

(2025) 05 GAU CK 0335
In the Gauhati High Court
Case No : CRL.A(J) Of 93 Of 2020

Bijoy Krishna

APPELLANT

Vs

The State Of Assam

RESPONDENT

Date of Decision : 20-05-2025

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 164, 173(2), 207, 209, 225, 313, 357(A), 383, 428
Indian Penal Code, 1860 — Section 34, 302
Indian Evidence Act, 1872 — Section 25, 26, 27, 30

Citation : (2025) 05 GAU CK 0335

Hon'ble Judges : Yarenjungla Longkumer, J; Manish Choudhary, J

Bench : Division Bench

Advocate : H. Gupta, B. Bhuyan

Final Decision : Allowed

Judgement

Manish Choudhary, J

1. This criminal appeal from jail under Section 383, Code of Criminal Procedure, 1973 ['the Code' or 'CrPC', for short] is directed against a Judgment and Order dated 20.11.2019 passed by the Court of learned Additional Sessions Judge – II [FTC], Tinsukia in Sessions Case no. 103[T]/2012. By the Judgment and Order dated 20.11.2019, the accused-appellant has been convicted for the offence of murder under Section 302, Indian Penal Code [IPC] and he has been sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo rigorous imprisonment for another year. It has been provided that the period of detention already undergone by the accused-appellant shall be set-off against the sentence of imprisonment under Section 428, CrPC.

2. The prosecution case is that on 09.08.2009, a First Information Report [FIR] was lodged by the informant, Surjya Mohan Tanti [P.W.3] before the Officer In-Charge, Doomdooma Police Station. In the FIR, the informant [P.W.3] had inter

alia alleged that at about 10-30 p.m. on 08.08.2009, four accused persons, namely, [i] the accused-appellant, Bijoy Krishna @ Mela [hereinafter also referred to as 'the appellant' or 'A-1, at places, for short']; [ii] Bishal Krishna @ Bom ['A-2']; [iii] Anit Krishna ['A-3']; and [iv] Pinku Krishna @ Tinku ['A-4']; who were brothers, got engaged in an altercation with Dasaru Tanti, a resident of Mankhowa Tea Estate, Prem Nagar Basti. The deceased, Dasaru Tanti was an elder brother of the informant's wife. According to the informant, the altercation arose due to a domestic matter. In the altercation which occurred at Line no. 15, the accused persons assaulted Dasaru Tanti and caused grievous injuries on his head and face. As a result, Dasaru Tanti died on the spot. It was further alleged that the mother of the deceased, Paikon Tanti [P.W.2] was also assaulted along with him.

3. On receipt of the FIR, the Officer In-Charge, Doomdoo Police Station registered the same as Doomdoo Police Station Case no. 303/2009 under Section 302, IPC read with Section 34, IPC and the investigation was entrusted to one Babu Singh [P.W.10], a Sub-Inspector of Police attached to Doomdoo Police Station.

4. During the course of investigation, the I.O. [P.W.10] arrested three of the four accused persons, A-1, A-2 & A-3 and after arrest, they were forwarded to the Court. However, the I.O. could not arrest the fourth accused person viz. Pinku Tanti @ Tinku [A-4]. In the course of investigation, the I.O. visited the Place of Occurrence [P.O.] at Line no. 15 of Mankhowa Tea Estate and recorded the statements of the witnesses under Section 161, Cr.P.C. The I.O. prepared a Sketch Map of the P.O. [Ext.-7] and also conducted the inquest proceeding on the deadbody of the deceased through an Executive Magistrate who after inquest, submitted an Inquest Report [Ext.-2]. The Post-Mortem Examination [PME] on the deadbody of the deceased was performed at Tinsukia Civil Hospital on 09.08.2009. After completing investigation into the case, the I.O. submitted a charge sheet under Section 173[2], CrPC vide Charge Sheet no. 254 on 30.11.2009 finding a prima facie case against all the four accused persons, named in the FIR, for committing the offence under Section 302, IPC read with Section 34, IPC. In the Charge Sheet, the I.O. mentioned that despite efforts, the accused, Pinku Tanti @ Tinku [A-4] could not be arrested by him. The I.O. made a prayer in the Charge Sheet to declare the accused, Pinki Tanti @ Tinku [A-4] as an absconder.

5. On submission of Charge Sheet no. 254 in connection with Doomdoo Police Station Case no. 303/2009 [corresponding G.R. Case no. 1038/2009] before the Court of learned Judicial Magistrate, First Class, Tinsukia, the learned Judicial Magistrate, First Class, Tinsukia secured appearance of the two accused persons, namely, the appellant, Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3] after issuance of process, as they were already on bail. An Order of Proclamation and Attachment [P&A] and further, an warrant of arrest were issued against the accused, Pinku Tanti @ Tinku [A-4]. The Enquiry Officer was examined. After

examination of the Enquiry Officer, the learned Judicial Magistrate, First Class, Tinsukia declared the accused, Pinku Tanti @ Tinku [A-4] as an absconder. As the copies were ready, the copies were furnished to the two attending accused persons, A-1 and A-3 in compliance of the provisions of Section 207, CrPC. The case of the accused, Bishal Krishna @ Bom [A-3] was split up as he was found to be a juvenile. As the offence under Section 302 is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Tinsukia committed the case records of G.R. Case no. 1038/2009 to the Court of Sessions by an Order of Commitment dated 14.05.2012 following the provision of Section 209, CrPC. The learned Public Prosecutor was notified accordingly, with a direction to the two accused persons, A-1 and A-3 to appear before the Court of Sessions on the date fixed.

6. On receipt of the case records of G.R. Case no. 1038/2009 by the Court of Sessions, the case was registered as Sessions Case no. 103[T]/2012. Thereafter, the case was transferred to the Court of Additional Sessions Judge-II [FTC], Tinsukia [‘the Trial Court’, for short] for trial and disposal. On appearance of the two accused persons, that is, the appellant, Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3] before the learned Trial Court, the case was opened by the learned Public Prosecutor as per Section 225, CrPC. After hearing the learned Public Prosecutor and the learned defence counsel; and after perusal of the materials in the case record; the learned Trial Court proceeded to frame the following charge against the two accused persons, A-1 [the appellant] and A-3 :-

That you on or about the 08.08.2009 at about 10.30 PM at Mankhowa T.E. 15 No. Line, under P.S. Doomdooma, District – Tinsukia, Assam in furtherance of common intention committed murder by causing the death of Sri Damru Tanti, the relative of the informant Sri Surjya Muhan Tanti.

You thereby committed an offence punishable under Section 302/34 of the Indian Penal Code within my cognizance.

7. The charge was thereafter, explained and read over to the accused persons. On being so read over and explained, both the accused persons pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined eleven nos. of prosecution witnesses and exhibited nine nos. of documents to bring home the charge against the two accused persons standing trial. After closure of evidence from the prosecution side, the two accused persons, A-1 and A-3 were examined under Section 313, CrPC by putting before them the incriminating circumstances appearing against them from the testimony of the prosecution evidence. The case of the accused persons was denial and falsity in the prosecution case. When asked, both the accused persons stated that they would adduce evidence in their defence. The defence side adduced evidence of three defence witnesses, D.W.1, D.W.2 and D.W.3, with the accused person, A-3 examining himself as D.W.1.

8. The details of the prosecution witnesses, exhibits and defence witnesses are

given below :-

Prosecution Witnesses

P.W.1

Dr. Amar Prasad – Medical Officer

P.W.2

Paikon Tanti – Mother of the deceased

P.W.3

Surjya Mohan Tanti - Informant

P.W.4

Asman Tanti

P.W.5

Ratan Tanti

P.W.6

Ukia Tanti

P.W.7

Bijay Muka

P.W.8

Suren Tanti @ Sambabu

P.W.9

Brij Kishor Prasad

P.W.10

Babu Singh – Investigating Officer

P.W.11

Monmee Sarma – Judicial Magistrate

Defence Witnesses

D.W.1

Anit Krishna, A-3

D.W.2

Dinesh Tanti

D.W.3

Devanand Tanti

Exhibits

Ext.-1

P.M.E. Report

Ext.-2

Inquest Report

Ext.-3

Command Certificate

Ext.-4

Forwarding Report

Ext.-5

Dead Body Challan

Ext.-6

FIR

Ext.-7

Sketch Map

Ext.-8

Charge-Sheet

Ext.-9

Statement of Paikon Tanti U/S 164Cr.P.C.

9. After hearing the arguments of the learned counsel for both the sides; and upon evaluation of the evidence on record; the learned Trial Court proceeded to deliver the Judgment and Order dated 20.11.2019. The learned Trial Court could not find sufficient incriminating evidence against the accused, Anit Krishna [A-3] to hold him guilty for the offence of murder with the aid of Section 34, IPC. The learned Trial Court has, however, found that the evidence against the appellant were sufficient to return a finding of guilt for committing the offence of murder of Dasaru Tanti. Holding him guilty of the charge of murder under Section 302, IPC, the appellant has been sentenced in the manner mentioned above.

10. We have heard Mr. H. Gupta, learned Amicus Curiae for the appellant and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor for the respondent State.

11. Mr. Gupta, learned Amicus Curiae appearing for the appellant has submitted

that there was no eye-witness to the alleged incident of assault, if any, which led to the death of the deceased. The prosecution sought to establish the case of the appellant by way of circumstantial evidence. It is his contention that neither the events in the chain of circumstance were independently established by cogent and reliance evidence nor the chain of circumstance was complete. He has further submitted that the learned Trial Court had erred to base the conviction on the basis of last seen theory. The Trial Court had placed undue reliance upon the evidence on P.W.3 to bring in the last seen theory. The learned Trial Court had also wrongly relied upon the event of quarrel which had allegedly taken place between the appellant and the deceased at a time anterior to finding the deadbody of the deceased. The deceased was found lying dead on a public road on the date of the incident and none from the immediate neighbourhood had deposed as regards the incident. The prosecution side had also failed to examine one material witness, who had allegedly informed P.W.2 and P.W.3 about the fact that Dasaru Tanti was lying dead on the road. It is his contention that the prosecution side had failed to lead cogent and reliable evidence in respect of each one of the alleged incriminating circumstances to form a chain of circumstance to draw an irresistible conclusion that it was only the accused and none other, who was the perpetrator of the crime.

12. Au contraire, it has been submitted on behalf of the State that the learned Trial Court was right to hold that the appellant and the deceased were last seen together when a quarrel broke out between them. It is contended that the circumstantial evidence led in totality and the evidence regarding last seen go to indicate that none other than the appellant, had committed the alleged crime of murder. A reference is also made to the evidence of D.W.1 to contend that the appellant had sustained an injury on his person on the date of the incident and from the testimony of D.W.1, it had clearly emerged that there was a fight between the appellant and the deceased on the date of the incident. Supporting the findings recorded by the Trial Court in its Judgment and Order of conviction and sentence, the learned Additional Public Prosecutor has submitted that there is no ground, much less good ground, to interfere with the verdict of the Trial Court.

13. We have duly considered the submissions of the learned counsel for the parties and have gone through the materials available in the case records of Sessions Case no. 103[T]/2012, in original.

14. As mentioned above, the prosecution side in order to bring home the charge against the two accused persons, A-1 [the appellant] & A-3 who faced the trial, examined eleven nos. of prosecution witnesses.

15. P.W.2 was the mother of the deceased. In her examination-in-chief, P.W.2 stated that she knew all the four accused persons. In respect of the incident, P.W.2 stated that all the four accused persons had together killed her son when he was returning home after completing his duty. At that time, she was at her house. When a person named Dil Bahadur raised alarm in the street, she came

out of her house. When she asked Dil Bahadur, Dil Bahadur replied that Mela [A-1], Bom [A-2], Anit [A-3] and Tinku [A-4] together killed the deceased. Then, P.W.2 went to the P.O. and saw her son lying on the road with injuries on his head and back. P.W.2 deposed that subsequently, she became unconscious. When she regained consciousness after few moments, she found herself at her house. It was her son-in-law, P.W.3 who lodged the FIR at the Police Station in connection with the incident. P.W.2 further stated that prior to the incident, the accused, Pinku Tanti @ Tinku [A-4] slapped her twice and at that time, Pinku Tanti @ Tinku [A-4] was armed with an axe.

15.1. When she was examined by the Court, P.W.2 stated that the wife and the daughter of the deceased were alive and they did not have any source of income. The age of daughter of the deceased was eight years and she was not going to school due to poor financial condition.

15.2. During cross-examination, P.W.2 stated that after the incident, she met Dil Bahadur at Line no. 15. The place where Dil Bahadur told her about the incident was about 400 yards away from the P.O. The houses of Deepali and Arjun were near their house and there was no other house on that road. She denied a suggestion that she did not state before the Police that Dil Bahadur raised alarm saying that the four accused persons had assaulted her son with iron rod. P.W.2 further stated that at the time of the incident, she was cooking food in her house.

16. P.W.3, in his examination-in-chief, stated that he knew both the appellant, A-1 and A-3. The deceased was his brother-in-law. As regards the incident, P.W.3 stated that at about 08-30 p.m. on the date of occurrence, he was in his shop. At that time, a quarrel took place between the deceased and the appellant. At that time, the other accused persons, Bishal Krishna @ Bom [A-2], Pinku Krishna @ Tinku [A-4] and one Maina came near his shop and they asked P.W.3 to settle the dispute between the deceased and the appellant. P.W.3 stated that then, he settled the dispute between the deceased and the appellant and thereafter, he left the place after closing the shop. It was after few minutes, one person named Dil Bahadur Narsingh came to his residence and informed that the deceased was murdered and the deadbody was lying at Tinali near the house of Bish Kishore Sah and Asman Tanti [P.W.4]. On being so informed, he stated to have rushed to the P.O. where the deadbody was lying. Reaching there, he saw the deadbody of the deceased. Then, he went to the Manager of the Tea Estate to inform him about the murder of the deceased. The Manager then told him to inform the matter to Police and accordingly, he lodged the FIR at Doomdooma Police Station. He exhibited the FIR as Ext.-6 and his signature therein as Ext.-6[1]. He also stated to have signed in the Inquest Report [Ext.-2] and identified his signature therein as Ext.-2[5]. P.W.3 further stated that when the incident occurred, Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2], Pinku Krishna @ Tinku [A-4] and one Maina were present. But the accused, Anit Krishna [A-3] was not present. He suspected that the above persons were responsible for killing the deceased.

16.1. In his cross-examination, P.W.3 admitted that he did not see the assault caused by the accused persons. He further stated that his shop was situated about 15-20 feet away from Tinali where the occurrence took place. He stated before Police that at the time of incident, he was at his house. In between Tinali and his house, the house of Binita and Ukia [P.W.6] were there. He further stated that it was after one hour of the quarrel, Dil Bahadur Narsingh informed him about the incident. He again stated that he had implicated the accused out of suspicion.

17. P.W.4 who knew both the accused persons, that is, the appellant, Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3] as well as the deceased, stated that he came to know about the death of the deceased from other residents of Line no. 15 only in the next morning. He heard that the appellant, Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3] along with others caused the death of the deceased.

17.1. In his cross-examination, P.W.4 stated that he only heard regarding the incident but he could not recall who had informed him regarding the incident.

18. In his evidence-in-chief, P.W.5 who knew both the accused persons as well as the deceased, deposed to the effect that on the date of occurrence, his wife, Usha Tanti informed him over phone that the deceased was murdered by some persons. It was only on the next day, he went to the P.O. and found blood stains on the road. Later, he came to know that the deceased was murdered by Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3].

18.1. During cross-examination, P.W.5 stated that only after two or three days from the date of the incident, he could learn from the villagers that the appellant, Bijoy Krishna @ Mela [A-1] and Anit Krishna [A-3] caused the murder.

19. P.W.6 also knew both the accused persons and the deceased. As regards the incident, P.W.6 stated that at about 08-00 p.m. on that day, she came out of her house hearing commotion at the road. She saw the deceased lying dead on the road of Line no. 15. Later, she heard that the accused persons had killed the deceased. She saw injury and blood on the head of the deceased.

19.1. During cross-examination, P.W.6 stated that she came to know about the murder of the deceased when she was at her house and it was P.W.2 who informed her about it. She went to see the deadbody only after arrival of Police personnel at the P.O. at 10-00 a.m. She stated that she did not know about how the death took place.

20. P.W.7 who also knew the accused persons and the deceased, deposed that it was at around 10-00 p.m. on the date of the incident, he came to know about the death of the deceased while returning from work. As asked by the Manager, he informed the incident at the Police Station. Later, he heard that the four accused persons, that is, the appellant, Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2], Anit Krishna [A-3] and Pinku Krishna @ Tinku [A-4] had

killed the deceased. It was after arrival of Police personnel, he went to see the deadbody, which was smeared with blood.

20.1. During cross-examination, P.W.7 stated that he did not see the deadbody and it was in the next morning, he heard that the four accused persons had killed the deceased. He further expressed inability to remember the name from whom he heard about the incident. He further stated that Police did not examine him.

21. P.W.8 also knew both the accused persons and the deceased. P.W.8 stated that he did not know how the deceased died. He further stated that though the Police personnel came, they did not examine him.

21.1. The cross-examination of P.W.8 was declined by the defence.

22. P.W.9 was another co-villager from Line no. 15 who knew both the accused persons and the deceased. P.W.9, in his examination-in-chief, testified that on the date of the incident, he was not at home. He came to his residence only after 4-5 days from the date of the incident and he came to know that a scuffle took place between the accused persons and the deceased and for that reason, the accused persons committed the murder.

22.1. During cross-examination, P.W.9 stated that he did not have any personal knowledge regarding the incident and Police did not record his statement.

23. From a look at the testimonies of the prosecution witnesses – P.W.2, P.W.3, P.W.4, P.W.5, P.W.6, P.W.7, P.W.8 & P.W.9, it can be easily noticed that the evidence of the prosecution witnesses, P.W.4, P.W.5, P.W.6, P.W.7, P.W.8 & P.W.9 are in the nature of hearsay evidence. In their testimony, these witnesses had testified that they came to know about the death of the deceased from others. Both P.W.4 & P.W.5 stated that they came to know about the incident only on the next date of the incident. The house of P.W.6 was near the alleged P.O. But, P.W.6 had stated that she did not know as to how the murder took place. P.W.7 came to know about the death of the deceased after 10-00 p.m., when he was returning from work. P.W.8 stated that he did not know how the deceased died and was not interrogated by Police. P.W.9 came to know about the death of the deceased only after 4-5 days from the date of the incident. Thus, the testimonies of these witnesses do not go to add any weight to the prosecution case.

24. We now turn to the testimony of the autopsy doctor, P.W.1, who had performed the Post-Mortem Examination [PME] on the deadbody of the deceased. In his examination-in-chief, P.W.1 stated that on 09.08.2009, he was working as the Sub-Divisional Medical & Health Officer at Tinsukia Civil Hospital. On 09.08.2009, he performed Post-Mortem Examination [PME] on the deadbody of the deceased in reference to Doomdooma Police Station Case no. 303/2009. The deadbody was identified by a Constable and one of the relatives of the deceased, P.W.9. On examination, he found three injuries on the person of the deceased :- [i] lacerated injury over left parietal region 2½” in length and deep

into the brain with fracture of parietal bone and subdural haematoma; [ii] lacerated injury behind left ear 2" in length bone deep and subdural blood collection and [iii] lacerated injury in front of left ear injury maxilla. He further stated that other than the three injuries, he did not detect any other injury. In his opinion, recorded in the PME Report, P.W.1 opined that the death was caused by coma as a result of head injuries sustained and the approximate time since death was 18-24 hours. P.W.1 further stated that injury no. 1 was sufficient to cause death of a person in the ordinary course of nature. He exhibited the PME Report as Ext.-1 with his signature therein as Ext.-1[1]; the Inquest Report as Ext.-2 with his signatures therein as Ext.-2[1], Ext.-2[2], Ext.-2[3] and Ext.-2[4]; the Command Certificate as Ext.-3 with his signature therein as Ext.-3[1]; the Forwarding Report as Ext.-4 with his signature therein as Ext.-4[1] and the Dead Body challan as Ext.-5 with his signature therein as Ext.-5[1].

24.1. During his cross-examination, P.W.1 stated that the injuries mentioned in the PME Report [Ext.-1] were lacerated injuries. He further stated that the injuries mentioned in the PME Report [Ext.-1] might not be caused by falling or due to hit by any substance as these injuries were homicidal and neither accidental nor suicidal. He denied the suggestion that the injuries could be sustained by falling or any other reason, other than assault.

25. The I.O. of the case was examined as P.W.10. In his examination-in-chief, he stated that on 08.08.2009, he received an information from the informant [P.W.3], P.W.7 and one Ajoy Tanti of Mankhowa Tea Estate, Line no. 15 that the deceased was killed by Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2] and Anit Krishna [A-3]. The Officer In-Charge, Doomdooma Police Station entrusted the investigation to him and he accordingly, visited the P.O. at 12-45. At the P.O., he found the deadbody lying at Tinali of Mankhowa Tea Estate, Line no. 15. He then prepared the Sketch Map of the P.O. [Ext.-7] and informed the Magistrate to conduct inquest. The Magistrate accordingly, carried out inquest on the deadbody and prepared an Inquest Report [Ext.-2]. On 09.08.2009, the informant, P.W.3 lodged the FIR at the Police Station and the same was accordingly registered. The FIR was exhibited as Ext.-6. After examining the informant at the Police Station, he again visited the P.O. and examined other witnesses, namely, Ratan Tanti [P.W.5], Smt. Ukia Tantia [P.W.6], and Brij Mohan Sah. The deadbody was thereafter, forwarded to Tinsukia Civil Hospital, Tinsukia for Post-Mortem Examination [PME]. He forwarded P.W.2 to the Court at Tinsukia for recording her statement under Section 164, CrPC. The three accused persons, Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2] and Anit Krishna [A-3] were arrested but the other accused, Pinku Krishna @ Tinku [A-4] could not be arrested and he was shown as an absconder in the Charge-Sheet. The accused, Bishal Krishna @ Bom [A-2] was found to be a juvenile. After collecting the PME Report, and completing the investigation, he submitted the Charge-Sheet [Ext.-8] against the accused persons, mentioned hereinabove.

25.1. During cross-examination, P.W.10 stated that he received the information

regarding the incident at around 12-midnight on 08.08.2009. He did not submit the extract copy of the General Diary Entry regarding the information received about the incident. He further stated that near the P.O., the houses of Asman Tanti [P.W.4], Ratan Tanti [P.W.5] and Brij Mohan Tanti were situated. He further stated that at the time of the alleged incident, all the said three witnesses were inside their houses and no one had witnessed the incident. He further stated that he did not send Paikon Tanti [P.W.2] for her medical treatment. P.W.3 stated before him that it was the accused, Tinku Tanti [A-4] who assaulted her son with an axe and P.W.2 did not mention any other accused person's name as assailant. He further stated that except the statements of witnesses, he did not find any other incriminating materials regarding the presence of the accused persons at the P.O.. In her statement recorded under Section 164, CrPC, P.W.2 confirmed that it was Tinku Tanti [A-4] who had assaulted her son with an axe. He further stated that he did not find any weapon of assault at the P.O. and he did not record the statement of Dil Bahadur Narsingh. He denied the suggestion that he had falsely filed the Charge-Sheet against the accused persons, Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2] and Anit Krishna [A-3]. He further clarified that the incident took place during the night hours and the P.O. was dark at that point of time.

26. P.W.11 was serving as Judicial Magistrate, First Class at Tinsukia on 14.08.2009 when she recorded the statement of Paikon Tanti [P.W.2] under Section 164, CrPC. In her examination-in-chief, P.W.11 exhibited the said statement of P.W.2 recorded under Section 164, CrPC as Ext.-9 with her signature therein as Ext.-9[1].

26.1. P.W.11 was cross-examined by the defence on the point whether reflection time was given or not.

27. Though P.W.11 exhibited the previous statement of P.W.2 recorded under Section 164, CrPC as Ext.-9, Ext.-9 was not shown to P.W.2 when she was being examined. A previous statement recorded under Section 164, CrPC can be used for both corroboration and contradiction. A previous statement recorded under Section 164, CrPC generally, serves two purposes, firstly, to deter the witness from changing his/her stand by denying the contents of his/her previously recorded statement; and secondly, get over the immunity from the prosecution by the witness under Section 164, CrPC. In the case in hand, the defence had no opportunity to confront the witness, P.W.2 with her previous statement recorded under Section 164, CrPC as her previous statement was not exhibited by the prosecution when P.W.2 was being examined. Such previous statement, that is, Ext.-9 was exhibited by the prosecution only at the time of recording the testimony of P.W.11, who can testify only regarding the statement, not on the veracity of the statement. Thus, the previous statement of P.W.2, cannot be treated as a piece of corroborative evidence to bring any benefit to the case of the prosecution nor it can be used for any purpose against the defence. The mention of the accused, A-4 assaulting P.W.2 in the FIR or the accused, A-4

slapping P.W.2 twice prior to the incident cannot be an incriminating circumstance against the appellant. Therefore, further dilation is not necessary on these aspects.

28. The prosecution sought to place reliance in the testimony of D.W.1, that is, A-3 who entered into the witness box raising a plea of alibi. To support the testimony of D.W.1, D.W.2 and D.W.3 had also adduced evidence in support of D.W.1's plea of alibi. The learned Trial Court after evaluation of the evidence of the prosecution witnesses and the defence witnesses, accepted the plea of alibi raised by D.W.1, who faced the trial along with the appellant and acquitted A-3 from the charge under Section 302, IPC read with Section 34, IPC.

29. From the testimony of D.W.1, the prosecution had pointed out about sustaining injuries by the appellant on the date of the incident. In his testimony, D.W.1 deposed to the effect that when after 11-00 p.m. on the date of the incident, he came out from the factory he met the appellant who was on his way to the factory, in an injured condition. When asked, the appellant told D.W.1 that the deceased had inflicted knife injury on the appellant. During cross-examination of D.W.1 by the prosecution, the prosecution exhibited the previous statement of D.W.1 recorded under Section 161, CrPC as Ext.- 9.

30. It has been argued that this part of the testimony of D.W.1 regarding the appellant is to be treated as an incriminating circumstance against the appellant and is an additional link in the chain of circumstances in view of Section 30 of the Evidence Act. Upon consideration of such submission, such submission is found not acceptable. The previous statement recorded under Section 161, CrPC of an accused cannot be readily read into evidence in a trial. The accused, A-3 was arrested immediately after the incident and the statement under Section 161, CrPC [Ext.-9] was recorded during his custody. Further, as per Section 25 of the Indian Evidence Act, 1872, a confession made to a Police Officer is prohibited and cannot be admitted in evidence. Section 26 of the Evidence Act provides that no confession made by any person whilst he is in the custody of a Police Officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. Section 27 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act. It makes that part of the statement which distinctly leads to discovery of a fact in consequence of the information received from a person accused of an offence, to the extent it distinctly relates to the fact thereby discovered, admissible in evidence against the accused. The fact which is discovered as a consequence of the information given is admissible in evidence. Further, the fact discovered must lead to recovery of a physical object and only that information which distinctly relates to that discovery can be proved.

31. Section 30 of the Evidence Act has laid down that 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. The pertinent requisite

for accepting a confession of an co-accused is that the co-accused who had made the confession, has to implicate himself and other co-accused for the offence alleged. If the co-accused does not incriminate himself and incriminates only his co-accused, then such confession cannot be accepted. In the case in hand, D.W.1 entered the witness box raising the plea of alibi, meaning thereby, he had adduced evidence to extricate himself from the charge under Section 302, IPC read with Section 34, IPC. He had adduced his evidence and the evidence of D.W.2 and D.W.3 to advance his plea that he was never present at the P.O. and was not with the appellant in the alleged incident of assault on the deceased.

32. It was one Dil Bahadur Narsingh to whom the two prosecution witnesses, Paikon Tanti [P.W.2] and Surjya Mohan Tanti [P.W.3] had attributed the role of the informer who had informed them about the alleged incident of assault on the deceased and about the deadbody of the deceased lying on the road on the date of occurrence. It needs iteration that P.W.2 stated that it was Dil Bahadur Narsingh who raised alarm from the street and hearing his alarm, P.W.2 came out of her house and when she asked Dil Bahadur Narsingh, Dil Bahadur Narsingh replied that it was the accused persons, Bijoy Krishna @ Mela [A-1], Bishal Krishna @ Bom [A-2], Anit Krishna [A-3] and Pinku Krishna @ Tinku [A-4] who together had killed the deceased. P.W.3 stated that when he left for his house after closing his shop, Dil Bahadur Narsingh came to his house after few minutes to inform that the deceased was murdered and the deadbody of the deceased was lying at Tinali. In his cross-examination, P.W.3 stated that it was after one hour of the quarrel, Dil Bahadur Narsingh informed him about the incident. P.W.3 in his earlier part of the testimony stated that the quarrel took place at about 08-30 p.m. The I.O. [P.W.10] had stated that he did not record the statement of Dil Bahadur Narsingh. If the testimonies of P.W.2 and P.W.3 on the above aspect are to be accepted, then Dil Bahadur Narsingh would emerge as the most material witness.

33. Non-examination of any witness may not affect the prosecution case in a case, but, in a given case, non-examination of a material witness could affect the prosecution case adversely. A material witness is one who could unfold the genesis of the incident or an essential part of the prosecution case and by examining such material witness the gaps or infirmities in the case of the prosecution could be supplied. It has been held in *Takhaji Hiraji vs. Thakore Kubersing Chamansing and other*, [2001] 6 SCC 145, to the effect that if such a material witness, without justification, is not examined, inference against the prosecution can be drawn by the court. As emerged from the discussion above, the statement of Dil Bahadur Narsingh was not recorded under Section 161, CrPC by the I.O. during the investigation. Dil Bahadur Narsingh was not cited as a witness in the Charge Sheet [Ext.-8]. Even during the trial when the name of Dil Bahadur Narsingh was brought in by P.W.2 and P.W.3 in their testimony as the vital cog, the prosecution did not make any effort to call and examine Dil Bahadur Narsingh as a witness. Thus, the testimonies of P.W.2 and P.W.3 on the aspect of informing them by Dil Bahadur Narsingh about the alleged incident

clearly falls in the realm of hearsay. Similarly, the aspect of informing P.W.2 and P.W.3 by Dil Bahadur Narsingh that the accused persons had assaulted the deceased is to be discarded being hearsay.

34. The prosecution side has founded its case and the learned Trial Court had acted on the last seen theory. Evidently, in the case in hand, there was no eye-witness and the case was based on circumstantial evidence. The last seen theory can be brought in as a facet of circumstantial evidence. It may be a weak kind of evidence by itself to find conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the deadbody being in very close proximity of time, the accused then owes an explanation with regard to the circumstances under which death might have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive can be inferred and if there is corroborative evidence available *inter alia* in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there is any doubt or break in the link of chain of circumstances, the benefit of doubt goes to the accused. Each case is always to be examined on its own facts for invocation of the doctrine. [Ref : Satpal vs. State of Haryana, [2018] 6 SCC 610]. The circumstance of last seen together theory can be brought into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused person seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused.

35. Reverting back to the facts of the case, the prosecution witness, P.W.3 testified to the effect that at about 08-30 p.m. on the date of the incident, a quarrel took place between the appellant and the deceased and at that point of time, other accused persons, A-2, A-4 and one Maina came there and they asked P.W.3 to settle the dispute between the appellant and the deceased. P.W.3 also testified that he then settled the dispute and left the place after closing the shop. Other than P.W.3, no other witness had lent corroboration on the issue of dispute and settlement. The learned Trial Court was only found to have harped on the aspect of quarrel. There was no discussion on the point that after the quarrel arose, a settlement was also arrived at between the two. P.W.3 did not testify that after quarrel and settlement of the dispute, the appellant and the deceased left the place together. In the absence of such evidence of the deceased and the appellant leaving the place together, the last seen theory cannot be automatically brought in. There has to be corroborative evidence that they were last seen together prior to discovery of the deadbody of the deceased. According to P.W.3,

the time gap was about one hour, and thereafter, he gave information of the Police Station.

36. The testimony of P.W.3 about the time gap between the dispute, settlement and the information received by him from Dil Bahadur Narsingh cannot be accepted in absence of other corroborative evidence because of a part of it, that is, the factum of giving information to P.W.3 by Dil Bahadur Narsingh, has already been discarded in the earlier part because of non-examination of the material witness. As per I.O. [P.W.10], it was at about 12-midnight on 08.08.2009, he received the information from P.W.3 as regards the alleged incident of death of the deceased. On analysis of the above evidence we find that the last seen theory, in the absence of any other piece of corroborative evidence lending credence to it, cannot be accepted as the time gap was such that the involvement of any other person in the incident of assault cannot be ruled out. As the last seen theory is found not applicable in the case, the onus was not shifted to the appellant to provide an explanation regarding the alleged murder of the deceased.

37. P.W.3 in his examination-in-chief as well as in cross-examination, deposed that he implicated the appellant and the other accused persons for the death of the deceased due to suspicion. But it is settled that suspicion, however grave it may be, cannot take the place of proof and there is a long distance to travel from the point of 'may be true' to the point of 'must be true'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take the place of proof. The long distance between 'may be true' and 'must be true', must be covered by clear, reliable, credible and unimpeachable evidence before an accused can be held guilty.

38. The case of the prosecution is based on circumstantial evidence. Learned Amicus Curiae has referred to a decision title Abdul Nassar vs. State of Kerala and another, [2025] INSC 35, as regards the principles to be kept in consideration in a case based on circumstantial evidence. The decision has followed the decision in Sharad Birdhichand Sarda vs. State of Maharashtra, reported in [1984] 4 SCC 116, which has attained the status of locus classicus. The law is well settled that in a case of circumstantial evidence, each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court has to satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It is settled proposition that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all

reasonable doubts. There is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions.

39. The alleged dispute existing between the appellant and the deceased would create a suspicion that the said dispute could be a motive for the appellant to commit the crime. But such suspicion has not even taken shape of grave suspicion. Even if it is grave suspicion, in the absence of any cogent and reliable corroborative evidence, grave suspicion cannot take the place of proof. Suspicion is always a double-edged sword.

40. Having considered the entire evidence of the prosecution side as brought on record, we are not persuaded to hold that the prosecution side has been able to establish all the events in the chain of circumstances by reliable, cogent and clinching evidence, thereby, to form a complete chain of circumstances establishing unerringly that it was the appellant only and none other, who had committed the alleged crime.

41. It is also a fundamental principle of criminal jurisprudence that if two views are possible on the evidence/materials adduced in a case, one pointing towards the guilt of the accused and the other to his innocence, the view which is favourable to the accused, at all stages, should be adopted. This principle assumes more relevance and pertinence in a case wherein the guilt of the accused is sought to be established by circumstantial evidence.

42. For the reasons mentioned hereinabove, we find ourselves not in agreement with the finding of guilt arrived at by the learned Trial Court from the evidence/materials on record. Having held that the prosecution has failed to prove his case against the appellant beyond reasonable doubts by way of clear, reliable, credible and clinching evidence, we find that the Judgment and Order dated 20.11.2019 of conviction and sentence passed by the Trial Court as one unsustainable in law and the same is liable to be set aside. It is accordingly set aside.

43. Consequently, the instant criminal appeal stands allowed. The appellant is to be released from custody forthwith if his custody is not required for any other case or purpose.

44. The records of the Trial Court are to be sent back forthwith.

45. Before parting with the record, we wish to place our appreciation on record as regards the services rendered by Mr. H. Gupta, learned Amicus Curiae appearing for the appellant and direct the Registry to make available to him just remuneration as per the notified fee structure applicable to the Amicus Curiae.

46. The jurisdictional District Legal Services Authority is directed to award adequate compensation to the victim[s] after due enquiry under Section 357A, CrPC and the extant Victim Compensation Scheme framed thereunder. We further observe that such enquiry shall be undertaken and completed with utmost expediency and thereafter, to award and disburse appropriate compensation thereunder to the victim[s] entitled upon conclusion of such

enquiry.