
(2022) 04 GAU CK 0034

In the Gauhati High Court

Case No : Criminal Appeal No. 89, 91, 96 Of 2014

Aswini Kalita

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 26-04-2022

Acts Referred:

Indian Penal Code, 1860 — Section 114, 201, 202, 302
Code Of Criminal Procedure, 1973 — Section 164, 223, 223(d), 313
Evidence Act, 1872 — Section 24, 27, 30, 114, 133

Citation : (2022) 04 GAU CK 0034

Hon'ble Judges : Suman Shyam, J; Robin Phukan, J

Bench : Division Bench

Advocate : K. Agarwal, B.K. Singh, S. Jahan, D. Das, B.M. Choudhury, Z. Kamar, D. Talukdar

Final Decision : Partly Allowed/Partly Allowed/Dismissed

Judgement

1. Heard Mr. K. Agarwal, learned senior counsel assisted by Mr. B.K. Singh and Ms. P. Neog, learned counsel appearing for the sole appellant in Crl. App. 96/2014; Mr. D. Das, learned senior counsel assisted by Mr. B.M. Choudhury, learned counsel for the appellants in Crl. App. 91/2014 and Mr. Z. Kamar, learned senior counsel assisted by Mr. D. Talukdar and Mr. P. Choudhury, learned counsel for the appellants in Crl. App. 89/2014. Ms. S. Jahan, learned APP, Assam, has appeared on behalf of the State of Assam.

2. These 3 (three) appeals are directed against the common judgement dated 15/02/2014 passed by the learned Additional Sessions Judge No. 1, Kamrup (M) at Guwahati, in Sessions case No. 40(K)/2004, whereby, the appellant in Criminal Appeal No. 96/2014, i.e. accused Aswini Kalita was convicted under Section 302/201 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 5,000/- for the offence committed under Section 302 of the IPC and to undergo rigorous imprisonment for three years and to pay fine of Rs. 1,000/- for committing the offence under

Section 201 of the IPC with default stipulations. By the impugned judgement, the appellants in Criminal Appeal No. 89/2014, viz. (1) Md. Washim Rafique, (2) Sri Balin Chandra Deka and (3) Sri Tilak Boro as well as the two appellants in Criminal Appeal No. 91/2014 i.e. Dr. Kismat Ali and Sri Sankar Biswakarma, were convicted under Section 201/202 of the IPC and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs. 1,000/- each for committing the offence under Section 201 of the IPC and also to undergo rigorous imprisonment for three months and to pay fine of Rs. 1,000/- each with default stipulation, for committing the offence under Section 202 of the IPC. The sentences awarded by the learned Sessions Court were to run concurrently in case of all the accused persons.

3. The prosecution case, as unfolded from the materials available on record, is to effect that on 22/08/2012, at about 9 a.m., an abandoned cartoon was seen lying under the over bridge at Hedayatpur, on the eastern side of the Nehru Stadium at Guwahati. Having seen the cartoon, suspecting bomb in it, Sri Arun Chandra Kalita had informed the Latasil Police Station, where-after, the Police arrived at the spot, opened the cartoon and found a female dead body inside the cartoon which was wrapped in a holdall. Accordingly, the Officer-in-Charge of the Latasil Police Station Sri Tileswar Saikia had lodged an ejahar based on which, UD case No. 9/2002 was registered in the Latasil Police Station on 22/08/2002 and thereafter, investigation had commenced.

4. Inquest was held and the dead body was sent for post-mortem examination. During the course of investigation, the dead body was identified as that of Preeti Roy Bharali. Having learnt about the identity of the deceased Latasil Police Station Case No.103/2002 was registered under Section 302/201 of the IPC. Upon completion of investigation, charge sheet was laid against accused Aswini Kalita under Section 302/201 of the IPC for committing the murder of deceased Preeti Roy Bharali and also for destroying the evidence. Charge sheet was also submitted against accused persons Md. Washim Raifque, Sri Balin Chandra Deka, Sri Tilok Boro, Dr. Kismat Ali and Sri. Sankar Biswakarma under Section 114/201/202 of the IPC and against co-accused Smt. Lakhi Das under Section 201 of the IPC. After committing the case for trial by the Sessions Court, charges, as aforesaid, were framed against all the accused persons .The charges were read over and explained to the accused persons. However, since they had pleaded not guilty and claimed to be tried, the matter went up for trial. All the accused persons were subjected to joint trial.

5. There is no eye witness in this case and the prosecution case is based on circumstantial evidence. The prosecution had also relied upon the confessional statements of 3 (three) accused persons, viz. Sri Aswini Kalita, Dr. Kismat Ali and Sri Sankar Biswakarma recorded under section 164 Cr.P.C. In order to bring home the charge, the prosecution had examined as many as 21 witnesses including the doctor who had conducted the post-mortem examination over the dead body (PW-16) and the two I.Os., who had conducted investigation and

submitted charge sheet in this case as PWs 21 and 20 respectively. Based on the evidence available on record, the learned Sessions Judge had convicted the above named appellants in the manner indicated herein above. However, co-accused Smt. Lakhi Das was acquitted by the learned trial court by giving her the benefit of doubt.

6. By referring to the materials available on record, Mr. K. Agarwal, learned senior counsel appearing for the appellant Aswini Kalita has argued that save and except the confessional statement of the accused, there is no other material available on record so as to convict his client. Mr. Agarwal has further argued that even the so called confession of the appellant has not been recorded in accordance with law in as much as, sufficient time for reflection was not afforded to the accused. The learned counsel has argued that statement of his client recorded by the learned Magistrate being ex-culpatory in nature, the same could not have been relied upon by the learned Sessions Court so as to convict the appellant, more so, in view of the fact that the appellant had subsequently retracted his confession. Mr. Agarwal has also argued that although the learned Sessions Judge has held that there was discovery of garments and hair of the victim by the Police on being led by the accused, in reality, there was no such discovery in this case. To sum up his arguments Mr. Agarwal has submitted the conviction of the accused cannot be based solely on his exculpatory confession and in the present case, the evidence available on record is not sufficient to complete the chain of circumstances so as to convict his client under Section 302/201 of the IPC. Therefore, the appellant deserves to be acquitted. In support of his above arguments, Mr. Agarwal has relied upon the following decisions :-

1. (1999) 5 SCC 253 State through Superintendent of Police, CBI/SIT Vs. Nalini and others.
2. AIR 1939 PC 47 Pakala Narayana Swami Vs. Emperor.
3. AIR 1953 SC 459 Puran Vs. State of Punjab.
4. AIR 1957 SC 637 Sarwan Singh Rattan Singh Vs. State of Punjab.
5. AIR 1978 SC 1248/(1978) 3 SCC 435 Shankaria Vs. State of Rajasthan,
6. AIR 1995 SC 980/(1995) 2 SCC 76 Shivappa Vs. State of Karnataka,
7. (2003) 3 SCC 21 Bhagwan Singh and others Vs. State of M.P.
8. (2006) 12 SCC 268 Babubhai Udesinh Parmar Vs. State of Gujarat.
9. (2011) 2 SCC 490 Rabindra Kumar Pal @ Dara Singh Vs. Republic of India.
10. 1981 Cri. L.J. 424 Kuthu Goala Vs. State of Assam.
11. AIR 1952 SC 159 Kashmira Singh Vs. State of Madhya Pradesh.
12. AIR 1964 SC 1184 Haricharan Kurmi Vs. State of Bihar.

7. Mr. D. Das, learned senior counsel appearing for the two appellants in Criminal Appeal No. 91/2014 has argued that the conviction of his clients is also based solely on their retracted confessional statements. Contending that the alleged confession of the appellants do not contain ingredients of section 201 of the IPC, Mr. Das has argued that this could at best be a case coming under Section 202 of the IPC on the ground of his clients not informing the Police and no further. In support of his aforesaid arguments, Mr. Das has relied upon the decision of the Apex Court rendered in the case of Dinesh Kumar Kalidas Patel Vs. State of Gujarat reported in (2018) 3 SCC 313.

8. Mr. Z. Kamar, learned senior counsel appearing for the appellants in Criminal Appeal No. 89/2014 had supported the arguments advanced by the learned counsel for the appellants in Criminal Appeal No. 91/2014 and has further argued that no case for conviction of his clients under Section 201 of the IPC has been made out on the basis of the evidence brought on record by the prosecution. Contending that there is nothing on record to indicate that the appellants were aware of the actual offender or for that matter, there was any attempt on their part to screen the offender in this case, it is the submission of Mr. Kamar that the appellant No. 1 Wasim Rafique could not have been convicted under section 201 of the IPC merely because he is the owner of the hotel where the incident allegedly took place. Mr. Kamar also submits that the attempt on the part of the prosecution to connect the appellant No.1 with the incident on the basis of the seized Maruti Car (Ext- 27) is also wholly untenable in the eye of law, inasmuch as, it has come out from the evidence of the prosecution witnesses that the seized Maruti Car belonging to PW-12 was not in a serviceable condition at the time when the incident allegedly took place. Mr. Kamar has also argued that the learned Magistrate did not afford proper time for reflection to the accused persons and, therefore, the alleged confessional statement of the accused cannot be treated as valid in the eye of law on such count alone. In support of his aforesaid arguments, Mr. Kamar has relied upon the decisions of the Supreme Court rendered in the case of Sarwan Singh vs The State of Punjab reported in AIR 1957 SC 637; Rabindra Kumar Paul Vs. Republic of India reported in AIR 2011 SC 1436 as well as the law laid down in the case of Devraj Goyal Vs. State of Uttarakhand reported in 2013 Cri L.J. 4394 (E to K) to contend that at-least 24 hours time for reflection ought to have been given to the accused persons before recording their confessional statements and the learned Magistrate ought to have informed the accused that they would not be sent to Police custody even if they did not record their confessional statement, which process was evidently not followed in this case.

9. Responding to the above submissions made by the appellants' counsel, Ms. S. Jahan, learned APP, Assam, appearing for the State has argued that the confessional statements of the three accused persons were recorded by the learned Magistrate in total compliance with the requirement of Section 164 Cr.P.C. and after giving each of them more than 4(four) hours time for reflection. Contending that there is no set formulae so as to decide the exact time to be

granted to an accused for reflection before recording the confessional statement, the learned APP has argued even if it is found that there were any procedural lapses in recording the confessions made by the accused persons, even then, that by itself cannot be a valid ground for this Court to reject the confessional statement of the accused persons if the same is otherwise found to be believable. The learned APP has further argued that even assuming that the confessional statement of Aswini Kalita (Ext-7) contains exculpatory statements, even then, the Court would have the discretion to segregate the exculpatory part from the inculpatory and act only on that part of the statement, which is inculpatory in nature, so as to convict the accused. The learned APP has further submitted that as per Section 30 of the Evidence Act, a confessional statement of a co-accused can be relied upon for the purpose of conviction of the accused and, therefore, the learned Sessions Judge had not committed any error in relying upon the confessional statement of the co-accused. In support of her aforesaid arguments, Ms. Jahan has relied on the decisions of the Supreme Court rendered in the case of Nishikant Jha Vs. State of Bihar reported in (1969) 1 SCC 347 as well as in the case of Keshoram Bora Vs. State of Assam reported in (1978) 2 SCC 407.

10. By placing reliance on two other decisions of the Supreme Court rendered in the case of K.I. Pavunny Vs. Assistant Collector (HQ) Central Excise Collectorate, Cochin reported in (1997) 3 SCC 721 and Pangambam Kalanjay Singh vs State of Manipur reported in AIR 1956 SC 9, Ms. Jahan has submitted that although the three accused persons had retracted their confession while recording their statement under Section 313 of the Cr.P.C., yet, the same would not wash away the confession in its entirety inasmuch as, the inculpatory part of the confession which finds corroboration from the other evidence, can be relied upon this Court.

11. We have considered the submissions advanced by the learned counsel for the rival parties and have also carefully gone through the materials available on record.

12. As noted here-in-before, the prosecution had examined as many as 21 witnesses to prove the charges brought against the accused persons. However, on a close scrutiny of the materials on record, we find that the testimonies of PWs. 3, 7, 8, 18, 19 and 20 are not of much significance in this case and, therefore, do not merit a detail evaluation by this Court. However, in so far as the remaining witnesses are concerned, their evidence, in our opinion, would have a relevant bearing in the outcome of these appeals and, therefore, it would be necessary to briefly discuss here-under, the evidence adduced by these witnesses.

13. PW-1 Smt. Rupali Barman was the maid servant of the deceased at the time of the occurrence. She has deposed to the effect that she had worked as a maid servant in the official quarter of the husband of the deceased i.e. Constable Rajani at Ambari during the relevant period of time. Rajani Bharali has two sons, aged about 11 years and 7 years and Preeti Bharali was his wife. She did not

know how Preeti Bharali died but while 'Baidedo' (elder sister) was alive, many people used to visit their house. During her stay in the house of Rajani Bharali, he had gone to Patna for a few days for treatment of his elder brother and Preeti, her two sons and herself were at home. In the absence of Rajani, some people visited the house and the deceased also occasionally went out alone. Rajani Bharali returned from Patna after 3/4 days but at that time "elder sister" (Preeti) was not at home. At around 10 a.m. that day, Preeti went out of her house wearing churidar and sandal. On being enquired, she had told Rajani that by asking her to prepare dinner, elder sister had gone out of house. PW-1 has also deposed that her brother-in-law (Rajani) had reached home around 10 p.m. but elder sister did not return home that night. Brother-in-law had searched for her but she could not be traced. Since elder sister did not return home even in the next morning, brother-in-law went to the Police Station to inform the Police about the same. Later on, she could learn from the Police that elder sister had died. PW-1 has also confirmed that her statement was recorded by the Magistrate and Ext.-1 was the said statement. Cross examination of this witness was declined by the defence side.

14. PW-2 Sri Rajanikant Bharali is the husband of the deceased Preeti Bharali. PW-2 has deposed that he knew Aswini Kalita as well as the other accused persons by their face. He also knew accused Smt. Lakhi Das. On 16/08/2002, he had gone to Patna for the treatment of his elder brother. When he left for Patna, at that time, his wife Preeti Bharali along with his two sons and maid servant Rupali Barman (PW-1) were there at his Railway quarter No. GS73(K) at Guwahati, situated near Guwahati Club. He returned back along with his elder brother and reached home on the night of 21/08/2002. He, accompanied by Dwijen Das, Biren Das and Dulumoni Bharali, had arrived at his quarter. On his arrival home, he did not find his wife. On being enquired, the maid servant (PW-1) had informed him that his wife had left home along with another woman at about 7 p.m. He kept waiting for the return of his wife till 2 a.m. He had also searched for his wife but could not find her. On the next morning, he had telephoned his mother-in-law and informed her about his wife going missing. In the morning, he had left for Kamalpur. At about 11-30 a.m. his son's tutor Sri Mohan Das came to his quarter and told him that the body of a woman was found packed in a cartoon under the station over-bridge. He then went there but could not find the dead body and came to know that the body has been taken to the Latasil Police Station. He went to Latasil Police Station and the Officer-in-Charge told him that the dead body has been taken to the Guwahati Medical College and Hospital (GMCH) for post-mortem examination. He went there and identified the dead body of his wife. PW-2 has also stated that on suspicion, Latasil Police had detained him but after 7 days, he got bail and came out of the jail. According to the PW-2, there was illicit relationship between his wife and accused Aswini Kalita. When he was posted at Lumding, at that time Aswini Kalita was also posted at Lumding and he used to visit their house. He had found love letters written by Aswini Kalita to his wife and raised protest. Aswini had

confessed of having written those letters and promised not to repeat it. PW-2 has also stated that when he was posted at Fakiragram Railway Station, his wife went with him and stayed in the place of accused Aswini for 3 (three) nights at Bongaigaon. He suspected that accused Aswini has killed his wife.

15. During his cross examination, PW-2 had stated that, on the next morning, at about 10 a.m. he had searched for his wife at different places at Guwahati for about one hour but could not find her. He has also stated that from 6 a.m. till 10 a.m. he did not lodge FIR since he was expecting the return of his wife. Although he had suspected illicit relationship of his wife with Aswini, yet, he did not do anything for protection of his wife. PW-2 had maintained that he was having normal conjugal relationship with his wife and did not contemplate divorce although he had rebuked his wife after getting hold of the love letters. According to the PW-2, the illicit relationship between Aswini and his wife went on for more than 7 years. Once he had also filed FIR against Aswini at the Bongaigaon GRP but no action was taken in the matter. PW-2 has admitted that he had been arrested in two cases, once in connection with the present case and the other was a rape case, where he got acquittal. The witness has denied the suggestion that he had killed his wife Preeti only to maintain illicit relationship with his maid servant.

16. PW-4 Smt. Nirupama Rajkumari, was the in-charge Chief Judicial Magistrate (CJM) Kamrup at Guwahati on 26/08/2002 when the witness PW-1 was brought before her for recording her statement under Section 164 of the Cr.P.C. PW-4 has proved Ext-3 which is the statement of PW-1 recorded by her. PW-4 has also deposed that on 31/08/2002, accused Sankar Biswakarma was brought before the Chief Judicial Magistrate (CJM), Kamrup, Guwahati for recording his confessional statement and she was entrusted with the job of recording the same. Accused Sankar Biswakarma was produced before her at about 11-20 a.m. The accused was asked as to whether he was willing to confess his guilt and in reply, he had expressed his willingness and desired to make a confession. Thereafter, by adhering to the requirements of procedure laid down in Section 164 Cr.P.C., the accused person was explained about the confession and was also cautioned about the same. Having done so, the accused was kept in her official chamber under watch of her Office Peon Sri Buddha Saikia, allowing him time for reflection. At about 4-05 p.m., the accused Sankar Biswakarma was again asked and warned of the consequences but he still expressed his desire to record his confession. In this manner, after giving him sufficient time for reflection and necessary caution and warning, as required by law, when the accused still expressed his desire to record his confession and on being satisfied that the accused was willing to make a confession, which was voluntary, she had recorded his confessional statement in three separate sheets. PW-4 has further stated that while the accused was kept in her office chamber for reflection, no Police Officer was allowed to enter her chamber. Ext.-4 is the order of the learned CJM dated 31/08/2002 requiring her to record the confessional statement of the accused and Ext.-5 is the confessional statement. PW-4 has also deposed that after

recording the confessional statement of the accused, he was remanded to judicial custody, which is also revealed from the order dated 31/08/2002 passed by the learned CJM.

17. PW-4 has further deposed that on 02/09/2002, accused Aswini Kalita and Dr. Kismat Ali were produced before the learned CJM, Kamrup (M) for recording their confessional statement and being the in-charge CJM, she was required to record their confessional statements. Accused Aswini Kalita and Kismat Ali were produced before her at about 11-25 a.m. for recording their confessional statements. Both the accused persons were asked as to whether they were willing to confess their guilt and both of them replied in the affirmative. As such, by adhering to the procedure laid down in section 164 of the Cr.P.C., both the accused persons were explained about the consequences of their confession and were kept in her official chamber, under the watch of the official peon Sri Buddha Saikia, giving them time for reflection. Later on, at about 4-10 p.m., both the accused persons were once again asked as to whether they were willing to confess their guilt and both of them expressed their willingness. Therefore, after giving sufficient time for reflection and cautioning them adequately about the consequences that may ensue and on being satisfied that the two accused persons were willing to voluntarily record their confessional statements, she had recorded their statement. PW-4 has proved the confessional statement of accused Aswini Kalita as Ext.-7 and that of Dr. Kismat Ali as Ext. 8.

18. During cross examination, PW-4 has stated that the accused persons were produced from judicial custody. She had stated that recording of the confessional statement of Aswini Kalita had started at 4-10 p.m. and was completed at 4-40 p.m. on 02/09/2002 and thereafter, the confession of accused Dr. Kismat Ali was recorded between 4-40 to 4-45 p.m. on the same day. The PW-4 has, however, admitted that although the confessional statement of accused Kismat Ali has been shown to have been recorded at around 4 p.m., yet, it was later on struck out and made 4.45 p.m. and the time for conclusion of recording of statement had also been changed to 5-10 p.m. but she could not explain as to why the time of recording the confessional statement had to be changed. Later on, this witness had stated that she did not ascertain from the accused persons before recording their statements as to what type of offence they had committed nor did she enquire from them as to from whose custody, they had been produced before her for recording the confessional statement.

19. PW-5 Sri Arun Chandra Kalita, who is the owner of a motor garage by the name and style "New India Automobile" situated at Hedyatpur, was the first person who had noticed the cartoon lying under the bridge wherein the dead body was packed. PW-5 has deposed that on 22/08/2002, he had reached his garage at about 9 a.m. and tried to open the door. At that time, he saw one cartoon, wrapped with rope, lying near the bridge in front of his automobile garage. He suspected it to be a bomb. Accordingly, he had informed the Latasil Police over phone and the Police came there immediately. The area was cordoned

off by the Police and sniffer dogs, accompanying the Police and Magistrate, was also brought there. Thereafter, the cartoon was opened and a naked female body was found inside it. He had formally lodged a written complaint before the Officer-in-Charge, Latacil Police Station and Ext. -9 is the said complaint. PW-5 has further deposed that the Magistrate had conducted inquest over the dead body in his presence and Ext. 2 was the inquest report wherein, he had put his signature Ext. 2(2). PW-5 has also stated that the Police had seized the cartoon, hold-all, yellow plastic rope (two pieces) red and blue colour plastic rope, in his presence by seizure list Ext. 10 and Ext. 10(1) was his signature.

20. Sri Subham Saikia was called as prosecution witness no. 6. PW-6 has deposed that on 25/08/2002, at around 2/3 a.m. (midnight) when he was in his official quarter situated at the 10th A.P.Bn. Kahilipara, Police came and knocked at his door. He woke up and saw some Police personnel standing therein. They took him in front of the house of Smt. Lakhi Das and showed him a packet containing some clothes which were seized by the Police in his presence. Ext. 11 is the seizure list and Ext 11(1) is his signature. This witness has also stated that there was no civilian present there at that time and the Police had also called his neighbours, viz. Constable Pranab Kalita, Constable Bhagawan Das and Constable Rambabu Shah.

21. PW-9 Sri Tileswar Saikia was the on-duty Officer-in-Charge of the Latacil Police Station on 22/08/2002. PW-9 has deposed that on 22/08/2002 at around 9 a.m., he had received a telephonic message from one Arun Chandra Kalita (PW-5) to the effect that an abandoned cartoon was seen lying under the over bridge, on the eastern side, in front of New India Automobile. On receipt of such information he rushed to the spot along with his staff and found one cartoon containing a female dead body. He then informed the Superintendent of Police (SP) and the Dy. SP and both of them came to the spot. One Magistrate by the name Cauvery Borkakati also came there and conducted inquest over the dead body. PW-9 has stated that during investigation, he had seized (1) one army colour single holder about 6 feet, (2) one khaki colour cartoon written as VIP luggage, (3) one yellow plastic rope 6 1/2 feet, (4) one yellow plastic rope 5 feet, (5) one red and blue colour plastic rope about 3 feet, (6) one red and blue colour plastic rope about 3 feet and 6 inches. PW-9 has also proved Ext. 10 seizure list by identifying his signature and had stated that the dead body was forwarded to the GMCH for post-mortem examination. In his cross examination, PW-9 has stated that on receipt of telephonic message from Arun Kalita, he had made GD entry being GDE No. 361 dated 22/08/2002.

22. PW-10 Sri P.K. Baruah is a Forensic Expert and was serving as the Deputy Director of Forensic Science Laboratory, Assam, Kahilipara, Guwahati. He has deposed that on 06/09/2002, he had received one sealed packet from the Senior Scientific Officer Serology, FSL, Assam, Kahilipara. After opening the packet, he found the following items:-

Year No.

My no.

1.

A few no. of long black coloured hair said to be collected from Maruti Car

Sero-214/02

Bio-470

2.

A small bunch of long black coloured hair said to be collected from holdall

Sero-215/02

Bio-471

3.

A sufficiently large bunch long black coloured hair said to be the cut hair of the deceased.

Sero-221/02

Bio-472

According to the PW-10, the hair samples of Ext. No. Bio-470, Bio-471 and Bio-472 could be identified as human hair from the head and were identical to each other in all respect. PW-10 has proved the FSL report (Ext. 16).

23. During his cross examination, PW-10 has clarified that though it was possible to distinguish between male hair and female hair if the root of the hair is available but in the present case, only cut hair was available. He was not asked to find out as to whether, it was a male or female hair. He has also deposed that he did not make any endeavour to find out as to whether, it was human hair or a fibre.

24. PW-11 Smt. Basumati Choudhury is the grandmother of PW-12 Anil Roy @ Pappu, who is the owner of a Maruti Car seized vide seizure list Ext. 27. PW-11 has deposed that her grandson Pappu (PW-12) has a Maruti Car and sometimes the car is kept in her house. She has stated that Police had seized the car some 3½ years ago and she had put her thumb impression in the seizure list but she did not know the registration number of the car.

25. PW-12 Sri Anil Roy @ Pappu has deposed that he owned a Maruti Car bearing registration No. AS01-M/7953. Since he did not have any garage, he had to keep the car in the house of his grandmother(PW-11). In the year 2002, when he went to Barpeta and Dhubri, he had asked his friend Sanjay Agarwala (PW-13) to take the car to the garage for servicing since his car had broken down. On his return after 7/8 days, he could learn that the Police has seized his car. On being enquired, the Police told him that the car was seized in connection with a murder

case. During his cross examination, PW-12 has stated that his car was not in a serviceable condition and it was in the garage.

26. PW-13 Sri Sanjay Agarwal is a friend of PW-12 and he has deposed that at the relevant time, he was at Guwahati and was an employee of "Cable Quest" located near the Police Reserve at Guwahati and his shop was near "Hotel Swagat". PW-12 used to work with him in the said shop. Once, his friend (PW-12) had to leave for Barpeta. He told him to handover the defective Maruti 800 car to a work shop known to him. Accordingly, the keys of the car were handed over to PW-13 by PW-12 by stating that the vehicle was parked in the house of his maternal grandmother at Rehabari. The car was to be handed over to the garage person for repair. Later on, the person from the garage came and took away the car with the help of a crane. After about 7/8 days, he was taken to the Latasil Police Station by Anil's father on the ground that the RC and the Insurance Policy of the vehicle were required to be deposited there. This witness has further stated that the RC of the vehicle was seized vide seizure list wherein he had put his signature. During his cross examination, PW-13 has said that the car was not in a plyable condition and that is why the garage people took it away with the help of a crane.

27. PW-14 Smt. Bina Saikia is another resident of the official quarters at the 10th A.P. Bn. at Kahilipara. She has deposed that the house of Anirudhha Das i.e. the husband of accused Lakhi Das was located near her quarter. In the year 2002, Police came to her house and called her to go to the front of the house. They were shown a churidar-pant and a ladies sandal, which was taken away by the Police. During her cross examination by accused Aswini Kalita and Lakhi Das, this witness has stated that the Police had taken her signature but her statement was not recorded. She was shown one piece of sandal and one packet of salt by the Police but not the churidar. However, those articles have not been shown to her in the Court.

28. PW-15 Sri Nilachal Bharali was the Officer-in-charge of the Dispur Police Station. He has deposed that on 24/08/2002, he got an information from the then Additional Superintendent of Police, Kamrup that there might be some clue as regards Latasil Police Station Case No. 103/2002 registered under Section 302/201 of the IPC. On receiving such information, he immediately proceeded to the residence of Anirudhha Das and on reaching his house, he had conducted search and found a newly dug pit. After digging out the pit, he found a ladies sandal and a shawl and seized those articles in presence of witnesses by seizure list Ext.-19. This witness has proved the seizure list Ext.19 by identifying his signature therein as Ext. 19(1).

29. PW-16 Sri Arun Pratim Baruah was the Medical officer on duty in the department of Forensic Science, Guwahati Medical College and Hospital (FMCH) on 22/08/2002 when the dead body of the victim was brought there for conducting post-mortem examination. PW- 16 has deposed that as per the post-mortem report, the following injuries were noticed in the dead body:-

"Injuries :

1. Contusion of size 3 cm x 1 cm, 4 cm above the supra sternal notch and 2cm to the right of midline.
 2. Contusion measuring 2 cm x 1 cm on the left side of neck 2.5 cm and above the left clavicle and 5 cm to the left midline.
 3. Oval shaped contusion measuring 4 cm x 2.5 cm present obliquely on right side of neck, 3 cm below the right mastoid process and 4 cm below and to the right from the lower end of right ear.
 4. Contusion of size 8 cm x 2.5 obliquely on the back of neck 2 cm above the 7th cervical vertebrae on the right side.
 5. Multiple contusion of size varying from 2 cm x 3 cm to 2 cm x 1 cm in size over an area of 8 cm x 4 cm on size on the back of right shoulder.
 6. Contusion of size 2.5 cm x 2 cm on the thyroid prominence of larynx.
 7. Contusion of size 1 cm x 1 cm on the left side of neck 0.5 cm on back to the greater coronue of hyoid bone.
 8. Contusion of size 1 cm x 1.5 cm on the right side of neck 2 cm below the thyroid prominence and 1 cm to the right of midline (Contusion were read in colour).
 9. Multiple contusion of size varying from 2 cm x 3 cm to 5 cm x 6 cm over the frontal, right parietal right temporal, left parietal and right side of occipital area covering an area of size 29 cm x 20 cm. Skull healthy.
 10. 3rd servical vertebra dislocated with contusion of surrounding tissues.
- (i) Vaginal smear taken from posterior fornix of vagina and around the cervix were negative for spermatozoa and gonocococi on both low and high power microscopy.
- (ii) A sample of blood preserved in EDTA, a sample of blood preserved in blotting paper, and one vaginal swab handed over in sealed and labeled container and received by I.O. Sri Hiteswar Saikia, O/C of Latasil PS."

The doctor had opined that the death of the victim was due to asphyxia resulting from manual strangulation and was homicidal in nature. All the injuries were ante mortem and caused by blunt force impact. Time since death was 18-30 hours approximately.

30. PW-17 Sri Bhagawan Das is another resident of 10 AP Bn. Complex at Kahilipara. He has also stated that on 25/08/2002, in the midnight, some police personnel came to his quarter and called him. Those police personnel told him that some enquiry in connection with a case is required to be made and asked him to put his signature in Ext. 11. This witness has identified his signature as

Ext. 11 (4) but has maintained that he could not say what was written in that document nor was he aware as to why the Police had taken his signature.

31. The Investigating Officer (IO) of Latasil Police Station case No. 103/2002 Sri Gautam Chakraborty was examined as PW-21. The IO has deposed that on 22/08/2002, while he was working as S.I. of Police at Latasil Police Station, the Officer-in-Charge of the Police Station had filed an ejahar which was registered as UD Case No. 09/2002, on receipt of information from somewhere and the matter was endorsed to him for investigation. On 22/08/2002 itself, at 7 p.m. he had opened a case diary, examined and recorded the statements of Rajani Bharali at the Police Station and at about 7-40 p.m. he had proceeded to the house of Rajani Bharali. Thereafter, he returned back to the Police Station along with Rupali Barman, Dibyajyoti Bharali and Himanshu Bharali for recording their statements. PW-21 has further deposed that on 23/08/2002 at about 8 a.m., Aswini Kalia was produced before him by the Officer-in-Charge, whereafter, the statement of Aswini Kalita was recorded. He was then produced before the Court seeking 14 days remand. On such request, the learned CJM, Kamrup had granted 10 days Police custody. On 25/08/2002, while the accused was in police custody, he had made a confession admitting his guilt of having committed the murder of the victim in the room No. 105 of Hotel Swagat at Lakhtokia and concealing the dead body beneath the bed of the room. The clothes of the deceased had been concealed in the house of his elder sister. Ext. 2 was the disclosure statement of the accused recorded by him. On the basis of such disclosure, he had proceeded to the house of Lakhi Das by taking Aswini Kalita along with him. On 25/08/2002, he had arrested Lakhi Das and produced her before the Court. Lakhi Das was also taken into police custody for 3 days and her statement was recorded. According to PW-21, accused Aswini Kalita had led him and his staff to the house of Lakhi Das and produced one bundle of clothes containing one green coloured printed jorjet saree, one cream coloured Assam Silk Chadar, one cream coloured Mekhela, one salwar (coffee colour), one kurta (coffee and white colour) one dupatta (coffee colour), one red coloured bra (torn condition), one right foot high heel leather sandal, one printed red and white bed sheet (6/5 feet), one ash coloured vanity bag (Sport Co) containing one comb, one Lakme eye brow, one spectacle bearing the emblem of Sarada Co, one blade, some cut hair, cash Rs. 10/- and one fair and lovely cream wrapped in a markin cloth measuring about 3/4 feet in length. PW-21 has deposed that those articles were seized vide seizure list Ext. 11 and Ext. 11 (5) was his signature. According to the IO, the articles had been produced by the accused Aswini Kalita by bringing them out from an abandoned well. He had examined and recorded the statement of the seizure witnesses who were present at the time of the recovery and production of the articles by the accused and took the accused person to the police custody. During the course of investigation, he had also visited Hotel Swagat and recorded the statement of the Manager and other staff.

32. The PW-21 has further deposed that during the course of investigation, the Manager and staff of Hotel Swagat had admitted that the incident took place in

room No 105 of their hotel. He had seized the hotel register vide seizure list Ext. 25. The hotel register M. Ext. 1 contains the relevant entry of room No. 105 in the name of one "Alok Biswas". The IO has also stated that he had seized vehicle bearing Registration No. AS02-M/7953 by means of which the dead body of the deceased was carried away from room No. 105 of Hotel Swagat and brought near the Hedyatpur Stadium, so as to leave it under the bridge. The vehicle was seized from the compound of Smt. Basumati Choudhury (PW-11) vide seizure list Ext. 27. According to the IO, he had sent accused Aswini Kalita, Sankar Biswakarma and Dr. Kismat Ali before the Court of learned CJM, Kamrup for recording their confessional statement and the same were recorded under Section 164 of the Cr.P.C. along with the statement of witness Rupali Barman (PW-1). The IO has further stated that after recording the statement of the witnesses, collecting the post-mortem report as well as the FSL report and making the relevant seizure, he had submitted charge sheet against the accused persons.

33. After recording the evidence adduced by the prosecution side, the statement of the accused persons were recorded under Section 313 of the Cr.P.C. whereby they had denied all the incriminating circumstances put to them. As a matter of fact, accused Aswini Kalita had stated that he gave the confessional statement under compulsion as he was subjected to severe torture by the police. Accused Sankar Biswakarma and Dr. Kismat Ali had also admitted that their confessional statements were recorded before the Magistrate but maintained that the same were recorded under threat and duress from the Police. The defense side, however, did not adduce any evidence.

34. In the light of the aforementioned materials brought on record by the prosecution side we are called upon to examine as to whether the prosecution had succeeded in establishing the charges brought against the accused persons beyond reasonable doubt.

CHARGE BROUGHT AGAINST ASWINI KALITA U/S. 302/201 IPC

35. The fact that accused Aswini Kalita had an illicit affair with the deceased is well established from the testimony of PW-2, who is the husband of the deceased. PW-2 has categorically deposed that the accused Aswini Kalita had illicit relationship with his wife and when he was posted at Lumding, accused Aswini Kalita, who was also posted at the same station, used to visit his residence. He had found love letters written by Aswini Kalita to his wife and raised protest. The accused had also confessed about writing such letters and promised not to repeat the same. Even thereafter, the deceased had stayed with the accused for three nights while he was posted at Bongaigon. During cross-examination, PW-2 could not be shaken. Therefore, from the evidence adduced by the PW-2 it is firmly established that accused Aswini had maintained illicit relationship with the deceased even after he was caught writing the love letters to her and notwithstanding the protest raised by her husband.

36. From the evidence of PW-1 it has also come out that at around 10 a.m. on 21/08/2002, the deceased went out of her house wearing Churidar and sandal and thereafter, she became traceless. When her husband i.e. the PW-2 had returned back from Patna and enquired about his wife, at that time, PW-1 told him that "elder sister" (Preeti) had gone out of house. PW-1 has also stated that on the day of the incident the victim went out from home at around 10 a.m. wearing churidar and sandal. Cross-examination of this witness was declined. The description of the wearing apparels of the victim on the date of occurrence matches the articles seized by the PW-21 from the house of Lakhi Das on being led by the accused.

37. PW-21 i.e. the IO has deposed that accused Aswini was produced before him on 23/08/2002 for interrogation and he was sent on police remand for ten days by the learned CJM Kamrup. The PW-21 has also stated that on 25/08/2002 while the accused was in police custody he had made a confession admitting that he had committed the murder of the deceased in room No. 105 of "Hotel Swagat" and concealed the dead body under the bed and her clothes had been concealed in the house of his elder sister Lakhi Das. PW-21 has further deposed that the accused Aswini had led him and his staff to the house of Lakhi Das and produced those articles belonging to the deceased which were seized by him vide seizure list Ext-11. This witness has also produced the disclosure statement of the accused as Ext-22. During his cross-examination by the defense side, the evidence adduced by the PW-21 remained un-rebutted. As a matter of fact, the testimony of PW-21 on the above count was not even challenged by the defense side during his cross examination. Likewise, the defense side has also not assailed seizure list Ext-19.

38. The effect of failure to cross examine a witness fell for consideration of the Hon'ble Supreme Court in the case of State of U.P. Vs Nahar Singh (Dead) and Others (1998) 3 SCC 561. In that case the informant (PW-1) was not cross-examined by the accused on the explanation of delay in lodging the complaint. It was held that since the evidence of PW-1 had remained un-challenged on the explanation of delay the same ought to have been believed by the High Court.

39. Again in the case of Muddasani Venkata Narsaiah (Dead) through LRs Vs Muddasani Sarojana reported in (2016) 12 SCC 288 the Apex Court has observed that a party is obliged to put his case in cross-examination of witnesses of the opposite party. The rule of putting one's version in the cross-examination is not merely a technical one but is one of essential justice. In case of non-cross examination of the witness on a particular fact, the Court would presume that the witness account has been accepted.

40. Taking note of the law laid down in the case of Nahar Singh (Dead) and Others (supra) and Muddasani Venkata Narsaiah (Dead) through LRs (supra) it was held in Arvind Singh VS State of Maharashtra reported in (2020) 8 SCC 302 that the prosecution is required to bring home the guilt beyond reasonable doubt. It would be open to the accused to raise such reasonable doubt by cross-

examination of prosecution witnesses to discredit them in respect of truthfulness and veracity. A party intending to bring evidence to impeach or contradict the testimony of a witness must give an opportunity to the witness to explain or answer when the witness is in the witness box.

41. From an analysis of the law laid down in the aforesaid decisions, what logically follows is that unless the witness is cross examined on a particular point while in the witness box and afforded an opportunity to explain, his evidence on that point would be treated to have been accepted by the opposite side. It would, however, be a different matter if the evidence adduced by the prosecution witnesses, due to inherent contradictions in their statement, causes a dent in the prosecution story, in which event, failure to cross-examine such witnesses may not have a material bearing in the matter. In the present case, the accused, having failed to cross examine the IO (PW-21) on the points noted above, it would not be open for him to argue at the appellate stage that there was no valid discovery and /or seizure of the articles belonging to the deceased on being led by the accused.

42. A plain reading of Ext-22 goes to show that the accused had in fact informed the Police that the victim was murdered in room No 105 of Sawagat Hotel and her wearing apparels and the cut hair were hidden by him in an abandoned well in the house of his elder sister Lakhi Das. Based on such information, the IO had not only reached the Hotel Swagat during the course of investigation but had also seized those articles from the house of Lakhi Das on being shown by the accused. In view section 27 of the Evidence Act, such information furnished by the accused leading to discovery of evidence was admissible in evidence and has been rightly proved by the prosecution.

43. In his discovery statement recorded by the IO (Ext-22) the accused Aswini had inter- alia stated that on 18-08-2002 Preeti had called him and informed that Rajani has gone to Patna and so she had called him. On 19-08-2002, he came and stayed in the house of Preeti and spent two nights in her house and on 21-08-2002 he had left the house of Preeti in the morning and booked a room at Hotel Swagat and called Preeti to come there. Preeti came to hotel Sawagat at around 11. am and he took her to the hotel room. Then he and Preeti had tea and apple and then an altercation took place between them regarding their marriage. When Preeti told him that she would kill him if he didn't marry her then he became angry and strangled Preeti with the "Dupatta" which she was wearing. After some time Preeti died. After her death he started worrying and so as not to leave behind any evidence, he took off the cloths of Preeti and made her naked and also cut her hair with a blade and put those in the vanity bag of Preeti. Then he had set the room in order and put the body of Preeti under the bed. Then he handed over the key of the room to a boy called Tilak and went to the house of her sister who stays in 10 APBn campus. On reaching there, he told his sister about the incident and after a discussion between them , put all the articles including the vanity bag in a markin cloth and threw it in a barren well in

front of the house. On the same day he had left for Bongaigaon at around 8.30 pm. From the evidence of PW-21 it is apparent that the statement of the accused (Ext-22) was recorded on 25-08-2002. The information contained in Ext-22, in so far as hiding the clothes of the victim is concerned, has turned out to be correct.

44. In order to establish that the accused Aswini Kalita had checked in at hotel "Swagat" at room No. 105, where the incident took place, the PW-21 had seized the Register (Ext-25). However, Ext. 25 reveals that the hotel room was booked in the name of one "Alok Biswas" and there is no mention of the name of Aswini Kalita in the hotel register. However, it has also come out from the evidence on record that the incident took place in room No 105 of Hotel Swagat and thereafter, the dead body of the victim was removed from the hotel and later on found under the over bridge at Hedayatpur wrapped in a holdall inside a cartoon. It is to be borne in mind that the incident is of the year 2002 and during that time the requirement of maintaining guest register in the hotel with proper identity proof was not as stringent as it is today. Therefore, the possibility of the hotel room no 105 being booked under the fake identity of "Alok Biswas" cannot be ruled out in this case.

45. The prosecution side has adduced forensic evidence to establish that human hair was recovered from the seized Maruti Car (Ext-27) which was seized on the basis of disclosure of accused Wasim Rafique. The fact that the Maruti Car belonged to the PW-12 and that PWs 12 and 13 were both working in a company whose office was located near the Swagat Hotel is also not in dispute.

46. During the course of hearing, the learned counsel for the appellants had pointed out several lapses committed by the IO while conducting investigation in connection with the aforementioned case as well as some serious lacuna in conducting trial with a view to convince this court that the present is a fit case to grant acquittal to the accused person. From a meticulous examination of the materials available on record, we also find that there was some lethargy on the part of the Investigating Officer in collecting evidence connected with the incident. In our opinion, the IO could have done a much better job in this case and to that extent, it may be necessary for the higher authorities in the State Police Departmental to look in the matter and take remedial measures wherever called for. However, such lapses on the part of the IO cannot be a valid ground to grant acquittal to the accused if the charge is otherwise found to have been established based on cogent evidence brought on record. From the evidence brought on record by the prosecution, we are of the view that the following circumstances have been established beyond doubt: -

- (a) That the deceased had died a homicidal death caused due to strangulation,
- (b) That the accused Aswin had an illicit relationship with the victim,
- (c) That 3 or 4 days before the occurrence, the husband of the deceased had gone to Patna.

(d) That the accused had visited the house of Preeti in the absence of her husband.

(e) On the day of the occurrence, i.e. on 21-08-2002, deceased Preeti went out of her house at around 10 am wearing "churidar" and "sandal".

(f) That the naked dead body of the deceased was found wrapped in a holdall, packed inside a cartoon, on the next day i.e. 22-08-2002 under the Hedayatpur over bridge.

(g) That the wearing apparels of the deceased along with her vanity bag and cut hair was recovered from a barren well in front of the house of the sister of the accused on being led by the accused.

(h) That the incident took place inside the room No.105 of Swagat Hotel.

47. Let us now consider the statement of the accused Aswini Kalita (Ext-7) recorded by the learned Additional Chief Judicial Magistrate u/s 164 Cr.P.C, the English translation of which, reads as follows :-

"I joined Railway Police on 15th July, 1991 and since then I have been working as a policeman. In the year 1994 I got transferred to Lumding from Rangapara. I got acquainted with Preeti Bharali while I was at Lumding itself. I work as a constable and Preeti's husband Rajani Bharali also worked as a constable with me. Gradually Preeti and my relationship grew deeper. I had love affair with Preeti and Preeti also loved me a lot. I was unmarried. In the year 1997 I got transferred from Lumding to Bongaigaon. After two (2) months I got transferred to New Bongaigaon. In the meantime Rajani Bharali also got transferred to Fakiragram. While I was at New Bongaigaon Preeti Bharali used to send me letters and sometimes visited me. I tried to persuade Preeti Bharali to leave me but she did not listen to me. Rajani Bharali knew about my relationship with Preeti Bharali. When I was at New Bongaigaon, once I suffered from jaundice and then Preeti came and stayed with me for some three/four days. After coming to my house Preeti was unwilling to leave my house and then her mother and her husband Rajani Bharali took her away from my house. Then Rajani Bharali filed complaint against me in our department but the department understood my condition and did not take any action against me. In 1998 Rajani Bharali got transferred to Guwahati. After the lodging of the complaint against me by Preeti Bharali's husband, I stopped making any contact with Preeti since the complaint against me was lodged by Preeti herself through her husband Rajani Bharali. Preeti Bharali made false allegation against me that I forced her to stay with me for three (3) days by showing her a dagger. Later, in the month of February, 2001 Preeti misbehaved with me while I was on duty at New Bongaigaon. After a few days Preeti called me over phone and from that time onwards our relationship revived. Rajani Bharali lived in his quarters near the over bridge at Guwahati Club. Sometimes I visited Preeti's house. Sometimes I stayed at Preeti's house in absence Rajani. In Rajani's absence in the house, Preeti used to call me to her house over phone. On 20.08.2002, as Preeti called me up, I came

to New Bongaigaon (Sic) and that night I had my dinner at Preeti's house and stayed there for the night. That day Rajani Bharali was not at home; he was at Patna. I had physical relations with Preeti. Around 7.30 am on the following morning, i.e. on 21.08.2002 I had my tea at Preeti's house and came out. Preeti said to me that she would do shopping and then would talk to me in the hotel. She asked me to remain in the Nehru Park from 9-00 to 930 am. When I used to come to Guwahati, I met Preeti at Hotel Swagat in Gate No. 2, Lakhtokia. The owner, manager and the 'hotel boys' of the hotel knew me and Preeti. I told Preeti at her home itself that I would go to Swagat Hotel. Not finding Preeti at Nehru Park, at 1-30 am I went to Swagat Hotel. In the reception counter of the hotel, I met owner Wasim Rafique. He made me sit in his chamber. I asked Wasim Rafique whether my wife was supposed to come there and so I asked him to give me a room. Owner Wasim Rafique gave me the key to Room No. 105. I said to Wasim Rafique, "Send my wife to Room No. 105 when she comes." I asked hotel boy Shankar Biswakarma to show me Room No. 105 and when he showed me the same, I opened the room with the key. After opening the room, I saw Preeti sleeping on the bed. I went to the bathroom and took a bath. I called Preeti but when Preeti did not respond, I touched her and found her dead. I don't know how Preeti had died. I found her dead. Seeing Preeti lying dead I got mad. I started thinking what to do then. I thought that if I would inform the police, everybody would question me. The time was around 11-00 am then. After a short while I locked the Room No. 105 and came out. Going out of the hotel I started thinking for a long time what to be done and what not to. I went to a wine shop and bought liquor. I had some liquor in the bar. I kept sitting near the railway track thinking for a long time. At 3-30 pm I returned to Room No. 105 of Swagat Hotel and with a plan to save my skin. I removed the clothes of Preeti and cut her long hair short. I put Preeti's clothes and hair in Preeti's bag. After that I laid Preeti under the bed of that hotel room in nude state. Then I locked room No. 105, came to the staff room, handed over the key to Tilok and also gave Rs. 130 as room rent in the hands of Tilok. Thereafter, I came out, boarded on a city bus and went to my sister's house at Kahilipara. Then it was around 6-00 pm. I kept Preeti's bag concealed in the shed outside my sister's house. When my sister went to serve me food, I took Preeti's bag to the foot of a hill and put it inside a dried well inside the jungle. Thereafter, I had my dinner at my sister's house and went to New Bongaigaon by train. On the night of 22-08-2002 police apprehended me and interrogated me. I told police that I had kept Preeti's bag in a well. I led police there and showed them the bag. I have confessed my guilt."

48. On a careful reading of the aforesaid statement of the accused Aswini Kalita, we find that this accused had given a detail account, not only of his relationship with the deceased but also how he had spent the previous night in the house of Preeti taking advantage of absence of her husband who had gone to Patna; how they had decided to meet at Hotel Swagat. He has also stated as to how, on the day of occurrence, Sankar Biswakarma had shown him room No 105 and as to

how he had hidden the naked body of the victim under the bed only to save his skin and thereafter, went out of room No 105 to procure some liquor; how he had removed the clothes of Preeti, cut her hair and then went to the house of his elder sister. He has also stated as to how the clothes and hair of Preeti were hidden by him inside a dry well near the house of his elder sister; that he had led the police to show them the bag and that he had confessed his guilt. Those statements appear to be consistent with the disclosure statement Ext-22 and finds due corroboration from the other evidence available on record. In other words, all the factual details emerging from the confessional statement of the accused Aswini appear to be correct and also substantially borne out from the materials available on record. The only fact which the accused did not admit in specific terms is that he had murdered Preeti inside Swagat Hotel room No. 105 by strangulating her although he has indirectly admitted the same by saying that he has admitted his guilt.

49. In the above context it will be pertinent to note here-in that according to the statement of accused Aswini recorded before the Magistrate, he had found Preeti lying dead inside the hotel room when he had entered the room. However, the aforesaid statement is found to be wholly inconsistent with the remaining part of his statement, more particularly the statement that the Hotel owner had handed him over the keys of room no 105 and that he had asked the Hotel owner Wasim Rafique to send his wife to the room when she comes. It is thus evident that the victim had entered the hotel room after the accused. From a careful analysis of the statement of the accused Aswini recorded under section 164 CrPC the only reasonable conclusion that can be drawn is that while the accused had truthfully narrated the entire incident, yet, he did not directly implicate himself in the murder of Preeti. But if the statements of the accused are taken on their face value, then also, it defies logic as to why the accused would strip the victim naked, cut her hair and put her under the bed if he did not have any role to play in her death. As such, the statement of the accused, read in its entirety, leaves no room for doubt that he had substantially and tacitly confessed to killing the victim inside the hotel room.

50. As noticed above, in his statement recorded under section 164 Cr.P.C, accused Aswini had disclosed all other relevant facts but had craftily avoided admitting in specific terms that he had killed the deceased. In other words the accused Aswini Kalita in his statement recorded under section 164 Cr.P.C has substantially admitted all the relevant facts, which, when viewed in the light of the evidence available on record, would constitute an offence and support the prosecution story. Therefore, we are unable to agree with the submission of Mr. Agarwal that the confessional statement of accused Aswin Kalita contains only exculpatory statements. Even if it is held that the confession of accused Aswini Kalita contains both exculpatory and inculpatory statements, in view of the decision of the Apex Court in the case of Nishikant Jha (Supra) and Keshoram Bora (Supra), we find force in the submission of the learned APP that it would be permissible for the Court to segregate the exculpatory part from the confessional

statement and act only on the other part of the statement.

51. In their confessional statement accused/ appellants Sankar Biswakarma and Dr. Kisamat Ali had stated as follows :-

" Statement of Sankar Viswakarma recorded U/s. 164 Cr.P.C. (Ext-5):-

I work as a 'Hotel boy' in Hotel Swagat situated at Lakhtokia Gate No.2. I have been working there for the last one year and three months. The name of the owner of that hotel is Wasim Rafique and the name of the manager of the hotel is Bolen Deka. On 21/8/2002 I was at the hotel. Around 10/10.30 am that day, a boy came to our hotel, took the key from the counter and went to the third floor. He showed me the key and asked me to which it belonged. Looking at the key I said that it was the key to Room No. 105 and I showed the room to the boy. After that the boy entered the room and I got myself busy in other works. Thereafter, around 11/11.30 am, a girl wearing Salwar Kameez came there and entered Room No. 105. Around 1/1.30 pm Tilak Boro and I had our lunch and went to sleep in the staff room. Around 4.30/5-00 pm the said boy who stayed in Room No. 105 woke up Tilok, handed over the key to him and asked whether he would give the money to Tilok or deposit the same at the counter. Tilok replied that he could give it at the counter. Thereafter, the person went away. After some 5 (five) minutes Tilok opened Room No. 105 for cleaning. A little later Tilok came running and woke me up. I was sleeping then, Waking me up, Tilok asked me to go and see that was lying in Room No. 105. Then I got up and hurriedly went with Tilok to Room No. 105. From the doorway of Room No. 105. I could see water in the room. Tilok asked me to see under the bed. Looking there I could see a girl lying there nude. Tilok told me that while cleaning the water he had seen the nude girl under the bed and informed me. Thereafter, both of us ran to owner Wasim Rafique and the Manager to inform about it. At that time the owner was not in the hotel. The manager called the owner over phone. The owner and the Manager came to see Room No. 105,. Tilok and I told the owner to inform the police. Then owner Wasim Rafique rebuked us saying that,"Shut up. This is my hotel. If I inform police the hotel will close down". The owner of the hotel asked us to keep mum and not to tell anybody about the incident. He asked us not to go out of the hotel. Thereafter, the owner of the hotel locked the Room No. 105 and took the key along. He asked us to remain inside the staff room and then went downstairs. After two hours he returned there bringing along carton, hold-all rope. One Kismat Ali, a veterinary doctor also came with him. They the owner and Kismat Ali went to Room No. 105. They also called us there. Kismat Ali had suggested to inform the police. Then owner Wasim Rafique said,"I am the owner of this building. You all keep quiet and pack the woman. Whatever needs to be done will be done by me." Out of fear, Tilok, Kismat Ali and I together packed the girl's nude dead body. At first Wasim Rafique and Kismat Ali put the girl inside the hold-all while we helped them in doing so. After that the owner and Kismat Ali put it inside the carton. Then they kept the packing in the store room. The owner asked Tilok and me to see if anybody was there. Out of fear,

that night Tilok and I did not have our dinner. Around 4.30/5-00 am on the following morning, the owner woke up us and asked us to dispose the dead body. As per the direction of owner, Tiolok, Kismat Ali, Wasim Rafique and I brought the dead body down from the store room and put it in the back seat of Papu's Maruti Car. The owner took the driver's seat. I said that I won't go with him but he threatened me to go with him. He also took Kismat Ali along. That day there was "Bole Bom" (a Hindu ritual where people goes on foot to religious place), so there were lots of people on the road. The owner asked me to drive in the places which were crowded. The owner took the car towards Guwahati Club and again took a turning through the road below the over bridge. The owner and Kismat Ali then disposed the girl's dead body at a place where there was a garage near the over bridge. I kept standing nearby. Thereafter, the owner made me sit in the car, took me towards Six Mile and left the vehicle in a person's house. Then we came to the hotel in an auto rickshaw. After that our owner called me and Tilok and asked us not to tell anybody about the incident. Some two/three days later police apprehended us."

Statement of Dr. Kismat Ali recorded U/s. 164 Cr.P.C. (Ext-8):-:-

"I passed Veterinary Degree course in the year 1997. In the year 2000 I took one bus on contract and since then I occasionally stay in Swagat Hotel. In that connection, I know Wasim Rafique, the owner of Swagat hotel. I sold my bus in the month of February, 2002. Then Wasim Rafique asked me to stay with him till I would get a better job. He also told that I could work with him and he also assured me that if he would get a proper job, he would engage me in the same. Wasim Rafique also deals in 'Second hand' vehicle. He engaged me in repairing of those vehicles and for that work he used to pay me Rs.2000/- per month. Around 5.30/6.00 pm on 21/8/2002, Wasim Rafique called me over phone and asked me to come to the hotel from a garage at Bharalumukh. As soon as I reached the hotel, Wasim Rafique told me that in Room No.105 a nude dead body of a girl was lying and he asked me to help him. After that Wasim Rafique, Manager Balen Deka and I went to the third floor of the hotel. Hotel 'boy' Tilok and Shankar also came out from the 'General room' and accompanied us to Room No.105. Thereafter, Wasim Rafique himself opened Room No.105 and entered the room taking us along. When Wasim Rafique dragged the bed, I saw the nude dead body of the girl which had been lying under the bed. We got scared. Then Wasim Rafique took us out of Room No.105, locked the room and took us to the office room. I told Wasim Rafique to inform the police but Wasim Rafique did not agree to it, rather he rebuked us saying that, "Who is the owner of the hotel, you or me?" Wasim Rafique said that Room No. 105 was not entered in the Register and if we would inform the police, the hotel would close down and we all would have to go to jail. Wasim Rafique sent Tilok and Shankar to the room in the first floor and asked us not to tell anybody about the matter. Wasim Rafique said that he would do whatever would be required to do. He said that 'anyhow', the dead body should be removed from the hotel. He asked to bring an old hold-all from upstairs. He himself brought big carton. As asked by Wasim

Rafique, Tilok, Shankar, Wasim himself and I together went to room No. 105 and Wasim Rafique wrapped the dead body with a hold-all. We all tied the dead body and put it inside the carton. At 11-00 pm we all brought the dead body and kept it in the general room. Around 4-00 am on the following day Wasim Rafique called Tilok, Shankar and me and asked us to bring down the dead body. We brought the dead body and put it near the main gate. Wasim Rafique asked us to keep the dead body on the backseat of a black coloured Maruti car. We did accordingly. Thereafter, Wasim Rafique sat in the driver's seat and made Shankar sit in the middle and asked me to be seated on the other side. When he saw people on the road, he made Shankar control the steering. After that the owner (Wasim Rafique) took the vehicle to Guwahati Club and disposed the dead body in an isolated place. Then he drove towards Six Mile. He dropped me at Punjabari and asked me to bring an auto rickshaw. He left the car there i.e. in the house of his father-in-law. Thereafter, he came to the hotel in that auto-rickshaw. He asked us not to tell anybody about it and also threatened us with dire consequences if we would do so."

52. The confessional statement of Sankar Biswakarma and Dr. Kismat Ali, recorded two days apart, narrates the same episode pertaining to removal of the dead body from the hotel room and complements the version of each other, thereby adding a ring of truth to their statements. In his confessional statement Sankar Biswakarma has stated that at around 10/10.30 am on 21/08/2002 a "boy" came to the hotel, took the key from the counter and went to the third floor. That person was carrying the keys of room No 105 and on being asked, he had shown him the room. Sankar has also stated that at around 11/11.30 a.m. a girl, wearing Salwar Kameez, came and entered the room. At about 4.30/ 5.00 pm, the boy, who had entered room No 105 had asked Tilok as to whether he could deposit the money with him or in the counter. After that he left the hotel. The remaining part of the statement of this accused relates to the manner in which the dead body was packed in a cartoon and removed from the hotel at the instance of the owner Wasim. The statement of the accused Sankar on such count completely matches the version of accused Kismat Ali as recorded in Ext-8.

53. From a careful evaluation of the statements in Exts-5 and 8 we are of the opinion that their statements are consistent with one another and corroborates the version given by each other. We are therefore, of the view that both the accused persons were speaking the truth. The "boy" referred to by Sankar Biswakarma in his confessional statement was none other than accused Aswini Kalita. The statement of Sankar Biswakarma (Ext-5), read in conjunction with the statement of accused Aswini (Ext-7), leaves no room for doubt that it was none other than the accused Aswini who had entered the hotel room No 105 of Swagat Hotel at around 10.a.m. on 21/08/2002 and the victim followed him to the hotel room about an hour later. When Aswini left the hotel room, dead body of Preeti was lying inside the room in a naked condition. Similar is the version of co-accused Dr. Kismat Ali. Therefore, from the conjoint reading of the confessional statements of the three accused persons, it is apparent that it was none other

than the accused Aswini who had murdered Preeti and left the dead body inside the hotel room. Thereafter, the body packed in a cartoon was removed from room No 105 of Sawagat Hotel and left under the Hedayatpur over bridge, by the co-accused persons.

54. Coming to the next questions as to whether, the confessional statements of the accused persons had been recorded in accordance with the provisions of law and if so, whether the learned trial court had committed an error in placing reliance on their confessional statements by ignoring their retractions, it is to be noted here-in that from the evidence of PW-4 it has come out that all the accused persons had been sufficiently cautioned about the consequences of their confession. Notwithstanding the same, when they insisted on recording their statements, the accused persons were sent to her office chamber for reflection under the watch of her peon. The PW-4 has also deposed that during that time no police personal was allowed inside her office chamber. After giving them about 4 hours time for reflection and despite being warned about the consequences, when the accused persons still wanted to record their statement, it was only then that their statements were recorded by her on being satisfied that the accused persons were willing to make their confession voluntarily.

55. After referring to the various earlier decisions on the principles to be followed while recording the confessional statement of the accused, the Hon'ble Supreme Court had culled out the guiding principles for recording confessional statement of an accused person under Section 164 Cr.P.C. in the case of Rabindra Kumar Pal @ Dara Singh (Supra), at para 64, which are reproduced herein below for ready reference :-

"64) The following principles emerge with regard to Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement."

56. In the aforesaid decision, the Supreme Court has also observed that the Magistrate should ask the accused as to why he wants to make a statement which will go against him and grant him sufficient time for reflection. Yet, no specific time frame for reflection has been laid down by the Apex Court.

57. In this case since the appellant's counsel has also argued that the learned Magistrate did not allow sufficient time for reflection to the accused person, we deem it appropriate to briefly discuss the law governing the issue.

58. In the case of *Parmananda Pegu Vs. State of Assam* reported in (2004) 7 SCC 779, the Supreme Court has made the following observations in para 17 to 19 :-

"17. The foremost amongst the factors that are sought to be relied upon by the prosecution is the retracted confession of the appellant recorded under Section 164 Cr.P.C. The confession has been extracted supra in verbatim. Before acting on a confession made before a Judicial Magistrate in terms of Section 164, the Court must be satisfied first that the procedural requirements laid down in Sub-sections (2) to (4) are complied with. These are salutary safeguards to ensure that the confession is made voluntarily by the accused after being apprised of the implications of making such confession. Looking at the confessional statement (Ext. 8) coupled with the evidence of PW 22, the then Addl. Chief Judicial Magistrate, Dhemaji, we have no doubt in our mind that the procedural requirements have been fulfilled. Inter alia, PW 22 deposed that after cautioning the accused that the confessional statement, if made, will be used in evidence against them, he gave three hours time for reflection during which the accused were kept in a room attached to the Court in the immediate presence of an office peon. PW22 further stated that it appeared to him that the accused made the statement voluntarily. A memorandum as required by sub-Section (4) was also recorded. Thus the first requirement for acting on a confession is satisfied but that is not the end of the matter. The Court, called upon to consider the evidence

against the accused, should still see whether there are any circumstances appearing from the record which may cast a doubt on the voluntary nature of the confession. The endeavour of the Court should be to apply its mind to the question whether the accused was free from threat, duress or inducement at the time of making the confession. In doing so, the Court should bear in mind, the principle enunciated in *Pyare Lal vs. State of Rajasthan* [(1963) Supp.1 SCR 689] that under Section 24 of the Evidence Act, a stringent rule of proof as to the existence of threat, duress or inducement should not be applied and a prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words,

"on the evidence and the circumstances in a particular case it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved".

18. Having thus reached a finding as to voluntary nature of a confession, the truth of the confession should then be tested by the Court. The fact that the confession has been made voluntarily, free from threat and inducement, can be regarded as presumptive evidence of its truth. Still, there may be circumstances to indicate that the confession cannot be true wholly or partly in which case it loses much of its evidentiary value.

19. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the Court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the Court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true. The law on the subject of retracted confession has been succinctly laid down by a three Judge bench of this Court in *Subramania Goundan Vs. State of Madras* [(1958) SCR 428] which lays down:

"The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being *In re Kesava Pillai* [ILR 53 Mad 160 : (AIR 1929 Mad 837)] (B) that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on

more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being *Balbir Singh Vs. State of Punjab* (S) AIR 1957 SC 216 (C), but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

The learned Judges then highlighted the difference between retracted confession and the evidence of an approver or an accomplice.

"Though under Section 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to Section 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and therefore it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue."

59. In the case of *Puran* (Supra) relied upon by Mr. Agarwal, it has been held that unless a retracted confession is corroborated in material particulars, it would not be prudent to base a conviction in a criminal case on its strength alone.

60. In the case of *Sarwan Singh Rattan Singh* (Supra), a similar view has been expressed by the Supreme Court. In that case, the Supreme Court has observed that a confession, even if it is held to be voluntary, it must also be established that the confession is true and it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities in the case.

61. In the case of *Shankaria* (Supra), the same view has been reiterated by

holding that in case of a retracted confession, corroboration would be a necessity.

62. By following the aforesaid decisions of the Supreme Court, a Division Bench of this Court has held, in the case of Kuthu Goala(Supra), to the effect that when in a capital case, the prosecution demands conviction of accused primarily on the basis of confession, the Court must apply the double test – (i) whether the confession is perfectly voluntary and (ii) if so, whether it is true and trustworthy. The same position has been reiterated in case of Bhagawan Singh and others (Supra). In that case, the Supreme Court has further held that the Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. The Magistrate should grant sufficient time for reflection and should also assure the accused of protection of any sort of apprehended torture or pressure from the Police in case he declines to make a confessional statement.

63. In Sarwan Singh Rattan Singh (Supra), it has been observed that although it would be difficult to lay down any hard and fast rule as to the time which should be allowed to the accused person for reflection, yet, it would be prudent to allow at-least 24 hours to the accused to decide as to whether or not he should make a confession.

64. In the case of Devraj Goyal (Supra), it has been observed that a minimum 24 hours time should be granted to the accused to re-think before giving confessional statement.

65. What follows from the aforementioned decisions relied upon the learned counsel for the appellant is that ideally, minimum 24 hours time should be granted to the accused for reflection before recording his confession. However, failure to grant at-least 24 hours time for reflection, would not pre se make the statement of the accused recorded under section 164 CrPC as bad in the eye of law. It will depend on the facts and circumstances of a given case as to whether, sufficient time was granted to the accused for reflection before recording the confessional statement. What would, however, be of utmost significance for the court to asses is as to whether, the confession has been recorded in compliance of the procedure laid down in section 164 Cr.P.C and also whether, the same is voluntary, free from any inducement and appear to be truthful. From the evidence available on record, we do not find a reasonable basis to doubt that the confession of the three accused persons, as noticed here-in-above, were not voluntary and truthful.

66. The next question pertains to the failure on the part of the learned Magistrate to put questions to the accused persons as to why they wanted to make a confession. In the present case it appears from the evidence on record that the PW-4 had not specifically asked the accused persons as to why they wanted to make a confession. However, it is also apparent from the materials on record that the accused persons were sufficiently warned on the consequences but despite the same they had shown their willingness to record their

confessional statement. The learned Magistrate was satisfied that the accused persons were voluntarily willing to record their confession and we do not find any justifiable ground to doubt the correctness of such satisfaction of the Magistrate. After recording their statements, the accused persons were sent to judicial custody. There is material corroboration of the confession of the accused persons from the other evidence available on record and therefore, truthfulness of the confessional statements is well established. We also find that all other procedural requirements laid down by section 164 Cr.P.C has been have been properly complied with while recording the statements of the accused persons. After going through the materials available on record no doubt arises as to the truthfulness and voluntariness of the confessions. Moreover, the appellant's counsel have also not been able to show any prejudice being caused to the accused persons due to the failure on the part of the PW-4 to put a question to the accused as to why they wanted to record their confession. In view of the above, we are of the opinion that, having regard to the facts and circumstances of the present case, mere failure on the part of the PW-4 to put a question to the accused as to why they wanted to record their statement would, by itself, not have a vitiating effect on the impugned judgment.

67. Coming to the next issue regarding reliance placed on the retracted confession of the accused persons, what would be significant to note here-in is that the accused person have not denied having made the confessional statements before the Magistrate, as reflected in Exts 5,7 and 8, but their stand is that the statements had been recorded due to torture and pressure from the police. The retraction has also come while examining the accused person under section 313 Cr.P.C and that too after about 10 years from the date when the same was recorded. Although the accused persons had all the time to retract from their confession on earlier occasions, yet, they did not do so.

68. Law is well settled that conviction can be based even on retracted confession of the accused if the same is found to have been recorded as per prescription of law and is also found to be voluntary and truthful and there is corroboration. In *Manjit Singh Vs CBI*, (2011) 11 SCC 578, while considering the question as to whether a retracted confession of the co-accused could be relied upon to convict the accused, the Apex Court has held that retracted statements could be used against the accused as well as the co-accused provided such statements were truthful and voluntary when made. In that case, the two accused persons had recorded their confessional statement but subsequently retracted their statements.

69. In *Babubhai Udesinh Parmar (Supra)*, the Apex Court has held that a judicial confession is undoubtedly admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary. The voluntary nature of the confession depends on whether there was any threat, inducement or promise and its truth is to be judged on the basis of entire prosecution story.

70. In *Bhagwan Singh Vs State of Punjab*, AIR 1952 SC 214, the Apex court has held that the burden to prove that the confessional statement was obtained by threat, duress or promise was on the accused. The above law has been reiterated in the case of *K.I.Pavunny* (supra).

71. In *Rajen Boro Vs State of Assam* reported in 2003 (2) GLT 632 this court has observed that it is not the requirement in law that once a confession was retracted, the court should presume that the confession was tainted. It was further observed that a non-retracted confession was a rarity in criminal cases. To retract from the confession was the right of the confessor/ accused and the accused against whom confessions were produced by the prosecution have invariably exercised that right. But it would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The court has a duty to evaluate the evidence concerning the confession by looking into all aspects.

72. In the case of *Dandeswar Barman Vs State of Assam* reported in 2017 (2) Gau LJ 668 the confessional statement of the accused was recorded before the Magistrate. During recording of his statement under section 313 CrPC the accused had admitted that his confession was recorded by the Magistrate but had taken a stand that the same was done under the influence of the police. However, observing that the confessional statement of the accused was supported by oral evidence on witnesses available on record and also noticing that there was no evidence of police torture, the Division Bench had rejected the plea of the accused and held that the confessional statement of the accused was true and reliable.

73. In the present case also there is nothing on record to substantiate that the confessions made by the accused was under threat or undue influence from the police. The accused persons have also failed to establish such a plea by leading evidence. We are, therefore, of the opinion that retraction of the confession by the accused persons was not bonafide and hence, the plea of the learned counsel for appellants on the above count does not merit acceptance by this court.

74. In *Kashmira Singh* (Supra), the Supreme Court has observed that the confession of a co-accused is not evidence in the ordinary sense of term but the same can be used only to lend assurance to other evidence available against the co-accused.

75. In the case of *Haricharan Kurmi* (Supra), it has been held that while dealing with a case against an accused person, the Court cannot start with the confession of a co-accused persons; 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.

76. In the case of *State of MP Vs. Mukesh and others* reported in (2006) 13 SCC

197, the Supreme Court has held that the statement of the accused was required to be corroborated by adducing independent evidence which was not done in that case. Unlike the present, that was a case where the entire prosecution case was based on the purported confession of a co-accused.

77. Again in the case of *Pancho Vs. State of Haryana* Pratham reported in AIR 2012 SC 523, relied upon by Mr. Z. Kamar, the Supreme Court has observed that it is not obligatory on the part of the Court to take the confession of a co-accused into account. Confession cannot be treated as substantive evidence against a co-accused. When the prosecution relies upon the confession of one accused against the another, the proper approach is to consider the other evidence against such an accused 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 accused, then the Court can turn to the confession with a view to assuring itself that the conclusion to draw from the other evidence is right.

78. Having regard to the evidence available on record, we are of the opinion that this is not case where the prosecution case was entirely based on the confessional statement of the accused. Rather, we find that the prosecution has brought on record sufficient evidence to establish the circumstances pointing towards the guilt of the accused Aswini Kalita. The confession of the accused persons only offers material corroboration to the evidence brought on record and lends assurance to the prosecution story.

79. The next issue that arises for decision in this case is as to whether, the confession of the co-accused could be used as per section 30 of the Evidence Act, for conviction of the accused in this case. Section 30 of the Evidence Act provides as follows :-

"30. 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."

80. In the case of *Nalini (Supra)*, the Hon'ble Supreme Court had the occasion to interpret Section 30 of the Evidence Act. While dealing with the postulates of Section 30, the Supreme Court has made the following observations in para 685, which is reproduced below :-

"685. A plain reading of Section 30 of the Evidence Act discloses that when the following conditions exist, namely, (i) more persons than one are being tried jointly; (ii) the joint trial of the persons is/or the same offence', (iii) a confession is made by one of such persons (who are being tried jointly for the same offence); (iv) such a confession affects the makers as well as such persons (who are being tried jointly for the same offence); and (v) such a confession is proved in court, the court may take into consideration such confession against the

maker thereof as well as against such persons (who are being jointly tried for the same offence).”

81. In the present case, what must be noted is that the co-accused Dr. Kismat Ali and Sankar Biswakarma were not charged u/s. 302 IPC. As such, it cannot be said that they were being tried jointly along with Aswini Kalita for the same offence. However, it appears that the joint trial of the accused was held since the offences were connected with the same transaction. Therefore, it is apparent that joint trial of all the accused persons was held in exercise of power conferred on the learned sessions judge under section 223(d) the Cr.P.C which permits joint trial of persons accused of different offences committed in the course of the same transaction.

82. Section 223 of Cr.P.C. lays down as to which persons may be charged jointly. Section 223 Cr.P.C. reads as follows :-

“223. What persons may be charged jointly.- The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course same transaction;

(b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860). or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and

such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.”

83. In *R. Dineshkumar @ Deena Vs State* represented by Inspector of Police and Others reported in (2015) 2 SCC 403 the question pertaining to joint trial of accused charged with different offences fell for consideration of the Supreme Court. After considering several earlier decisions governing the issue including the judgment rendered in the case of *State of Andhra Pradesh Vs Cheemalapati Ganeswara Rao & Another* reported in AIR 1963 SC 1850, the Apex Court has observed that where several persons are alleged to have committed several separate offences, which are not wholly un-connected, then there may be joint trial unless such trial is likely to cause either embarrassment or difficulty to the accused in defending themselves.

84. In the present case, although the accused persons have been charged with separate offences, yet, the alleged offences are not un-connected but are intricately linked to one another and therefore, can be treated as part of the same transaction, thus bringing it within the ambit of section 223(d) of CrPC. Moreover, it is not the case of any of the appellants that the joint trial has either embarrassed or caused prejudice to them. In such view of the matter, we are of the opinion that it was permissible for the trial court to look into and rely on the totality of the materials available on record including the confessional statements of the co-accused persons so as to convict the accused even though section 30 of the Evidence Act may not have any application in this case. In other words, we are of the view that it was open for the learned Sessions Judge to look into Exts. 5 and 7 for the purpose of corroboration of the evidence adduced by the prosecution so as to establish the charge brought against accused Aswini Kalita beyond reasonable doubt.

85. By relying upon the decision in the case of *Pakala Narayan Swami (Supra)*, Mr. Agarwal has argued that no statement of the accused, which is self exculpatory, can amount to a confession, if the exculpatory statement is of some fact, which if true, would negate the alleged offence. However, as noted above, we are of the view that the entire confessional statement of accused Aswini is not exculpatory. The inculpatory part of the statement finds material corroboration for the evidence on record. Even the nature of injuries mentioned in the postmortem report matches the version of the accused as in Ext-22. Therefore, having regard to the facts and circumstances of this case, the decisions relied upon by Mr. Agarwal, in support of his arguments would also be of no assistance to him.

86. In view of the discussions held in the foregoing paragraphs, we are of the view that there is sufficient circumstantial evidence lead by the prosecution to establish that the accused Aswini Kalita had committed the murder of the deceased Preeti in room No 105 of Hotel Swagat on 21-08-2002 and thereafter,

made an attempt to destroy evidence connected with the crime so as to save himself. The confession of the accused person corroborates the evidence brought on record by the prosecution so as to conclusively establish the prosecution story that it was none other than the accused Aswini who had committed the murder of the deceased.

Charge brought against accused/ appellants Md. Wasim Rafique, Sri Balin Chandra Deka, Sri Tilak Boro, Dr. Kismat Ali and Sri Sankar Biswakarma under Section 201/202 of the IPC:-

87. The next question that would arise for consideration of this Court is as to whether, the conviction of appellants in Criminal Appeal No. 91/2014 and Criminal Appeal No. 89/2014, under Section 201/202 of the IPC is sustainable in the eye of law.

88. We have already held that the evidence available on record has clearly established that the occurrence took place in room No 105 of Hotel Swagat on 21-08-2002 but the dead body of the deceased was recovered from a cartoon lying under the Hedayatpur flyover at Guwahati. The fact that the body was removed from the hotel is also apparent from the evidence available on record as well as the confessional statements of accused Sankar Biswakarma and Dr. Kismat Ali which are inculpatory in nature. Accused Dr. Kismat Ali and Sankar Biswakarma have also implicated the other co-accused persons including the Hotel owner Wasim Rafique. From the evidence available on record, there can be no doubt about the fact that the aforementioned accused persons had not only seen the dead body inside the hotel room No 105 of Hotel Swagat but were also aware that it was a case of homicidal death. These accused persons were aware that an offence has been committed which they were bound to report to the Police. Notwithstanding the same, the accused persons intentionally did not inform the police. Instead, they removed the dead body from the hotel room. Therefore, we find ourselves in agreement with the conclusion reached by the learned trial court that the charge brought against accused Md. Washim Rafique, Sri Balin Chandra Deka, Sri Tilak Boro Dr. Kismat Ali and Sri Sankar Biswakarma under section 202 of the IPC stood fully established.

89. The next question that arises for decision in this case is as to whether, the prosecution has succeeded in establishing the charge brought against accused Md. Wasim Rafique, Sri Balin Chandra Deka, Sri Tilak Boro Dr. Kismat Ali and Sri Sankar Biswakarma u/s 201 of the IPC.

90. The ingredients of section 201 of the IPC have been stated and re-stated in a number of decisions of the Supreme Court. In the case of V.L. Tresa Vs. State of Kerala reported in (2001) 3 SCC 549, it has been held that the foremost necessity for establishing a charge under Section 201 of the IPC must be to screen the offender known or unknown.

91. In the case of Sukhram Vs. State of Maharashtra reported in (2007) 7 SCC 502, the Supreme Court has laid down the postulates of section 201 IPC in para

18, which is quoted herein below :-

"18. The first paragraph of the Section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. To bring home an offence under Section 201 of IPC, the ingredients to be established are: (i)committal of an offence; (ii)person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii)person charged with the said offence should have caused disappearance of evidence and (iv)the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown."

92. In the light of the principles laid down in the above, it would be necessary for this Court to examine as to whether, the prosecution has succeeded in establishing the charge brought against these accused persons under Section 201 of the IPC.

93. As noted above, the involvement of the owner of the hotel Wasim Rafique has clearly come out from the confessional statement of Dr. Kismat Ali and Sankar Biswakarma wherein, they have stated that the dead body was removed from the hotel under the instruction of accused Wasim Rafique since he did not want the Police to come to his hotel. There is, however, no evidence to suggest that the dead body was removed from the hotel to screen the actual offender in this case.

94. In so far as removal of the dead body with the help of the Maruti 800 car belonging to PW-12 is concerned, here also we find that the evidence led by the prosecution suggests that the said vehicle was not in a serviceable condition at the relevant point of time, which fact has come out from the cross examination of PW-13. His evidence on the aforesaid point finds corroboration from the testimony of the owner of the vehicle i.e. PW-12, who has also stated that his car had broken down and, therefore, he had requested his friend (PW-13) to take the car to the garage. PW-13 has also stated that he had handed over the car to the garage for repair and that the car was not in a working condition, as a result of which, it was taken by the garage people with the help of a crane. If that be so, the evidence adduced by the prosecution witnesses PWs 12 and 13 clearly goes to show that the Maruti 800 Car belonging to the PW-12 was not in a working condition. There is, therefore, considerable doubt as to whether the said car could at all have been used by the accused persons for transporting the dead

body from the hotel to the place under the over-bridge, wherefrom the same has been recovered by the police.

95. Although the IO (PW-21) has stated that the Maruti Car has been recovered on being shown by the accused Wasim Rafique, yet, no such disclosure statement is available in the record so as to presume that there was discovery of the car within the meaning of Section 27 of the Evidence Act.

96. As noted above, all these accused persons have been accused of removing the dead body to screen the offender. There is, however, nothing on record to show that accused persons, Sri Balin Chandra Deka, Sri Tilak Boro, Dr. Kismat Ali and Sri Sankar Biswakarma had any prior acquaintance with accused Aswini. Rather, it appears that their involvement in the matter was purely under the instruction of the hotel owner Wasim Rafique. It also appears that all of these accused persons were either the employees in the hotel or were under the direct control of the hotel owner. As such, although it is possible that the Hotel owner Wasim Rafique had prior acquaintance with accused Aswini Kalita, yet, it cannot be concluded from the evidence on record that the dead body was removed from the hotel only to screen accused Aswini i.e. the real offender. Rather it appears from the materials on record that the sole purpose behind removing the dead body from the hotel was to protect the reputation of the hotel and also to prevent the police from reaching the hotel and creating more trouble for the hotel owner. In view of the above, we are of the opinion that, in so far as accused Md Wasim Rafique, Sri Balin Chandra Deka, Sri Tilak Boro, Dr. Kismat Ali and Sri Sankar Biswakarma are concerned, the ingredients of section 201 IPC have not been fulfilled in this case. In other words, we are of the opinion that the prosecution has failed to establish the charge brought against these accused persons under section 201 IPC beyond reasonable doubt

97. For all the aforesaid reason, we are of the unhesitant opinion that the conviction of the accused appellants Md. Wasim Rafique, Sri Balin Chandra Deka, Sri Tilak Boro, Dr. Kismat Ali and Sri Sankar Biswakarma under Section 201 of the IPC is unsustainable in the eye of law due to lack of evidence against them. As such, giving them the benefit of doubt, these accused persons stand acquitted in respect of the charge framed against them under Section 201 of the IPC. However, their conviction and the sentence awarded by the learned trial Court for committing the offence under Section 202 of the IPC stand affirmed.

98. In the result, Criminal Appeal No 96/2014 stands dismissed.

99. Criminal Appeal No. 91/2014 and Criminal Appeal No. 89/2014 stand partly allowed.

Registry to send back the LCR.

We have been informed at the Bar that all the appellants had been granted bail during the pendency of the appeals before this Court. We, therefore, direct appellant Aswini Kalita to surrender before the learned Additional sessions Judge

No.1, Kamrup (M) at Guwahati within 10 (ten) days from today, so as to serve his remaining jail sentence.

Likewise, appellants Md. Wasim Rafique, Balin Chandra Deka, Tilak Boro, Dr. Kismat Ali and Sankar Biswakarma to also surrender before the learned trial Court within 10(ten) days from today so as to serve the remaining jail sentence, if any, in terms of this judgment.

All the three appeals are disposed off accordingly.