Bani Alam Mazid @ Dhan vs The State Of Assam on 24 February, 2025

Author: Abhay S. Oka

Bench: Abhay S. Oka

2025 INSC 260 REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1649 OF 2011

MD. BANI ALAM MAZID @ DHAN APPELLANT(S)

VERSUS

STATE OF ASSAM RESPONDENT(S)

JUDGMENT

UJJAL BHUYAN, J.

This criminal appeal by special leave is directed against the judgment and order dated 11.08.2010 passed by the Gauhati High Court at Guwahati (High Court) dismissing Criminal Appeal No. 88/2007 filed by the appellant.

2. Criminal Appeal No. 88/2007 was filed by the appellant against the judgment and order dated 20.03.2007 passed by the learned Sessions Judge, Kamrup in Sessions Case No. 16(K)/2005 whereby Date: 2025.02.24 16:42:02 IST Reason:

the appellant was convicted under Sections 366(A)/302/201/34 of the Indian Penal Code, 1860 (IPC). Appellant was sentenced to suffer rigorous imprisonment (RI) for 5 years alongwith a fine of Rs. 3,000.00 with a default stipulation for the offence under Section 366(A) IPC. For the offence under Section 201 IPC, he was sentenced to undergo RI for 5 years alongwith a fine of Rs. 3,000.00, again with a default stipulation. Appellant was also sentenced to undergo RI for life and to pay a fine of Rs. 3,000.00 with a default stipulation for the offence under Section 302 IPC.

3. Prosecution case in brief is that on 26.08.2003 at about 02:00 PM, PW-1 Amzad Ali lodged a first

information before the Hajo Police Station stating that on 22.08.2003 at about 03:30 PM, appellant alongwith Mohd. Jahangir Ali (co-accused) had kidnapped his minor daughter Marjina Begum (16 years). The first informant alleged that his daughter had taken away Rs. 60,000.00 in cash from his house. He stated that though there was a search for the girl, she could not be traced out. It was further mentioned that one Aklima Bibi, mother of the appellant Bani Alam Majid, and one Farid Ali, husband of the elder sister of the appellant, came and told the first informant that the appellant had kidnapped his daughter and had kept her at Mukalmuwa with the intention of marrying her. First informant stated that the aforesaid two persons had assured him that their marriage would be arranged and, therefore, requested him and his family members not to lodge any complaint before the police. However, as there was no trace of the missing girl for about four days, the FIR in question was lodged.

3.1. On the basis of the aforesaid first information, Hajo P.S. Case No. 131/2003 came to be registered under Sections 366(A)/34 IPC. Appellant and co-accused Jahangir Ali were arrested. In the course of investigation, the dead body of the victim girl was found. At the conclusion of the investigation chargesheet was submitted against both the accused persons under Sections 366(A)/302/201/34 IPC. The offences under Sections 366(A) and 302 IPC being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions at Kamrup, Guwahati. 3.2. Trial Court framed charge against the accused persons under the aforesaid provisions to which they pleaded not guilty and claimed to be tried. To prove its case, prosecution examined as many as 14 witnesses. Co-accused Jahangir Ali examined himself as DW-1. After the evidence was recorded, statement of the accused persons including that of the appellant were recorded under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.). At the conclusion of the trial, learned Sessions Judge convicted and sentenced the appellant as well as the co-accused as above.

4. Aggrieved by the aforesaid conviction and sentence, both the accused persons preferred separate appeals before the High Court. While appeal of the appellant was registered as Criminal Appeal No. 88/2007, the other appeal was registered as Criminal Appeal No. 82(J)(2007). High Court vide the judgment and order dated 11.08.2010 (impugned judgment) set aside the conviction of the accused persons including that of the appellant under Section 366(A) IPC but affirmed their conviction under Sections 302/201/34 IPC. Sentences imposed for commission of the aforesaid offences by the Court of Sessions were maintained. The related appeals were accordingly dismissed.

5. Mr. Ajim H. Laskar, learned counsel for the appellant submits that it is a case of circumstantial evidence. High Court while discarding the extra-judicial confessions of the appellant made before some of the witnesses on the ground that those were made in the presence of the police, however held that the other two circumstances of last seen together and leading to discovery were proved against the appellant and on such basis, convicted the appellant under Section 302 IPC. On the theory of last seen together, one of the two circumstances, learned counsel submits that though PW-2 is stated to have seen the two together, she herself deposed that there was neither any coercion by the appellant nor any force applied by him while taking away the victim in the vehicle. PW-2 neither resisted nor raised alarm. Though the victim remained untraceable thereafter for several days, she again did not raise any alarm. He submits that High Court had accepted that there was no force applied by the appellant on the victim girl and that she had gone with him on her own

volition. Because of this, conviction of the appellant by the trial court under Section 366(A) IPC was set aside. It has come on record from the evidence tendered that the deceased was last seen alive together with the appellant on 22.08.2003. Dead body was allegedly recovered on 27.08.2003 after lodging of FIR on 26.08.2003. If this be the position, no credence can be given to the theory of last seen together to come to any definitive conclusion that it was the appellant and the appellant alone who had killed the victim girl.

5.1. Learned counsel submits that appellant had no reason or motive to cause the death of the victim girl. It has come on record that appellant and the victim girl were in a romantic relationship and that the victim girl had gone with the appellant on her own volition. Even the mother and brother-in-law of the appellant were reported to have told PW-1, father of the victim girl, that the two of them would get married. Therefore, there cannot be any conceivable reason or motive for the appellant to commit murder of the victim girl.

5.2. He submits that in a case of circumstantial evidence, motive plays an important role. It is an important link to complete the chain of circumstances. In the absence of any motive, the chain of circumstances is not complete in which case guilt of the accused cannot be said to be proved beyond all reasonable doubt. In support of this contention, learned counsel for the appellant has referred to a decision of this Court in Nandu Singh Vs. State of M.P.1 5.3. Mr. Laskar, learned counsel for the appellant, also submits that there was no recovery of the cash amount of Rs. 60,000.00 allegedly taken away by the victim girl from her house as she went with the appellant. In fact, no investigation was carried 2022 SCC Online SC 1454 out by the police in this direction and consequently, no recovery of cash was made.

5.4. In so far the theory of leading to discovery is concerned, the same also does not inspire any confidence in as much as it was an extension of the extra-judicial confessions made by the appellant before some of the prosecution witnesses which were not accepted by the High Court since those were made in the police station and in front of the police while the appellant was under

> police custody. The extra-judicial confessions and the theory of leading to discovery are intrinsically connected; rather those are intertwined. If the extra-judicial confessions were discarded by the court as an inadmissible piece of evidence, by the same logic, the theory of leading to discovery cannot be accepted as a valid piece of evidence.
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> 5.5. Learned counsel thus submits that there is grave doubt about the veracity of the prosecution case. Not to speak of a complete chain of circumstances, even the two instances of circumstantial evidence i.e. theory of last seen together and leading to discovery, cannot be said to have been proved against the appellant by the prosecution witnesses beyond all reasonable doubt. As a matter of fact, the prosecution case has to fall as one of the circumstances i.e. extra-judicial confession has been disbelieved by the High Court. Therefore, the chain is not complete.

In such circumstances, conviction of the appellant becomes wholly untenable. Consequently, the appellant is entitled to the benefit of doubt and acquittal.

6. Per contra, learned counsel for the State submits that both the trial court and the High Court have correctly convicted the appellant under Sections 302/201/34 IPC. The evidence on record clearly and correctly proves the commission of offence by the appellant.

6.1. He submits that the evidence on record reveals that from the time the victim girl went with the appellant till her death, she was in the custody of the appellant. High Court had rightly observed that the prosecution cannot be asked to explain what had happened after the victim girl left with the appellant. It is for the appellant to explain the same, which the appellant failed to do. From all the circumstances put together, the only inference that can be drawn is that it is the appellant and none else who had committed the crime.

6.2. Learned counsel for the State submits that although the extra-judicial confessions of the appellant made before PWs – 5, 6, 7, 10 and 11 would be hit by the provisions of Sections 25 and 26 of the Evidence Act, 1872 ('the Evidence Act' hereinafter), nonetheless, the statement of the appellant leading to discovery of the dead body of the victim girl would be an admissible piece of evidence under Section 27 of the Evidence Act.

6.3. FIR was lodged on 26.08.2004 and the dead body was recovered the following day. Though there is a time gap between the time the two of them were last seen together and the recovery of the dead body, the same would not be fatal to the prosecution case. Merely because there is a time gap between the time when the victim and the accused were last seen alive together and recovery of the dead body, that would not establish the innocence of the appellant. The accused has a duty and obligation to prove his innocence before the court and he cannot be allowed to remain silent once the prosecution discharges the initial burden. 6.4. Learned counsel for the State finally submits that there is no error or infirmity in the conviction of the appellant and, hence, no interference is called for. Therefore, the appeal should be dismissed.

7. Submissions made by learned counsel for the parties have received the due consideration of the court.

8. Let us first examine the evidence tendered by the prosecution witnesses. Amzad Ali is PW-1. He is the father of the deceased. He identified the accused-appellant in court. In his examination-in-chief, he stated that about 2 years back his daughter Marjina was walking along the road on foot with another girl. At that time, appellant and the other accused Jahangir forcefully took his daughter away and put her in a Tata Sumo vehicle. The incident happened around 03:30 PM. When he returned home, he came to know that the two accused persons had kidnapped his daughter. Though he searched for her, he was unsuccessful. 2/3 days after the incident, PW-1 met the other accused Jahangir. On being asked, Jahangir told PW-1 that his daughter was in Mukalmuwa and that he need not worry about her. At that time, Farid (husband of elder sister of the appellant) was present. Farid told PW-1 not to worry; he would bring the girl and arrange her marriage with the appellant. PW-1 further deposed that his daughter had taken away Rs. 60,000.00 in cash from his house. He

stated that he lodged the first information before the police since his daughter was missing. Jahangir (accused No. 2) told PW-1 that they had killed his daughter and thrown her body away at Pandu. According to PW-1, when he alongwith the police went there, they found his daughter's body lying on the railway track at Pandu. He saw injuries on her head. Delay in lodging the first information was attributed to remaining busy searching for his daughter.

8.1. On behalf of both the accused persons, PW-1 was cross- examined. In his cross-examination, he stated that the dead body was recovered on the day following lodging of first information. He saw the dead body of his daughter at Pandu around 5 PM in the evening. Junu Begum was the name of his daughter's friend; they were classmates reading in the same school. He disclosed that the first information was written by Samsul (PW-6). 8.2. PW-1 further stated that his daughter Marjina had a love affair with the appellant since last 5 years. At the time of the occurrence, the daughter was about 16 years of age. He came to know about the incident from Junu Begum. He denied the suggestion that the two accused persons did not kidnap his daughter and that they did not kill her, further denying the suggestion that Junu Begum did not tell him that the accused persons had kidnapped his daughter.

8.3. While PW-1 admitted that the first information was written by Samsul (PW-6), he forgot whether PW-6 had read over the first information to him after writing the same. He further stated that he did not remember what was written in the first information.

9. PW-2 is Junu Begum. In her examination-in-chief, she stated that deceased Marjina @ Kali was her friend. They studied together. She further stated that she knew the appellant and identified him in the court. At about 3'o clock in the afternoon two years back, she and Marjina were walking along the road to the house of her elder sister Nabira. At that time, the two accused persons came in a Tata Sumo vehicle and forcefully took Marjina away. PW-2 deposed that before the incident, Marjina had told her that she loved the appellant. She further deposed that she came to know 4 days after the occurrence that the two accused persons had killed Marjina and left her body alone. Later, she saw Marjina's dead body in the house of PW-1.

9.1. PW-2 was cross-examined on behalf of both the accused persons. In her cross-examination, PW-2 stated that appellant had come first and had got Marjina into the car. The other accused person Jahangir was sitting in the vehicle. There were a few passengers also in the vehicle. She stated in her cross-examination that she did not raise any hue and cry but she informed the husband of appellant's elder sister Farid about the incident. PW-2 was categorical in stating that Marjina had left on her own accord. 9.2. PW-2 further stated in her cross-examination that when the Tata Sumo vehicle stopped, Marjina got into the said vehicle. Marjina did not carry any bag. She stated that she did not notice who were there in the vehicle.

10. PW-3 is Minuwara Begum. From her testimony, it is not discernible as to her relationship with the deceased or how she was presented as a witness by the prosecution. In her examination-in-chief, she stated that she knew the accused as well as the deceased. She identified the two accused persons in the court. She further stated that appellant had a love affair with the deceased. However, deceased had told her that if she did not go with him, she would be dead. Deceased had further told

PW-3 that appellant wanted to take her to Andhra Pradesh for which she had to manage some money. Father of the deceased had collected an amount of Rs. 60,000.00 by selling his land. On the date of occurrence, Marjina took away the money with her. PW-3 stated that she had seen the appellant going behind Marjina to the vehicle. Appellant's mother Aklima and his brother-in-law Farid had informed family members of Marjina that they would arrange the marriage of the appellant with Marjina and, therefore, they should not search for her. Later on, she came to know that appellant had killed Marjina.

10.1. In her cross-examination, PW-3 stated that she did not see any money in the hands of Marjina. According to her, appellant had pulled Marjina towards the vehicle though she did not hear Marjina raise any hue and cry. She however admitted that she did not inform anyone about the occurrence immediately. A meeting of villagers called 'mel' was held at night in the residence of Marjina. As PW-3 was invited, she had gone there. Influential persons of the village attended the said meeting.

11. Mother of the deceased Bulbuli Begum is PW-4. She identified the two accused persons in the court. She stated that about two years back, her daughter Marjina had gone missing from home. PW-2 had informed her that the appellant had taken Marjina away. Though they searched for their daughter, she could not be traced out. Appellant's mother Aklima and brother-in-law Farid came to their house and told them that they should not search for their daughter and that they would arrange the marriage of their daughter Marjina with the appellant. She stated that accused Jahangir told her that appellant had killed his daughter Marjina. Later on, Marjina's dead body was recovered from Pandu. PW-4 stated that she saw injuries all over the dead body. Marjina was about 16 years of age at the time of occurrence. Marjina had taken away Rs. 60,000.00 in cash which PW-4 stated that she had kept it for purchasing some land. She acknowledged that before the occurrence, appellant and Marjina were in love. 11.1. In her cross-examination, PW-4 stated that on the day of occurrence, Marjina left home after her meal to go to the residence of her elder sister Alima. A good number of village people were present at the time when mother and brother-in-law of the appellant gave the proposal of marriage. She denied the suggestion that PW-2 had not informed them about the occurrence and that Jahangir (accused No. 2) had not come and informed them of appellant killing Marjina. She further denied the suggestion that the two accused persons had not kidnapped his daughter and had not killed her.

12. PW-5 is Anwar Hussain. In his cross-examination, PW- 5 stated that he knew the deceased Marjina Begum. He also knew the two accused persons whom he identified in court. In his evidence in chief, PW-5 stated that on 27.08.2003, police took the two accused persons to Hajo Police Station under arrest. According to PW-5, he alongwith some 40 persons from the village went to the police station. Appellant confessed before them that he had hit Marjina with a stone as a result of which she became senseless. After that, he had killed her by strangulating her with his vest. PW- 5 stated that later on they found the dead body of Marjina near the railway track. He also stated that appellant had concealed the body in a 'pitoni' which is a marshy place but PW-5 contradicted himself by saying that he saw the corpse in the police station. However, he added that appellant loved Marjina and took her away on the day of occurrence.

12.1. In his cross-examination, PW-5 stated that in the police station, he and the other villagers saw the two accused persons being taken out from the lockup. Police first interrogated Jahangir and thereafter the appellant. He admitted that he had not seen the appellant taking away Marjina. PW-5 denied the suggestion that appellant did not tell them that he had killed Marjina. However, he added that police had not interrogated him.

13. PW-6 is Samsul Haque, the scribe. In his evidence-in- chief, he stated that he knew Amzad Ali (PW-1). As per version of PW-1, he wrote the 'ejahar' (first information), Ex.-1. He stated that he had read over the first information to PW-1 and obtained his thumb impression. Police took him alongwith the accused Jahangir and members of the public and recovered the dead body near the Pandu railway line. At that time, appellant was in jail. Police had seized a blood-stained vest which is Ex.-3. Accused Jahangir had confessed before the police and PW-6 that he had killed Marjina Begum. However, he contradicted himself by saying that appellant took the vest of Jahangir and killed Marjina by hanging her with the vest.

13.1. In his cross-examination, he stated that he was taken to Pandu in a police vehicle where the dead body was recovered. He was there alongwith the officer-in-charge of the police station and 4/5 policemen. There was no magistrate. He had put his signature on the seizure list in the police station. He admitted in cross-examination that he did not tell the police that Jahangir had given his vest by taking it off.

14. PW-7 is Jahidur Rahman. In his examination in chief, he stated that on hearing the news of Marjina's death, he went to the thana (police station). There he saw her dead body. He also saw the two accused persons in the thana. The two accused persons told before the police that they had killed Marjina by pressing her neck and thereafter had thrown her body near the railway line. He had heard that the two accused had kidnapped Marjina 2/3 days before the occurrence.

14.1. In his cross-examination, PW-7 stated that he had not seen the incident himself. At the time of interrogation of the accused, he was present alongwith Anowar Hussain and Samsur Ali.

15. PW-8 Mainul Haque stated in his examination in chief that on 27.08.2003, he had gone to the thana where he saw the dead body of Marjina. He also saw the two accused persons in the thana. When the police interrogated the two accused persons, they stated that they had taken the girl to Coochbehar from where they returned and had been going along the railway line. They had injured Marjina by hitting her with stones after which they strangulated her with a vest.

15.1. However, in his cross-examination, he stated that he did not know with whom Marjina had eloped. He had gone to the police station on his own accord. In the police station, he saw the two accused persons in the room of the officer-in-charge. There were about 30 to 40 people present in the police station and all of them were in the room of the officer-in-charge.

16. PW-9 Dr. Amarjyoti Patowary had conducted the postmortem examination of the deceased. As per the postmortem notes, there were as many as 13 injuries on the face, neck, chest, waist, right forearm and on the left and right legs. He opined that death was due to asphyxia as a result of

manual strangulation. All the injuries found on the body of the deceased were ante-mortem, caused by blunt weapon and homicidal in nature. He also opined that evidence of recent sexual intercourse was not detected. The deceased was not pregnant. He had carried out the postmortem examination on 27.08.2003 and opined that approximate time of death was 24 to 36 hours prior to such examination.

17. PW-10 is Abdul Hamid. In his deposition, he stated that he had heard that accused Bani Alam (appellant) had abducted Marjina Begum who did not return home. He heard after 4 days that dead body of Marjina Begum was found lying in a marshy land near the railway track at Jalukbari. He stated that he had gone to the thana the next day. In the thana, he found both the accused persons. Accused Bani Alam (appellant) told PW-10 and others in the thana that after abducting Marjina, he had pressed her neck. When he found that she was still alive, he hit her with stones causing her death. Thereafter, he had thrown her body in a marshy land near the railway track. According to him, accused Jahangir told them that both the accused persons had strangulated Marjina with the vest of Bani Alam (appellant).

17.1. In his cross-examination, PW-10 stated that policemen were present when the two accused persons narrated the incident. He had gone to the thana in a police vehicle like many others on being called by the police. Police did not record his statement.

18. Jamser Ali, who is the brother of deceased Marjina, is PW-11. He stated that he was called to the thana by the police. He went to the thana alongwith other villagers. In the thana, he saw both the accused persons. Accused Bani Alam Mazid (appellant) told them that he had abducted Marjina and had squeezed her throat with a vest. He also hit her with stones. After that he had concealed the dead body in a ‘pitoni’ (marshy land) near Pandu. 18.1. In his cross-examination, PW-11 stated that the two accused persons were handcuffed in the police station. Police were present when the two accused persons made their confessions.

19. The investigating officer deposed as PW-13. In his examination in chief, he stated that in the course of investigation, the two accused persons confessed before him that they had killed Marjina and had kept her dead body near the Pandu railway track under Jalukbari police station. They led the police accompanied by the circle officer to the place where the dead body was kept concealed. The circle officer had conducted inquest over the dead body. He stated that he had seized a half ganjee (vest) with blood stains, marked as Ex.-3.

19.1. In his cross-examination, PW-13 stated that he had arrested the two accused persons on 26.08.2003. He did not make any prayer before the concerned Chief Judicial Magistrate to get the confessional statements of the accused recorded. He further admitted that the blood stained ganjee (vest) was not sent to the Forensic Science Laboratory (FSL) for examination.

20. PW-14 is the circle officer Kamal Kumar Baishya. He stated that on 26.08.2003, he had received the requisition from the officer-in-charge of Hajo police station to hold inquest over the dead body of Marjina Begum. He had carried out the inquest in the presence of witnesses.

21. Though the appellant was confronted with the incriminating evidence against him for recording of his examination under Section 313 Cr.P.C., he stated in response that though he knew the deceased, he denied all the allegations made against him vis-à-vis, abduction and murder of Marjina Begum.

22. Before we appreciate the evidence, it will be apposite to briefly advert to the law relating to circumstantial evidence as this is a case where conviction is based on circumstantial evidence. In a recent decision of this Court in Ramu Appa Mahapatar Vs. State of Maharashtra2, this Court dealt with the limitations of an extra- judicial confession which is one of the instances of circumstantial evidence. In that context, this Court following the consistent line of judicial precedents held that circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principle fact can be legally inferred or presumed. The chain must be complete and each fact forming part of the chain must be proved. Where a case rests on circumstantial evidence, 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. This Court held as under:

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> 16. .....As we know, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

The chain must be complete and each fact forming part of the chain must be proved. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, 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 would not only have to be proved beyond reasonable doubt, those would also have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. All these circumstances should be complete and there should be no gap left in the chain of evidence. The proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. The circumstances taken cumulatively must be 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. While there is no doubt that conviction can be based solely on circumstantial evidence but great care must be taken in evaluating circumstantial evidence. If the evidence relied upon is reasonably capable of two inferences, the one in favour of the accused must be accepted.

23. In so far the present case is concerned, prosecution relied on three circumstances to prove the guilt of the appellant. These were: appellant and the victim were last seen together; extra- judicial confession made by the appellant before PW Nos. 5, 6, 7, 8, 10 and 11; and the fact of recovery of the dead body following the confessional statements of the appellant made to PW Nos. 5, 6, 7, 8, 10 and

11. High Court discarded the circumstance of extra- judicial confessions made by the appellant before PW Nos. 5, 6, 7, 8, 10 and 11 on the ground that those confessions were made in the presence of the police and thus would be hit by the provisions of Section 25 of the Evidence Act. Thus, High Court had disbelieved one of the three circumstances put forth by the prosecution as part of the chain of circumstantial evidence to prove the guilt of the appellant. If this be the position, then it could not be said that the chain of circumstantial evidence was complete and that no other inference except the guilt of the accused was possible therefrom. As the chain got broken, appellant was entitled to the benefit of doubt as it could not be said that the circumstances put together established the guilt of the accused (appellant) beyond all reasonable doubt.

24. However, the High Court convicted the appellant on the strength of the remaining two pieces of circumstantial evidence holding that those two complete the chain wherefrom no other inference except the guilt of the appellant was possible.

25. In our view, the High Court clearly fell in error in coming to such a conclusion. When one of the three circumstances was disbelieved and discarded by the High Court, then the chain of circumstantial evidence could not have been held to be complete and proved and on that basis to hold the accused guilty of the offence. Each and every circumstance forming the chain of circumstantial evidence has to be proved.

26. Since the High Court convicted the appellant on the strength of the aforesaid two circumstances, let us deal with the same. Firstly, let us consider the circumstance of last seen together. PW-2 is the only witness who stated in her evidence that appellant had forcefully taken Marjina away in a Tata Sumo when both of them were walking along the road. However, she stated that Marjina had told her that she loved the appellant. In her cross- examination, she categorically stated that Marjina had gone with the appellant on her own accord and, therefore, she did not raise any hue and cry. In fact, she stated that Marjina had got into the Tata Sumo vehicle when the same stopped near them and that she did not carry any bag. PW-3 (Minuwara Begum) stated that she had seen the appellant going behind Marjina to the vehicle though she did not see any money in the hands of Marjina. She did not hear Marjina raising any hue and cry. However, from her evidence, it is not discernible as to her relationship with the deceased or the appellant. It has also not come on record as to how she saw Marjina going away with the appellant; as to whether she was commuting along the road at that point of time; and whether she had seen Marjina in the company of PW-2.

27. It has further come on record that mother and brother- in-law of the appellant had come to the residence of PW-1 and assured him that his daughter was safe with the appellant and that they would arrange for their marriage. For four days, PW-1 did not lodge any complaint or first information though his daughter had gone missing. It was only on 26.08.2003 afternoon that the FIR was lodged and thereafter the dead body was recovered on the following day.

28. None of the witnesses stated that they had seen Marjina with cash or carrying any bag. Police also did not investigate this angle and there was no recovery of cash.

29. First and foremost, there are glaring discrepancies in the evidence of PWs 2 and 3 who allegedly had seen the deceased last alive in the company of the appellant on 22.08.2003. Dead body was recovered 5 days thereafter on 27.08.2003 that too after lodging of FIR on 26.08.2003.

30. In State of Goa Vs. Sanjay Thakran3, this Court held that 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. However, in all cases, it cannot be said that the evidence of last seen together has to be rejected merely because there is a time gap between the accused and the deceased last seen together and the crime coming (2007) 3 SCC 755 to light is after a considerable long duration. If the prosecution is able to lead evidence that likelihood of any person other than the accused being the author of the crime becomes impossible then the evidence of the circumstance of last seen together although there is a long duration of time in between can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. This Court held as follows:

> 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.

31. This Court in Kanhaiya Lal Vs. State of Rajasthan4 held that the circumstance of last seen together does not by itself lead to the inference that it was the accused who had committed the (2014) 4 SCC 715 crime. There must be something more to establish the nexus between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to proof of guilt against the accused. This Court held thus:

> 15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan5.

32. Anjan Kumar Sarma Vs. State of Assam6 is a case where this Court held 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 (2010) 15 SCC 588 (2017) 14 SCC 359 circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

33. Applying the legal principles culled out from the above decisions to the evidence of PW-2 and PW-3, it is clear that there was considerable time gap between the time the appellant and the deceased were last seen together alive and recovery of the dead body. Therefore, it cannot be said with any degree of certainty that it was the appellant and the appellant alone who had committed the offence.

34. This brings us to next circumstance of leading to discovery.

35. Section 27 of the Evidence Act deals with such information received from the accused which may be proved. Section 27 of the Evidence Act is couched in the language of a proviso and immediately follows Section 26. It is, therefore, necessary that the two sections are discussed conjointly. While Section 26 deals with confession made by an accused while in custody of police, Section 27 as noted above deals with such information received from the accused which may be proved. Section 26 of the Evidence Act, without the Explanation which is not relevant, is as follows:

> 26. Confession by accused while in custody of police not to be proved against him. – No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

35.1. What Section 26 of the Evidence Act says is that no confession made by any person while he is in the custody of a police officer shall be proved as against such person unless it is made in the immediate presence of the Magistrate. This is an exception to the absolute bar of Section 25 which declares that no confession made to a police officer shall be proved as against a person accused of any offence. Section 27 on the other hand is a qualification of Section 26 and reads as under:

27. How much of information received from accused may be proved. – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

35.2. Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

36. The contours of Section 27 was examined by the Privy Council in the case of Pulukuri Kottaya Vs. King-Emperor7, whereafter it was observed that the discovery of fact contemplated under Section 27 of the Evidence Act arises by reason of the fact that information given by the accused exhibited his knowledge or mental awareness as to its existence at a particular place. Relevant portion of the aforesaid decision is extracted hereunder:

S. 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody AIR 1947 PC 67 produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

37. This Court in Vasanta Sampat Dupare Vs. State of Maharashtra8 referred to the observations made by the Privy Council in Pulukuri Kottaya (supra) and culled out the following principles:

> 23. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in Pulukuri Kotayya v. King Emperor has held thus:
>
> ... it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been (2015) 1 SCC 253 used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

38. In the case of Asar Mohammad Vs. State of Uttar Pradesh9, this Court referred to the word 'fact' appearing in Section 27 of the Evidence Act and held that such a fact need not be self- probatory. The word 'fact' contemplated in Section 27 of the Evidence Act is not limited to 'actual physical material object.' Discovery of fact arises by reason that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place which includes discovery of the object, the place from which it is discovered and the knowledge of the accused as to its existence.

39. Applying the law relating to Section 27 of the Evidence Act as can be culled out from the aforesaid decisions, we find that the circumstance of leading to discovery is intrinsically connected with the circumstance of extra-judicial confessions made by the appellant and the other co-accused before PW-5, PW-6, PW-7, PW- (2019) 12 SCC 253 8, PW-10 and PW-11. We have already noted that the High Court had rejected the circumstance of extra-judicial confessions as being in-admissible evidence. It was in the course of such extra- judicial confessions that the said prosecution witnesses mentioned about the information given by the accused persons leading to discovery of the dead body. According to PW-5, he along with some forty villagers had gone to the police station where after the appellant allegedly confessed his guilt and told PW-5 and others that he had concealed the dead body in a marshy place. But in his substantive evidence, PW-5 contradicted himself by saying that he saw the corpse in the police station. PW-6, the scribe, stated in his evidence that police took him along with the other accused Jahangir and members of the public and recovered the dead body near the railway track at Pandu. He stated that at that time appellant was in jail. So according to the version of PW-6, appellant was not taken by the police to the place from where the dead body was recovered. Though he stated that co-accused Jahangir had confessed before him and the police that it was he who had killed Marjina Begum, he contradicted himself by saying that it was the appellant who had taken the vest from Jahangir and had killed Marjina by hanging her with the vest. In his cross-examination PW-6 admitted that there was no magistrate at the time when the dead body was recovered. There is an improvement in the version of PW-6 in the sense that PW-6 admitted in his

cross-examination that he had not told the police that Jahangir has given his vest to the appellant.

40. The inconsistencies of the prosecution witnesses on the circumstance of leading to discovery continued. PW-7 in his evidence in chief stated that he saw the dead body of Marjina in the police station. Therefore, he was not a witness to the fact of recovery of the dead body. According to him, the two accused persons had told him before the police that they had killed Marjina by pressing her neck and thereafter had thrown her body near the railway line. This statement is clearly at variance with what the scribe PW-6 had stated. Similarly, PW-8 stated that when he had gone to the police station on 27.08.2003, he saw the dead body of Marjina there. The two accused persons told the police before them that they had taken Marjina to Coochbehar from where they returned. As they were going along the railway line, they injured Marjina by hitting her with stones after which they strangulated her with the vest. This statement of PW-8 again is wholly inconsistent with the versions of PW-6 and PW-7. In his cross- examination PW-8 stated that he saw about thirty to forty people present in the police station when the accused persons were making their statement.

41. Such inconsistencies were further magnified when PW-10 deposed that appellant told him and others in the police station that after abducting Marjina he had pressed her neck. When he found that she was still alive he hit her with stones causing her death. Thereafter he had thrown her dead body in a marshy land near the railway track. According to him, accused Jahangir had told that both the accused persons had strangulated Marjina with the vest of the appellant. However, in his cross-examination, he mentioned that police did not record his statement under Section 161 of the CrPC though he had gone to the police station in a police vehicle on being called by the police like the other villagers. So the evidence of PW-10 is of no consequence. Similarly, PW-11, brother of the deceased, stated that he was in the police station along with the other villagers when appellant told them that he had abducted Marjina, whereafter he had squeezed her throat with the vest. He also hit her with stones. After that, he had concealed the dead body in a marshy land near Pandu.

42. From the above, it is clear that except PW-6 none of the aforesaid witnesses have stated that they were present at the place from where the dead body was recovered by the police on being shown by the accused persons. They had only seen the dead body in the police station. But even the version of PW-6 is difficult to accept inasmuch as according to him it was the other accused Jahangir who led him and members of the public along with the police to a place near the Pandu railway track from where the dead body was recovered, the appellant being in jail at that time. Such statements of PW-6 have to be taken with a pinch of salt as he tied himself up in knots by stating that it was Jahangir who had confessed to killing Marjina.

43. PW-13, the investigating officer, however, stated that the two accused persons after confessing before him that they had killed Marjina led the police to the place where the dead body was kept concealed near the Pandu railway track.

44. After analysing the evidence on record, it is difficult to accept the prosecution case that the dead body of Marjina was recovered from the concealed place near the Pandu railway track at the instance of the appellant. Therefore, Section 27 of the Evidence Act cannot come to the aid of the prosecution.

45. PW-13, the investigating officer, stated that though he had seized the vest with blood stains, he did not send the same to the FSL for examination. Therefore, there is no evidence on record to show that firstly the blood stains on the vest are human blood and secondly those matches the blood of the deceased. In his cross-examination, PW-13 also stated that he did not make any prayer before the concerned Chief Judicial Magistrate to get the confessional statements of the accused recorded.

46. Viewed in the above context, the circumstance of leading to discovery cannot be said to have been proved beyond all reasonable doubt as against the appellant. If that be the position, not only the chain of circumstantial evidence is not complete, all the circumstances put forth by the prosecution to prove the guilt of the appellant cannot be accepted as having been proved as valid pieces of evidence. Therefore, the appellant deserves to be given the benefit of doubt and is entitled to an acquittal on this count.

47. There is one glaring lacuna in the prosecution case which we would like to highlight. It has come on record from the evidence of PW-1 (father of the deceased) and PW-4 (mother of the deceased) that appellant's mother Aklima and brother-in-law Farid had told them that they need not worry about their daughter and that they would arrange the marriage of their daughter with the appellant. In fact according to PW-1, Farid had told him that he would bring the girl and arrange her marriage with the appellant but these two persons were not examined by the police and presented as witness before the court. If indeed the version of PW- 1 and PW-4 are to be believed, both the mother and brother-in-law of the appellant knew the whereabouts of the deceased girl. Therefore, they were material witnesses. Non-examination of such material witness has definitely dented the prosecution case.

48. Before parting with the record, we are tempted to deal with one more aspect since it was argued by learned counsel for the appellant. It has come on record that the appellant and the deceased were in love. Mother of the appellant along with his brother-in-law had told PW-1, father of the deceased, that they would arrange the marriage of the two. Therefore there could not have been any motive for the appellant to cause the death of Marjina. Postmortem report has also ruled out recent sexual activity of the deceased. This coupled with the fact that there is no recovery of cash allegedly taken away by the deceased from her residence makes the prosecution narrative all the more suspect.

49. In Anwar Ali Vs. State of Himachal Pradesh10, this Court after referring to the previous decisions observed that in a case where direct evidence of eye witness is available, motive loses its importance. But absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused.

50. Relying on the decision in Anwar Ali (supra), this Court in Shivaji Chintappa Patil Vs. State of Maharashtra11 observed that in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances.

51. This Court in Nandu Singh (supra) summed up the legal position that in a case based on circumstantial evidence, motive assumes great significance. It is not as if motive alone becomes the crucial link in the case to be established by the prosecution and that in its absence, the case of the

prosecution has to be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

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52. Thus, having regard to the discussions made above, we are of the view that none of the circumstances put forth by the prosecution to prove the guilt of the appellant can be said to have been proved, not to speak of proving the complete chain of circumstances, to dispel any hypothesis of innocence of the appellant. When the prosecution failed to prove each of the circumstances against the appellant, the courts below were not justified in convicting the appellant.

53. Accordingly, the criminal appeal is allowed. Consequently, the judgment and order of the High Court dated 11.08.2010 as well as that of the Sessions Court dated 20.03.2007 are hereby set aside. Appellant is acquitted of the charges levelled against him and is set at liberty forthwith unless his custody is required in connection with any other crime.

.....J. [ABHAY S. OKA] .....J. [UJJAL BHUYAN] NEW DELHI;

FEBRUARY 24, 2025.