IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 67 of 2017

Under section 302/201 of the IPC and 8 of the POCSO Act.

(Arising out of Tezpur PS Case No. 2253/17)

State of Assam

-Vs-

Sri Dhiren Tanti ... Accused Person

Present: Smti I. Barman, AJS,

Special Judge, Sonitpur, Tezpur.

For the State : Mr. S. K. Maitra,

Special Public Prosecutor

For the accused : Mr. H.P. Sedai, Advocate

(Legal Aid Counsel)

Date of Argument : 18-01-2020, 01-02-2020

Date of Judgment : **11-02-2020.**

JUDGMENT

1. The prosecution case as is discerned from record is briefly stated as follows:

"On 01-11-2017, at around 2.30 p.m. accused Dhiren Tanti @ Biken Tanti in the pretext of looking for fire wood had taken the informant's 11 years old daughter victim'X' (herein after called as 'the deceased') to the midst of No. 3 block of Malijan tea garden and committing her rape tortured her physically and pressing neck, inflicted blow over her head, as a result of which she died. After the incident, the accused dragged the dead body to a drain of the garden.

- 2. The investigation commenced vide GD Entry No. 11 dated 01-11-2017 entered on receipt of a verbal information that one minor girl has been murdered and the dead body was concealed under the ground. On receiving the information he went to the place of occurrence, arrested the accused and did the videography on being lead by the accused where he dumped the dead body. Thereafter, on lodging the formal FIR (Ext.2) on 02-11-2017 by the victim's uncle (PW 3), the In-charge of the Salonibari Police Out Post entered the G.D. Entry No. 29 dated 02-11-2017 and forwarded the FIR to the Officer-in-Charge of Tezpur Police Station for registering a case. Accordingly, Tezpur P.S. Case No. 2253/17 u/s 302/201 of the IPC read section 4 of POCSO Act was registered and endorsed SI Aminul Islam (PW 8) to investigate the case who had already initiated the investigation. In course of investigation, the Investigating Officer (PW 8) visited the place of occurrence, recorded the statement of the witnesses and on completion of investigation having found materials, laid charge sheet against the accused Dhiren Tanti u/s 302/201 of the IPC.
- **3.** On producing of the accused person before this Court, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge against the accused Dhiren Tanti @ Biken Tanti under section 302/201 of the IPC and 8 of POCSO Act. Particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- **4.** To substantiate the case, prosecution examined as many as 11 (eleven) witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein he denied that he had committed the offences, which he was alleged to have been committed and did not come forward to adduce evidence.

- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.
- **6.** The points for determination is that -
 - (1) Whether the accused Dhiren Tanti @ Biken Tanti on 01-11-2017, after 2.30 p.m. at Malijan No. 3 block under Tezpur PS, committed murder by causing the death of the minor girl "X" aged about 11 years and thereby committed an offence punishable U/s 302 of the Indian Penal Code?
 - (2) Whether the accused Dhiren Tanti @ Biken Tanti on the same date, time and place, knowing or having reason to believe that offence of murder of "X" punishable with death or imprisonment for life has been committed by him, did cause the dead body of "X" to disappear with the intention of screening himself from legal punishment and thereby committed an offence punishable U/s 201 of the Indian Penal Code?
 - (3) Whether the accused on the same date, time and place, committed sexual assault on "X", aged about 11 years and thereby committed an offence punishable under section 8 of POCSO Act?

Discussins, Decisions and reason thereof.

7. In the present case, there is no eye witness to the occurrence and the entire prosecution story merely based on circumstances. The learned Special Public Prosecutor Mr. Maitra vehemently argued that the evidence on record has sufficiently established the chain of circumstances which is completely succeeded in proving the guilt of

the accused. On the other hand, Mr. Sedai the learned defence counsel has argued that prosecution miserably failed to prove the "last seen together" theory, rather the materials on record merely creates suspicion and did not lead to prove the guilt of the accused beyond all reasonable doubt.

- **8.** In order to appreciate the rival submissions advanced by the learned counsel of the parties, having regard to the evidence on record, I would like to scrutinize the evidence on record for the purpose of adjudicating the charge against the accused.
- 9. PW 1 Pinki Karmakar in her evidence stated that on the day of incident at around 2.30 p.m. while she was plucking tea leaves in the garden, she saw the accused dragging the victim inside the garden in block NO.3 of Malijan TE under Sonabeel Division and in the evening time finding the deceased's mother searching for her daughter, she told the deceased's mother that she saw the accused taking the deceased forcibly inside the garden. Hearing this, her mother along with Castanti Surin and Anil Ghatowar proceeded to the garden in search of her daughter. During search, they found one 'chappal' of her daughter and a lathi used for collecting fire wood and then noticing the legs found the dead body of the deceased. The body was covered with Soil and only the legs were coming out. Seeing the dead body, on raising alarm local people gathered there. She gave statement before Magistrate u/s 164 Cr.P.C. wherein she put her thumb impression.

During cross she stated that the deceased was the grand daughter of the daughter of her brother. Her house is situated infront of the house of the deceased. On the day of the incident, she went to the garden for plucking tea leaves at around 2.30 p.m. At that time about 100 labourers were working in the block of the tea garden, amongst whom Dasen Nayak, Philsita Nayak are still alive. She stated that when the accused took the victim, she was wearing one yellow colour pant and one white colour sporting and on the next day of

occurrence the dead body was recovered. She denied the suggestion that as per dictation of Sankar, she gave statement before the Magistrate. She further stated that the accused came to her house at around 3 p.m. while she was at home, thereafter the accused went to Kherbari to sell her saucepan (deksi) and stayed there. She asserted that though she had not seen the actual incident but she had seen the accused forcefully taking the victim inside the garden and hence, she thought it is only the accused who killed the deceased. She admitted that she had not reported others the fact of dragging the victim by the accused inside the garden.

- **10.** PW 2 Dr. Mridurupam Gogoi, the Sr. Medical Officer, performed the autopsy on the dead body of the deceased, 11 years, female on 02-11-2017 and found three lacerated injuries over left cheek, two at the label of left eye size 2 cm x 2 cm x 3 cm and one below it size 3 cm x 2 cm x 2 cm, left eye ball absent. Neck was tied with a cloth with knot at the left side, and there was one abrasion mark on right breast size 1 cm x 1 cm x 1 cm. The abdominal cavity was full of blood. The medical officer opined that death is due to haemorrhagic shock due to abdominal blunt trauma. He proved the post mortem report as Ext.1. In cross-examination he admitted that the time since death and presence of rigor-mortis was not mentioned in the post mortem report.
- **11.** Informant Sankar Ghatowar, the uncle of the deceased deposing as PW3, stated that on 01-11-2017, at around 2 p.m., his niece the victim along with accused Dhiren Tanti went to collect firewood and at around 7 p.m. he heard that the victim did not return from bagan. He stated that the mother of the victim along with other villagers searched for her and following the mark of dragging of someone, noticed one toe coming out from the earth of the drain of the garden and then found the dead body of the victim in the drain covered with earth. At that time the accused was also present with other persons who searched the victim but, as soon as the dead body

was found, he fled away and on the very day the accused was caught by the villagers of other village. On being informed about the incident, police came and took the accused to the police station. On the night, the dead body was guarded by the villagers and on the next day, he lodged the FIR Ext. 2. On the next day in presence of police, the villagers brought out the dead body of the deceased. He saw injury over the head of the deceased and the neck of the deceased was tied with a "gamosa". He proved the inquest report as Ext. 3 and his signature as Ext.3(1).

During cross he stated that except recovery of the dead body he knew nothing about the incident. He had not seen at what time and how the deceased reached Bagan. He further stated that on the day of incident many persons worked in the garden from 7 a.m. to 12 p.m. and after break of two hours, they again worked from 2 p.m. to 4 p.m. He denied the suggestion that as the accused is a permanent labour, hence out of jealous he threatened him that one day he would put him into jail. He stated that as the accused fled away, hence, he suspected that the accused committed murder of the deceased.

12. PW 4 the mother of the deceased, stated that on the day of incident, in the evening after returning home, not seeing the deceased when she enquired her husband about the deceased, he replied that she went to Bagan with Dhiren Tanti to collect firewood. As till then, she did not return, hence, she along with neighbours searched for her daughter and called her by name. During search they found one chappal of her daughter and then seeing mark of dragging towards drain, followed the marks and noticing one toe, found the dead body of the victim in the drain covered with soil. Seeing the dead body when she raised alarm, the accused fled away. Next day morning police along with the villagers digging the earth brought out the dead body from the drain. She saw cut mark over cheek near the eye and both the eye balls were came out and the

neck of the deceased was tied with a 'gamosa'. She heard that the deceased was raped and thereafter she was killed. She also gave her statement u/s 164 Cr.P.C.

During cross, she stated that on the day of incident she went out from home at 7 a.m. and returned home at 4 p.m. On that day she along with 400/500 people worked in the Line No. 4 and the dead body of the victim was recovered from line No. 3. The distance between Line No. 3 and 4 is about 10 k.m.

13. PW 5 Smti Dasen Nayak deposed that on the day of incident at around 3.30 p.m. when she went to bring cattle, she had seen the accused Dhiren Tanti and the deceased in line No. 3 and in the evening she came to know that accused Dhiren Tanti committed rape on the deceased and thereafter committing murder buried the dead body in a drain of the bagan.

During cross she stated that when she went to Bagan to bring cattle except Dhiren and the deceased none was present. At a few distance the labourers were plucking tea leaves. She saw the accused and the deceased from a distance of 10/15 meter away. She also saw a lathi in the hand of the accused. She admitted that before Magistrate she stated that as she had seen the accused along with the victim hence, they all suspected that the accused killed her. She denied that as tutored by Sankar, she made statement before the Magistrate and before the court.

14. PW 6 Sri Kundan Karmakar testified that on the day of incident at around 2 p.m. when he was playing carom, he saw Dhiren Tanti along with the deceased proceeding towards garden and in the evening came to know that the victim did not return. Later on he heard that the deceased along with the accused went to the garden for collecting fire wood. On the very day, in the evening the dead body of the deceased was recovered in a drain of the Bagan. He saw

the dead body which was covered with earth. He also noticed injury over the head of the deceased.

During cross he stated that he played carom with Bow, Debru and Badal under a Peepal tree. The bagan is about $1\frac{1}{2}$ - 2 km away from the place where they played carom. The accused was ahead of the deceased while proceeding towards the bagan. The accused was holding a 15 ft long lathi (Dang) and the deceased was wearing a yellow colour half pant. He cannot say where the deceased and the accused had gone. He also did not know who informed police.

- **15.** PW 7 Sankar Chandra Rava, the Scientific Officer, Serology Division, Directorate of Forensic Science, Assam, Guwahati, Kahilipara, deposed that on 17-03-2018 he received a parcel with branded cover which consists of two numbers of vaginal smear glass slide containing stains of suspected semen and on examination found negative test for spermatozoa (semen). He proved the report as Ext.4.
- **16.** PW 8 SI Aminul Islam, the then In-charge of Salonibari Police Out Post, deposed that on 01-11-2017 on receipt of an information over phone from the Welfare Officer of Malijan TE that one minor girl has been murdered and the body was concealed under the ground, he made the Salonibari Police Out Post GDE No. 11 (Ext.7) and along with ASI Nijay Kr. Domai and staff proceeded to the place of occurrence. When he reached the place of occurrence, many persons gathered there. He got the information there that the accused Dhiren Tanti is taking shelter in the nearby village namely Kherbari. Then he deputed some staffs and some responsible persons in the area asking them not to change the position of the dead body till arrival of Magistrate. He arrested the accused Dhiren Tanti. On next day morning at around 7 a.m. he along with Circle Officer and the accused went to the place of occurrence where the Circle Officer conducted inquest over the dead body. He further stated that before conducting inquest, accused Dhiren Tanti took them to the place

where the body was dumped. He further stated that the accused led them to the place where the body was dumped and videography was done of the same. Thereafter the dead body was sent to KCH, Tezpur for post mortem examination. He prepared the sketch map of the place of the occurrence vide Ext. 5. Thereafter, on receipt of an FIR from Sankar Ghatowar (PW3), he forwarded the same to the O/C Tezpur Police station. He recorded the statement of the witness including informant and got recorded the statement of witnesses Pinky Karmakar (PW1), Dipmala Topno (PW4), Dasen Nayak (PW5) and Kundan Karmakar (PW6) u/s 164 Cr.P.C. He also sent the vaginal swab of the victim to FSL for examination.

During cross-examination, he stated that the Video graphy was done by police personnel Krishna, by his digital camera but the said camera, was not produced. He also did not record the statement of Krishna who later on handed over the CD of the video graphy. He also cannot say where the CD was processed. He had not submitted any certificate from the Expert who prepared the CD from computer. He also did not cite the said Expert as witness and did not produce the computer where the CD was processed. He also did not seize the said CD. But two CD are avoidable in the case diary without any mark or date or case number. Though the CD is in a cover, but in the cover there is no case number or date. In the charge sheet also he did not mention about the CD. He admitted that he did not record the statement of the accused regarding leading to the fact of discovery of dead body. He further stated that in Ext. 7 the GDE No. 11, he did not mention the phone Number by which he was informed about the incident. He did not record the statement of Mr. Duwarah who informed him first about the incident. He further stated that after visiting the place of occurrence, knowing that the accused is taking shelter in a nearby village Kherbari, he went there and apprehended the accused. He further stated that he brought the accused to the police station at 10 p.m. of 01-11-2017 and forwarded him to the court on 03-11-2017 at 3 p.m. He further stated that on the basis of Salonibari OP GDE NO. 11 dated 01-11-2017 the post mortem was conducted but in the sketch map, the GDE number was not mentioned. There was no residential house within half km from the place of occurrence. He further stated that he closed the case diary on 03-11-2017 and again opened on 06-11-2017 and till 06-11-2017 he did not examine any other witness except the informant. He admitted that the statement of witnesses Pinky Karmakar, Deceased's mother, Dasen Nayak and Kundan Karmakar are not of his hand writing and their statements were recorded by Constable Moonmee Saikia as dictated by him. In the diary there is no mention about leading to discovery of the dead body. He also admitted that the case diary does not contain the page number.

- **17.** PW 9 Dr. S.K. Borah, the Circle Officer of Chariduar Revenue Circle, deposed that on 02-11-2017 at around 7.50 a.m., in reference to Salonibari Out Post GDE No. 11 dated 02-11-2017, he conducted inquest upon the dead body of the deceased after disinter, as shown by Sankar Ghatowar and found head injury with blood mark and injury on the left eye. He also found wooden lathi near the dead body, the neck was tied with gamosa and a knot on the left side of the neck. He proved the inquest report as Ext.3.
- **18.** PW 10 Miss Juhi Gogoi, the then Judicial Magistrate, 1st class, Tezpur recorded the statement of the witnesses, Pinki Karmakar, Dasen Nayak, Dipmala Topno and Kundan Karmakar u/s 164 Cr.P.C. vide Ext. 8 to Ext. 11 respectively who made their statements voluntarily.
- **19.** PW 11, SI Labanya Bejbaruah, another Investigating Officer of this case, deposed that on transfer of earlier I.O., he collecting the FSL report, finding sufficient materials against the accused Dhiren Tanti submitted the charge sheet u/s 302/201 of the IPC. He proved the charge sheet as Ext. 6.

- **20.** Prosecution case is that accused Dhiren Tanti Das committed murder of the deceased girl aged about 11 years and buried the body in the tea garden. Nobody witnessed the occurrence and the case rests on circumstantial evidence. It is well settled by a catena of decisions of the Hon'ble Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from these circumstances.
- **21.** In the case of *Bhagat Ram v. State of Punjab*, AIR 1954 SC 621, it has been laid down that, where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring home the offences beyond any reasonable doubt. The Apex Court in the case of *State of U.P. v. Satish* referred to the following observation made by the Supreme Court in the case of *C. Chenga Reddy v. State of A.P.*, 1996 (10) SCC193:-
 - "21. In a case based on circumstantial evidence, the settled law is the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."
- **22.** The Apex Court in the case of *Padala Veera Reddy v. State of A.P.* 1989 Supp (2) SCC 706, laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:- (SCC pp. 710-11, para 10)

- "10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
 - (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (3) the circumstances, taken cumulative, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
 - (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
- **23**. In the case of *Hanumant Govind Nargundkar vs. State of M.P.* AIR, 1952 SC 343 it was observed, thus:-

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with

the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

- **24.** In the case of *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 1984 SC 1622, while dealing with the circumstantial evidence, the Supreme Court laid down that the following conditions precedent must be fully established before convictions could be based on circumstantial evidence. The conditions are:-
 - (1) the circumstance from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established.
 - (2) the facts so established should be consistent 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.
- **25.** In the instant case the prosecution in order to prove his case mainly relied on the following circumstances:
 - i) The cause of death of the deceased is haemorrhage shock due to abdominal blunt trauma.

- ii) On the day of incident at 2.30-3.00 pm, the accused Dhiren Tanti was seen together with the victim inside the garden and in the evening time the dead body of the victim was recovered in the drain of the garden.
- iii) PW5 Dasen Nayak and PW 6 Kundan Karmakar saw the accused along with the victim proceeding towards garden since when the deceased not returned and at that time the accused was holding a lathi in his hand.
 - iv) A lathi was found lying near the dead body.
- v) The accused was present when the villagers were searching the victim but as soon as the dead body was found, he fled away and thereafter, the accused was caught by the villagers from other village.
- vi) Accused Dhiren Tanti had shown the place of occurrence where the dead body was dumped.
- 26. The post-mortem report vide Ext. 1, disclosed that the deceased sustained three lacerated injury over left chick, two at the level of left eye size 2 cm x 2 cm x 3 cm and one below it size 3cm x 2cm x 2cm, left eye ball was absent and neck was tied by a cloth with a knot at the left side. The deceased also sustained one abrasion mark on right breast size 1cm x 1 cm x 1 cm and the abdominal cavity was full of blood, however no injury was found over genital area. The medical officer opined that death occurred due to injuries of abdomen. Cause of death is not challenged by defence. In statement u/s 313 Cr.P.C. accused pleaded innocence regarding sustaining injury by the deceased. From the evidence of the medical officer, it appears that the injuries sustained by the deceased were homicidal in nature.
- **27**. In this case the circumstantial evidence that the deceased being last seen with the accused is relevant. Last seen together is one of the circumstances to link the accused with the offence and to prove his guilty.

28. So far as the last seen aspect is concerned, the Apex Court in the case of State of U.P. v. Satish [2005 (3) SCC 144] observed as follows:

"The last seen theory comes into play where the time-gap between the point of time, when the accused and the deceased were last 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 persons 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. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 4 and 5."

- **29.** In the case of Ramreddy Rajeshkhanna Reddy v. State of A.P. [2006 (10) SCC 172] the Hon'ble Supreme Court held that: "The last seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case the courts should look for some corroboration."
- **30.** In this respect Mr. Maitra the learned Special Public Prosecutor placed the case of Sahadevan alias Sagadevan vs State, (2003) 1 SCC 534, wherein the Apex Court has held that in a case of last-seen-together, it is obligatory on the part of the appellant to explain as to when and where he parted the company of the deceased.

Mr. Maitra also placed the ruling reported in AIR 2002 SC 3164 (Bodh Raj @ Bodha and Ors vs. State of Jammu and Kashmir).

31. In this case, PW 1 Pinki Karmakar testified that on the day of incident at around 2.30 pm while she was plucking tea leaves in the garden, saw the accused Dhiren Tanti dragging the victim within the block

No. 3 of Maligan Tea Estate under Sonabheel division and in the evening time she finding the mother of the victim searching for her daughter, reported her that she saw the accused dragging the victim forcefully inside the garden. Hearing this, the mother of the victim along with Castanti Surin, Anil Ghatowar and some other boys went within garden to enquire about her daughter. During search they found one choppol and a lathi used for collecting fire wood and then noticing a portion of leg coming out from earth, found the body of the deceased covered with soil. Seeing the same they raised alarm and on next day police brought out the dead body. Same statement she made u/s 164 Cr.P.C (Ext.8) that she saw the deceased with the accused at about 3.30 PM proceeding to No.3 Tea Garden. During cross this witness asserted that though she had not seen the actual incident but she had seen the accused forcefully taking the victim inside the garden. Learned Defence counsel argued that in cross examination PW1 stated that she asked the accused Dhiren Tanti to sell her "Saucepan (Deksi)" for which accused came to her house at 3 pm when she was present at home and thereafter the accused went to Kherbari to sell her "Saucepan" and stayed there and as such the prosecution story that she had seen the accused taking the victim inside the garden is not believable one. On careful scrutiny of the deposition and statement under Section 164 Cr.P.C. of PW1, it reveals that in statement under Section 164 Cr.P.C. recorded after five days of the incident, she stated that she had seen the accused with the deceased at 3.30 PM and in deposition, she stated that she saw them at 2.30 PM. Being an illiterate lady, she might not have known the exact time but, her evidence that she saw the deceased with the accused in the garden in the afternoon between 2.30 to 3.30 PM remain un-demolished and for this minor variation regarding time, she cannot be disbelieved. PW 5 Dasen Nayak also stated that when she went to bring cattle at 3.30 PM, from 10/15 meter away she had seen the accused Dhiren Tanti and deceased together in line no. 3 and at that time the accused was holding a lathi. Another vital witness PW 6 Kundan Karmakar also stated that on the day of incident at around 2.00 pm when he was playing carom, he saw the accused Dhiren Tanti along with the deceased proceeding towards the garden and in the evening came to know that the deceased did not return from garden and thereafter, her dead body was recovered from the drain of the tea garden. During cross it was brought on record that when the accused and the deceased were proceeding towards garden, the accused was holding a 15 ft. long lathi. PW5 and PW6 also made the same statement in their deposition as well as in statement recorded under Section 164 of Cr.P.C. (Ext. 9 and Ext. 11).

- **32.** PW3 and PW4 the uncle and mother of the deceased respectively categorically stated that on the day of incident the victim along with the accused went to garden to collect fire wood. Though the defence during cross examination of the PWs took the plea that on the day of incident the accused went to the house of one Asmat Ali for selling "Saucepan" of PW1 Pinki Karmakar and when Asmat asked him to bring the "Saucepan", the accused again went to the house of Pinki Karmakar and on his return with the Saucepan, he was caught by public out of suspicion but during cross, PW1 Pinki Karmakar, did not state that the accused again returned to her home to take the "Saucepan". She only stated that at 3.00 PM, accused came to her house and then she sent him to Kherbari to sell Saucepan. Through this plea the defence tried to place that at 3.00 PM, he was in Kherbari not in the Tea Estate, but, the evidence of PW1,PW5 & PW6 regarding witnessing the accused with the deceased going inside the garden remain unshaken.
- **33.** PW 3 and PW4 also stated that when they searched for the girl, they saw mark of dragging of someone and following the mark they noticed one toe coming out from the soil of the drain and thereafter found the dead body. All other PWs also categorically stated that the dead body was covered with soil and noticing one toe coming out, they found the dead body.
- **34.** The evidence of deceased's mother PW4 unveiled that not finding the victim at home till 4.00 PM, when victim's mother inquired her husband, he told her that their daughter went with the accused to garden

to collect fire wood. This evidence indicates that the victim's father knew that she went with the accused to the garden to collect fire wood. The evidence discussed above also disclose that on the day of incident PW1, PW5 & PW6 saw the accused with the deceased victim going inside the garden and when she did not return till 4.00 PM, they searched for her and from mark of dragging and the toe, recovered the dead body in the drain of the garden. The learned defence counsel drew attention of this Court that according to PW1, she along with about 100 labourers were working in the tea garden at around 2.30 pm and if actually the accused dragged the victim inside the garden, it would be noticed by the said labourers also and as such the evidence of PW1 who claimed that she saw both of them is not believable one. On careful scrutiny it reveals that in statement u/s 164 Cr.P.C. (Ext 8), PW1 stated that at about 3.30 pm, she saw the accused with the deceased when she was plucking tea leaves, she did not state the fact of dragging. In my considered opinion when the labourers were busy in plucking tea leaves, they all might not have given attention to the persons who passed by the garden and only for this, the evidence of PW1 that she had seen the accused and the deceased together cannot be disbelieved. Learned defence counsel also drew my attention that according to PW1, on that day at 2.30 pm, about 100 labourer including PW5 Dasen Nayak were working in the tea garden whereas PW5 stated that when she went to bring cattle, had seen the accused with the victim. On careful perusal of the deposition of PW5 it reveals that she went to bring cattle at 3.30 PM. Therefore, after working in the garden, possibility of proceeding to bring cattle cannot be ruled out. The learned defence counsel also argued that not disclosing the material fact by PW1, PW5 and PW6 regarding witnessing the accused with the deceased together till recording statement under Section 161 Cr.P.C. and 164 Cr.P.C., their evidence are not believable. In my view, seeing the deceased with the accused the residents of same tea garden, they might not have thought that he is going to commit some offence with the girl for what they perhaps informed none but after recovery of the dead body,

they believed that it is the accused who committed the crime and gave statement accordingly.

- 35. The theory of last seen together is one where two persons are seen together alive and after a interval of time one of them is found alive and other dead. If the period between the two is short, presumption has to be the person alive being the author of the crime. Time gap should be such as to rule out possibility of somebody else committing that crime. It is true that circumstance of last seen together does not necessarily lead to the inference that it was the accused who committed the crime, there must be more establishing connectivity between the accused and the victim. In the instant case at around 2/2.30 pm, deceased was seen with the accused and in the evening time not finding her when her family members with others searched for her, the dead body was recovered. Though there is a gap since she was seen with the accused till the body was recovered but the alleged incident was in a tea garden where labourers were working in the garden till 4/5 pm. Had the deceased came out from the garden, she would be noticed by someone but since she was taken inside the garden nobody noticed her and thereafter body was recovered. Accused also failed to explain during this long period where he was. Furthermore, since the accused was last seen with the deceased till recovery of dead body of victim, the victim was not seen with any other person and such facts makes the last seen theory stronger and reliable against the accused.
- **36.** The learned defence counsel further argued that Pinky Karmakar(PW1) though deposed that she saw the accused dragging the victim inside the tea garden, which an improved version not stated before the IO and the evidence of PW5 & PW6 though claimed that they saw the deceased with the accused which was not stated before the IO, as such their evidence are not believable, but, in my opinion, when they saw the victim with the accused they might not have think that the accused took her with intend to commit an offence. In the case of Gautam Sahu @ Ajit Sahu Vs State of Assam, 2006(2) GLT 196 placed by defence, the deceased was seen with accused on 28-09-2018 at 3.00 PM and the body

was recovered on 30-09-2018 at 12 noon and the Hon'ble High Court held that for this long gap it cannot be held that none other than the accused committed murder of the deceased. But, in the present case, the deceased was seen with accused at 2.30-3.00 PM and the body was found in the evening on the very day. There is also no evidence that someone saw the accused coming out from the garden or some others entry in the garden during the period. Absence of any other person in the place of occurrence appears to be one of circumstances to link the accused with the offence to prove his guilt. It is not the case of the defence that anyone else other than the accused was there at the relevant time. Though the accused took the plea that at that time he was in village Kherbari but failed to substantiate the plea by adducing evidence as discussed above.

The learned defence counsel argued that before filing the FIR, the **37.** Welfare Officer, Malijan TE over telephone and the General Manager in writing informed at Salonibari OP regarding the incident on the basis of which GD Entry No.11 dated 01-11-2017 was entered but, both of them who informed police first were not examined by the IO. Learned defence Counsel also submitted that A.S. Gill the General Manager informed the I/C Salonibari Out Post in writing that the line chowkidar reported him about an incident of death and the father of the deceased knew that the deceased with the accused went to the garden to collect firewood but the said chowkidar and deceased's father were not examined by prosecution. The learned Counsel argued that non-examining those witnesses are serious lapses on the part of the prosecution. In this respect he relied on the ruling reported in 2013(4) GLT 1017 Bircha Kurmi vs. State of Assam. In the case of Bircha Kurmi, one Apurba Saikia informed first the village head man that the accused was moving around with an axe in his hand and already killed one person on which police came and initiated investigation but, prosecution neither bring on record as to whether any General Diary Entry had been made on the basis of the information nor examined Apurba Saikia who informed the village headman first and the Hon'ble Apex Court held that the FIR received later on during investigation cannot be treated as First Information Report and remanded back the case to prove the General Diary Entry and to examine the person who first informed the village headman. In the said case, the person who informed first had seen the accused moving with an axe and knew well that the accused murdered one person, whereas in the present case the Welfare Officer of Maligaon TE and the Manager of Sonabil TE as soon as came to know about the recovery of a dead body, informed police. There is no evidence on record that they came to the place where the dead body was found. They are not eye witnesses, and they might not have known who killed the deceased. Moreover, in this case, receiving a phone call from the Welfare Officer about burying a minor girl after committing murder, GD Entry No. 11 dated 01-11-2017 was made which was proved as Ext.7. Hence, in my considered opinion the aforesaid ruling is not applicable in this case.

38. In this case one vital circumstance is that when the villagers searched for the victim, the accused also accompanied them but as soon as the body was recovered, accused fled away and on the very night he was apprehended by the villagers from village Kherbari. PW 8 the IO testified that when he reached the place of occurrence, he got the information that the accused Dhiren Tanti had taken shelter at nearby village Kherbari and accordingly he arrested accused Dhiren Tanti therefrom. In a question put to the accused in this respect, the accused replied that he did not accompany the villagers in searching the victim as at that time he was at Kherbari. To prove this plea he examined none. However, during cross of PW1, it was brought on record that at 3.00 PM, the accused went to Kherbari to sell her Saucepan, but, in order to escape from the offence, possibility of going to Kherbari after committing the offence cannot be ruled out. All the PWs positively supported that at the time when the body of the deceased was recovered, the accused fled away and as such the plea of the accused that he was not present when searching the girl is not sustainable. Though absconding of the accused from the place of occurrence cannot by itself establish the guilt of the accused but being parted from the searching party immediately after recovery of the dead body is a vital piece of circumstantial evidence linking him with the death of the deceased. Here the learned Special Public Prosecutor placed the case of Narendra Nama Das and Another vs. State of Tripura reported in 2009 (1) GLR856.

- **39.** The learned defence counsel relying the case of Sujit Biswas Vs State of Assam reported in 2013 Cr LJ 3140 submitted that the evidence of PW1 and PW3 to PW6 disclosed that due to absconding of the accused, they only suspect the accused as perpetrator of the crime, but failed to establish that none other than the accused committed the crime. But, in the present case, all the circumstances discussed above, if taken together led to the only hypothesis of guilt of the accused in committing murder of the little girl. The evidence of the witnesses are found to be cogent, convincing and not contradictory and nothing could be elicited by the defence in cross to discard their testimony. The entire consequence of evidence on the deposition of the PWs are in unison about the killing the deceased by the accused.
- Further, the learned defence counsel also strenuously argued that there is delay of 18 hours in lodging FIR without any explanation and the allegation on rape has not been proved by the medical report and FSL report which gives rise to serious doubt of the prosecution version. In that respect, he relied the case of Pritam Nath and Ors Vs state of Punjab decided by the Apex Court in Crl Appeal No.216/2002 reported in Supreme Court on Acquittal in Criminal cases (1995-2015). In the case in hand, the fact of missing of victim girl came to the knowledge of the victim's mother (PW4) at 4.00 PM on 01-11-2017 after she returned home from work and the dead body was recovered in the evening time. As it was night, hence, inguest was conducted on 02-11-2017 at 7.50 AM and thereafter the FIR was lodged on the very day i.e. on 02.11.2017 at 3.00 PM. The episode of finding the dead body of the little girl was shocking and traumatized the simple villagers to take recourse the formal and legal procedure immediately and in the above facts and circumstances of the case, I found that this delay of about 18 hours is not fatal to the prosecution. In this respect the Learned Special Public Prosecutor placed the ruling reported in 1991 AIR (SC) 63, 2011(5) GLR 626. Moreover, finding the dead body of

the girl in that situation, the villagers might think that she was killed after committing rape which is mentioned in the FIR, but, in evidence they did not allege rape.

- 41. The learned defence counsel also argued that the statement of PW1, PW4, PW5 and PW6 under Section 161 of Cr.P.C. were recorded after 5 days of the incident by constable Munmi Saikia as admitted by the IO and as such those are not acceptable in the eye of law. In that respect, defence counsel referred the ruling reported in 2016(3)SCC(CRI)211, but, in my considered opinion when the accusations of prosecution otherwise established, only for recording statement of the witnesses after 5 days, can't be the basis of throwing away the whole case. Moreover, admittedly, the IO during cross-examination admitted that Munmi Saikia reduced the statement of those witnesses as dictated by him. So, it is not the case where a constable below the rank of S.I. recorded the statement of witness u/s- 161 Cr.P.C. rather it firmly established that statements were recorded as per the dictation of I.O. Learned defence counsel further submitted that PW1 and PW3 to PW6 improved their version which were not disclosed before the IO in statement under Section 161 Cr.P.C. and as such their evidence cannot be believed. In that respect he relied the ruling reported in 2011 Cr.L.J. 817 but in the instant case the evidence of PWs regarding witnessing the accused with the deceased in the garden appears to be coherent, supportive and corroborative and the version of witnesses pertaining to the fact of victim last seen with the accused, recovery of victim's dead body under soil of drain with injuries and fleeing the accused witnessing the recovery of victim's dead body, remain unshaken and defence side failed to dismantle their versions by way of bringing out any sort of material contradictions.
- **42.** Learned defence Counsel relying the case of Sujay Sen @ Sujoy Kr Sen vs. State of West Bengal reported in Supreme Court on acquittal in Criminal cases (1995-2015) submitted that in the FIR, the informant did not mention his source of knowledge regarding allegation of rape on the minor victim and her murder and the present case based only on

circumstantial evidence and as the prosecution fails to prove the chain of circumstances, the accused is entitled to benefit of doubt. He further submitted that the informant had not seen the deceased going with the accused for collecting fire wood and only out of jealousy the FIR was lodged. But, in the FIR (Ext. 2), nowhere the informant mentioned that he saw the incident. After recovery of the dead body and knowing that the deceased was last seen together with the accused, the FIR was lodged implicating the accused. It is also not believable that for some jealousness, one can implicate an innocent with such a heinous crime such as murder. The defence side failed to bring out anything to prove jealousness or any previous grudge for implicating the accused with false case. The informant himself appears to be a reported witness and he lodged ejahar after recovery of the dead body of the deceased and considering the condition of dead body he might have suspicion of rape. Hence, non-proving of charge of rape does not make the case of the prosecution weaken and doubtful.

- **43.** Learned defence counsel also argued that PW1, PW3 and PW4 are related witness and having material contradiction in their evidence they cannot be relied upon in absence of corroboration from independent witness. Here he cited the ruling reported in 2009(4) GLT 187. But, in the present case, PW 5 & PW 6 are not related witness. Both the witnesses corroborated to reaffirm that they saw the accused and the deceased together in Line No.3 as discussed above and later on the body was recovered, in the above evidence in my considered view the aforesaid ruling is not applicable in the present case.
- **44.** It is further submitted by the learned defence counsel that regarding recovery of the dead body by the accused, videography was done but, the statement of the accused was not recorded regarding leading to discovery of the said fact and not seizing the CD as well as without certificate as required under Section 65(B)(4) of Evidence act, it is not admissible. In this respect he relied the ruling reported in 2018(1) SCC(Crl) 792. In the case, admittedly, CD was not seized and after recovery of the dead body

the accused was taken to the place where he buried the body. The evidence of the PWs disclosed that the accused was present at the time of recovery of the dead body by the villagers. He knew the place where the dead body was found. The cumulative effect of the evidence of the PWs shows that there is cogent evidence that the accused was seen with the deceased going inside the garden. There is no evidence on the side of the defence to prove the plea of the accused that he did not take the deceased to the garden.

- **45.** In this case the prosecution story of alleged rape on the victim girl is not supported by the PM report as no injury was found in her private part and vaginal smear also gave negative test. But the PM report reflects that she sustained lacerated injury over cheek, near eye and abrasion over right breast and abdominal cavity was found full of blood. One eye ball was also found absent and neck was tied with a cloth. The medical officer clarified that due to the injuries of abdomen, death was caused to the deceased. She was so brutally assaulted that her eye ball was come out. Though the allegation of rape is not supported by the medical report, but the PM report reveals that due to abdominal injury she died. The deceased is a girl of only 11 years. She was so assaulted on various parts of the body including abdomen that she died instantly due to the injuries.
- **46.** The Ld. defence counsel also argued that as the PM report does not reflect the time since death of the deceased hence, it cannot be said that after 2.30 pm she died and as such the accused could not be held guilty even if he was seen with the victim. But the cogent evidence of the PWs as discussed above and the plea of the accused which he could not prove, clearly established that none other than the accused was present with the deceased. The evidence of PWs as discussed above and the fact that the accused failed to prove his plea of alibi at the place of occurrence leads to only one conclusion that he alone was responsible for death of the deceased.
- **47.** Therefore, the circumstances which obtained from the mouth of the prosecution witnesses coupled with the medical evidence as discussed

above, I find no any ambiguity in the involvement of the accused in committing the murder of the deceased. All the given circumstances coupled with last seen together create a unbreakable chain showing culpability of the accused.

- **48.** In the present case the totality of the evidence and the circumstance pressed on record undoubtedly finger towards the accused as author of the crime and the injuries of abdomen sustained by the little girl indicates that the accused intentionally caused the death of the deceased perhaps not succeeding in going to do some illegal acts.
- **49.** In the light of the discussions made above, it reveal that there are series of incriminating evidence which are consistent with the guilt of the accused and inconsistent with his innocence. The complete chain of incriminating circumstance and last seen together the deceased with the accused led to forming a reasonable link of certainty that the murder of the deceased being committed by none but the accused and as such I am of the considered view that charge u/s 302 IPC against the accused stands proved. Accordingly he is convicted for offence punishable u/s 302 IPC.
- **50.** In this case it is in the evidence of PWs that body of the deceased girl was found covered with soil in a drain and only from a toe in the midst of the soil, her body was found. This reveals that the body was buried for causing of disappearance of evidence with intend to screening himself from punishment and as such the accused Dhiren Tanti is also found guilty punishable u/s 201 IPC and convicted accordingly.
- **51.** However there is no evidence that the deceased was sexually assaulted or raped. Though the PM report suggestive of presence of abrasion over her breast but only from this it cannot be safely held that with sexual intend she was caused injury. Therefore, he cannot be held guilty for offence u/s 8 of POCSO Act. Accordingly he is acquitted from charge of section 8 of POCSO Act.
- **52.** The convict Dhiren Tanti is heard on quantum of sentence and recorded his statement u/s 235(2) Cr.P.C. Accused/convict prayed for

leniency. It is an unfortunate case of a minor child aged about 11 years having met an untimely death. Considering the entire facts and circumstances of the case and mode and manner of the crime, accused Dhiren Tanti is sentenced to undergo rigorous imprisonment for life with fine of Rs. 10,000/- i/d to undergo rigorous imprisonment for further six months for offence punishable u/s 302 IPC. Accused is also convicted u/s 201 IPC and sentenced to undergo rigorous imprisonment for 5(five) years with a fine of Rs. 5,000/- i/d to undergo further rigorous imprisonment for another three months. Both the sentences will run concurrently.

- **53.** Convict Dhiren Tanti is in hazot. Be sent him to Central jail Sonitpur, Tezpur to serve of the sentence.
- **54.** Case is recommended for compensation to the next of kin of the deceased as per provision of Section 357 A of Cr.P.C. by District Legal Services Authority, Sonitpur, Tezpur.
- **55.** Let the free copy of the judgment be furnished to the convict.
- **56**. Also send a copy of the Judgment to the District Magistrate, Sonitpur, Tezpur as per provision of section 365 Cr.P.C. and a copy to the District Legal Services Authority, Sonitpur, Tezpur.
- **57.** Given under my hand and seal of this Court on this the **11**th **day of February, 2020.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur

APPENDIX

Prosecution witnesses.

1. PW 1 : Pinky Karmakar,

2. PW 2 : Dr Mridurupam Gogoi(MO),

3. PW 3
4. PW 4
5. PW 5
6. PW 6
7. PW 7
8. PW 8
Sankar Ghatowar,
Smother of the victim,
Smti Dasen Nayak,
Sri Kundan Karmakar,
Sri Sankar Chandra Rava,
SI Aminul Islam(IO),

9. PW 9 : Dr SK Borah,

10. PW10 : Miss Juhi Gogoi(JMFC) & 11. PW11 : SI Labanya Bejbaruah(IO).

Exhibits.

Ext. 1 : Post Mortem report,

Ext. 2 : FIR,

Ext. 3 : Inquest report.

Ext. 4 : FSL report,

Ext. 5 : Sketch map,

Ext. 6 : Charge sheet,

Ext. 7 : Certified copy of Salonibari OP GD Entry

No. 11 dated 01-11-2017,

Ext. 8 : Statement of PW1 U/S 164 CrPC,

Ext. 9 : Statement of PW5 U/S 164 CrPC,

Ext.10 : Statement of PW4 U/S 164 CrPC,

Ext.11 : Statement of PW6 U/S 164 CrPC,

Ext.12 : Order of PW10 dated 06-11-2017.

(I.Barman) Special Judge, SONITPUR: TEZPUR