidence.

14. Now, keeping the above principles in mind, an endeavour would be made to adjudge the submissions of learned Advocates of the respective parties, in the light of the given facts and circumstances on the record of the learned trial court.

15. A careful perusal of the record of the learned trial court indicates that to bring home the charges, under Sections 364/302/34 IPC, the prosecution side had examined as many as 15 witnesses, including the Doctor and the Investigating Officer and exhibited as many as 11 documents.

16. The informant/respondent No.2 was examined as P.W.1. P.W.2 is Shri Atul Pegu, he is a witness of seizure of the vehicle. P.W.4, Shri Tankeswar Gogoi, P.W.5, Smti Phuluprabha Saikia, P.W.6, Smti. Binita Gogoi are the witness of seizure of the 'Khamti Dao', which was found lying near the place of occurrence. P.W.8 is Shri Naren Baruah. P.W.9, Shri Lakheswar Kaman and P.W.11, Shri Rajesh Kumoti are the witness of TIP conducted at District Jail Dhemaji. P.W.12 is Dr. Hridoy Nanda Boruah, who had conducted autopsy on the dead body of the deceased driver. P.W. 13 is the I.O., namely Dilip Bania, who had completed investigation and submitted charge sheet (Ext.5), after transfer of the earlier I.O., namely, S.I. Dibyajyoti Dutta. P.W.14, Shri Monoranjan Payeng is the Executive Magistrate, who had held inquest on the dead body of the deceased. P.W.3, Shri Manoj Chetry, P.W.7 Shri Phatik Chandra Chutia, are the witness of holding inquest on the dead body, including P.W.1 the informant/respondent No.2. P.W.7 is the elder brother of the deceased. P.W.15 is the Judicial Magistrate, who had conducted TIP of the suspects, at District Jail Dhemaji. We have carefully gone through the evidence of all these witnesses and also gone through the 11 exhibits, so relied upon by the prosecution side.

17. The evidence of the informant/respondent No.2, (P.W.1) and the FIR-Exhibit-1, reveals that the occurrence took place on 07.01.2014. On that day, at about 8 am, the driver (since deceased) of the informant/respondent No.2, informed him that two youths, familiar to him wanted to hire his Maruti

Van (Taxi) from Gogamukh Taxi Stand to go to Dhakuakhana. The informant/respondent No.2 then accorded him permission and at around 8 pm in the evening the driver informed the informant/respondent No.2 that they had crossed Champara Bridge, at Ghilamara. But, thereafter, the informant/respondent No.2, could not contract him and on the next day, his dead body was recovered at a place, within the jurisdiction of Ghilamara Police Station. Thus, it appears that the occurrence of hiring the vehicle took place on 07.01.2014, at the Taxi Stand of Gogamukh-Gerukamukh Road. The dead body of the deceased driver, having been recovered on 08.01.2014, in the morning, near the bridge at Laokot-Singia road, under the Ghilamara P.S., the incident of causing injury over the neck of the deceased, which was the immediate cause of his death, in all probability, took place on the night of 07.01.2014. P.W.9 and P.W.11 also corroborated the evidence of P.W.1 in respect of taking the vehicle on hire by two accused/appellants from the Taxi Stand of Gogamukh-Gerukamukh Road. P.W. 4 stated that the dead body was found near the Pucca Bridge, in between Laokot and Singia. P.W. 6 stated that the dead body was found near the Pucca Bridge, at Singia. The other prosecution witnesses, however, could not specifically state the date and time of occurrence, but some had stated that the occurrence took place in the year 2014.

18. The P.M. Report, Ext. 5 indicates that the time since death is approximately 20 hours. The Doctor, P.W.12 Dr. Hridoy Nanda Boruah reveals that he conducted P.M. Examination at about 3 pm on 08.01.2014. That being so, the occurrence, in all probability took place at around 7 pm. But, the last contact, the informant/respondent No.2 had made with the deceased, was at 8 pm. With the recovery of the 'Khamti Dao' from the place where the dead body was recovered, it is very much probable that the incident of causing injury to

the deceased, with all probability, took place after 8 pm, on 07.01.2014, near the Pucca Bridge, in between Laokot and Singia.

19. Thus, we find from the evidence of the prosecution witnesses that the incident of taking away of the vehicle on hire took place in the morning, at about 8 am, on 07.01.2014, and the incident of causing injury to the deceased driver, over his neck, took place after 8 pm, on the same day i.e. 07.01.2014, and with all probability, at the place, near the Pucca Bridge, in between Laokot and Singia, under the jurisdiction of Ghilamara P.S., from where the dead body, including the weapon of offence i.e. 'Khamti Dao' was recovered. It is to be noted here that the accused/appellants had not disputed the date, time and place of occurrence.

20. Now, it is to be seen how Jugeswar Chutia @ Sunai Chutia suffered demise and whether his demise was accidental, suicidal or homicidal in nature. To decide this issue, the evidence of Dr. Hridoy Nanda Boruah, P.W.12, who had conducted autopsy on the dead body of Jugeswar Chutia @ Sunai Chutia, is relevant. His evidence reveals that on 08.01.2014, he was serving as Medical and Health Officer No.1, at North Lakhimpur Civil Hospital. On that day, on police requisition, vide Ghilamora P.S. G.D. entry No.135, dated 08.01.2014, he had performed autopsy on the dead body of Jugeswar Chutia @ Sunai Chutia, 43 yrs., male, escorted and identified by Constable No. 487, namely, Ananta Sonowal. And on examination he found the following:-

I- EXTERNAL APPERARANCE:-

1. Condition of subject stout emaciated, decomposed etc ----- Average built, rigor mortis present in all the four limbs and neck, eyes closed.

2. Wound position and character ---- Heavy sharp cut injury left side of the neck, abrasion on left side of forehead above left eye brow. Blood stains all around the face and neck, look is pale.

3. Bruise-position and size

4. Mark of ligature on neck dissection etc

II- CRANIUM AND SPINAL CANAL

1. Scalp, skull, vertebrae--- Heavy sharp cut injury on left side of neck from near the left angle of mouth to occipital region, revealing cut Injury.

2. Membrane:- Membrane divided at the site of cut injury.

3. Brain and spinal cord--- Spinal cord transacted along with cervical vertebra and carotid and jugular vessels. Lethal injuries sufficient enough to cause death.

III-THORAX

1.	Wall, ribs and cartilages	Intact
2.	Pleurae	Intact
3.	Larynx and Tracheae	Intact
4.	Right Lungs	Intact
5.	Left Lungs	Intact
6.	Pericardium	Intact
7.	Heart	Intact

8. Vessels	Intact
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IV-ABDOMEN

1. Walls	Intact
2. Peritoneum	Intact
3. Mouth, Pharynx, Esophagus	Intact
4. Stomach and its contents	Intact
5. Small intestine and its contents	Intact
6. Large Intestine and its Contents	Intact
7. Liver	Intact
8. Spleen	Intact
9. Kidneys	Intact
10. Bladder	Intact
11. Organs of Generation external and internal	Intact

V- MUSCLES, BONES AND JOINTS

1. Injury	As described
2. Disease or deformity	NIL
3. Fracture	As described
4. Dislocation	Nil

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE:-

At PM examination heavy sharp cut injury has been seen on left side of the neck, extending from near the left angle of mouth to occipital region, spinal cord transacted along with cervical vertebra C-2 and C-3 along with carotid and jugular vessels, prevailing cut injury with blood stains all around. The injuries are ante mortem in nature and lethal, sufficient enough to cause death of a person.

20.1. Upon the aforementioned finding he opined that the cause of death is shock and hemorrhage as a result of lethal injuries as described. Time since death is approximately 20 hours. The manner of death is apparently homicidal. He confirmed the Post Mortem Report, Exhibit 5, and his signature thereon. Exhibit 5, the Post Mortem Report, is also consistent with his evidence.

21. It also appears that during investigation, the I.O. got the inquest held on the dead body of deceased Joygeswar Chutia @ Sunai Chutia, by the Executive Magistrate, P.W.14. The evidence of P.W.14 Shri Monoranjan Payeng also corroborated the evidence of P.W.12, in respect of the injury on the dead body of the deceased. His evidence reveals that on 8-1-2014, he did inquest on the dead body of Joygeswar Chutia @ Sunai Chutia, which was lying on the side of Lawkot Singia Road. During inquest, he had found grievous injury on the backside of the neck and blood stains on the body. The injury, according to him, may be caused by sharp cutting weapon. The Inquest Report, Exhibit-2 is also consistent with his version. P.W.1, 3, and 7, were the witness of holding inquest on the dead body and they also confirmed the same, however, they have not whispered anything about the injury.

22. Probative value of the evidence of these two witnesses could be demolished in cross-examination. Their evidences, together with Exhibit- 5 and 2, goes a long way to established beyond all reasonable doubt that the deceased Joygeswar Chutia @ Sunai Chutia had suffered homicidal death. And in all probabilities, the injury suffered by him was caused by Mat.Ext.1 which was seized vide seizure list, Exhibit-8, by the I.O., having found the same lying near the place of occurrence. It is a fact that the I.O. had not sent the same for serological test at FSL. Mr. Deka, the learned Amicus Curiae for the accused/appellant Mintu Chutia, has rightly pointed this out at the time of hearing.

23. But, the evidence of P.W.12, and the P.M. report indicates that he, P.W.12 had found a heavy sharp cut injury on (Lt.) side of neck, extending from near the (Lt.) angle of mouth to the occipital region, wherein spinal cord stands transected along with cervical vertebrae (C₂, C₃) along with carotid & jugular vessels. The seizure list, Ext.3, the Mat.Ext.1 is described as - “One *khamti* dao, stained with blood clot like substance. Its handle is made of wood. One thick wire is wrapped just below its ferrule. The dao is 1(one) foot and 4(four) inches long along with its handle.” From the description of the Mat.Ext.1 in the seizure list, Ext.4 which also contained stain of blood clot like substance, and the dimension of injury found on the deceased, probabilities to a great extent, the Mat. Ext.1, being used in committing the offence.

24. Thus, we find from the evidence of P.W.12 and his report Ext-5 and the evidence of P.W.14 and the Inquest Report, Ext.2, that the injuries sustained by the deceased Joygeswar Chutia @ Sunai Chutia was homicidal in nature. Now, what left to be seen is who had caused the injury leading to his death.

25. Admittedly, there is no direct evidence. The prosecution side had relied upon the last seen together theory, as evident from the testimony of P.W. 9 and 11, who had seen the accused/appellants at the Gogamukh Taxi Stand, while the vehicle of the deceased was being hired by them to go to Dhakuakhana. Notably, P.W.9 and 11 have identified the accused/appellants during T.I.P. conducted by the I.O. at District Jail, Dhemaji. Another circumstance, which is evident from the evidence of respondent No.2 (P.W.1) is the statement made by accused Mintu Chutia at the Gogamukh Police Station, implicating that accused Bidul Kalita had killed Jugeswar Chutia.

26. It also appears that the learned trial court, while dealing with the circumstantial evidences, so brought on the record, had held in para No. 25 of the impugned judgment and order, as under:-

“25. On scrutiny of the evidence and other materials on record emerges the following:

- (1) On the relevant date the accused persons hired the vehicle (Maruti van) and the deceased Jogeswar Chutia @ Sunai Chutia, attached to the vehicle as driver, drove the said vehicle.
- (2) The accused persons along with the driver were the only occupants in the vehicle.
- (3) The dead body of the accused was first seen by the witness No.2 lying dead on the roadside near a bridge and then it was identified.
- (4) The vehicle was recovered in abandoned condition.
- (5) A dao was recovered at the place of the occurrence.
- (6) The accused persons were identified by witnesses in TIP.

26. Here in this instant case the above mentioned circumstances lead us to examine the last seen theory, as the accused persons were last seen with the deceased.

27. Hon'ble Supreme Court in State of U.P. vs Satish, AIR 2005 SC 1000 held as under: "The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

28. "The evidence of last seen may provide for a link in the chain but unless that time gap between the deceased having been last seen in the company of the accused person and the murder is proximate, it is difficult to prove the guilt of the accused only on that basis" (Shri Sujit Rundra Paul v. State of Tripura, 2009 CrLJ 3291 (3298) (Gauh-DB)

29." Where the accused was last seen with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge, as the accused failed to do so, held that he failed to discharge burden cast upon him by s. 106 of the Evidence Act." (State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254 (266):AIR"

30. While evaluating the theory of last seen together I also bear in mind the possibility of any other person meeting the deceased in the intervening period i.e. the time gap between the accused persons and the deceased last seen together and the crime coming to light i.e. death of the deceased. In this regard I have carefully scrutinized the evidence led by the prosecution side and I find that the likelihood of any person

other than the accused persons being the author of the crime becomes impossible in the facts and circumstances of the case.

31. The accused persons when examined u/s 313 Cr.PC. simply denied having committed such offence. Precisely they stated that they were not involved in the commission of the alleged offence.

32. On consideration of the facts and circumstances brought on record we find that there is ample evidence on record that the accused persons were last in the company of the deceased till 8 PM on 07-01-2014 and the dead body was recovered on 08-01-2014 in the morning. So in my opinion the accused persons owe an explanation u/s 106 of Evidence Act in regard to the facts as to where they got off or, and what time they parted with the deceased driver.

33. As regards section 106 of Evidence Act the Hon'ble Supreme Court in State of Rajasthan V. Thakur Singh in para 22 of the judgment held:

"The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts,"

27. Thereafter, the learned trial court at para No. 37 of the impugned judgment and order arrived at the conclusion as under:-

“37. I have given my anxious thought to entire facts materials. From the thread bare discussion of the materials on record it is found that prosecution has been able to establish facts consistent with the hypothesis of the guilt of the accused. We also find that the circumstances brought on record by the prosecution side are of conclusive nature and the chain of evidence is so complete as not to leave any reasonable ground for the conclusion consistent with the

innocent of the accused persons. We also find that in all human probability the accused persons committed the act.”

28. In order to adjudge the finding of guilt, so arrived at by the learned trial court we deemed it necessary to briefly refer to the evidence on the record.

29. The evidence of P.W.1, Sri Manoj Kaman, the informant/ respondent No.2, reveals that he had a Maruti Van. On the date of incident, that took place on 07/01/2014, his driver went out along with his Maruti Van. Later on, the driver informed him over phone that he had gone to Dhakuakhana to drop two persons known to him. As he did not return, he rang him up and the driver then told that he had crossed Ghilamara Champara Bridge. But, the driver did not return along with the vehicle thereafter. The following morning, he went to the house of the driver and came to know from his family members that the driver had not returned home. Then he went to Gogamukh Police Station and lodged an ejahar (Ext.1) there. While he was in the P.S., the police from Gilamara (P.S.) informed to that P.S. that they had found a dead body. Then he, along with the police, went to Ghilamara P.S., wherefrom he along with the police of Ghilmara, went to the place where the dead body was lying. He could recognize the dead body to be of his driver Jagyeswar Chutia. Thereafter, inquest was held on the dead body. Ext.2 is the Inquest Report, wherein he put his signature, Ext. 2(1). Thereafter, post-mortem examination on the dead body was held in Lakhimpur Civil Hospital. Thereafter, the dead body was brought home and was cremated. His evidence also reveals that his vehicle was found at Thekeraguri, on the following day of the recovery of the dead body. Thereafter, police released the vehicle in his custody vide Zimma Nama, Ext. 3 (SIC). His evidence also reveals that at Gogamukh P.S., accused Mintu Chutia stated before the police that accused Bidul Kalita had killed Jogeswar Chutia. At that time, he was present in

Gogamukh Police Station. Nothing tangible could be elicited in cross-examination of this witness. He denied the defence suggestion that accused Mintu Chutia did not state that accused Bidul Kalita had killed Jogyeswar Chutia.

30. Thus, the evidence of this witness would not help the prosecution in establishing the charges against the accused/appellants. He had not seen the persons who had hired his vehicle to go to Dhakuakhana from Gogamukh. He was informed by the deceased that he had gone to Dhakuakhana to drop two persons known to him. Though he stated that at Gogamukh P.S. accused Mintu Chutia stated before the police that accused Bidul Kalita had killed Jogeswar Chutia, such statement being made before police that too at Police Station, is not admissible in view of the bar imposed by Section 26 of the Evidence Act.

31. P.W.2, Shri Atul Pegu, is a witness of seizure of the vehicle. He is the V.D.P. Secretary of Abhoypur Naharoni Gaon. His evidence reveals that seeing a Maruti van, being kept parked on the road of Abhoypur Lachang Gaon, the people, who went to plough in the field, informed him of it. Then arriving at the village Abhoypur Lachang, he saw that vehicle. He then informed the police about it. Then Manoj Kaman arrived at the place of occurrence. The vehicle was checked. The vehicle was seized vide seizure list Ext.3, wherein he signed as witness. Then police took the vehicle to the police station and Manoj Kaman said that the vehicle belonged to him and that someone had lifted it. This witness is not cross-examined.

32. Notably, the I.O. P.W.13 had not whispered any word about the place of recovery and seizure of the vehicle. But, the evidence of P.W.2 and Ext.3, the seizure list, which the P.W.1 had stated to be a zimmanama, indicates that the vehicle was recovered at Abhoypur Lachang Village in abandoned

condition and this belied the evidence of P.W.1 that the vehicle was recovered at Thekeraguri.

33. P.W.3 is Sri Monuj Chetri. His evidence reveals that the incident took place about two years ago. The deceased, Sonai Chutia used to drive a Maruti Van and someone had hired the said vehicle, and thereafter, Sonai Chutia did not return. His dead body was found lying near a culvert. He went to see the dead body. Then police held inquest on the dead body and he put his signature in the inquest report, Ext. 2 as witness. It is elicited in cross-examination that he does not know who hired that vehicle and he do not know how Sonai Chutia died.

34. P.W.4, Sri Tankeswar Gogoi, testified that on one day in the year 2014, in the morning, Shri Padma Saikia, the Gaonburah of the village, came to his house and informed him that a dead body was lying near the Pucca Bridge, in-between Laokut and Singia. Then he, along with Gaonbura, went to that place and found a crowd of people gathered there and also found the dead body which could not be identified. He then reported the matter to the O/C, Ghilamara Police Station over phone. Then immediately police came to the place of occurrence. Then seeing the cut injury on the neck of the dead body, police conducted search for the weapon and found one '*khamti* dao' there and seized the same, vide seizure list, Ext. 4, wherein he put his signature as witness. Later, the family members of the deceased had identified the dead body. This witness was not cross-examined.

35. P.W. 5, Smti. Phuluprabha Saikia, is also a witness of seizure of the dao. Her evidence reveals that in 2014 a dead body was found lying near the Pucca Bridge. Then police seized a dao vide seizure list, Ext. 4 and took her

signature over there as witness. She could know from the police that the deceased had been killed with that dao. It is elicited in cross-examination that she put her signature on the seizure list in Ghilamara Police Station.

36. P.W.6 is Smti. Binita Gogoi, is the V.D.P. Secretary of village No.1 Singia. Her evidence reveals that in the month of January, 2014, the children of the village informed her that a dead body of a man was lying near the bridge at Singia and that the neck of the dead body was in half slit state. Then she had sent Dipankar Gogoi to inform Gaonburah Padma Saikia and V.D.P. Secretary Tankeswar Gogoi. The Gaonbura and the Secretary both came to her house, with whom, she went to the place of occurrence and saw a dead body of a man lying there with injury over neck. A '*Khamti Dao*' was lying near it and Tankeswar Gogoi informed the police of it, then police came there and seized the dao vide seizure list, Ext.4 and took her signature therein as witness. She confirmed M. Ext.1, the seized dao in the court. This witness is not cross-examined by the accused/appellants.

37. Thus, it appears that the evidence of these five witnesses, P.W.2, 3, 4, 5 and 6, also would not come into aid of the prosecution side, so as to establish who had caused the fatal injury to the deceased Jogyeswar Chutia @ Sonai Chutia, except, however, in establishing recovery and seizure of the weapon of offence, i.e. Mat. Ext.1, vide seizure list, Ext.4 and the seizure of the vehicle, vide-Ext.3.

38. P.W.7, Sri Phatik Ch. Chutia, is the elder brother of the deceased Jogyeswar Chutia @ Sonai Chutia. His evidence reveals that about 2 years ago, his younger brother was working as the driver of the Maruti Van, belonging to Jay Chandra Kaman. One day when the said vehicle was hired for a trip to

Dhakuakhana, his younger brother went there; he did not come back from Dhakuakahna. The following day, he went to Gogamukh Taxi Stand and made an enquiry to that effect. The boys, who were present at the Taxi Stand, told him that accused Mintu Chetia, along with another boy, hired the said vehicle to go to Dhakuakana. Then he informed the police station of it. Then 1/2 an hours later, he got the information from the police station that a dead body was lying by the side of road that leads to Laokot. Then he, along with owner of the vehicle, and the boys, who were present at the Taxi Stand, went to that place and found the dead body of his younger brother lying there and he identified the dead body. Thereafter, inquest was held on the dead body and his signature was taken there as witness and Ext.2 is the said inquest report. In cross-examination he denied the suggestion of the accused/appellants that nobody from the Taxi Stand said that accused Mintu Chetia, along with another boy, had hired the said vehicle to go to Dhakuakana.

39. Though it is evident from the evidence of this witness that on the following day of missing of his brother he went to Gogamukh Taxi Stand and made an enquiry about his brother and the boys, who were present at the Taxi Stand, told him that accused Mintu Chetia, along with another boy, hired the said vehicle to go to Dhakuakana, and then he informed the police station of it, yet, this piece of his evidence is hearsay and being the person, from whom he came to know about the same, is not examined as witness, his evidence becomes unworthy of credence.

40. The evidence of P.W.8, Sri Naren Boruah also would not help the prosecution side as he is not aware of how Sunai, the driver suffered demise. He only deposed that dead body of Sonai Chutia of his village was found on the

road at Ghilamara in the year 2014. Then accompanied by other villagers, he went to Ghilamara and then to police station, where, Sunai's elder brother Phatik Chutia had identified the dead body. And that he did not know how Sunai died. This witness is not cross examined.

41. P.W.9, Shri Lakheswar Kaman, is the elder brother of the informant/respondent No.2. His evidence reveals that about 2 years back, Bidul Kalita and Mintu Chutia hired the car of his brother Monoj to go to Dhakuakhana. The driver of the vehicle was Jogeswar Chutia. His evidence also reveals that he was present when they had taken the car. The car did not come back even after it was night. Next morning he was informed by Gogamukh Police that a person was lying dead near Singia. Then his brother Monoj had gone there and found the dead body of Jogeswar. The car was found after about 2 days near Dhakuakhana. It is elicited in cross-examination of this witness that he did not tell the names of the accused when the Police had questioned him. He also denied the suggestion that he had not seen who had taken the car.

42. But, it appears that P.W.9 is 'chance witness', who was present at the Taxi Stand, when the accused/appellants had hired the vehicle of the respondent No.2. By, co-incidence or by chance he remained present at the Taxi Stand at the relevant time. However, there is no explanation as to why he was there at the relevant time. The requirement of law is that he has to reasonably explain his presence at the place of incidence at the relevant point of time. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Surinder Singh And Another vs. State of U.P.** reported in **(2003) 10 SCC 26**. Admittedly, this witness also did not tell the names of the

accused/appellants in his statement before police under Section 161 Cr.P.C. Because of this reason we find the evidence of P.W.9 unworthy of credence and as such no reliance could be placed upon the same.

43. P.W. 11 is Shri Rajech Kumoti. He is a driver by profession. His evidence reveals that he knows the accused present in the dock, but he doesn't know their names. His evidence reveals that about two years back, the two accused persons had taken the car of Monoj Kaman on rent. And Jugeswar was the driver of the car. At that time his car was also parked there and he was having tea. Later on, he got to know that the driver was killed. Then police questioned him. It is elicited in cross-examination of this witness that he does not know the names of the accused as he only saw them on that day. He denied the defence suggestion that he had not seen who had taken the car.

44. Though, probative value of the evidence of this witness could not be shaken in cross-examination, yet his evidence only establishes hiring of the vehicle of the respondent No.2, by the accused/appellants. He had not seen and also not aware of, as to who had caused the cut injury suffered by the deceased driver. At best, his evidence would establish the theory of last seen together, the merit of which we would undertake little later.

45. Indisputably, P.W. 9 and 11 are also the witness of the TIP. But, unfortunately, the prosecution side had failed to prove the TIP chart through these two witnesses. Not a single question was put to them by the prosecution side in respect of the TIP. However, the TIP chart was proved as Ext. 10, by examining the Judicial Magistrate 1st Class, Dhemaji, who had conducted TIP at District Jail, Dhemaji as P.W.15.

46. P.W. 15 is Smti Kingkini Borah was the Judicial Magistrate 1st Class, Dhemaji, who had conducted TIP at District Jail, Dhemaji. Her evidence reveals that on 25-02-2014, as per order of the Ld. C.J.M., Dhemaji, she had conducted T.I.P., in connection with G.R. Case No.14/2014 (GMK). Her evidence also reveals that she had conducted the TIP by placing the suspects in a line, consisting of 35 persons, with similar built and dresses. At that time the witnesses were kept outside the District Jail and no police person was present while the TIP was being conducted. Then one witness was called and asked to identify the suspect, if any, from the line, involved in the offence. Then, witness Rakesh Kumti identified both the accused persons, by touching them with his hand. Then she had re-shuffled the line and the suspects and called the second witness- Lakheswar Kaman and asked him to identify the suspect if any. Then he also identified both the accused persons by touching them with his hand. Her evidence also reveals that she had taken care, so that the first witness cannot meet the second witness, after his turn.

47. Her evidence also reveals that after the TIP she had prepared the report, Exhibit-10, and put her seal and signature there. She had also confirmed Exhibit-11, the relevant order in the G.R. Case and Ext-11(1) is her signature. In cross-examination she had denied the defence suggestion that the witnesses got opportunity to come in contact with the accused persons.

48. Thus, though the TIP chart stands proved through P.W.15, yet, it is well settled that the primary object of holding TIP is to enable the witnesses to identify the person involved in the commission of offence (s) if the offenders are not personally known to the witnesses. But, it appears that both the accused appellants were known to P.W.9. However, it is well settled that TIP is not a

substantive piece of evidence. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Malkhansing vs. State of M.P. (2003) 5 SCC 746**.

49. In this context, it is worth mentioning that Mr. Deka, the learned Amicus Curiae for the accused/appellant Mintu Chutia, has vehemently contended not to attribute any evidentiary value to the TIP, for being conducted after a considerable period of time of arrest of the accused/appellants, and without any explanation for the delay. It appears from the record that the TIP was conducted on 25.02.2014, while accused Bidul Kalita was arrested on 15.01.2014 and Mintu Chutia was arrested on 16.01.2014. There is no explanation, whatsoever, for the inordinate delay of 40 days. Having considered the submission of Mr. Deka, in the light of given facts and circumstances on the record, we find substance in the same. And the case law, **Manoj (supra)** referred by him also fortified his submission. It is to be noted here that in the said case Hon'ble Supreme Court has held as under:-

“**110.** A popular and widely used method of accused identification, by witness, in criminal trials, is the identification parade. TIP procedures are used, where witnesses who claim to have seen the accused at, or about the time of occurrence to identify such accused from the midst of other individuals, who bear physical attributes similar to them, without any aid or other source. TIPs are meant to test witness veracity and their capability to identify unknown persons. TIPs should normally be conducted at the earliest possible time to eliminate the chance of accused being shown to witnesses before the identification parade, which might otherwise affect such witnesses' memory. TIPs are conducted during investigation; however, there is no provision of law enabling an accused to claim it as a matter of

right, as held in *Malkhansingh v. State of M.P.* (2003) 5 SCC 746, In *Ramanathan v. State of T.N.* [*Ramanathan v. State of T.N.*, (1978) 3 SCC 86, para 18 this Court outlined the utility and weight of a TIP. There is no hard-and-fast rule that delay or failure in holding the TIP ipso facto renders the evidence inadmissible or unacceptable; it however, affects the credibility and weight attached to such identification, as held in *Shyamal Ghosh v. State of W.B.* (2012) 7 SCC 646.

50. It appears that while the accused/appellants were arrested on 15.01.2014 and 16.01.2014, respectively, the TIP was conducted on 25.02.2014. There was delay of more than 40 days. In the meanwhile the accused/appellants were produced before the court on more than two occasions and accused/appellant Bidul Kalita was also taken into police custody for a period of three days, as it appears from the record of the learned committing court. That being so, the possibility of seeing the accused/appellants, by the P.W.9 and 10, before the TIP was conducted, cannot be ruled out. Therefore, in view of the settled position of law, we are not inclined to place any reliance upon the same.

51. Even if the TIP herein this case is accepted for the sake of argument, along with the evidence of P.W. 9 and 11, then also the same would only fortify the theory of last seen together of the accused/appellants with that of the deceased driver. But, what more important is how far the said theory of last seen together is believable here in this case.

52. It is well settled that last seen together is a piece of circumstantial evidence. In absence of eye witness and tangible evidence it is the last resort of the prosecution. Notably, Mr. Deka, the learned Amicus Curiae for the accused/appellant Mintu Chutia had pointed out that the time gap between the

last seen together of the deceased with that of the accused/appellant and the last contact between the respondent No.2 is 12 hours and the recovery of the dead body on 08.01.2014, is about 24 hours. According to him, the time gap between the above two points is so wide that the possibility of involvement of other persons cannot be ruled out and as such, the last seen together theory has to be rejected. There appears to be substance in his submission and the case laws (i) **Sanjay Thakaran (supra)**, (ii) **Anjan Kumar Sharma (supra)** also strengthened the same.

53. In the case of **Sanjoy Thakaran (supra)** Hon'ble Supreme Court in para No. 34 has held as under:-

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (*sic of*) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the

author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

54. In the case of **Anjan Kumar Sarma** (supra) in para 23, Hon'ble Supreme Court has held as under:-

“23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to.

.....”

55. Notably, in the case in hand the last seen together place is the Taxi Stand of Gogamukh-Gerukamukh Road. And the dead body was found in between Laokot and Singia near a Pucca-Bridge. Both the places are different. Besides, there is no evidence to show that the deceased was in exclusive

possession of the accused/appellants, where the incident took place. The incident of homicide took place at night after 8 pm and that too at a place far away, where the accused/appellants and the deceased were last seen together.

56. Thus, in view of the settled legal proposition in respect of the theory of last seen together and its application, as discussed herein above, and also considering the facts and circumstances on the record, specially the time gap between the last seen together and the recovery of the dead body in the morning of next day of occurrence i.e. on 08.01.2014, this court is unable to place reliance on this piece of circumstantial evidence.

57. P.W. 13, Shri Dilip Bania is the I.O. who had submitted charge sheet against the accused/appellants. In fact he had not carried out any part of investigation except submission of charge sheet after collection of the P.M. Report. His evidence reveals that on 18/8/14, he was on duty as the O/C of Gogamukh Police Station. On that day, since S.I. Sri Dibyajyoti Dutta, who was the investigating officer of Gogamukh P.S. Case No.05/14, got transferred, he handed over the case diary of that case to him. Then he perused the case diary and found that in course of his investigation, Sri Dutta had drawn the sketch map by inspecting the place of occurrence, examined the witnesses, forwarded the dead body for post-mortem examination after conducting inquest on it, seized the stolen vehicle and given the same on zimma as per the order of the court, seized a bloodstained *khamti* dao, forwarded accused Mintu Chutia and Bidul Kalita to court after arresting them and recorded the statements of the witnesses by interrogating them. Then he had collected the post-mortem examination report and submitted the charge sheet, Ext. 6, in the court against arrested accused Sri Mintu Chutia and Bidul Kalita u/s 364/302/379/34 IPC. He

also confirmed the Sketch Map, Ext. 7, which was drawn by S.I. Dibyajoyti Dutta. He also confirmed the seizure list, Ext. 4, by which the bloodstained *khamti* dao was seized by S.I. Naren Sonowal. He also confirmed Ext. 8, the seizure list, through which S.I. Sri Dibyajoyti Dutta seized the SCD and a dao from S.I. Sri Naren Sonowal. He further confirmed Ext. 3, the seizure list, through which S.I. Dutta had seized the Maruti Van bearing Reg. No.AS-07F-5055, one tiffin box and a *gamocha* from the place of occurrence. He also confirmed Ext. 9, the seizure list, through which the R/C, Insurance Certificate and the Sale Letter of the vehicle bearing Reg. No.AS-07F-5055 were seized from Manoj Kaman by Sri Dutta. He also confirmed Ext.1, the ejahar of this case and the signature of Sri Subhan Chandra Das with a note. This witness is not cross-examined.

58. Thus, from the evidence on the record and also from the discussion made herein above, this court is of the view that the circumstances, which the prosecution side has relied upon to contend that it has been able to establish the circumstances to prove the charges against the accused/appellants, and also the circumstances which the learned trial court had held to be established in para No.25 of the impugned judgment, could not be said to have been established beyond all reasonable doubt. As the last seen together theory is found to be not believable, the accused/appellants, to the considered opinion of this court, owe no explanation u/s 106 of Evidence Act. We therefore, unable to record concurrence with the finding, so recorded by the learned trial court. The evidence on the record, thus, falling far short of to establish even a prima-facie that the accused/appellants had caused the injury to the deceased, let alone establishing the same beyond all reasonable doubt.

59. In the case of **Richhpal Singh Meena v. Ghasi**, reported in **(2014) 8 SCC 918**; Hon'ble Supreme Court, having taken note of its earlier decisions, has held that in an offence, where death is the end result, a five step enquiry must be carried out by the court. The court has to enquire as to:-

- (i) Is there a homicide?
- (ii) If yes, is it a culpable homicide or a "not-culpable homicide"?
- (iii) If it is a culpable homicide, is the offence one of culpable homicide amounting to murder (Section 300 IPC) or is it a culpable homicide not amounting to murder (Section 304 IPC)?
- (iv) If it is a "not-culpable homicide" then a case under Section 304-A IPC is made out.
- (v) If it is not possible to identify the person who has committed the homicide, the provisions of Section 72 IPC may be invoked. Since this five-pronged exercise has apparently been missed out in the first category of decisions, the learned amicus was of the opinion that those decisions require reconsideration.

60. Application of the aforesaid five step enquiry, to the given facts and circumstances of the case in hand, it becomes clear that –

- (i) There was death of Jogeswar Chutia @ Sunai Chutia which was a homicide;
- (ii) The opinion of Doctor Hridoy Nanda Baruah (P.W.12) indicates that the death was due to shock and haemorrhage as a result of the injuries described. That being so, it was a culpable homicide;

(v) From the nature of the weapon used and also from the nature and dimensions of the injuries described in the P.M. Report, Exhibit-5, and also the considering place of injury i.e. neck, this court is of the view that it falls in clause thirdly of Section 300 IPC and on such count it was a murder;

(iv) But, the evidence on the record are falling short of to establish beyond all reasonable doubt that who the assailants were, that caused the said injuries to deceased Jogeswar Chutia @ Sunai Chutia;

61. The accused/appellants were convicted and sentenced, under Section 364 IPC. Section 364 of the IPC, inter alia, deals with abducting in order to murder. It reads as follows:-

“364. Kidnapping or abducting in order to murder.—Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with [imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

The offence of abduction is described in Section 362 of the IPC and it reads as follows:-

“Abduction.- Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

It is to be distinguished from kidnapping which is of two kinds as stated in Section 359 of the IPC, viz., kidnapping from India and kidnapping from lawful guardianship. Both kidnapping and abducting, are referred to in Sections 364 and 365 of the IPC. Thus, it appears that charge under

Section 364 of the IPC comprises of following ingredients :-

- “(i) That the accused kidnapping or abducted any person;
- (ii) That such kidnapping or abduction was committed so that,
 - (a) such person may be committed; or
 - (b) be put in a danger of being murdered.”

62. In the case in hand, from the evidence, so brought on record and discussed herein above, we afraid, the prosecution side had not succeeded in establishing the ingredients of the section. Not a single witness, so examined by the prosecution side, whispered any word about abduction or kidnapping of the deceased driver in order to murder him or he may be so disposed of as to be put in danger of being murdered. The only evidence available is that two persons had hired the vehicle for a trip to Dhakuakhana. There is no evidence of forcibly carrying or enticing the driver. That being so, the conviction and sentence of the accused/appellants, under such Section 364 IPC, to our considered opinion, cannot withstand the legal scrutiny. Mr. Upadhaya, the learned counsel for the accused/appellant Bidul Kalita, has rightly pointed this out in his argument and we are in agreement with the same.

63. We have considered the submission of Mr. K.K. Das, the learned Addl. P.P., with the aid of all circumsppection at our command. But, we are in respectful disagreement with him and also unable to place reliance upon P.W. 9 and 11 because of the reasons discussed herein above.

64. Thus, we find and hold that the accused/appellants have succeeded in demonstrating substantial and compelling reasons to interfere with the

impugned judgment and order of conviction, so passed by the learned trial court.

65. In the result, we find both the appeals well merited and accordingly, the same stand allowed. The impugned judgment and order of conviction stands set aside and quashed. The accused/appellants shall be released from jail hazoot if not warranted in any other case. Send down the record of the learned trial court with a copy of this judgment and order.

66. The learned trial court, has, however, refused to grant any compensation under Section 357A Cr.P.C. But, it appears that the learned trial court had not assigned any reason for such refusal. As no reason is assigned, this court is not in a position to test the correctness or otherwise of the same. Notwithstanding, keeping in mind the object behind enacting such a benevolent provision, and also considering plight of dependent family members, of the deceased, in absence of only earning member of the family, we are inclined to direct the District Legal Services Authority, Dhemaji to examine the matter and if found eligible under the Rules/Schemes, to grant adequate amount of compensation, as per the Assam Victims Compensation Schemes, 2012, as amended from time to time, to the family members of the deceased driver, namely Jogeswar Chutia @ Sunai Chutia. And this exercise has to be carried out within a period of three months from the date of receipt of a copy of this judgment and order. The Registry shall forward a copy of this judgment to the Secretary, District Legal Services Authority, Dhemaji.

67. Before parting with the record, we would like to place on record, our appreciations to Mr. N. Deka, for the invaluable services rendered by him as Amice Curiae in disposing of appeal. The Registry shall pay him the fee, which

he is entitled to, as per Rule.

JUDGE

JUDGE

Comparing Assistant