

GAHC010017832022



2024:GAU-AS:8382-DB

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

**CRIMINAL APPEAL [J] NO. 26/2022**

Bapan Dutta

*.....Appellant*

**-VERSUS-**

The State of Assam

*.....Respondent*

**CRIMINAL APPEAL [J] NO. 29/2022**

Biren Das @ Bira

*.....Appellant*

**-VERSUS-**

The State of Assam

*.....Respondent*

**Advocates :**

|                                     |   |  |
|-------------------------------------|---|--|
| Appellant in Crl. A.[J] No. 26/2022 | : | Mr. P. Mahanta, Amicus Curiae  |
| Appellant in Crl. A.[J] No. 29/2022 | : | Mr. A. Tiwari, Amicus Curiae   |
| Respondent                          | : | Ms. B. Bhuyan, Senior Counsel &<br>Additional Public Prosecutor, Assam |
|                                     |   | Ms. R. Das, Advocate   |
| Date of Hearings                    | : | 12.08.2024 & 13.08.2024  |
| Date of Judgment & Order            | : | 13.08.2024   |

**BEFORE**  
**HON'BLE MR. JUSTICE MANISH CHOUDHURY**  
**HON'BLE MR. JUSTICE KAUSHIK GOSWAMI**

**JUDGMENT & ORDER**

[*M. Choudhury, J.*]

Both these criminal appeals from Jail under Section 383, Code of Criminal Procedure, 1973 ['CrPC' and/or 'Code'] have arisen out of a common Judgment and Order dated 30.11.2021 passed by the Court of learned Sessions Judge, Udaguri in Sessions Case no. 41 of 2017. The criminal appeal, Crl. A.[J] no. 29 of 2022 is preferred by the accused-appellant, Biren Das @ Bira [hereinafter referred to as 'A-1', for easy reference]. The other criminal appeal, Crl. A.[J] no. 26 of 2022 is preferred by the accused-appellant, Bapan Dutta [hereinafter referred to as 'A-2', for easy reference].

2. In the trial of Sessions Case no. 41 of 2017, these two accused-appellants, Biren Das @ Bira [A-1] and Bapan Dutta [A-2] faced a charge of murder in view of the alleged homicidal death of one Gauranga Das, along with another accused person, Umesh Deka [hereinafter referred to as 'A-3', for easy reference], and also a charge for the offence under Section 201, Indian Penal Code [IPC], allegedly committed in furtherance of their common intention. By the common Judgment and Order of conviction and sentence dated 30.11.2021, both the accused-appellants have been convicted for the offence under Section 302, Indian Penal Code [IPC] in aid of Section 34, IPC and also for the offence under Section 201, IPC in aid of Section 34, IPC holding that in furtherance of their common intention, they committed the murder of Gauranga Das [hereinafter referred to as 'the deceased', for easy reference] and thereafter, concealed the deadbody. For the offence under Section 302, IPC read with Section 34, IPC, the accused-appellants have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each, in default of payment of fine, to undergo simple imprisonment for another six months each. For the offence under Section 201, IPC read with Section 34, IPC, each of the accused-appellants has been sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- and in default of payment of fine, to undergo

simple imprisonment for another one month. It has been ordered that both the sentences are to run concurrently.

3. As it has been mentioned, the trial of Sessions Case no. 41 of 2017 was regarding homicidal death of Gauranga Das. The case, Sessions Case no. 41 of 2017 arose out of Panery Police Station Case no. 75 of 2016 and corresponding G.R. Case no. 1180 of 2016.
4. The crime case, Panery Police Station Case no. 75 of 2016 came to be registered pursuant to lodgment of a First Information Report [FIR] by one Ajay Deka as the informant before the Officer In-Charge, Panery Police Station on 20.11.2016. The informant is a resident of Ward no. 4, Police Station – Tangla. In the FIR, the informant inter alia mentioned that he was executing a contract-work of construction of a water tank under the aegis of the Public Health Engineering [PHE] Department at Munchibasti, Village – Uttar Kalikhola under Panery Police Station for the last two months and one Gauranga Das was engaged by him as a head mason for his said contract-work. The informant further mentioned that some labours were also engaged under the head mason, Gauranga Das. When the said contract-work was undergoing, one person named Umesh Deka [A-3], who worked with the head mason, Gauranga Das came to the house of the informant at Tangla at around 04-30 p.m. on that day and informed the informant that two fellow workers of the head mason, Gauranga Das viz. Biren Das @ Bira [A-1] and Bapan Dutta [A-2] after killing Gauranga Das, dumped the deadbody of Gauranga Das in a septic tank. The informant further stated that the murder of Gauranga Das was committed some 14/15 days earlier. By lodging the FIR, the informant requested to carry out an investigation into the matter.
5. On receipt of the FIR, the Officer In-Charge, Panery Police Station registered the same as Panery Police Station Case no. 75 of 2016 on 20.11.2016 for the offences under Sections 302/201/34, IPC. The Officer In-Charge, Panery Police Station assigned the case to one Prabin Chandra Deka, a Sub-Inspector of Police attached to Panery Police Station to investigate into the case. On being assigned with the investigation, the I.O., Prabin Chandra Deka [P.W.15] carried out the investigation and thereafter, submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 05 of 2017 on 23.03.2017 finding in prima facie case well established for

the offences under Sections 302/201/34, IPC against the three accused persons viz. [i] Biren Das @ Bira [A-1]; [ii] Bapan Dutta [A-2] and [iii] Umesh Deka [A-3].

6. On submission of the Charge-Sheet, the Court of Chief Judicial Magistrate, Udaguri issued summons to the charge-sheeted accused person, Umesh Deka [A-3] for his appearance before it as he was allowed to go on bail, in the meantime. On 08.06.2017, the accused person, Umesh Deka [A-3] appeared before the said Court of learned Chief Judicial Magistrate, Udaguri with a petition to allow him to remain on previous bail. On the same day, the court also secured the appearance of the other two charge-sheeted accused persons, Biren Das @ Bira [A-1] and Bapan Dutta [A-2] from judicial custody. Upon appearance of all the three accused persons, the Court of learned Chief Judicial Magistrate furnished copies to all of them in compliance of the procedure laid down in Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Udaguri by an Order of Commitment dated 08.06.2017 committed the case records of G.R. Case no. 1180 of 2016 to the Court of Sessions, Udaguri for trial. The accused person, Umesh Deka [A-3] was allowed to remain on previous bail on the basis of an application filed by him seeking such relief. The custody of the other two accused persons, Biren Das @ Bira [A-1] and Bapan Dutta [A-2] was converted into committal custody. The learned Public Prosecutor was notified accordingly and the case was posted on 15.06.2017 next for appearance of the accused persons before the Court of Sessions, Udaguri.
7. On receipt of the case records of G.R. Case no. 1180 of 2016, the Court of Sessions, Udaguri ['the trial court', for short] registered the same as Sessions Case no. 41 of 2017. After hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials available in the case record, the learned trial court, on 28.06.2017, framed the following charges against all the three accused persons :-

Firstly, that you prior to 14/15 days of 20.11.2016 at Uttar Kalikhola Munchibasti under Panery Police Station, in furtherance of common intention, committed murder intentionally causing the death of Gauranga Das and thereby, committed an offence punishable under Section 302/34 of the Indian Penal Code [IPC] and within my cognizance.

Secondly, that you on the same day, time and place, caused disappearance of the evidence of the commission of said murder in furtherance of common intention and thereby committed an offence punishable under Section 201/34, IPC and within my cognizance.

8. When the charges were read over and explained to the accused persons, the accused persons pleaded not guilty and claimed to be tried. Accordingly, the trial court proceeded with the trial. During the course of the trial, the prosecution side examined sixteen nos. of prosecution witnesses and they were : [i] P.W.1 : Ajay Deka; [ii] P.W.2 – Omar Ali; [iii] P.W.3 : Tazar Ali Ahmed; [iv] P.W.4 : Abul Bhuyan; [v] P.W.5 : Radheshyam Dutta; [vi] P.W.6 : Dr. Arindam Bora; [vii] P.W.7 : Saheb Khan; [viii] P.W.8 : Khabiruddin Ali; [ix] P.W.9 : Sadek Ali; [x] P.W.10 : Kasem Ali; [xi] P.W.11 : Salim Ali; [xii] P.W.12 : Phul Kumari Das; [xiii] P.W.13 : Madan Das; [xiv] P.W.14 – Sudhan Das; [xv] P.W.15 : Prabin Chandra Deka; and [xvi] Dr. N.C. Bhuyan. In addition, the prosecution side claimed to have brought on record eleven nos. of documents viz. [i] Ext.-1 – FIR; [ii] Ext.-2 – Seizure List; [iii] Ext.-3 – Inquest Report; [iv] Ext.-4 – Post-Mortem Examination [PME] Report; [v] Ext.-5 – Sketch Map of the P.O.; [vi] Ext.-6 – the Statement of the accused, Biren Das @ Bira [A-1] recorded under Section 161, CrPC; [vii] Ext.-7 – Note as to recovery of the deadbody; [viii] Ext.-8 – Charge-Sheet; [ix] Ext.-9 – Order dated 23.11.2016; [x] Ext.-10 – Order dated 25.11.2016; and [xi] Ext.-11 – the statement of the accused, Bapan Dutta [A-2] recorded under Section 164, CrPC.
9. During pendency of the trial, the accused person, Umesh Deka [A-3] expired and as a result, the case abated against him. Consequently, the trial continued against the other two accused persons, Biren Das @ Bira [A-1] and Bapan Dutta [A-2]. After closure of the evidence from the prosecution side, the two accused persons were examined under Section 313, CrPC and they were provided with the opportunities to explain the incriminating circumstances appearing against them in the evidence led by the prosecution. The plea of both the accused persons was denial. When they were asked as to whether they would adduce any evidence in their support, the accused persons had, however, declined to adduce any evidence in their support. Thereafter, the learned trial court proceeded to hear submissions of the learning counsel for the parties. After hearing the learned counsel for the parties and

evaluation of the evidence/materials on record, the learned trial court delivered the Judgment and Order, impugned herein.

10. We have heard Mr. A. Tiwari, learned Amicus Curiae for the accused-appellant, Biren Deka @ Bira [A-1]; Mr. P. Mahanta, learned Amicus Curiae for the accused-appellant, Bapan Dutta [A-2]; and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the respondent State assisted by Ms. R. Das, learned counsel.
11. Mr. Tiwari, learned Amicus Curiae appearing for the accused-appellant, Biren Deka @ Bira [A-1], who has also submitted a synopsis of written argument, has contended that there was no eye-witness to the occurrence and there was no evidence to the effect that the accused, Biren Deka @ Bira [A-1] had any previous enmity with the deceased. He has referred to the testimony of the prosecution witness, P.W.12 who was the wife of the deceased to press such point. He has contended that from the materials on record, it has been established that the discovery of the deadbody of the deceased was made at around 10-30 a.m. on 21.11.2016, whereas Biren Deka @ Bira [A-1] was arrested only at around 06-00 p.m. on 21.11.2016. The prosecution cannot base its case on the fact of discovery of the deadbody and cannot take shelter under Section 27 of the Evidence Act for the fact that from the FIR itself, it is evidently clear that the fact that the deadbody was dumped in a septic tank was disclosed to the informant by the accused person, Umesh Deka [A-3] at around 04-30 p.m. on 20.11.2016. He has further contended that when Biren Deka @ Bira [A-1] was taken by the Police personnel to the place at Munchibasti on 21.11.2016, he was handcuffed and the so called extra-judicial confession attributed to Biren Deka @ Bira [A-1] by the prosecution was not admissible in law. Mr. Tiwari has further contended that the alleged weapon of assault was not recovered on 21.11.2016, as shown in the Seizure List, but the same was seized only on 23.11.2016. There was ambiguity in the prosecution case as regards the date of occurrence. He had further contended that the extra-judicial confession of Biren Deka @ Bira [A-1] was hit by the provisions of Section 24 and Section 25 of the Evidence Act. The alleged weapon of assault, which had no bloodstains on it, was neither sent for serological examination nor was it shown to the Autopsy Doctor, P.W.6. He has contended that the learned trial court had erred in law to take the confessional statement of Bapan Dutta [A-2] and Umesh Deka [A-3] as links in the chain of circumstances whereas such confessional statements ought to have been excluded from consideration. He

has further contended that the prosecution witnesses, who deposed about the recovery of the deadbody from the septic tank, are only post-occurrence witnesses and their evidence did not add any weight to the case of the prosecution.

12. Mr. Mahanta, learned Amicus Curiae appearing for the accused-appellant, Bapan Dutta [A-2] while adopting the submissions of Mr. Tiwari, has further submitted, pointing towards the circumstances relied on by the learned trial court, that despite no clear evidence the learned trial court had erred to reach a conclusion that immediately before the occurrence, all the accused persons and the deceased were sleeping together in the same room and before commission of the crime, a quarrel broke out between the accused person, Biren Deka @ Bira [A-1] and the deceased. In essence, the learned trial court had invoked the last seen together theory in the case in hand. He has further submitted that on 21.11.2016, it was only Biren Deka @ Bira [A-1] who was taken by the Police personnel to recover the deadbody of the deceased at Munchibasti as the accused person, Bapan Dutta [A-2] was arrested only on 22.11.2016. The trial court had gone behind the confessional statement of Bapan Dutta [A-2] to hold the accused-appellant, Bapan Dutta [A-2] guilty for both the offences under Section 302, IPC and Section 201, IPC in aid of Section 34, IPC without examining the admissibility or otherwise of the confessional statement purportedly recorded under Section 164, CrPC from the standpoint of Section 30 of the Evidence Act. It is his contention that before placing his findings on a confessional statement, the inculpatory part and the exculpatory part of such confessional statement are to be examined and only thereafter, the learned trial court ought to have attributed the particular act on the part of the accused person, Bapan Dutta [A-2]. In any view of the matter, from the confessional statement, it was evidently clear that the accused person, Bapan Dutta [A-2] had no role in connection with the alleged homicidal death of the deceased.
13. With the above submissions, learned amici curiae have contended that the prosecution had failed to prove the relevant and necessary circumstances by cogent and credible evidence and there were many missing links in the chain. Thus, the finding of guilt, recorded by the learned trial court, is not sustainable in law.
14. Ms. Bhuyan, learned Additional Public Prosecutor appearing for the State has submitted that the discovery of the deadbody of the deceased was made on the

basis of the statement of the accused person, Biren Deka @ Bira [A-1] and the said statement has been duly exhibited as Ext.-6. Thus, the fact of discovery of the deadbody of the deceased from the septic tank situate at Munchibasti, Village – Uttar Kalikhola under Panery Police Station is admissible under Section 27 of the Evidence Act. Ms. Bhuyan has further contended that on 21.11.2016, though there were some discrepancies in the prosecution witnesses as regards the recovery of the deadbody, the accused person, Biren Deka @ Bira [A-1] had, in presence of the prosecution witnesses, pointed out the place from which the recovery of the deadbody was made and such evidence is also admissible under Section 8 of the Evidence Act. From the evidence on record, it has also emerged that the three accused persons and the deceased were engaged in the construction work, as mentioned by the informant, P.W.1, at Munchibasti, Village – Uttar Kalikhola at the relevant time and they were staying together at one place. From the confessional statement of the accused person, Bapan Dutta [A-2], it has emerged that there was discord as regards payment of money between the deceased and the accused person, Biren Deka @ Bira [A-1] and as such, the prosecution had been able to bring on record the motive behind the murder and the same was an additional link in the chain. The learned State counsel has further contended that the learned trial court had rightly invoked Section 34, IPC as all the accused persons had committed the act of murder in furtherance of their common intention. It has been contended that the prosecution has been able to establish all the circumstances by reliable evidence and since the chain of circumstances is complete and there was no missing link, the Judgment and Order of conviction and sentence needs no interference. Further, it is a case where the provision of Section 106, Evidence Act is applicable and each of the accused persons owed an explanation as regards the death of the deceased and concealment of the deadbody in a septic tank. Ms. Bhuyan has referred to the four-Judges decision in **Balbir Singh vs. State of Punjab, AIR 1957 SC 216**, to contend that though from the confessional statement [Ext.-11], even if it is assumed that the inculpatory part of the accused person, Biren Das @ Bira [A-1] in so far as the charge of murderous assault would not be admissible in evidence, the inculpatory part of the said statement in so far as concealment of the deadbody is concerned, the accused person, Biren Das @ Bira [A-1] had implicated himself also, thus, the said part would be admissible for the charge under Section 201, IPC. Ms. Bhuyan has contended that from the ratio laid down in Balbir Singh [supra], the proposition

emerges is that in evaluating a confessional statement of an accused person, the inculpatory part can be accepted as evidence, leaving aside the exculpatory part.

15. We have given utmost consideration to the submissions of the learned counsel for the parties and have also perused the evidence/materials on record including the testimonies of the prosecution witnesses and the documentary evidence laid before the trial court, as available in the case records of Sessions Case no. 41 of 2017, in original. We have also gone through the decisions referred to by the learned counsel for the parties in support of their submissions and those decisions would be referred to at appropriate places in the later part of this Judgment.
16. P.W.1, Ajay Deka, who was the informant, knew the deceased and all the three accused persons as they were working under him in the contract-work he was executing under the Public Health Engineering [PHE] Department. After identifying all the three accused persons in the dock, P.W.1 proceeded to depose that on 20.11.2016, the accused person, Umesh Deka [A-3] came to him and informed him that the accused person, Biren Das @ Bira [A-1] killed Gauranga Das and kept the deadbody of Gauranga Das in a septic tank at Munchibasti. As the accused person, Umesh Deka [A-3] was under influence of alcohol when he disclosed to him, he [P.W.1] asked his staff to ask the accused person, Umesh Deka [A-3] again. P.W.1 further stated that when his staff confirmed about the incident from the accused person, Umesh Deka [A-3], he [A-3] was taken to Panery Police Station by him and his staff. The other accused person, Biren Das @ Bira was also apprehended by his staff from a place near Tangla Railway Station and he [A-1] was also handed over to Police on that day. P.W.1 exhibited the FIR lodged by him as Ext.-1 and his signature therein as Ext.-1[1]. During cross-examination, P.W.1 disclosed that he had no personal knowledge about the occurrence and the accused person, Umesh Deka [A-3] could not say about the exact date when the occurrence took place. P.W.1 denied a suggestion that the accused persons were not involved in the occurrence.
17. The case of the prosecution was that the deadbody of the deceased was recovered from a place shown by the accused person, Biren Deka @ Bira [A-1] and the cause of death of the deceased was a homicidal one. In such view of the matter, we now turn to the medical evidence available on record in the forms of the testimony of the Autopsy Doctor, P.W.6 and the Post-Mortem Examination [PME] Report [Ext.-4].

18. P.W.6, Dr. Arindam Bora was serving, on 21.11.2016, as the Medical & Health Officer at Udaguri Civil Hospital. In his evidence-in-chief, P.W.6 testified that on 21.11.2016, he performed post-mortem examination on the deadbody of Gauranga Das in connection with Panery Police Station Case no. 75 of 2016, after the deadbody was identified by UBC Rubul Ali, Akhil Dey and Dudhan Das. In his testimony, P.W.6 stated that after performing autopsy, he found the following on the deadbody of the deceased :-

AS EXTRANAL APPEARANCE :

Rigor mortis absent. Wearing brown colour shirt and pant.

CRANIUM AND SPINAL CANAL :

Scalp, Skull, vertebrae - Deep penetrating injury on forehead. All other organs are normal.

THORAX :

Walls ribs and cartilages Normal.

Pleurae, Larynx and trachea, lungs, Vessels - all are normal.

ABDOMEN :

Walls, Peritoneum, Mouth, pharynx, oesophagus, Stomach and its contents, Small intestine and its contents, Large intestine and its contents - all are normal.

INJURY :

Deep penetrating injury on forehead

MORE DETAILS DESCRIPTION :

Deep penetrating injury on forehead. Severe bleeding from forehead. Injury size is 4 inch x 1 1/2 inch.

P.W.6 exhibited the Post-Mortem Examination [PME] Report as Ext.-1 with his signature therein as Ext.-4[1]. In the PME Report [Ext.-4], P.W.6 recorded his opinion as regards the death. He opined that the death was due to shock and hemorrhage due to penetrating injury on the forehead and the injury sustained by the deceased was sufficient to cause his death instantaneously.

19. For ready reference, the relevant parts of the PME Report [Ext.-4] are also extracted hereinbelow :-

1. EXTERNAL APPEARANCE :

1. Condition of subject stout emaciated, decomposed etc. :  
Rigor mortis – absent. Pt wear brown colour shirt and pant.
2. Wounds – position and character : Nil
3. Bruise Position size and nature : Nil
4. Mark of ligature on neck dissection, etc. : Nil

II – CARANIUM AND SPINAL CANAL :

1. Scalp, Skull, Vertebrae : Deep penetrating injury on forehead
2. Membrane : Intact
3. Brain and spinal cord : Intact
  
4. THORAX
  1. Walis ribs and cartilages : Intact
  2. Pleaurae : Intact
  3. Laryax and trachea : Intact
  4. Right lung : Intact
  5. Left lung : Intact
  6. Pericardium : Intact
  7. Heart : Intact
  8. Vessels : Intact

IV - ABDOMEN

1. Walls : Nil
2. Peritonoum : Nil
3. Mouth, oesophagus : Nil
4. Pharynx : Intact
5. Stomach and its contents : Half digested food particle is found
6. Small intenstine and its contents : Half digested food particle is found
7. Liver : Intact
8. Sleen : Intact
9. Kidneys : Intact
10. Bladder : Intact
11. Organs of generation external and external : Intact

V - MUSCLES, BONES AND JOINTS

1. Injury : Deep penetrating injury on forehead

- |                         |       |
|-------------------------|-------|
| 2. Disease or deformity | : Nil |
| 3. Fracture             | : Nil |
| 4. Dislocation          | : Nil |

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE

Deep penetrating injury on forehead. Some bleeding from forehead.

Injury size in [4" x 1½"]

OPINION OF ASSISTANT SURGEON AS TO CAUSE OF DEATH

SUB – ASSISTANT SURGEON

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

Sd/-Illegible

[Dr. Arindam Bora]

27.02.2017

Medical & Health Officer

Udaguri Civil Hospital

Udaguri, BTAD

ASSISTANT SURGEON OF SUB-ASSISTANT SURGEON

REMARKS BY CIVIL SURGEON

DHO/17/387

No. 28/2/17

Sd/-Illegible

Jt. Director of Health Services

Udaguri, B.T.A.D.

20. From the above medical evidence, it can be safely concluded that the death of the deceased was a homicidal one.
21. As to how the investigation of the case proceeded after the FIR was lodged, reference can be made to the testimony of the I.O., Prabin Chandra Deka [P.W.15], who testified about the sequence of events from the stage of institution of the FIR to the submission of the charge-sheet.
22. In his evidence-in-chief, P.W.15 deposed to the effect that on the 20.11.2016, when he was posted as a Sub-Inspector of Police at Panery Police Station, P.W.1, Ajay Deka lodged the FIR before the Officer In-Charge, Panery Police Station. On the

basis of the said FIR, the Officer In-Charge, Panery Police Station registered a case being Panery Police Station Case no. 75 of 2016 under Sections 302/201/34, IPC and entrusted the investigation of the case to him. The informant, Ajay Deka [P.W.1] at the time of lodging the FIR at the Police Station also brought the two accused persons viz. Biren Deka @ Bira [A-1] and Umesh Deka [A-3] and stated that Biren Deka @ Bira [A-1] committed the murder of Gauranga Das and Umesh Deka [A-3] informed him about the incident. The statement of the informant, Ajay Deka P.W.1 was thereafter, recorded under Section 161, CrPC in the Police Station. The statements of the two accused persons, Biren Deka @ Bira [A-1] and Umesh Deka [A-3] were also recorded and they were taken into custody at night on 20.11.2016. P.W.15 further stated that the accused person, Biren Deka @ Bira [A-1] confessed in his statement that on 08.11.2016, at about 10-30 p.m., he committed the murder of Gauranga Das while he was sleeping by assaulting him by means of an iron chiprang [an instrument used for digging earth] and with the help of Bapan Dutta [A-2] and Umesh Deka [A-3], who worked with him as masons. P.W.15 further stated that Biren Deka @ Bira [A-1] disclosed to him that the deadbody was kept concealed inside a septic tank. After such disclosure, the Officer In-Charge, Panery Police Station discussed the matter with the Additional Deputy Commissioner in order to recover the deadbody as per the statement of Biren Deka @ Bira [A-1]. P.W.15 further stated that it was on the following day, that is, on 21.11.2016, he along with the Additional Deputy Commissioner; the Officer In-Charge, Panery Police Station; Phul Kumari Das [P.W.12], the wife of the deceased; and other Police personnel; on being led by Biren Deka @ Bira [A-1], went to the place of occurrence and Biren Deka @ Bira [A-1] told before the public gathered near the place of occurrence that he concealed the deadbody of Gauranga Das inside the septic tank after assaulting him with a chiprang. P.W.15 further deposed that on being shown by the accused person, Biren Deka @ Bira [A-1], the deadbody of the deceased was recovered from a septic tank in presence of witnesses. P.W.15 stated to have recorded the statements of witnesses, Omar Ali [P.W.2], Tazar Ali Ahmed [P.W.3], Abul Bhuyan [P.W.4] and Khabiruddin Ali [P.W.8], before whom the accused confessed that he had committed the murder of the deceased and thereafter, kept the deadbody concealed in the septic tank. P.W.15 further stated that after recovery of the deadbody, the same was identified by the wife of the deceased, Phul Kumari Das [P.W.12] at the spot. Then, he [I.O.] recorded the statements of other witnesses. Inquest proceeding was held on the deadbody of the deceased by the Additional

Deputy Commissioner, Dithakananda Hazarika and the Inquest Report was prepared. After the inquest, the deadbody was sent to Udaguri Civil Hospital for post-mortem examination. The I.O., P.W.15 stated to have prepared a Sketch Map of the P.O. [Ext.-5] P.W.15 further testified that on the basis of the statements of the accused person, Biren Deka @ Bira [A-1] and Umesh Deka [A-3], he arrested the accused person, Bapan Dutta [A-2] who assisted them in concealing the deadbody of Gauranga Das. P.W.15 further stated that he recovered and seized the chiprang, as shown by the accused person, Biren Deka @ Bira [A-1] from a ditch near the septic tank where the deadbody of Gauranga Das was concealed, in presence of witnesses. He [I.O.] thereafter, sent the accused persons, Biren Deka @ Bira [A-1], Bapan Dutta [A-2] and Umesh Deka [A-3] for recording their statements under Section 164, CrPC and they were accordingly produced before the jurisdictional Court. P.W.15 further stated that he collected the Post-Mortem Examination [PME] Report and after conclusion of investigation, finding a prima facie case against the three accused persons, Biren Deka @ Bira [A-1], Bapan Dutta [A-2] and Umesh Deka [A-3] laid the charge-sheet for the offences under Section 302/201/34, IPC. The I.O. [P.W.15] exhibited the Seizure List whereby the iron chiprang was seized as Ext.-2; the Sketch Map of the P.O. as Ext.-5; the statement of the accused person, Biren Deka @ Bira [A-1] recorded under Section 161, CrPC as Ext.-6; his Note as to recovery of the deadbody as Ext.-7; and the Charge-sheet as Ext.-8. The I.O. [P.W.15] also identified his signatures appearing in the afore-mentioned exhibits.

- 22.1. During cross-examination, P.W.15 stated that the FIR was lodged on 20.11.2016 and the accused person, Bapan Dutta [A-2] was arrested at 08-00 a.m. on 22.11.2016. Prior to the arrest of the accused person, Bapan Dutta [A-2], the accused person, Biren Deka @ Bira [A-1] was arrested at about 06-00 p.m. on 20.11.2016. P.W.15 further disclosed that it was accused person, Biren Deka @ Bira [A-1] who mentioned the date of occurrence as 08.11.2016. P.W.15 admitted that the accused person, Biren Deka @ Bira [A-1] was in the Police custody at the time he led to the recovery of the deadbody. P.W.15 denied a suggestion that he did not recover and seize the materials, as indicated in the statement of the accused.
23. From the evidence led by the prosecution through the above prosecution witnesses and the documentary evidence, mentioned above, it has emerged that the FIR [Ext.-1] was lodged by the informant [P.W.1] on 20.11.2016 and at the time of lodging the

FIR [Ext.-1], the informant [P.W.1] also brought the two accused persons, Biren Deka @ Bira [A-1] and Umesh Deka [A-3] along with him to the Police Station. After registration of the FIR as Panery Police Station Case no. 75 of 2016, the two accused persons, Biren Deka @ Bira [A-1] and Umesh Deka [A-3] were taken into custody. It was on the following day, that is, on 21.11.2016, the I.O. [P.W.15] along with the accused person, Biren Deka @ Bira [A-1]; the Additional Deputy Commissioner of the District; the Officer In-Charge, Panery Police Station; and the wife of the deceased [P.W.12]; along with his staff proceeded to the place of occurrence [P.O.] at Munchibasti, Village – Uttar Kalikhola and recovered the deadbody of the deceased, Gauranga Das from a septic tank there. The I.O. [P.W.15] had claimed that the septic tank wherefrom the deadbody was recovered, was shown by the accused person, Biren Deka @ Bira [A-1]. It has not emerged from the testimony of the I.O. [P.W.15] that the accused person, Umesh Deka [A-3] also accompanied Biren Deka @ Bira [A-1] to the P.O. When the deadbody was recovered on the 21.11.2016, the other accused person, Bapan Dutta [A-2] was not arrested as he was arrested only on 22.11.2016.

24. The prosecution witnesses, P.W.2 – Omar Ali; P.W.3 – Tazar Ali Ahmed; P.W.4 – Abul Bhuyan; and P.W.8 – Khabiruddin Ali had all testified that they were called over phone either by the Officer In-Charge, Panery Police Station or by other Police personnel to reach a place at Munchibasti, Village – Uttar Kalikhola. According to P.W.2 and P.W.3, they were called on 20.11.2016 to Munchibasti. P.W.4 and P.W.8 did not mention the date when they were called to Munchibasti. In their testimonies, P.W.2, P.W.3, P.W.4 and P.W.8 had deposed that at the P.O. at Munchibasti there was a public gathering. They admitted about the presence of the Additional Deputy Commissioner, Dithakananda Hazarika; the Officer In-Charge, Panery Police Station; and the other Police personnel at the P.O.
- 24.1. P.W.2 deposed that the deadbody was recovered on being shown by the accused person, Biren Deka @ Bira [A-1]. When the accused person, Biren Deka @ Bira [A-1] was asked, he stated that he had monetary transaction with the deceased, Gauranga Das and for that reason, he had killed Gauranga Das and other accused persons assisted him in killing the deceased and to conceal the deadbody in the septic tank.

- 24.2. P.W.3, Tazar Ali Ahmed stated that at the spot, the local persons told him that the accused person killed one Gauranga Das and concealed his deadbody in the septic tank. Thereafter, the Police asked the accused person to show the deadbody and the accused person led the Police to a septic tank. A sweeper then opened the septic tank and found the deadbody of the deceased. P.W.3 further stated that when asked, the accused person, Biren Deka @ Bira [A-1] confessed that he had killed the deceased with the help of two other persons.
- 24.3. P.W.4, Abul Bhuyan like P.W.3, deposed that when he went to the P.O. at Munchibasti, local persons told him that one person was killed and his deadbody was concealed in a septic tank. Then the accused person, Biren Deka @ Bira [A-1] showed the place where the deadbody was concealed and a sweeper, called by Police, opened the septic tank wherein the deadbody was found. P.W.4 further stated that when asked by the Police, the accused person, Biren Deka @ Bira [A-1] confessed that he had killed the deceased with a chabul [iron rod]. P.W.4 stated that the chabul [iron rod] was seized by Police in his presence vide a Seizure List [Ext.-2] and he gave his signatures therein as Ext.-2[1].
- 24.4. P.W.8, Khabiruddin Ali deposed that after the call received from the Officer In-Charge, Panery Police Station, he proceeded to Munchibasti. There, the Officer In-Charge, Panery Police Station told him that a deadbody was found inside a septic tank as shown by the accused person, Biren Deka @ Bira [A-1]. P.W.8 stated that he saw the accused person, Biren Deka @ Bira [A-1] in handcuff and the accused person, Biren Deka @ Bira [A-1] when asked, confessed before them that he committed the murder of the deceased and thereafter, kept the deadbody inside the septic tank. P.W.8 also stated that the Police personnel recovered and seized one chiprang in his presence vide a Seizure List, Ext.-2 wherein he gave his signatures as Ext.-2[2].
- 24.5. In their cross-examination, all these prosecution witnesses – P.W.2, P.W.3, P.W.4 and P.W.8 – admitted that they did not have any personal knowledge as to how the incident took place.
- 24.6. What have emerged from the testimonies of these the afore-mentioned prosecution witnesses – P.W.2, P.W.3, P.W.4, and P.W.8, are that on being called by the Police

personnel, they went to the P.O. at Munchibasti. Going there, they saw the accused person, Biren Deka @ Bira [A-1] in handcuff and there was presence of the Additional Deputy Commissioner; and the Officer In-Charge, Panery Police Station; along with other Police personnel. The public also gathered at the P.O. These prosecution witnesses had claimed the deadbody of the deceased, Gauranga Das was recovered from a septic tank after the septic tank was shown by the accused person, Biren Deka @ Bira [A-1]. In the depositions, they had also stated that when the accused was asked by Police, the accused person, Biren Deka @ Bira [A-1] admitted that he had killed the deceased, Gauranga Das with the help of an iron object, called differently as chiprang or chabul or khanti, etc.; and thereafter, concealed the deadbody of the deceased in the septic tank with the assistance of two other accused persons.

25. We can now turn to the testimonies of the other prosecution witnesses – P.W.5 and P.W.7 who deposed that they were also at the P.O.
26. P.W.5, Radheshyam Dutta was the VDP Secretary of Village – No. 1 Geruajhar. In his deposition-in-chief, he stated that after the inquest proceeding, conducted by the Magistrate, he subscribed his signature in the Inquest Report, Ext.-3 as Ext.-3[1]. This witness was not cross-examined by the defence.
27. P.W.7, Saheb Khan testified to the effect that on a day in 2016, he heard that a deadbody was recovered from a septic tank at Munchibasti and a large number of people gathered there, he went there and noticed that one deadbody was removed from a septic tank in presence of the police personnel; the SDO; the Village Headman; the VDP Secretary, etc. The inquest proceeding was conducted by the SDO [Civil] and he [P.W.7] gave his signature in the Inquest Report, Ext.-3 as Ext.-3[2].
28. P.W.9, Sadek Ali, P.W.10, Kasem Ali and P.W.11, Salim Ali are all inhabitants of Village – Uttar Kalikhola.
29. P.W.9 deposed that he knew the informant, the deceased and the accused persons. He stated that the deceased, Gauranga Das, a mason, used to work with the accused persons. Mentioning about a day, he stated that on that day, the accused persons

and the deceased after finishing their works, went together. It was after fifteen days, he came to know that a deadbody was recovered from a septic tank at Munchibasti and he went there to see the deadbody. Going there, he saw that many persons including the Officer In-Charge, Panery Police Station; the SDO [Civil]; the Village Headman; and the VDP Secretary, had gathered there. P.W.9 further stated that the accused person, who was in handcuff, showed the place wherefrom the deadbody of Gauranga Das was recovered. P.W.9 also stated that the accused person, Biren Deka @ Bira [A-1] confessed before people gathered there that he had committed the murder of Gauranga Das and thereafter, concealed the deadbody in the septic tank. In cross-examination, P.W.9 denied the suggestions given to him by the defence.

30. P.W.10, Kasem Ali knew the accused persons as they were working near his house. P.W.10 stated that the accused persons and the deceased, Gauranga Das were masons by profession and they used to work under a contractor, Ajay Deka [P.W.1]. Deposing as regards an incident in 2016, P.W.10 stated that at the material time, the deceased and the accused persons were engaged by the informant [P.W.1] – contractor for doing some masonry work. After fifteen days, he heard that a deadbody was found inside a septic tank at Munchibasti. On hearing the news, he went to the P.O. at Munchibasti to see the deadbody. Going there, he saw the presence of the SDO; the Officer In-Charge, Panery Police Station; the Village Headman; the VDP Secretary and other persons at the P.O. He also saw the accused person, Biren Deka @ Bira [A-1] under handcuff. P.W.10 stated that on being led by the accused person, Biren Deka @ Bira [A-1], a deadbody was recovered from a septic tank behind a house and he identified that the deadbody was of Gauranga Das. The deadbody was recovered from the septic tank by the Police in his presence with the help of sweeper. Later on, the deadbody was taken to the Police Station. P.W.10 also stated that Police also recovered a chiprang in his presence and he signed as a witness in the Seizure List, Ext.-2 and he identified his signature therein as Ext.-2[3]. In cross-examination, he denied a suggestion that the Police did not recover the deadbody on being led by the accused person. He also denied a suggestion that the accused did not confess before them that he had killed the deceased. He reiterated that one chiprang was recovered and seized by Police at the P.O.

31. P.W.11, Salim Ali knew about the accused persons as masons by profession. He stated that at the material time, they were engaged in a contract-work undergoing at Uttar Kalikhola. Deposing about the recovery of the deadbody, he stated that on one day in 2016, the VDP Secretary called him to the site where the accused persons were earlier working. When he reached the P.O., he saw presence of Police personnel there. P.W.11 stated that one chiprang was recovered by the public in that place and the same was seized by the Police in his presence. He stated that he signed as a witness in the Seizure List, Ext.-2 prepared in that connection. He also identified the chipang, when shown to him as Mat. Ext.-1, as the one which was seized by the Seizure List, Ext.-2. In cross-examination, P.W.11 stated that the deadbody was recovered prior to his visit to the P.O. wherefrom the same was recovered.
32. From the testimonies of the afore-mentioned three prosecution witnesses – P.W.9, P.W.10 and P.W.11 – it has emerged that they used to know the deceased and the accused persons as all of them were engaged as masons in a contract-work then undergoing at a place in their village. From their testimonies, it has emerged that they used to know the deceased and the accused persons as the deceased and the accused persons were engaged in that contract-work undertaken in their village. It has further emerged that from the testimonies of P.W.10 and P.W.11 that a chiprang was recovered in their presence and they signed as seizure witnesses in the Seizure List, Ext.-2 prepared by the Police in that connection. There is discrepancy in the evidence of P.W.10 and P.W.11 as regards the date of seizure of the chiprang but none has deposed as regards the exact date when the chiprang was recovered by Police from the P.O.
33. The prosecution witnesses – P.W.12, P.W.13 and P.W.14 – are close relatives of the deceased, Gauranga Das.
34. P.W.12, Phul Kumari Das was the wife of the deceased. P.W.12 deposed to the effect that her husband, Gauranga Das was working as mason under the informant, Ajay Deka [P.W.1] at the time of his death. P.W.12 further stated that the accused persons were also working along with her husband at that relevant point of time. P.W.12 further stated that on 21.11.2016, she was told by the In-Charge [Mohori], Akhil Dey to go to the place where her husband was working. She was taken

thereafter, to the Police Station when her identity as the wife of the deceased, Gauranga Das was confirmed and thereafter, she was taken by the Police personnel to the place where her husband was working. Going there, she came to know that her husband was killed in that place and saw his deadbody there as the same was recovered from a septic tank. After she identified the deadbody of her husband, she was sent home. She came to know at the P.O. that from the people gathered there that it was the accused person, Biren Deka @ Bira [A-1] who committed the murder of her husband and thereafter, kept the deadbody concealed in the septic tank. In cross-examination, P.W.12 stated that she did not know how her husband had died at the P.O. and prior to that day, she never visited the contract-work site where the deadbody of her husband was found. According to P.W.12, her husband used to visit home from the contract-work site once in a week. The accused persons prior to the incident, used to come along with her husband to their house now and then.

35. P.W.13, Madan Das, who knew the informant and the accused persons, is a brother of Gauranga Das. P.W.13 testified to the effect that on one day in 2016, he was told by the Police personnel from Panery Police Station to visit the Police Station. Accordingly, he visited the Police Station at around 12-00 o'clock on that day and after ensuring his identification, the Police personnel there shown him a deadbody as the deadbody of his brother, Gauranga Das. P.W.13 stated that the accused persons used to work with his brother, Gauranga Das, who was a mason by profession. In cross-examination, P.W.13 stated that he did not know as to how the incident had occurred resulting into the death of his brother.
36. P.W.14, Sudhan Das is another brother of the deceased, Gauranga Das. According to him, the occurrence took place on 08.11.2016. It was on that day, 08.11.2016, the informant, Ajay Deka [P.W.1] informed him telephonically at about 09-00 a.m. that the persons who were working as masons, along with his brother at Uttar Kalikhola, committed the murder of his brother during sleep and the deadbody of his brother was recovered from a septic tank. On receiving the information, P.W. 14 came to Panery Police Station and saw the deadbody of his brother there. The deadbody was thereafter, taken to Udaguri Civil Hospital for post-mortem examination and after post-mortem examination, the deadbody was handed over to the family.

37. As mentioned above, the prosecution witnesses – P.W.12, P.W.13 and P.W.14 – were close relatives of the deceased. P.W.12 is the wife of the deceased and P.W.13 and P.W.14 are the brothers of the deceased. None of these prosecution witnesses had knowledge as to how and as to when the deceased had met his death. From their testimonies, it has, however, emerged that the accused persons were known to the deceased from before as they, as masons, were also working at the same site at Uttar Kalikhola under the informant, Ajay Deka [P.W.1]. The testimony of P.W.14 to the effect that he was told by the informant, Ajay Deka [P.W.1] that it was on 08.11.2016 his brother, Gauranga Das was murdered is not acceptable in the face of the testimony of Ajay Deka [P.W.1] that he had no personal knowledge about the occurrence and came to know about the occurrence from the accused person, Umesh Deka [A-3] only on 20.11.2016.
38. P.W.16, Dr. N.C. Bhuyan was, on 23.11.2016, posted as Munsiff-cum-Judicial Magistrate, 1<sup>st</sup> Class at Udaguri. As per the testimony of P.W.16, he was directed by the Chief Judicial Magistrate, Udaguri on 23.11.2016 to record the confessional statement of the accused person, Bapan Dutta [A-2]. When Bapan Dutta [A-2] was produced before him on 23.11.2016, he appointed one Legal Aid Counsel as the accused person, Bapan Dutta [A-2] was found not represented by any defence counsel. Thereafter, the accused person, Bapan Dutta [A-2] was explained that he was not bound to make any confession and if he did so, it might be used as evidence against him. After explaining so, the accused person, Bapan Dutta [A-2] was remanded to judicial custody till 25.11.2016 for reflection. Thereafter, the accused person, Bapan Dutta [A-2] was produced before him on 25.11.2016 from jail and on that occasion also, Bapan Dutta [A-2] was explained that he was not bound to make confession and if he did so, it might be used as evidence against him. When the accused person, Bapan Dutta [A-2] wanted to make confession, he was placed under the custody and supervision of a Court Peon from 10-00 a.m. to 03-00 p.m. for reflection. When at 03-00 p.m. on 25.11.2016, the accused person, Bapan Dutta [A-2] was asked again as to whether he wanted to make confession or not, he [A-2] answered in the affirmative even after explaining him that he was not bound to make confession. P.W.16 testified to the effect that after it was found that the accused person, Bapan Dutta [A-2] still wanted to make confession voluntarily, he recorded his statement in his presence and after recording the statement, the same was read over to him. When the statement was read over to him, the accused person, Bapan

Dutta [A-2] admitted the statement as a correct one. P.W.16 testified that the confession contained a full and true account of the statement made by the accused person, Bapan Dutta [A-2] and at the time of recording, the accused person was in a free state of mind. The signatures of the accused person, Bapan Dutta [A-2] was thereafter, taken in his presence and after completion of the formalities, the accused person, Bapan Dutta [A-2] was remanded to judicial custody. P.W.16 exhibited the Orders passed on the 23.11.2016 and on 25.11.2016 as Ext.-9 and Ext.-10 respectively along with his signatures appearing therein. P.W.16 also exhibited the confessional statement of the accused person, Bapan Dutta [A-2] as Ext.-11 and identified his signatures therein as Ext.-11[1] & Ext.-11[2] respectively. P.W.16 also identified the signatures of the accused person, Bapan Dutta [A-2] in Ext.-11 as Ext.-11[3], Ext.-11[4], Ext.-11[5], Ext.-11[6], Ext.-11[7] and Ext.-11[8] respectively. When cross-examined, P.W.16 stated that when the accused, Bapan Dutta [A-2] was produced before him for recording confessional statement, he noticed some injuries on his person. He further stated that on 25.11.2016, the accused person, Bapan Dutta [A-2] was produced from judicial custody.

39. From the testimony of P.W.16, it has emerged that the P.W.16 on 25.11.2016 recorded the confessional statement of the accused, Bapan Dutta [A-2] under Section 164, CrPC.
40. The learned amici curiae appearing for the appellants have not raised any question as regards the procedure followed by P.W.16 in recording the said confessional statement, Ext.-11 vis-à-vis the provisions contained in Section 164, CrPC read with Section 281, CrPC. They have made their challenge on the point of admissibility of such confessional statement from the standpoint of the rule contained Section 30 of the Evidence Act.
41. Admittedly, the present case is one which is rested on circumstantial evidence as there was no eye-witness to the incident of alleged assault on the deceased. The duty and the role of the prosecution in a case resting on circumstantial evidence have been explained by a three-Judge decision in Sharad Birdhichand Sarda vs. State of Maharashtra, reported in [1984] 4 SCC 116, as follows :-

152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant vs. State of Madhya Pradesh* [AIR 1952 SC 343 : 1952 SCR 1091]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi vs. State of Uttar Pradesh* [(1969) 3 SCC 198] and *Ramgopal vs. State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in *Hanumant case* [AIR 1952 SC 343 : 1952 SCR 1091] :

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 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.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

[1] the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in *Shivaji Sahab Rao Bobade vs. State of Maharashtra* [(1973) 2 SCC 793 : 1973] where the observations were made: [SCC para 19, p. 807]

Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between ‘*may be*’ and ‘*must be*’ is long and divides vague conjectures from sure conclusions.

- [2] the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
- [3] the circumstances should be of a conclusive nature and tendency,
- [4] they should exclude every possible hypothesis except the one to be proved, and
- [5] there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

42. In the case in hand, the prosecution has relied upon a number of circumstances and has urged that if the circumstances are linked together, the chain of circumstantial evidence is found to be complete to bring home not only the charge of murder under Section 302, IPC but also the charge under Section 201, IPC in aid of Section 34, IPC. The learned trial court to arrive at the finding of guilt, after referring to Sharad Birdhichand Sarda [supra], had delineated the circumstances in paragraphs 53 & 54 of the Judgment, which reads as under :-

53. After close scrutiny of the evidence on record, the following circumstances have been brought on record :-
- [i] Immediately before the occurrence all the accused including the deceased were sleeping in the same room;
  - [ii] Before committing the crime the quarrel broke out between the deceased and the accused Biren Das on question of money;
  - [iii] The victim disappeared since 08.11.2016 i.e. from the date when the quarrel broke out;

- [iv] The dead body was recovered from the septic tank of the house near the construction place at the instance of the accused Biren Das. The weapon [sabool] was also recovered by investigating officer at the instance of the accused Biren Das;
- [v] Accused Biren Das confessed his guilt in presence of large number of people gathered at the time of recovery of the dead body. He gave extra-judicial confession before police as well as before general public including village headman.
- [vi] Accused Bapan Dutta and another co-accused Umesh Deka, who had already expired, have confessed their guilt by implicating the accused for causing the death of deceased and their part for concealing the dead body in the septic tank.

54. In the case in hand, it is also found that the circumstantial evidence brought on record by way of ocular evidence as well as documentary evidence can be considered as conclusive nature to prove the guilt of accused.
43. The learned State Counsel has urged that the recovery of the deadbody of the deceased from a septic tank from the place at Munchiasti and the recovery of the chiprang [Mat. Ext.-1] were pursuant to the statement of the accused, Biren Deka @ Bira [A-1], Ext.-6 and such recovery is admissible under Section 27 of the Evidence Act. The prosecution has also laid stress on the judicial confession of the accused person, Bapan Dutta [A-2], Ext.-11 to submit that the same had corroborated the other evidence led by the prosecution for both the charges. The learned trial court is also found to have placed reliance upon the confession of the accused person, Umesh Deka [A-3], who had already expired during the trial, as a circumstance in the chain.
44. Before any discussion on the substantive evidence, claimed to have led by the prosecution during the trial, a reference to the rule of evidence contained in Section 30, Evidence Act appears necessary. As per Section 30 of the Evidence Act : Consideration of proved confession affecting person making it and others jointly under trial for same offence, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who

makes such confession. Illustrations to Section 30 aptly bring out the rule. Illustration [a] : A and B are jointly tried for the murder of C. It is proved that A said 'B and I murdered C'. The Court may consider the effect of this confession as against B; Illustration [b] : A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said 'A and I murdered C'. This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

45. From the reading of Section 30, Evidence Act, it is evident that before a statement by one of the accused persons can be taken into consideration against the other accused, the following conditions must be fulfilled : [a] there must be a joint trial for the same offence; [b] it must be a confession; [b] the confession must affect himself and the other, that is, implicate the maker substantially to the same extent as the other co-accused; and [d] the confession of guilt must be duly proved.
46. It is a settled proposition that a confession is to be used only to corroborate other substantive evidence led by the prosecution. A confession of a co-accused cannot be treated as substantive evidence and it can be pressed into service only when the Court is inclined to accept the other evidence and feels the necessity to lend an assurance. Thus, a confessional statement of a co-accused *per se* is not substantive piece of evidence against a co-accused.
47. Resting the discussion on the confessional statement at this stage, for the time being, we like to turn to the other prosecution evidence, which are claimed to be substantive evidence. One of the circumstances relied upon by the prosecution evidence is that immediately before the occurrence all the accused persons and the deceased were sleeping in the same room. From the said circumstance projected by the prosecution, it transpires that the prosecution appears to have relied on the last seen theory.
48. The prosecution sought to project that the death of the deceased had occurred on 08.11.2016. The said projection appears to have been based on the information given in the FIR [Ext.-1] by the informant, Ajay Deka [P.W.1], which information, in turn, was based on information purportedly given to him by the accused person, Umesh Deka [A-3]. But none of the prosecution witnesses had specifically deposed

to the effect that either on 08.11.2016 or on any date immediately preceding 08.11.2016 or succeeding 08.11.2016, the deceased was seen in the company of the either of the three accused persons – A-1, A-2 or A-3.

49. The circumstances of last seen together can 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 the possibility of any other person being with the deceased could be completely ruled out. The time gap between the accused person seen in the company of the deceased and the detection of 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 person and the deceased last seen together and the crime coming to light is after 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 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 of such accused person. But the circumstance of last seen together does not by itself and necessarily leads to the inference that it was the accused who committed the crime. There must be something more to establish connectivity between the accused and the crime [Ref : State of Goa vs. Sanjay Thakran and another, [2007] 3 SCC 755].
50. Reverting back to the facts of the case when we zero in on the testimony of the Autopsy Doctor [P.W.6] and the PME Report [Ext.-4], it is found that the Autopsy Doctor [P.W.6] did not depose anything regarding approximate time of death of the deceased in his testimony. The Autopsy Doctor [P.W.6] in the PME Report [Ext.-4] also did not record anything as regards the approximate time of death of the deceased when he performed the autopsy on the deadbody of the deceased on

21.11.2016. When we look at the PME Report [Ext.-4], we find no mention that the deadbody, recovered on 21.11.2016, was a decomposed one. It had, however, been reported that rigor mortis was absent. But, there are many stages for rigor mortis in human beings. There is no ocular evidence that the deceased had died on 08.11.2016. Due to absence of any medical opinion either in the testimony of the Autopsy Doctor [P.W.6] or in the PME Report [Ext.-4] as regards the approximate time of death of the deceased and in the absence of any ocular evidence as regards time/date of death of the deceased and the time/date when the deceased was last seen alive, it is difficult to reach a definite finding on the time gap between the time/date when the deceased was last seen alive and the time/date of death of the deceased, even by approximation. Moreso, the prosecution had not led any evidence as regards the time/date when the deceased was last seen alive in the company of the accused person[s]. Thus, we find that there is no credible and conclusive evidence either in the ocular evidence or in the medical evidence to reach a conclusion that immediately before the death of the deceased, all the accused persons and the deceased were sleeping in the same room to bring in the theory of last seen together. With uncertainty as regards the approximate time of death, for that matter, the date of death and no evidence when the accused person[s] was/were last seen together with the deceased, it is difficult to comprehend applicability of last seen theory in the present case. Consequently, we find ourselves in disagreement with the learned trial court on the point that immediately before the occurrence all the accused persons were sleeping together with the deceased in the same room as a proved circumstance.

51. Section 162, CrPC lays down a fundamental principle to be followed in a criminal trial that a statement made before a Police Officer during investigation cannot be used for any purpose whatsoever, except to contradict a witness in the manner provided by Section 145 of the Evidence Act; and when any part of such statement is so used, any part thereof may also be in the re-examination of such witness, that too, only for explaining any matter required to in his cross-examination. Section 162, CrPC has, however, provided that such a statement can be used [i] when it falls within the provisions of Clause [1] of Section 32 of the Evidence Act or [ii] for the limited purpose provided in Section 27 of the Evidence Act.

52. As per Section 25 of the Evidence Act, a confession made to a Police Officer shall not be proved as against a person accused of any offence. Section 26 of the Evidence Act has provided that no confession made by any person while 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. Section 27 of the Evidence Act is an exception to Section 25 and Section 26 of the Evidence Act. It makes that part of the statement which distinctly leads to discovery of a fact in consequence of information received from a person 'accused of an offence', in the custody of a Police Officer, to the extent it distinctly relates to the fact thereby discovered, admissible in evidence against the accused. The fact which is discovered as a consequence of the information given is admissible in evidence. The fact discovered should lead to recovery of a physical object and only that information which distinctly relates to the discovery can be proved. The rationale behind Section 27, Evidence Act is that the fact discovered and the recovery made in consequence of information given by the accused is an assurance that the information given by a person accused of the offence can be relied upon. Section 27 of the Evidence Act does not, however, mean that discovery of a fact is to be equated to the object produced or found. The discovery of the fact resulting in recovery of a physical object implies knowledge of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of fact includes the object found, the place from which it was recovered and the knowledge of the accused as to its presence at the particular place, which was not easily noticeable. One of the leading cases on Section 27, Evidence Act is **Pulukuri Kottaya vs. Emperor, AIR 1947 Privy Council 67**. Expounding the rule embodied in Section 27 of the Evidence Act, it has been observed in **Pulukuri Kottaya** [supra] as under :

8. The second question, which involves the construction of Section 27, Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms :

- 25. No confession made to a Police officer, shall be proved as against a person accused of any offence.
- 26. 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.

9. The explanation to the section is not relevant.

27. 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.

10. Section 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 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 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. Mr. Megaw, for the Crown, has argued that in such a case the 'fact discovered' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the Police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of

construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view 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 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.

11. ...Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed.

53. Formal arrest of the accused is not a *sine qua non* to bring into operation the rule embodied in Section 27 of the Evidence Act. The expression, 'custody' appearing in Section 27 of the Evidence Act does not mean formal custody. The Constitution Bench of the Hon'ble Supreme Court of India in **State of Uttar Pradesh vs. Deoman Upadhyaya, 1961 1 SCR 14**, has observed that the bar under Section 25 of the Evidence Act applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was in custody at the time of making the confession. Further, for the ban to be effective the person need not have been accused of an offence when he made the confession. The reason is that the expression 'accused person' in Section 24 and the expression 'a person accused of any offence' in Section 26 and Section 27 have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjacent clause 'accused of any offence' is, therefore, descriptive of the person against whom a confessional statement made by him is declared not provable, and

does not predicate a condition of that person at the time of making the statement. In **Dharam Deo Yadav vs. State of Uttar Pradesh, [2014] 5 SCC 509**, it has been held that the expression 'custody' in Section 27 of the Evidence Act does not mean formal custody, but includes any kind of surveillance, restriction or restraint by the Police. Even if the accused was not formally arrested at the time of giving information, the accused is, for all practical purposes, in the custody of the Police and the bar imposed by Section 25 and Section 26 of the Evidence Act and accordingly, the exception contained in Section 27 of the Evidence Act, would apply. Following **Deoman Upadhyaya** [supra] and **Dharam Deo Yadav** [supra], the Hon'ble Supreme Court recently in **Perumal Raja @ Perumal vs. State, Represented by Inspector of Police, [2024] 1 S.C.R. 87 : 2024 INSC 13**, has observed, while interpreting Section 27, that as soon as an accused or suspected person comes into the hands of a Police Officer, he is no longer at liberty and is under a check, and is, therefore, in 'custody' within the meaning of Sections 25 to Section 27 of the Evidence Act. It is for this reason that the expression 'custody' has been held, as earlier observed, to include surveillance, restriction or restraint by the Police.

54. Going by the above enunciated proposition, the expression 'a person accused of any offence' appearing in Section 26 and Section 27 of the Evidence Act includes a person who is under any kind of restriction, restraint or even surveillance by the Police. Even if the accused was not formally arrested at a time of giving information, the accused ought to be deemed, for all practical purposes, in the custody of the Police. As soon as a person as suspect comes into the hands of a Police Officer, he is no longer at liberty and he is under a check and is, therefore, in 'custody' within the meaning of Section 25 to Section 27 of the Evidence Act. From the evidence/materials on record, we find that in so far as the statement of the accused, Biren Das @ Bira [A-1] recorded by the I.O., which was exhibited as Ext.-6, is concerned, if a fact was discovered as a consequence of information given in such statement then it would come within the scope and ambit of Section 27 of Evidence Act, provided all other conditions are satisfied. Even though on 20.11.2016, the accused person, Biren Das @ Bira [A-1] was not formally arrested, but after he was brought to the Police Station by the informant, P.W.1, the I.O. had taken him into custody. The prosecution had claimed that such statement [Ext.-6] was recorded

after the accused person, Biren Das @ Bira [A-1] was taken into custody on 20.11.2016.

55. It is to be borne in mind that as per the rule contained in Section 27, it is only so much of information as relates distinctly to the fact discovered thereby would be admissible in evidence.
56. At this juncture, it is also apt to refer the following observations made in the decision in **Venkatesh @ Chandra and another vs. State of Karnataka, [2022] 4 SCR 556** :-

19. We must observe that we have repeatedly found a tendency on part of the Prosecuting Agency in getting the entire statement recorded rather than only that part of the statement which leads to the discovery of facts. In the process, a confession of an accused which is otherwise hit by the principles of Evidence Act finds its place on record. Such kind of statements may have a direct tendency to influence and prejudice the mind of the Court. This practice must immediately be stopped. In the present case, the Trial Court not only extracted the entire statements but also relied upon them.

57. In the case in hand also, the prosecution had brought the entire statement of the accused, Biren Das @ Bira [A-1] on record in the form of Ext.-6. Following **Venkatesh @ Chandra** [Supra], we quote only the relevant excerpt from the previous statement [Ext.-6] which has a bearing *qua* Section 27 of the Evidence Act. The relevant excerpt from Ext.-6 would be as under :

***'Then we put Gauranga's deadbody into the septic tank and closed the lid'.***

58. From the exposition of the rule of evidence embodied in Rule 27 of the Evidence Act in the catena of decisions, it emerges that the first condition which is necessary for bringing the rule into operation is that the discovery shall be of a fact, which should be a relevant fact, in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. The third condition is that at the time of receipt of the information, the accused must be in Police custody, as expounded above. Furthermore, it is only so much of the

information which relates distinctly to the fact thereby discovered, resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. Only that part of the information which is clear, immediate and approximate cause of discovery is admissible. What can be culled out from the afore-quoted excerpt of Ext.-6 for use of the rule embodied in Section 27 of the Evidence Act is that the accused person, Biren Deka @ Bira [A-1] had the knowledge that the deadbody of the deceased, Gauranga Das was in a septic tank whose lid was closed.

59. The I.O. [P.W.15] deposed to the effect that the deadbody of the deceased was recovered from a septic tank at Munchibasti on 21.11.2016 on the basis of the statement of the accused person, Biren Das @ Bira [A-1], recorded as Ext.-6. On reading the purported previous statement of the accused person, Biren Das @ Bira [A-1], exhibited as Ext.-6, we find the following statement at its end :-

***'I showed to the Police the place where I had kept the deadbody hidden'.***

From the afore-quoted statement, it is evidently clear that the statement was recorded after the accused person, Biren Das @ Bira [A-1] showed the septic tank at Munchibasti, Village – Uttar Kalikhola where the deadbody was hidden. Needless to mention that the part 'where I had kept the deadbody hidden' appearing in the afore-quoted statement is not admissible in evidence.

60. A fact already known to the Police would be incongruous to the rule of evidence laid down in Section 27 and will not meet the condition. The materials on record does not indicate as to when such statement, Ext.-6 was recorded by the I.O. [P.W.15]. It is pertinent to recall that in the FIR [Ext.-1], the informant, Ajay Deka [P.W.1] mentioned that he was informed by the accused person, Umesh Deka [A-3] that the two accused persons, Biren Das @ Bira [A-1] and Bapan Dutta [A-2] after killing the deceased, dumped the deadbody of the deceased in a septic tank. The FIR [Ext.-1] also contained the information that all the accused persons and the deceased were engaged in a contract-work of construction of a water tank at Munchibasti in Village - Uttar Kalikhola under the contractor, Ajay Deka [P.W.1]. Thus, from the FIR [Ext.-1], it is evident that there was already the information available that the deadbody of Gauranga Das was kept concealed in a septic tank. Under Section 27 of the Evidence

Act, if an information by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be read into evidence but when the fact has already been discovered, as recorded in Ext.-6 in the instant case, the evidence could not be led in that connection. In the other words, if the deadbody was already recovered from the septic tank by the Police prior to recording of the statement of the accused person in the form of Ext.-6 then such statement of the accused person recorded subsequently as regards the place where the deadbody was concealed is not admissible under Section 27 of the Evidence Act, for the reason that if a fact which has already been discovered anterior to information given in the statement then that evidence could not be led in that connection. The prosecution is also required to establish that before the information given by the accused on the basis of which the deadbody was recovered, no other person had knowledge about the existence of the deadbody in the septic tank from where it was recovered. But, such is not the case here. That the deadbody of the deceased, Gauranga Das was concealed in a septic tank at Munchibasti in Village – Uttar Kalikhola was informed to the I.O. [P.W.15] on 20.11.2016 itself by the FIR [Ext.-1]. Thus, no evidentiary value can be attached to the purported statement, exhibited by the prosecution as Ext.-6, and it has to be excluded from consideration.

61. The second circumstance relied by the learned trial court, as extracted above in paragraph 42, is that before commission of the crime, a quarrel broke out between the accused person, Biren Das @ Bira [A-1] and the deceased on question of money. None of the prosecution witnesses had deposed as regards occurrence of a quarrel between the accused person, Biren Das @ Bira [A-1] and the deceased on the question of money. In absence of any such evidence, we are persuaded to form the view that the learned trial court had relied on the contents of Ext.-6, which was a statement recorded under Section 161, CrPC facing the bar created by Section 162, CrPC, to draw such circumstance, for the clear reason that it was only in that statement, occurrence of a quarrel between the two was referred to. Such inference is not permissible under the rule embodied in Section 27 of the Evidence Act. It needs a mention, keeping in mind the observation made in **Venkatesh @ Chandra** [supra] in the paragraph extracted, that the entire statement of the accused person, Biren Das @ Bira [A-1] was brought on record as Ext.-6.

62. Another circumstance referred by the learned trial as well as by the prosecution is that the object of assault, chiprang was recovered by the I.O. [P.W.15] at the instance of the accused person, Biren Das @ Bira [A-1]. The accused person, Biren Das @ Bira [A-1] did not mention in his Ext.-6 statement about the place where any chiprang could be found. None of the prosecution witnesses, who were present at the P.O. when the deadbody was recovered, had deposed to the effect the chiprang was recovered after being shown by the accused person, Biren Das @ Bira [A-1]. In such fact situation, drawing of the circumstance that the alleged object of assault, chiprang was recovered by the I.O. [P.W.15] at the instance of the accused person, Biren Das @ Bira [A-1], appears to us, is one which is not borne out of the evidence on record. It also requires a mention that the prosecution had not led any other evidence connecting the said chiprang so recovered, with the alleged homicidal death of the deceased.
63. Before this Court, it has been contended by the prosecution that on the day when the accused person, Biren Das @ Bira [A-1] was taken to Munchibasti in Village – Uttar Kalikhola, he confessed to the effect that he had killed the deceased with a chiprang and after killing, he had dumped the deadbody in the septic tank and such confession would be admissible because the confession was made in presence of a Magistrate. It has been contended that the confession was made by the accused person, Biren Das @ Bira [A-1] before a Magistrate, that is, the Additional Deputy Commissioner/Sub-Divisional Officer [Civil] and such confession is admissible under Section 26 of the Evidence Act. It may be mentioned, at the cost of repetition, that as per Section 26 of the Evidence Act, 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. It has been categorically held by a Full Bench of this Court in **Kartik Chakrabarty and others vs. State of Assam**, reported in **[2018] 2 Gau LR 1**, that the expression, 'Magistrate' occurring in Section 26 of the Evidence Act means a Judicial Magistrate and not an Executive Magistrate. Therefore, such contention after consideration, deserves to be rejected and is accordingly rejected. Furthermore, the Executive Magistrate before whom the confession was allegedly made, did not enter into the witness box to testify on the aspect of confession.

64. The prosecution has further contended that when the accused person, Biren Das @ Bira [A-1] was taken to the place at Munchibasti in Village – Uttar Kalikhola, he, in presence of a nos. of prosecution witnesses, showed the septic tank where the deadbody of the deceased was found and on that basis, has urged that such pointing towards the septic tank by the accused person, Biren Das @ Bira [A-1] is relevant under Section 8 of the Evidence Act.
65. In **A.N. Venkatesh and another vs. State of Karnataka, [2005]** 7 SCC 714, relied on by the prosecution, it has been observed that the evidence of the circumstance, simpliciter, that the accused pointed to the Police Officer, the place where the deadbody of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 of the Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. Even if the disclosure statement is held to be not admissible under Section 27 of the Evidence Act, still it would be relevant under Section 8 of the Evidence Act. The evidence of the Investigating Officer [I.O.] and the prosecution witnesses, named therein, that the accused had taken them to the spot and pointed out the place where the deadbody was buried, has been held to be an admissible piece of evidence under Section 8 of the Evidence Act as the conduct of the accused.
66. From the decision in **A.N. Venkatesh** [supra], it transpires that the part of the testimony of the prosecution witnesses that the deadbody of the deceased was recovered from the P.O., that is, the premises wherein the septic tank was situated; and that the prosecution witnesses who were present there deposing to the effect that the accused person, Biren Das @ Bira [A-1] pointed to the septic tank wherefrom the deadbody was recovered; is relevant under Section 8 of the Evidence Act and therefore, is an admissible piece of evidence.
67. Section 8 makes the conduct of an accused person relevant, if such conduct influences or influenced by any fact in issue or relevant fact. It could be either a previous or a subsequent conduct. The conduct, in order to be admissible, must be such that it has close nexus with the fact in issue or relevant fact. We have already found that no value can be attached on the point of discovery of fact of the recovery

of the deadbody from the septic tank on the basis of the statement of the accused person, Biren Das @ Bira [A-1], Ext.-6 from the standpoint of Section 27 of the Evidence Act.

68. The fact that the accused pointed to the place wherefrom the deadbody was recovered does not go to indicate anything about his involvement in the concealment of the deadbody. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person, on whose pointing out the deadbody was discovered. Apart from the discussion already made in the preceding paragraphs hereinabove, the decision in **Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra, [2022] 10 SCALE 290**, can be referred to in this connection. The Hon'ble Supreme Court, in paragraph 45 therein, has observed as under :-

45. What emerges from the evidence of the P.W.4 & P.W.10 respectively is that the appellant stated before the panch witnesses to the effect that 'I will show you the weapon concealed adjacent the shoe shop at Parle'. This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of the weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence.

69. From the fact of pointing by the accused person, Biren Das @ Bira [A-1] towards the septic tank wherefrom the deadbody was recovered by Police, and on its acceptance as admissible under Section 8 of the Evidence Act, at least three alternative situations are possible; *firstly*, the accused person, Biren Das @ Bira [A-1] had derived the knowledge of the existence of the deadbody inside the septic tank through some other source; *secondly*, the accused person, Biren Das @ Bira [A-1] might have even seen somebody concealing that deadbody in the septic tank; and

*thirdly*, the accused person, Biren Das @ Bira [A-1] himself concealed the deadbody in the septic tank. The first two situations are compatible with the innocence of the accused person, Biren Das @ Bira [A-1] whereas the third situation could be a factor to infer his involvement in the crime. Therefore, it cannot be outrightly presumed or inferred that because the deadbody was discovered in the septic tank on being pointed out by the accused person, Biren Das @ Bira [A-1] he was the person who had concealed it, much less that he had killed the deceased. The prosecution herein has canvassed that the rule of evidence contained in Section 106 of the Evidence Act is applicable in the case in hand. Section 106 of the Evidence Act does not in any way lessen the burden of proof which is always on the prosecution. Section 106 of the Evidence Act comes in a scenario when the prosecution is required to establish the facts by way of circumstantial evidence. The rule of evidence contained in Section 106 of the Evidence Act comes into operation only when the various links in the chain of evidence laid by the prosecution are found to have been conclusively proved by reliable and credible evidence and the circumstances point towards the guilt of the accused with reasonable definiteness. Therefore, drawing analogy from **Shahaja @ Shahajan Ismail Mohd. Shaikh** [supra], even if the discovery of the fact, that is, recovery of the deadbody from the septic tank is accepted under Section 8 of the Evidence Act as a relevant piece of evidence as regards subsequent conduct of the accused person, Biren Das @ Bira [A-1] still, in view of atleast three possible alternative situations, enumerated above, the fact that the accused person, Biren Das @ Bira [A-1] was the author of the crime remains in the position of 'may be true' and does not get shifted to the position of 'must be true', as required in a case resting on circumstantial evidence.

70. Though the prosecution has pressed that the rule of evidence contained in Section 106 of the Evidence Act would be applicable in this case, we do not find any reason for applicability of the rule of evidence embodied in Section 106 of the Evidence Act in the case in hand. The rule of evidence embodied in Section 106 of the Evidence Act gets operational only in cases where the prosecution can be said to have succeeded in proving the facts from which a reasonable inference can be drawn regarding the guilt of the accused. From the above discussion, it has already emanated that apart from the lone substantive piece of evidence in the context of Section 8 of the Evidence Act, which is in the position of 'may be true', the prosecution has not been able to establish the other circumstances by reliable and

credible evidence. In such view of the matter, the obligation to offer a plausible explanation by the accused persons under Section 106 of the Evidence Act as regards the circumstance under which the deceased had died cannot said to have shifted to them. It has been clearly observed in **Sharad Birdichand Sarda** [supra], that in a case resting on circumstantial evidence where various links are found to have been satisfactorily made out and the circumstances point towards the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, then only absence of explanation from the end of the accused would operate as an additional link to complete the chain.

71. The other circumstance from which the confession of guilt was drawn by the learned trial court is the confession of guilt made by the accused person, Umesh Deka [A-3], who had already expired during the trial. We find that during the course of investigation, the statement of the accused person, Umesh Deka [A-3] was recorded under Section 164, CrPC on 25.11.2016 by P.W.16, Dr. N.C. Bhuyan, Judicial Magistrate, 1<sup>st</sup> Class, like the accused person, Bapan Dutta [A-2]. But when deposed before the court, P.W.16 did not depose anything as regards the confessional statement of the accused person, Umesh Deka [A-3], recorded under Section 164, CrPC. Even otherwise, such a statement cannot be taken into evidence in the form of previous statement under Section 32[1] of the Evidence Act as a dying declaration. Dying declaration is admissible under Clause [1] of Section 32 of the Evidence Act and it lays down that statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question are relevant whether the person who made them was or was not, at a time when they were made, under expectation of death and whatever may be the nature of the prosecution in which the cause of his death comes into question. In the statement recorded under Section 164, CrPC, the accused person, Umesh Deka [A-3] had stated as regards the death of the deceased, Gauranga Das and had not stated anything as regards his own cause of death and as such, such confessional statement could not have been relied upon, otherwise also, by the prosecution as well as by the learned trial court to take it as a circumstance in the chain of circumstances.
  
72. Ms. Bhuyan has relied upon in the four-Judge decision in **Balbir Singh vs. State of Punjab, AIR 1957 SC 216**, to contend that though from the confessional statement

of the accused person, Bapan Dutta [A-2], exhibited as Ext.-11, the inculpatory part of the accused person, Biren Das @ Bira [A-1] so far as the charge of murder would not be admissible in evidence but the inculpatory part of the said statement for the charge under Section 201, IPC would be admissible in evidence since on that point apart from implicating the accused person, Biren Das @ Bira [A-1] the accused person, Bapan Dutta [A-2] also implicated himself.

73. From the decision in **Balbir Singh** [supra], the proposition which emerges is that in evaluating a confessional statement of an accused person, the inculpatory part can be accepted as evidence leaving aside the exculpatory part.
  
74. The rule of evidence embodied in Section 30 of the Evidence Act has come under consideration of a Constitution Bench of the Hon'ble Supreme Court in **Haricharan Kurmi vs. State of Bihar, AIR 1964 SC 1184**. The Hon'ble Supreme Court after considering the provision contained in Section 30 of the Evidence Act, has observed in the following manner :

11. ...When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in Section 30 is not evidence under Section 3 of the Act. Section 3 defines 'evidence' as meaning and including-

- [1] all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
  
- [2] all documents produced for the inspection of the Court.

12. As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the

court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right..... Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. *The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30.* The same view has been expressed by this Court in *Kashmira Singh vs. State of Madhya Pradesh, 1952 SCR 526 : AIR 1952 SC 159....*

\* \* \* \*

16. It is true that the confession made by Ram Surat is a detailed statement and it attributes to the two appellants a major part in the commission of the offence. It is also true that the said confession has been found to be voluntary, and true so far as the part played by Ram Surat himself is concerned, and so, it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true; and in that sense, the reading of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion, however grave, must not be allowed to take the place of proof. As we have already indicated, *it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.* In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that

the charge is not proved against him, and so, he is entitled to the benefit of doubt....

75. From the rule of evidence embodied in Section 30 of the Evidence Act and the exposition made in **Balbir Singh** [supra] and **Haricharan Kurmi** [supra], it is clear that the confessional statement of the accused person, Bapan Dutta [A-2], exhibited as Ext.-11, can be taken into consideration to lend assurance to the conclusion of guilt reached against the accused on the basis of the substantive evidence led against them by the prosecution and it is not permissible to take into consideration such confessional statement at the beginning in the process of appreciation of evidence on record. In the discussion, made above, as regards substantive evidence we have already reached a view that the only substantive piece of evidence is in the context of Section 8 of the Evidence Act and the said lone substantive piece of evidence is without reasonable definiteness and is hanging in the position of 'may be true'. When the said piece of evidence is considered in juxtaposition with the permissible part of the confessional statement of the accused person, Bapan Dutta [A-2], the position which emerges is that both, even if combined together, fall substantially below the standard beyond reasonable doubts and the chain of circumstances is evidently incomplete for holding the two accused persons, Biren Das @ Bira [A-1] and Bapan Dutta [A-2] guilty for the offence of murder.
76. In respect of a criminal offence, a person is ordinarily responsible for his own act. A person can also be vicariously liable for the acts of others if he had common intention to commit the offence. Section 34, IPC has provided that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. The expression, 'common intention' implies a pre-arranged plan and acting in concern pursuant to the plan. If the common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is vicariously and constructively liable for the criminal act done by one of them. The offence defined in Section 201, IPC is attracted when one causes disappearance of evidence of offence or gives false information to screen the offender. The essential ingredients of the offence under Section 201, IPC are as follows – [i] an offence has been committed; [ii] the accused knew or had reason to believe that such offence

has been committed; [iii] the accused caused disappearance of the evidence thereof; [iv] give false information in respect thereof; [v] knowing or having reasons to believe the same to be false; and [vi] the accused did so with intention to screen the offender from legal punishment.

77. When the evidence available on record are examined vis-à-vis the ingredients of the offence defined under Section 201, IPC and Section 34, IPC are analysed, we find want of sufficient materials to attract the said offences against the two accused-appellants.
78. Though because of the facts that the deceased who was a head mason and the accused persons were his co-workers in a contract-work which was undergoing at the relevant point of time, the factum of homicidal death of the deceased has pointed the needle of suspicion towards the accused persons as the probable assailants, but such suspicion, however grave it may be, cannot take the place of proof and there is a long distance to travel from the point of 'may be true' to the point of 'must be true'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take the place of proof. The principle of criminal jurisprudence is that the court has a duty to ensure that mere conjecture or suspicion shall not be allowed to take the place of legal proof. The long distance between 'may be true' and 'must be true', has to be covered by way of clear, cogent and credible evidence produced by the prosecution, before an accused is held to be guilty of a crime. Another golden principle, which runs through the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing towards the guilt of the accused and the other to his innocence, the view which is favourable to the accused, at all stages, should be adopted. This principle assumes more significance in cases when the guilt of the accused is sought to be established by way of circumstantial evidence.
79. Testing on the parameters, on which a case resting on circumstantial evidence is to be tested, we are of the clear and unhesitant view that the prosecution in the case in hand, has not been able to prove all the required circumstances by clear, cogent and credible evidence and thereafter, to complete the chain of circumstances to point unerringly that the accused-appellants herein, that is, A-1 and A-2 were the probable

assailants and were the perpetrators of the crime of homicidal death of the deceased in furtherance of their common intention.

80. In view of our above view, both the accused-appellants are found entitled to the benefit of doubt. As a corollary, the Judgment and Order of conviction and sentence dated 30.11.2021 passed by the learned trial court against the two accused-appellants is found unsustainable in law. Accordingly, the Judgment and Order of conviction and sentence passed in Sessions Case no. 41 of 2017 is set aside. Resultantly, both the criminal appeals stand allowed.
81. The accused-appellants are, thereafter, to be released from custody forthwith if their custody is not required in connection with any other case or purpose.
82. We reiterate the direction given by the learned trial court as regards award of adequate compensation to the family of the victim in terms of the provisions contained in Section 357A, CrPC and the extant Victim Compensation Scheme framed thereunder.
83. Before parting with, we wish to place our appreciation on record as regards the services rendered by Mr. P. Mahanta and Mr. A. Tiwari, learned Amici Curiae appearing for the accused-appellants and direct the Registry to make available to them just remuneration as per the notified fee structure applicable to an Amicus Curiae.
84. The Registry to send back the case records of the learned trial court forthwith.

JUDGE

JUDGE

**Comparing Assistant**