

(2019) 12 SIK CK 0004
In the Sikkim High Court
Case No : Criminal Appeal No. 23, 24 Of 2017

Abdul @ Badrul And Ors

APPELLANT

Vs

State Of Sikkim And Ors

RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 201, 302, 304A, 392
Code Of Criminal Procedure, 1973 — Section 162, 164, 281, 313
Evidence Act, 1872 — Section 21, 24, 25, 30, 106
Constitution Of India, 1950 — Article 20(3), 22

Citation : (2019) 12 SIK CK 0004

Hon'ble Judges : Meenakshi Madan Rai, J; Bhaskar Raj Pradhan, J

Bench : Division Bench

Advocate : Ajay Rathi, Phurba Diki Sherpa, Vivek Kohli, Thupden Youngda, S.K. Chettri, N. Rai, Sudha Sewa

Final Decision : Allowed

Judgement

Meenakshi Madan Rai, J

1. This common Judgment disposes of both Appeals which impugn the Judgment, dated 21.07.2017, being Sessions Trial Case No.09 of 2015 of the

Court of the Sessions Judge, West Sikkim, at Gyalshing. In Criminal Appeal No.24 of 2017, the Appellants No.1, 2, 3 and 4 were the accused persons

No.2, 3, 4 and 5 respectively before the learned trial Court, (hereinafter referred to as A2, A3, A4 and A5). In Criminal

Appeal No.23 of 2017 the Appellant was the accused No.1 before the learned trial Court and shall be referred to as A1 herein.

2. Relying upon the alleged confessional statement of A1 being Exhibit 30 and circumstantial evidence, the Learned trial Court found A1, A2, A3 and

A4 guilty of the offence under Section 302 and Section 120B of the Indian Penal

Code, 1860 (for short, 'IPC') both read with Section 34 IPC.

A5 was found guilty of the offence under Section 201 IPC. A1 to A4 were convicted and sentenced to suffer imprisonment for life under Section 302

IPC and to pay fine of Rs.50,000/- (Rupees fifty thousand) only, each. Under Section 120B IPC, A1 to A4 were sentenced to undergo life

imprisonment and to pay fine of Rs.50,000/- (Rupees fifty thousand) only, each. The sentences of imprisonment were ordered to run concurrently. A5

was sentenced to undergo rigorous imprisonment under Section 201 IPC for a term of four years and to pay fine of Rs.50,000/-, (Rupees fifty

thousand) only, with a default clause of imprisonment.

3. Assailing this finding, in Criminal Appeal No.24 of 2017, learned Senior Counsel for A2 to A5 advanced the argument that their conviction is based

entirely on the purported confessional statement of A1 a co-accused, under Section 164 of the Code of Criminal Procedure, 1973 (for short,

'Cr.P.C.'), Exhibit 30. However, this statement is in the first instance inadmissible in evidence as A1 was administered oath prior to the recording

of his statement. Towards this end, reliance was placed on *Suren Rai v. State of Sikkim* SLR (2018) Sikkim 108. That, assuming that the statement of

A1 is admissible, it cannot be relied on to convict another accused, the statement having been made by an accused himself. In this context, the

observation in *Nathu v. The State of Uttar Pradesh* AIR 1956 SC 56 and *Haricharan Kurmi v. State of Bihar* AIR 1964 SC 1184 was pressed into

service where it was held inter alia that the confession of a co-accused cannot be treated as substantive evidence. A1, in his statement has

unequivocally stated that he is innocent, thereby decimating the value of the purported confessional statement. That, the impugned Judgment however

erroneously held that the statement of A1 was a confession which is an incorrect finding and the Prosecution cannot rely on the statement to foist the

offence on the Appellants. Besides, the learned Magistrate who recorded Exhibit 30, ought to have recorded it only as a statement, in view of its

exculpatory nature. That, A1 had asserted that the statement was tutored thereby exposing its falsity and rendering it inconsequential to the

Prosecution case, strength on this count was drawn from *Aghnoo Nagesia v. State of Bihar* AIR 1966 SC 119. That, no other evidence collated by the

Prosecution establishes the guilt of A2 to A5 in the offence. That, by mustering

the call records of A1 and the deceased Rekha Tiwari, an attempt was made by the Investigating Officer (for short, 'I.O.') to establish that A1 being familiar with the deceased had called her on her cell phone thereby enabling and facilitating the Appellants to commit the alleged offence, as she heeded to his request and came out of her house. Towards this end, the Prosecution relied on Exhibit 44 wherein the exact tower location of A1 and the deceased were sought to be verified from the mobile number of the I.O., which in itself is a preposterous proposition besides failing to establish mens rea. That, A1 in Exhibit 30, had stated that A4 had used a 'khukuri' (a sharp edged weapon) to slit the throat of the deceased. This statement stands belied by Exhibit 27, the Post-Mortem Report, prepared by P.W.40, Dr. O.T. Lepcha, who detected no such injury as evident from its absence in Exhibit 27, raising doubts on the veracity of Exhibit 30. That, the categorical statement of P.W.1 the daughter of A2 and the deceased, under cross-examination is that her parents shared cordial relations and A2 loved the deceased. On the face of such evidence the Prosecution has failed to assign any motive to A2 to commit the heinous offence. That, the evidence of P.W.2 reveals that the victim was epileptic and prone to seizures hence her falling down the stairs and to her death on account of such a seizure cannot be ruled out. The attention of this Court was drawn to Exhibit 10, the Crime Scene Reconstruction Memorandum and it was contended that the document was inadmissible in evidence in terms of the provisions of Section 25 of the Indian Evidence Act, 1872 (for short, 'Evidence Act') having been prepared by the I.O. on the basis of the statement made by A1, allegedly in the presence of witnesses. It was further urged that the Prosecution has relied on Exhibit 22, Diary of the deceased but as per the evidence of the Handwriting Expert, P.W.39, only signatures of the deceased have been proved but not her handwriting. It was next contended that the admitted handwritings of the deceased in the Devanagari script, in the Nepali vernacular, were not forwarded to the Handwriting Expert along with the questioned documents, and thereby remained uncomparated. That, A3 had lodged the First Information Report (for short, 'FIR'), Exhibit 32, however on account of his arrest in connection with the crime neither the contents nor the signature in Exhibit 32 have been proved, which forthwith crumbles the Prosecution case

striking at its very foundation. The Prosecution also sought to augment its case relying on Exhibit 34, the FIR dated 24-04-2012 said to have been

lodged by the deceased against one Dilip Chettri, alleging verbal abuse by him. However he is not arrayed as an accused in the instant matter, the

document is thus irrelevant as the deceased has not incriminated any of the Appellants in the said document which thereby lends no assistance to the

Prosecution case. Exhibit 46 the blood samples of A1 and A3 and some pieces of cloth were forwarded to the Expert for his opinion, who for his part

could not arrive at a conclusion. That, uncomparred and unproved Exhibits including cash and other articles from the room of A5 cannot support the

Prosecution case. In the absence of any evidence linking the offence to A2 to A5 the impugned Judgment of the Learned trial Court is obviously

perverse and deserves to be set aside. On this count reliance was placed on *Damber Bahadur Chhetri v. State of Sikkim* 2010 CRI.L.J. 3076 (Sikkim)

and *Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan* (2013) 5 SCC 722.

4. Mr. Ajay Rathi, Learned Counsel for A1 in Crl.A. No.23 of 2017, while adopting the arguments canvassed by Learned Senior Counsel for A2 to

A5 supra would contend that in fact A1 had no role in the alleged incident neither did he aid or abet the alleged offence. It is the clear and categorical

statement of A1 in his examination under Section 313 Cr.P.C. that the purported confessional statement under Section 164 Cr.P.C. was made under

threat, duress and coercion apart from oath having been administered to him and cannot be rendered as evidence. He sought assistance from the ratio

in *Suren Rai* (supra). That, no evidence emanates against A1 in connection with the incident and the Prosecution case rests entirely on circumstantial

evidence which however is disjuncted and does not establish the guilt of A1. He relied on *Hanumant v. State of Madhya Pradesh* AIR 1952 SC 343

and *K. Venkateshwarlu v. State of Andhra Pradesh* (2012) 8 SCC 73.

A1 in his alleged confessional statement did not inculcate himself, hence the statement being exculpatory is inadmissible in evidence. On this count,

reliance was placed on *Champa Rani Mondal v. State of W.B.* (2000) 10 SCC 608. Besides, A1 did not abscond at any stage of the proceedings nor

does he have criminal antecedents. That, the evidence is bereft of links to A1, hence he deserves an acquittal.

5. Learned Advocate General in repudiation of the contentions of learned Counsel for A1 and learned Senior Counsel for A2 to A5, submitted that

there is no strength in their submissions that the confessional statement of A1 was recorded after oath was administered as it is evident that the

statement was recorded on paper which was previously formatted. Walking this Court through the evidence of the other Prosecution witnesses, he

pointed out that before recording the evidence of the Prosecution witnesses the words "oath administered" have been typed to indicate

administration of oath to them. These words are conspicuously absent in the document on which the Section 164 Cr.P.C. statement of A1 was

recorded, hence, the question of oath having been administered is devoid of any merit. That, this Court is aware of such preformatted forms on which

confessional statements are recorded and has taken note of it in *Suren Rai* (supra). That, the statement of A1 was voluntary and no proof of coercion

as alleged exists as can be gauged from the evidence of the Magistrate PW 41, who took necessary precautions before recording Exhibit 30 and

ensured that the statements were voluntary. Exhibit 30 having been recorded on 10.03.2014, eight months after the incident is untutored and made

while he was in judicial custody and not police custody. It was canvassed that this statement clearly fell within the parameters of a confession since he

has stated that he was present at the scene of the crime, confessed his role in the incident, and clearly elucidated the role of A2 to A5. His confession

is admissible and enables the Court to draw an inference of the common object of A1 and A2 to A5. On this aspect reliance was placed on *Lokeman*

Shah and Another v. State of W.B. AIR 2001 SC 1760 and *Aghnoo Nagesia* (supra). That, the circumstantial evidence furnished by the Prosecution

is of an unbroken and cogent chain establishing the guilt of A1 to A5. That, A4 the second wife of A2 had gone to the room of the deceased, as per

P.W.1, at around 2 a.m. to check on her but found her missing from the room and thereupon telephonically intimated P.W.1. That, the action of A4

defies all logic as no reasons have been put forth as to why she took such a step at that time of the night. Investigation found A4 in possession of bank

notes of the ICICI Bank which was in fact money withdrawn by the deceased a few days prior to the incident. That, in the absence of any

explanation by A4 as to how she came to be in possession of the bank notes, Section 106 of the Evidence Act kicks into place shifting the onus on A4.

The next contention urged was that the investigation had revealed that gold jewellery belonging to the deceased was found to be in the possession of

A4 as also her Mother Infant Immunization Card and Diary, Exhibit 22 and the circumstance remained unexplained by A4. That it was indeed

incongruous that none of the occupants of the house heard any untoward sound as evidently the victim was strangled, although they were all

(except A2) present in the house. That, Exhibit 22 also implicates A2 to A4 as it is clear from the details therein that attempts had been earlier made

by them on the life of the deceased. Hence, the circumstances as narrated above being cogent and continuous, clearly links the offence to all the

Appellants. Consequently, the Appeals lacking merit deserve a dismissal.

6. The rival contentions were heard in extenso. The evidence and documents scrutinised carefully. The impugned Judgment was perused and

considered as also the citations made at the Bar.

7. The questions that fall for consideration before this Court are;

(i) Whether the purported confessional statement of A1 can be considered as a confession?

(ii) Whether circumstantial evidence links the offence to the Appellants?

8. Before dealing with the above questions, it is but imperative to delve into the facts of the case for clarity. On 13-07-2013, the FIR Exhibit 31 was

lodged by A3 at the Gyalshing P.S. to the effect that on 13-07-2013 in the absence of his brother (A2), his sister-in-law Rekha Tiwari was found dead

in one corner of the courtyard of their house, near the Tulsi plant, covered by a bag and a cloth tied around her neck. Her gold jewellery was missing,

thus suspecting foul play he had filed the report seeking an enquiry into the matter. Consequent thereto, Gyalshing P.S. Case came to be registered

against unknown persons under Sections 392/302 of the IPC, dated 13-07-2013, and endorsed to P.W.42 for investigation. It transpired that the

deceased was from Bhutan, had married A2 and from the wedlock they had a son and a daughter, the former however fell victim to a road accident.

Following the incident A2 married A4, from whom a son was born. A2 shared his house at Gyalshing with both his wives, his unmarried elder sister

A5 and the son of A3. A1 had come to Sikkim about 12-13 years ago and was a tenant in the house of one Pradeep, the brother of A2 in Gyalshing.

In the course of his employment in constructions he became acquainted with A2

and his family, including the deceased. The deceased confided to A1 that her husband did not want to give a share in his landed property to their daughter which was evidently a bone of contention between them. Consequently A2 made plans to do away with the deceased and approached A1 for this purpose telling him to call the deceased outside the house to enable his family to settle the matter pertaining to landed property with the deceased 10-15 days prior to the incident. On 12-07-2013, A2 left for Siliguri. In accordance with the plan A1 called the deceased to meet him outside her house at around 12.30 pm on 13-07-2013. Initially she rejected the idea but on his insistence she came out at around midnight and made her way towards A1 who was waiting near the water tank of the house of A2. However, as she stepped into the courtyard towards the water tank A3 suddenly appeared and started strangulating her from behind. On witnessing this, A1 rushed to obstruct A3 but was impeded by A4 who also suddenly appeared from below the staircase and placed a 'khukuri' on his neck threatening him with dire consequences. The deceased was strangulated by A3 and her body lain close to the Tulsi plant. Being threatened by A3 with death if he remained in Gyalshing, A1 left the spot for his rented room. The conversation of A1 with the deceased on the intervening night of 12-07-2013 and 13-07-2013, A1 and his location were revealed by call details and route mapping. After commission of the offence A3, A4 and A5 removed the jewellery from the deceased, went to her room and scattered her valuables and cash to make out a scene of robbery. Later, a sum of Rs.2,75,000/- (Rupees two lakhs and seventy five thousand) only, was found in the possession of A5 the source of which she failed to cogently explain leading to the possibility that the money belonged to the deceased. After the crime A5 stayed back in the house, A3 returned to his house while A4 went to the house of her husband's nephew situated at a walking distance of two minutes. A4 then informed Tulshi Chettri P.W.2 that the deceased had disappeared and asked him to fetch A3. Around 4.30 a.m., A5 with the ruse of getting water went towards the water tank and claimed to have discovered the body of the deceased. Meanwhile, A1 was also informed of the incident by his friends, apprehending arrest he absconded to his native place and thereafter to Chandigarh from where he was arrested on 23.02.2014. In view of the

facts and circumstances, a prima facie case was made out against A1, A2, A3, A4 and A5 under Sections 302/201/392/120B of the IPC and Charge-

Sheet submitted accordingly.

9. While dealing with the first question formulated, it would be apposite to examine what "confession" means. The Evidence Act is bereft of the

definition of the word "confession." In *Pakala Narayana Swami v. The King-Emperor* AIR 1939 PC 47, Lord Atkin while discussing the word, at

Paragraph 15 of the Judgment, observed as follows;

"...Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An

admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the

owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some

confusion appears to have been caused by the definition of confession in Art. 22 of Stephen's "Digest of the Law of Evidence" which defines a

confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the

surrounding articles are examined it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions

in criminal cases and for this purpose defines confessions so as to cover all such admissions; in order to have a general term for use in the three

following articles confession secured by inducement, made upon oath, made under a promise of secrecy. ..."

Consequently, the definition of "confession" as given in Stephen's Digest of the Law of Evidence supra was discarded.

10. In *Palvinder Kaur v. State of Punjab* AIR 1952 SC 354 the Hon'ble Supreme Court dealt with "confession" and "exculpatory

statements." The matter pertained to an allegation of murder of the Appellant's husband by the Appellant and an accomplice, Mohinderpal, by

administering poison. The Appellant made a confessional statement to the Magistrate which was relied on by the Hon'ble High Court to establish the

charge against her under Section 201 IPC. The Supreme Court inter alia held as follows;

"16. The statement read as a whole is of an exculpatory character. It does not

suggest or prove the commission of any offence under the Indian

Penal Code by any one. It not only exculpates her from the commission of an offence but also exculpates Mohinderpal. It states that the death of

Jaspal was accidental. The statement does not amount to a confession and is thus inadmissible in evidence. â?¡â??

The Hon?ble Supreme Court further held that the Court accepted the inculpatory part of that statement and rejected the exculpatory. That, the Court

is not competent to accept only the inculpatory part, it must either be accepted in whole or rejected in whole.

11. In Aghnoo Nagesia (supra), the Hon'ble Supreme Court dealt with â??confessionâ? as envisaged under Section 24 to Section 30 of the Evidence

Act and Section 162 and Section 164 of the Cr.P.C. and inter alia held that â??A confession or an admission is evidence against the maker of it,

unless its admissibility is excluded by some provisions of law.â? It was further observed that a statement or confession made in the course of an

investigation may be recorded by a Magistrate under Section 164 Cr.P.C. subject to the safeguards imposed by the Section. â??Confessionâ? was

therefore summarized as follows;

â??12. Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains

self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged

to be confessed. If an admission of an accused is to be used against him the whole of it should be tendered in evidence, and if part of the admission is

exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. See Hanumant v. State of U.P. [(1952)

SCR 1091, 1111] and Palvinder Kaur v. State of Punjab [(1953) SCR 94, 104]. The accused is entitled to insist that the entire admission including the

exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory,

and the prosecution intends to use the whole of the statement against the accused.

.....

15. Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under Section 304-A of the

Indian Penal Code and a statement made by him to a police officer that "I was drunk; I was driving a car at a speed of 80 miles per hour; I could

see A on the road at a distance of 80 yards; I did not blow the horn; I made no attempt to stop the car; the car knocked down A. No single

sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under Section 304-A of

the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement. Again, take a

case where a single sentence in a statement amounts to an admission of an offence. A states "I struck B with a tangi and hurt him". In

consequence of the injury B died. A committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he

brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such

as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of

the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. Each

and every admission of an incriminating fact contained in the confessional statement is part of the confession."

12. In *Central Bureau of Investigation v. V.C. Shukla and Others* AIR 1998 SC 1406 it was inter alia held as follows;

"45. The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an

accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and

was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to a Police Officer, or was made at

a time when the accused was in custody of a Police Officer. If a statement was made by the accused in the circumstances just mentioned its

admissibility will depend upon the determination of the question whether it does not amount to a confession. If it amounts to a confession, it will be

inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an

inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter

XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him. Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance.â??

Hence, by making a statement if the accused does not acknowledge his guilt, it does not tantamount to a confession although some incriminating facts may have been stated. Besides the above, it is now settled law that conviction of an accused can be based on confession only if the confession so recorded is found to be voluntary and true.

13. On the anvil of the observations made in the citations supra we may now examine the statement of A1 recorded purportedly under Section 164

Cr.P.C. by P.W.41 and whether it qualifies as a confession fulfilling the requirements of voluntariness and truthfulness. In the first instance, records

reveal that A1 was arrested on 23-02-2014 and remanded to police custody on 27-02-2014. He was produced before the Learned Magistrate on 10-

03-2014 for the purpose of recording Exhibit 30. The Learned Magistrate explained to him that he was not in police custody and enquired from him as

to whether he was induced, coerced, promised or advised by the Police to make a statement to which his reply was in the negative. She also enquired

whether the confession was prompted by any harsh treatment by anyone to which he again replied in the negative. These questions reveal that all

necessary precautions were taken indeed by the Magistrate, however she recorded the statement of A1 without affording him time for reflection and

as the form reveals she administered oath to A1 which is specifically barred by law. As per A1 on the directions of A2, â??The same night I called

the deceased at around 11:30 pm and asked her to come out at 12:30 am. I had asked the deceased to come out near the tank of their house. At 12:30

am I was waiting for the deceased near the tank. She switched on the light and she saw me. When the deceased was walking down the stairs, Arjun

and the second wife were hiding under the stairs. I saw them when the deceased switched on the light. The deceased started walking towards me and

had only taken two steps of the stairs, when Arjun used a cloth and put it across her neck and tried to strangulate her from the back. When I saw this

I ran towards the deceased to separate Arjun. However, by then the second wife pounced on the deceased and grabbed her hair and slit her throat

with a khukuri. The deceased could not make any sound/noise. The dead body of the deceased was made to rest on the wall of the house. Arjun also

had a khukuri and he placed that on the back of my head and made me touch the dead body. He threatened to kill me if I told anyone about the

incident and that if I did report the matter then I would be implicated in the murder. He asked me to run away from Gyalshing and asked me to go to

my home town. I have been falsely implicated in this case. Arjun and Prem Tiwari are also in judicial custody. In the jail they had offered me rupees

2.50 lakhs if I lied and owned up to the murder. I am innocent. Arjun, Prem Tiwari and the second wife have to be punished. â?¡â??

14. Firstly, it may be reiterated that the statement was taken after administering oath to A1 as reflected in the document, thereby leading to an

insinuation that the statement was recorded under coercion. Even assuming that this was not the case and as argued by Learned Advocate General

that the statement was recorded in a pre-typed format and thereby admissible, it does not qualify as a confessional statement on the touchstone of the

observations in the ratiocinations supra. It was self-exculpatory and he has stated nothing about his role in the murder of the deceased but has

specifically asserted that he is innocent and has been falsely implicated thereby denuding the statement of the nature of confession. The whole burden

of establishing the case lies on the Prosecution. Where the Prosecution relies upon the confessional statement of the accused in proof of the charge

strict compliance with the provisions of Section 164 of the Cr.P.C. is essential. The administering of oath itself would make a confessional statement

totally inadmissible in evidence in view of the mandatory provisions of Article 20(3) of the Constitution and Section 281 of the Cr.P.C. It would be

apposite to bear in mind that A1 in his Section 313 Cr.P.C. Statement has retracted his purported confession. As a matter of caution the Courts

require corroboration to a retracted confession, although not a rigid rule of law, procedure or practice and the amount of corroboration necessary

would be a question of fact to be determined in the light of the circumstances of each case. In view of the above discussions Exhibit 30 deserves to be

and is discarded as evidence. The finding of the Learned trial Court that it was a confessional statement is in our considered opinion, fallacious.

15. Addressing the second question formulated supra. The prosecution examined 45 witnesses. As we carefully walk through the evidence of the

witnesses, P.W.3 to P.W.6, P.W.8 to P.W.16, P.W.18 to P.W.26, P.W.30 to P.W.32, P.W.34 and P.W.36 it is apparent that the evidence is devoid of

any assistance to the Prosecution case. From the remaining 18 witnesses, it is to be examined whether the offence can be linked to the Appellants. At

this juncture, it would do well to observe that in a case of circumstantial evidence, all circumstances from which the conclusion of the guilt is to be

drawn should be fully and cogently established. All the facts so established should be consistent with the hypothesis of the guilt of the accused, should

be conclusive in nature and exclude every other hypothesis except the unerring guilt of the accused. The circumstances must form an unbroken chain

of events leading to the proof of the guilt of the accused. Should any of the circumstances not be explained by reasonable hypothesis, the benefit

thereof accrues to the accused.

16. P.W.1, the daughter of the deceased and A2 was informed at around 2 am on 13.07.2013/2014 by her stepmother A4 that the deceased

was missing from her room which was found open and household articles were scattered. A4 also told her that despite a thorough search the

deceased could not be found anywhere. At around 5 am-6 am the same morning A4 called her on the phone and told her that the deceased was found

dead. PW 1 accordingly went to the house of her deceased mother and found her lying in the courtyard. The cross-examination of P.W.1 elicited the

fact that A2 used to love the deceased immensely and their relations were cordial and harmonious. Her evidence thus shed no assisting light on the

case. P.W.2 is similarly unable to throw light on the incident as her evidence is only to the extent that A4 went to her house at around 12.30 a.m. and

informed her that the deceased was missing from the house. She went to their house and tried to inform A3 of the circumstance but found his phone

to be switched off. The next morning the body of the deceased was discovered in the courtyard.

17. P.W.43, the second I.O. of the case went to the State Bank of Sikkim, Gyalshing where P.W.17 was a Senior Manager and seized Exhibit 7 the

Account Opening Form of the deceased in the State Bank of Sikkim, allegedly bearing the admitted signatures of the deceased. Exhibit 24 an Account

Opening Form of the deceased in the Union Bank of India, alleged to contain her admitted signatures was also seized. P.W.39, the Expert in his

evidence has stated that the admitted writings A1 to A4 on Exhibit 7 and the admitted writings A5 to A7 on Exhibit 24 were written by the same

person. Exhibit 22, a yellow coloured pocket notebook, as per P.W.39, contained red enclosed questioned writings stamped and marked Q1, Q2 and

Q3. Exhibit 23, one brown coloured telecom diary contained the questioned markings Q4 to Q8. According to P.W.39, the person who wrote A1 to

A7 (the admitted writings of the deceased) also wrote Q1, Q4, Q5, Q7 and Q9. Exhibit C was a blue coloured pocket diary containing questioned

writings marked Q7 and Q9. As per P.W.39 "My opinion that the person who wrote the blue enclosed writings stamped and marked A1 to A7

also wrote the red enclosed questioned writings similarly stamped and marked here as A1, (sic) Q4, Q5, Q7 and Q9 is based on the following

considerations:..." thereafter he elucidates the reasonings for his findings. We have to differ with the contention of Learned Senior Counsel for A2 to

A5 that only the signatures of the deceased were proved but not her handwritings, for the reasons as given by P.W.39 supra. Besides, the documents

marked "Q" encircle the handwritings and not only the signatures of the deceased and were examined by P.W.39. That having been said how the

identification of the handwriting of the deceased lends any support to the Prosecution case is unfathomable since the contents of the questioned

document Q2 on Exhibit 22 pertains to an incident of 2011, wherein Pradeep the brother of A2 had suspected the deceased of some extra marital

relations and had informed her husband A2. Pradeep then allegedly attempted to murder her, however he is not an accused in the instant matter. In

the questioned document Q3 also in Exhibit 22, she has stated that on 23-08-2011 A3 had bad mouthed her, evidently no threat of death was held out

to her by him. It is also recorded that one Rupa tried to assault her but the deceased also assaulted her. In the questioned document Q6 on Exhibit 23

she appears to have some grievance against one Dilip Budathoki who also is not an accused in the instant case neither has she made any allegation of

physical assaults on her or attempt to murder her. The questioned document Q8 also does not indicate anything against A1 to A5. Consequently, the

writings marked Q1, Q2 and Q3 in Exhibit 22 and the writings marked Q4 to Q8 in Exhibit 23 establishes that the handwritings are of the deceased but

the contents do not implicate A1 to A5 in any way. The evidence of P.W.17 and P.W.39 also fail to support the Prosecution case. The Learned trial

Court had considered Exhibit 22 and concluded that the diary entries revealed attempts on the life of the deceased. For the foregoing reasons we

differ from this finding.

18. P.W. 42, the first I.O. of the case has stated that he had seized three bundles of sealed bank notes in the denomination of Rs.100/-, two of which

were of the ICICI Bank and one of the SBI Bank from the room of A5 and other currency notes. The Learned Advocate General would have us

believe that since A5 was in possession of these notes the provisions of Section 106 of the Evidence Act fell into place on her inability to account for

such possession. In our considered opinion, this argument has no legs to stand since it is for the Prosecution in the first instance to establish its case

beyond a reasonable doubt. In *Ranjit Kumar Haldar v. State of Sikkim* (2019) 7 SCC 684 it was inter alia observed as follows;

“14. The general rule is that the burden of proof is on the prosecution. Section 106 of the Act was introduced not to relieve the prosecution of their

duty but it is designed to meet the situation in which it would be impossible or difficult for the prosecution to establish facts which are especially within

the knowledge of the accused.”

In the instant matter, had the investigation been diligently conducted it could well have been established by the Prosecution as to who had withdrawn

the said amount from the ICICI Bank and the SBI Bank. The Prosecution cannot expect the accused persons to prove the Prosecution's case. The

argument that the money belonged to the deceased was bereft of any evidence since no proof emanated on this count. The Bank Passbook of the

deceased was not furnished to indicate the deposits made by her or withdrawals for that matter, hence this argument must fail. It was also contended

that certain other articles of the deceased were found in the room of A5. Since they lived in the same house and are undoubtedly related to each

other, it can be presumed, in the absence of proof, that the deceased had handed over the articles to her for safekeeping considering that the evidence

establishes that the deceased used to go to the market for running her clothes

business, along with A2.

19. P.W.7 who is a co-villager of A2 to A5 was witness to the seizures made by the Prosecution but this lends no support to the Prosecution case.

She deposed that the Police seized some cash amounts from the possession of A5, vide Exhibit 3, on which she affixed her signature but she was

unable to disclose the reasons for such seizure or conclusion thereof. In this connection, it would be appropriate to examine Exhibit 3, the Seizure

Memo vide which the cash amounts were seized from the room of A5 from a wooden box. It was not established by evidence as to whom the

wooden box belonged to. Exhibit 5 is also a Seizure Memo in which P.W.7 affixed her signature as a witness vide which gold ornaments and some

documents were recovered, however the seizure of these articles fails to link the crime to the Appellants. P.W.33 was another witness to seizures in

Exhibit 3 along with P.W.7 and Exhibit 4, but he was unaware of any details pertaining to the matter. The role of P.W.27 was to the extent that he

handed over Exhibit 9 in four bundles being the entire call details printed by him as he was working as a Computer Operator under the Department of

Information and Technology and deputed to the Crime Branch. This document reveals details of calls made but reveals no link to the crime. P.W.28

claims that his mobile phone was used to trace the mobile tower location of A1 but his mobile phone was admittedly never seized. P.W.37 was

present when P.W.29 took the hair samples of A1 to A4, however what became of these hair samples is anyone's guess, since no statements have

been made in this context by the I.Os of the case. P.W.35 has furnished the call detail numbers pertaining to mobile number 918802684316 and

918285138714. These numbers according to the witness was issued to one Salaudin and one Amit. The seizure of Exhibit 12 the Customer

Application Form of of Amit and Exhibit 13 the Customer Application Form of Salaudin could also not establish anything pertaining to the offence.

P.W.38 although witnessed the seizure of articles lying in the courtyard of the house and some jewellery and cash from inside the house, he was

unaware of the ownership of the articles. P.W.40 is the Doctor who conducted post mortem examination on the body of the victim at around 2.40 pm

to 3.30 pm on 13.07.2013. He recorded the injuries found on the person of the victim and opined as follows, 'The opinion as to the approximate

time since death was around 12 hours and the cause of death to the best of my knowledge and belief was due to asphyxia as a result of homicidal

ligature strangulation. This was not demolished in cross-examination but the fact remains that the Prosecution is required to establish beyond

reasonable doubt that the death took place by strangulation and P.W.42, the first I.O. of the case despite having conducted the initial investigation and

making seizures as discussed hereinabove, in cross-examination admitted unequivocally that he did not find any material to show the involvement of

the Appellants in this case. P.W.43, the second I.O. of the case who was a Deputy Superintendent of Police posted at the Crime Branch took

gargantuan steps in his effort to establish the Prosecution case but his efforts were in vain. The Crime Scene Reconstruction Memorandum, Exhibit 10

is as pointed out by Learned Senior Counsel for A2 to A5 inadmissible in evidence in view of the embargo of Section 25 of the Indian Evidence Act

although both P.W.42 and P.W.44 could substantiate its existence. Steps were initiated by him to locate A1, and the call details Exhibit 9 were

collected by him nevertheless nothing points to the involvement of the Appellants in the death of the victim nor could mens rea of A1 be established by

Exhibit 9. P.W.45, the final I.O. of the case also was unable to indicate any evidence to link the Appellants to the offence.

20. The Learned trial Court was of the opinion that the confessional statement was valid and discovery of the belongings of the deceased with A5

raises a strong suspicion and points to her involvement in the crime. Suspicion undoubtedly rears its head against A2 to A5 in view of the place and

circumstances of the death but suspicion however strong cannot take the place of proof as has been propounded in *Raj Kumar Singh alias Raju alias*

Batya (supra) and *M. Nageshwar Rao vs. State of Andhra Pradesh* (2011) 2 SCC 188. Hence, the finding of the Learned trial Court that an attempt

had been made on the victim's life and she feared attempts were still being made on her life, cannot sustain in view of the gamut of facts and

evidence as already discussed supra. In conclusion we are of the considered opinion that the impugned Judgment and Order on Sentence deserves to

be and is set aside.

21. A1 to A4 are acquitted of the offence under Section 302 and Section 120B of the IPC read with Section 34 IPC.

22. A5 is acquitted of the offence under Section 201 IPC.
23. All Appellants be set at liberty forthwith, if not required in any other matter.
24. Both the Appeals are allowed.
25. Fine, if any, deposited by the Appellants in terms of the impugned Order on Sentence, be reimbursed to them.
26. No order as to costs.
27. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.