
(2013) 06 SIK CK 0002
In the Sikkim High Court
Case No : Criminal Appeal No. 06 of 2012

Deepak Pradhan	Vs	APPELLANT
State of Sikkim		RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Citation : (2013) CriLJ 4834

Hon'ble Judges : Pius C. Kuriakose, C.J; Sonam Phintso Wangdi, J

Bench : Division Bench

Advocate : N. Rai, Ms. Jyoti Kharka and Mr. Sushant Subba, for the Appellant;
Karma Thinlay Namgyal, Additional Public Prosecutor and Mr. S.K. Chettri,
Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Sonam Phintso Wangdi, J.—In this Appeal, the Appellant seeks to assail the judgment dated 14-03-2008 passed by the Learned Sessions Judge, South and West District at Namchi in Sessions Trial Case No. 30 of 2004 by which he and Rudra Thapa, Accused No. 1, were convicted for offences under Sections 302 /201 /379 /34 of the Indian Penal Code (in short "IPC") and sentenced to undergo imprisonment for life.

(a). To state the prosecution case briefly, on 01-07-2004 one Devi Prasad Sharma, priest of Kali Mandir, 16th Mile Jorethang-Melli Road, appeared at the Jorethang Police Station and orally informed that in the early morning of that day he saw a person lying on the cliff below the road in front of the Kali Mandir.

(b) On this information, PI C. Chopel, P.W. 25, O/C Jorethang Police Station, rushed to the place accompanied by available staff from the Police Station and found an unidentified dead body of a male aged about 30-35 years thrown into the bushes about 30" below the road on the cliff for concealment lying in a supine position with head upside down. On retrieving the body, a cut injury measuring 7"" long and 4"" deep was noticed on the right nape which indicated

the death to be homicidal in nature. Wearing apparels of the deceased, a leather wallet containing driving licence, identity card and two pocket diaries bearing the name of Avijit Haobam of West Imphal, Manipur, recovered and seized at the time of inquest, helped in identifying the dead body. Photographs of the dead body were also taken from different angles and a rough sketch of the place of occurrence prepared. After the inquest, the dead body was forwarded to the District Hospital, Namchi for medico-legal autopsy and opinion.

(c) On the basis of these facts, P.W.25 registered a case suo moto under Sections 302 /201 IPC under Jorethang P.S. Case No. 18(7)04 dated 01-07-2004 against unknown persons and endorsed it to SI M.L. Pradhan, P.W.26, for further investigation.

(d) It is stated that during the inquest of the dead body, the following articles were recovered from the body of the deceased:-

(i) Leather Wallet marked M.O. XIII which contained Driving Licence in the name of the deceased, Exhibit 2;

(ii) Student Identity Card of the deceased marked Exhibit 3;

(iii) Personal pocket diary marked Exhibit 34;

(iv) Indian currency note of Rs. 306/- marked M.O. XI (collectively);

(v) One Bhutan currency note of Rs. 10/- marked M.O.XII;

(vi) Some visiting cards marked M.O.XV (collectively);

(vii) Wrist watch (Omega) marked M.O.VIII;

(viii) One steel bracelet marked M.O.IX;

(ix) One silver ring marked M.O.XVI; and

(x) One copper ring marked M.O.X.

(e) P.W.25 handed over these to P.W.26 while endorsing the case to him for investigation. From the articles so recovered the deceased was identified to be Haobam Avijit Singh, resident of Pisum Chingmathak, Imphal, Manipur.

(f) During the autopsy, blood sample of the deceased and viscera were preserved for CFSL examination. When the cell phone number collected from the pocket diary, Exhibit 34, was dialed, it was responded to by Haobam Ajit Singh, P.W.11, the elder brother of the deceased, who informed that the deceased had left for Siliguri on 25-06-2004 in his Maruti Esteem Car bearing No. MN 1K 2920. Enquiry revealed that this very vehicle had been seen at Jorethang in the early morning of 30-06-2004 by H/C Ash Bir Subba, P.W.1 and Constable Wangyal Tshering Lepcha during their patrolling duty. Melli Check Post also reported that the vehicle had entered Sikkim in the evening of 29-06-2004 and had left for Siliguri on 30-06-2004. "Hue and cry" messages were then transmitted to O/Cs

and I/Cs of all Police Stations and Out-Posts of Sikkim and, Darjeeling and Jalpaiguri Districts of West Bengal, specially alerting Melli Check Post. Later, the Police team led by P.W.25 proceeded to Siliguri apprehended Rudra Thapa, Accused No. 1, the Appellant and Rajen Biswakarma, Accused No. 3, from Pradhan Nagar, Siliguri and also recovered the Maruti Esteem Car, M.O.I from Dagapur, Siliguri in presence of witnesses vide Exhibit 10 along with its certificate of registration, merit certificate in the name of the deceased awarded by Cricket Association, Namchi and a car stereo from Pradhan Nagar, Siliguri.

(g) The accused persons were brought to Jorethang Police Station where the statement of Rudra Thapa, Accused No. 1 was recorded u/s 27 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), Exhibit 13, in presence of witnesses, Dilip Kumar Agarwal, P.W.18 and Sunil Prasad, P.W.24. On the basis of this the weapon of offence, a "khukuri", M.O.VI and its sheath, M.O. VII, were recovered from the place shown by the accused and seized vide Seizure Memo Exhibit 15.

(h) The investigation revealed that on 21-06-2004, the deceased and his elder brother Haobam Ajit Singh, P.W.11, had arrived at Gangtok in their Maruti Esteem Car, M.O.I from Manipur. On 25-06-2004 the deceased had left Gangtok for Siliguri alone in his car and, at the Presbyterian Church, Pradhan Nagar, Siliguri, while searching for one of his friends from Manipur, he met Kumar Pariyar, P.W.21, a driver of that Church with whom Rudra Thapa, Accused No. 1, had been residing. The deceased stayed at that place till 28-06-2004 and during this time he got acquainted with the Accused No. 1 and the Appellant. On 27-06-2004 when the victim asked the two accused persons to look for a buyer for the Maruti Esteem Car, M.O.I, on payment of some commission, they offered to purchase it themselves at a cost fixed at Rs. 1,20,000/-. As the accused persons did not have the capacity to pay the amount they conspired to rob the deceased of the vehicle by murdering him.

(i) On the pretext that the amount would be paid at Soreng, West Sikkim, where the Appellant lived, they left Siliguri for Soreng on 29-06-2004 on the vehicle, M.O.I, crossing Melli Check Post at 1640 hours informing of this to the Police on duty at the Check Post. The accused persons then deliberately delayed their journey from Melli to Jorethang with the intention to commit the offence enroute late in the night under the cover of darkness. At Bhanrikhola near Jorethang, the Appellant led them to the bank of river Rangeet by a "kutcha" road but finding the place to be inconvenient, led them back on to the main road. This was noticed by one Dawa Tamang alias David Tamang, P.W.20, a quarry labour who lived in a hut nearby. On their way to Jorethang they stopped under a pole light in front of the Kali Mandir at 16th Mile in the vicinity of Jorethang at about 2200 hours where the deceased came out of the vehicle and lifted its bonnet open as the engine had got heated. When the deceased bent forward to check the battery, Rudra Thapa, Accused No. 1, struck him on the neck with a "khukuri" from behind causing the deceased to fall off the road on to the cliff towards the

Rangeet river and got stuck upside down on the bush 30" below.

(j) The two accused persons then fled towards Jorethang on the vehicle, M.O.I, in which they spent the night in front of Hotel Rangeet Valley. At about 0400 hours of 30-06-2004 when a Police patrol party consisting of Ash Bir Subba, P.W.1 and Constable Wangyal Tshering Lepcha, having noticed them, checked their documents, the accused persons showed the R/C book that had the photograph of the deceased pasted on it stating that the driver had gone out. The accused persons were later seen by W/C Dawa Gyatso Bhutia, P.W.2, posted at the Akar Bridge Police Booth as its in-charge, pushing the car across the Bridge. On reaching Sikkim Sangam Auto Works across Bridge at Naya Bazar, mechanic Biren Oraon, P.W.9, finding the battery low set it up for charging.

(k) The Appellant and Accused No. 1 left for Soreng where they went to the house of one Bhim Bahadur Pradhan, P.W.4 and sought his help in selling the car which he said had been purchased by Rudra Thapa, Accused No. 1, believing it to be one brought from Manipur but was actually found to have been a stolen one and, that the person from whom it was purchased had returned from Jorethang. When P.W.4 expressed his inability to help, Accused No. 1 managed to sell him his cell phone for Rs. 1,200/- on payment of Rs. 150/- as advance. The accused persons then returned to Jorethang in the afternoon where they met Mohan Kumar Rai, P.W.8. On the pretext that their driver had gone back to Siliguri due to illness, the Appellant and the Accused No. 1 asked P.W.8 to look for a driver which later led them to engaging Aitaraj Rai, P.W.12. They then proceeded towards Siliguri and crossed Melli Check Post at 1800 hours informing the Police on duty that they were travelling from Don Bosco School, Soreng to Siliguri. On reaching Siliguri, they parked the vehicle in front of a Club House and stayed in the room of one Kiran Pradhan. On 01-07-2004 they engaged one Rajen Biswakarma, the Accused No. 3, to sell the vehicle, M.O.I who helped them to conceal the car at Dagapur, Siliguri for being disposed off later. P.W.12 being suspicious of the activities of the accused persons, returned back to Jorethang in the same evening.

(l) The medico-legal autopsy report, Exhibit 21, prepared by Dr. K.B. Gurung, Senior Medico Legal Consultant, P.W.19, indicated the cause of death of the deceased as being due to ante-mortem neck injury caused by heavy sharp cutting weapon.

(m) The facts and circumstances as revealed from the investigation having clearly made out a prima facie case under Sections 120B /397 /302 /201 /34 IPC against Rudra Thapa, Accused No. 1 and the Appellant and under Sections 120B /201 against Rajen Biswakarma, Accused No. 3, charge-sheet was accordingly filed against them.

2. The Learned Sessions Judge, South and West Sikkim upon consideration of the materials on record by Order dated 16-10-2004, discharged Rajen Biswakarma, Accused No. 3, for want of evidence against him but framed charges against

Rudra Thapa, Accused No. 1 and the Appellant for the offences punishable under Sections 302 /201 /379 /34 IPC to which they pleaded not guilty and claimed trial.

3. During the trial, the prosecution examined 26 witnesses including the Investigating Officer (in short "I.O.") apart from exhibiting a number of documents in order to prove its case against the accused persons. On the culmination of the trial, they were found guilty of the charges and accordingly sentenced as already observed in the earlier part of this judgment.

4. It is relevant to note that out of the two accused persons, namely, Rudra Thapa, Accused No. 1 and Deepak Pradhan, Accused No. 2, who were convicted and sentenced by the impugned judgment and order, only the Accused No. 2, the Appellant, has preferred this Appeal to assail the impugned judgment. It has been stated that the Accused No. 1 is absconding since he broke jail. The Appeal will, therefore, be confined to the Appellant alone.

5. Appearing on behalf of the Appellant, Mr. N. Rai, Learned Senior Advocate, submitted that the case against the Appellant is based solely upon circumstantial evidence and that the prosecution case is riddled with contradictions and suffers from the vice of lack of proof beyond reasonable doubt. We may take up each of the contentions raised by Mr. Rai in seriatim below:-

(i) The evidence of P.Ws 1, 2, 5, 6, 7, 17, 25 and 26 requires to be scrutinised carefully as they are police witnesses and, therefore, interested.

(ii) By relying upon the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, Mr. Rai submitted that the evidence of P.Ws 3, 6, 13, 14, 15, 16, 17, 20, 22 and 23 cannot be considered at all as the circumstances emerging out of the evidence of these witnesses have not been put to the Appellant in his examination u/s 313 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.").

(iii) The Vehicle Movement Register, Exhibit 5, as per Mr. Rai is a fabricated document for the following reasons:-

(a) There are over-writings over Exhibit 5(a) which is the relevant entry pertaining to the case.

(b) The entry of date "30-06-2004" in the column pertaining to the time of entry when such an entry already existed on top of the page casts a serious doubt on the authenticity of the register.

Apart from this, the perfect sequential manner of the entries maintained in the Register gives rise to a reasonable suspicion that the Register, Exhibit 5, is a fabricated one.

(c) There is neither signature nor seal of the Police Officers on Exhibit 5.

(d) Exhibit 5 is not a "Government Register" but an exercise book of the kind which is easily available in stationery shops.

(iv) Test Identification Parade of the accused persons was not conducted rendering their identity in the Court room after considerable gap of time unreliable. The same would be the case as regards the identification of the OMA @ Omprakash and Another Vs. State of Tamil Nadu, and Kanan and Others Vs. State of Kerala, were referred to and relied upon by Mr. Rai on this contention.

(v) Referring to the cases of Salim Akhtar @ Mota Vs. State of Uttar Pradesh, and Tulshiram Bhanudas Kambale and others Vs. The State of Maharashtra, it was submitted that the material objects and the alleged weapon of offence were not sealed at the place of its seizure by the Investigating Agency and the finger prints of the accused persons were also not lifted by the I.O.

(vi) The disclosure statement u/s 27 of the Evidence Act, Exhibit 13 of Rudra Thapa, Accused No. 1, cannot be used against the Appellant when the Appellant did not give any such statement. Mr. Rai referred to a large number of decisions in support of this contention but it would be sufficient to mention only Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar, .

(vii) The Appellant was ignorant of the existence of the weapon of offence, i.e., "khukuri", M.O.VI. There is no evidence as to how the "khukuri" came to be in the hands of the Accused No. 1.

(viii) As per the evidence of Dr. K.B. Gurung, Senior Medico Legal Consultant, P.W.19, blood would spurt out from an injury like the one found in the neck of the deceased when struck by sharp cutting weapon. But neither traces of blood nor hair were found at the place of occurrence. There was also no blood at the spot from where the body was retrieved. There is no evidence of there being rainfall during that period. Going by the evidence that there was only one "khukuri" which the Accused No. 1 had disclosed in his statement u/s 27 of the Evidence Act and that the deceased had died by a solitary "khukuri" blow would indicate that it was not the Appellant who had struck the fatal blow on the deceased. Even if the murder was committed by Accused No. 1, the Appellant was ignorant as to from where Accused No. 1 had brought the "khukuri" and in what manner he struck the fatal blow on the deceased.

The substance of his entire submission is that the Appellant was not at all connected with the weapon of offence being unaware of its procurement and its use by Rudra Thapa, Accused No. 1.

(ix) It has come in the evidence of Biren Oraon, P.W.9 that the accused persons were seen in the company of one driver called "Jaggu" but the said "Jaggu" was not produced by the prosecution to corroborate the evidence of P.W.9.

(x) The prosecution witness, Aitaraj Rai, P.W.12, who is said to have been engaged by the accused persons to drive their vehicle to Siliguri is a false witness which stands established by the fact that he was always seen in the company of the O/C Jorethang P.S., P.W.25, when the FIR pertaining to the case was lodged, when P.W.25 visited Siliguri in connection with case and with the

I.O., P.W.26, at all places which he visited for the purpose of investigation of the case and, was also a witness to all the documents prepared in Siliguri.

(xi) There are irreconcilable contradictions regarding the mobile phone, M.O.II, as to whether or not it belonged to the deceased.

(xii) The Appellant could not be held liable for the offence u/s 302 IPC and other cognate offences by application of Section 34 IPC, the common intention of the Appellant and the Accused No. 1 to commit those offences having not been established.

(xiii) The only fact emerging from the evidence of P.W.21 involving the Appellant is with regard to the purchase of the vehicle from the deceased and, therefore, the common intention in so far as the Appellant is concerned would be attracted only on the factum of the purchase of the vehicle. There is no evidence that would inculcate the Appellant in the commission of the offence u/s 302 IPC. Reference was made on this by Ben Kumar Rai alias Johny Rai Vs. State of Sikkim, and Ramashish Yadav and Others Vs. State of Bihar, .

(xiv) Adverse inference ought to have been drawn against the prosecution for failing to examine material witnesses like (a) "Jaggu"; (b) Kiran Pradhan from whom a car stereo, M.O.IV, was seized; (c) the two passengers who boarded the Maruti Esteem Car at Jorethang; (d) Anil Sharma; and (e) Constable Wangyal Tshering Lepcha. Reliance on this was placed upon to Thulia Kali Vs. The State of Tamil Nadu, and Guljara Singh Vs. State of Rajasthan, .

(xv) The FIR was drawn suo moto by the O/C Jorethang P.S., P.W.25, when it ought to have been on the basis of the information provided by Devi Prasad Sharma, the Priest at the Kali Mandir. This as per Mr. Rai casts a serious doubt on the prosecution case. As per the case of the prosecution the deceased was murdered at the place of occurrence in the evening of 29-06-2004 but no one else had seen the dead body on 30-06-2004. It was seen by the Priest, Devi Prasad Sharma, only in the early morning of 01-07-2004. Therefore, as per him, the incident probably took place either in the night of 30-06-2004 or early in the morning of 01-07-2004 and that since during that period as per the evidence of P.W.12 and P.W.21, the accused persons were in Siliguri, they could not have committed the offence.

(xvi) The entire documents pertaining to the vehicle and the deceased were seized by the Police from the possession of Rudra Thapa, Accused No. 1 and, that the Appellant has been involved only because of his being in the company of Accused No. 1.

(xvii) The CFSL reports, Exhibits 42 to 45, cannot be accepted as a valid piece of evidence as they were not proved as required u/s 293 Cr.P.C. and that the Scientific Expert was also not produced for the purpose. On this, Mr. Rai has sought to rely upon the case of Sonam Tshering Bhutia Vs. State of Sikkim, .

(xviii) The CFSL report also cannot be considered as an acceptable and reliable

evidence as neither the origin nor the group of the blood could be determined by referring to the case of Chitra Vijay Singh and Another Vs. State of Chhattisgarh, and Kansa Behera Vs. State of Orissa, .

(xix) The medico-legal autopsy report prepared by Dr. K.B. Gurung, P.W.19, was assailed as being doubtful in view of the over-writings in column K and mistakes in columns K(a) and K(b) from which a reasonable inference of manipulation in the report can be drawn.

(xx) Relying upon the case of Mohibur Rahman and Another Vs. State of Assam, and State of Goa Vs. Sanjay Thakran and Another, it was submitted that the last seen theory set up on behalf of the prosecution based on the evidence of P.W.21 would not be sustainable considering the distance of about 100 kms. between Siliguri and Jorethang and the gap of time when the deceased was seen with the accused persons and when the dead body of the deceased was discovered. It is, therefore, submitted that the last seen theory would become altogether irrelevant in the facts and circumstances of the present case.

(xxi) To sum up his contentions it was stated as follows:-

a) If "khukuri", M.O.VI, was the weapon of offence there is no proof as to who had brought it to the place of occurrence and from where.

b) The Appellant had not made any disclosure statement and the disclosure statement made by the A-1 cannot be used against the Appellant. Without the said disclosure statement the link to the chain of circumstances breaks in the case of the Appellant.

c) Exhibit 5 is a fabricated document which if discarded will lead to there being no starting point for the link to the chain of circumstances.

d) That no officials of Melli Check Post identified any of the accused persons or deceased, either at the entry or at the exit of the Check Post.

e) No T.I. Parade was conducted to identify the accused persons.

f) No FIR was taken from Devi Prasad Sharma and

g) No Blood or hair mark was noticed or picked up from the place of occurrence.

(xxii) Mr. Rai went on to submit that although the facts and circumstances would attract a fair amount of suspicion against the Appellant, suspicion cannot take the place of proof. Support on this was sought by Mr. Rai in the following decisions:

(a) The State of Punjab Vs. Bhajan Singh and Others,

(b) Smt. Basanti Vs. State of Himachal Pradesh, and

(c) Ashish Batham Vs. State of Madhya Pradesh, .

(xxiii) It was then submitted that from the evidence and the facts and

circumstances available on the records possibilities do emerge that (a) the Appellant is involved in the murder of the deceased; (b) the accused persons had in fact purchased the Maruti Esteem Car, M.O.I for Rs. 1,20,000/-; and (c) the deceased was murdered by some others in the evening of 30-06-2004. Relying upon the case of Sharad Birdhichand Sarda (supra) it was submitted by Mr. Rai that when several possibilities can be deduced from the evidence then by application of the settled principle of law the one that benefits the accused ought to be accepted.

6. Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, supporting the impugned judgment submits that there is no reason as to why the impugned judgment should be interfered with. As per him, the prosecution has been able to establish beyond reasonable doubt, the circumstances appearing against the Appellant. The following have been culled out by him as the circumstances that stand proved against the Appellant:-

(i) The deceased and his brother, Haobam Ajit Singh, P.W.11, had left Manipur for Gangtok on 19-06-2004 in their family car bearing registration no. MN 1K 2920 and reached Gangtok on 21-06-2004. The deceased stayed with his brother at Gangtok till 24-06-2004 and left for Siliguri on 25-06-2004.

(ii) On reaching Siliguri, the deceased met Kumar Pariyar, P.W.21. In his evidence, P.W.21 has set out in detail as to how he introduced the deceased to the Appellant and the other accused persons and their close association thereafter. P.W.21 also stated about the various incidents that took place during the stay of the deceased with him, most important of which was the conversation between the Appellant and the deceased and their agreement to purchase the vehicle on 50:50 basis and ultimately, on 28-06-2004 the accused persons fixing the price of the vehicle at Rs. 1,20,000/- after checking the relevant documents.

(iii) P.W.21 saw the accused persons in Siliguri on 01-07-2004 and when asked they gave a false story that the documents of the vehicle purchased by them were found to be duplicates and that the deceased had fled away.

(iv) Karma Lhendup Bhutia, P.W.5 and Lok Man Subba, P.W.6, Police Constable and Head Constable respectively on duty at the Melli Check Post on 29-06-2004, witnessed entry of the vehicle No. MN 1K 2920 into Sikkim and as per P.W.5 the three accused persons were present in the said vehicle.

(v) One Esteem car was seen parked in front of Jorethang Kali Mandir between 10 to 10.30 p.m. by Pradeep Gupta, P.W.10 sometimes in the month of June, 2004. He also saw one man standing in front of the car with his back towards him. On 29-06-2004 between 7 and 7.30 p.m., Dawa Tamang, P.W.20, a quarry labour at the Bhanrikhola, saw a white car being driven up from the Bhanrikhola side emitting smoke profusely. He also saw three boys coming out of the said vehicle and trying to control the smoke. One of them was also seen pouring water in the engine. Later, the three boys boarded the vehicle and drove away towards Jorethang.

(vi) The vehicle was seen at Jorethang in the early morning of 30-06-2004 by H/C Ash Bir Subba, Jorethang P.S., P.W.1, during his patrolling duty with Constable Wangyal Tshering Lepcha. When they noticed the accused persons in the vehicle and asked them for papers they produced the registration certificate of the vehicle saying that the driver of the vehicle had gone to Bazar to have tea. P.W.1 who later had also accompanied the police team to the place of occurrence after being informed of the discovery of a dead body, recognised it to be of the same person whose photograph was seen pasted in the vehicle registration certificate shown to him by the accused persons.

(vii) The accused persons were seen by W/C Dawa Gyatso Bhutia, P.W.2 pushing a white esteem car being No. MN 1K 2920 towards the Akar Bridge at 7 a.m. of 30-06-2004.

(viii) The Appellant calling out at Bhim Bahadur Pradhan, P.W.4, at his house in Soreng Busty in the morning of 30-06-2004 informing him that the car that they had purchased from Manipur was found to be a stolen one. That the person who sold it to them had returned from Jorethang and that he required the help of P.W.4 to look for a purchaser for the car or to find a garage where they could sell it in parts.

(ix) The Appellant falsely informing Mohan Kumar Rai, P.W.8, at Jorethang that the driver of the vehicle had fallen ill and had sent him to Siliguri for treatment as a pretext in seeking his help to look for a driver.

(x) P.W.9, an Electrician at Sikkim Sangam Auto Works, Naya Bazar, West Sikkim, knew the accused persons who had come to the garage with P.W.12, a driver by profession who was known as "Jaggu" to collect the battery left by them for being recharge.

(xi) The vehicle bearing No. MN 1K 2920 had crossed Melli Check Post on 30-06-2004 and proceeded towards Siliguri. This was noted by P.W.17 and P.W.7, Constables on duty at the Melli Check Post at the material time.

(xii) Entry Exhibit 5(a) in the Vehicle Movement Register, Exhibit 5, that was seized from Melli Police Station.

(xiii) The disclosure statement u/s 27 of the Evidence Act, Exhibit 13, rendered by Rudra Thapa, Accused No. 1 in presence of P.W.18 and P.W.24 and on the basis of that statement the weapon of offence, M.O.VI and its sheath, M.O.VII were recovered from the place shown by the Accused No. 1.

(xiv) The Appellant failed to explain the circumstances put to him u/s 313 Cr.P.C.

7. As per the Learned Additional Public Prosecutor the circumstances set out above stand proved beyond any reasonable doubt and those circumstances form an unbroken chain leading to the sole hypothesis that the Appellant had committed the murder of the deceased.

8. It was his further submission that the circumstances set out above which, as

per him, stand proved beyond any reasonable doubt, would establish that there was a common intention between Rudra Thapa, Accused No. 1, and the Appellant for committing the murder of the deceased and to rob him of his vehicle.

9. A number of decisions were cited by him on the principle governing Section 34 IPC but it will be sufficient to mention only one of them being Chaman and Another Vs. State of Uttaranchal, where we find reiteration of the settled position of law that "direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances". It also re-emphasises that "in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime."

10. As regards the value of the disclosure statement of the co-accused and its applicability to the Appellant, it was submitted that it was permissible to take the confession of a co-accused as a corroborative piece of evidence in the light of the other evidence available in the records and may be used to lend assurance to those. Reliance in this regard was sought upon to Pancho Vs. State of Haryana, where it has been held that "where the prosecution relies upon the confession of one accused against 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 said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right." The Learned Additional Public Prosecutor also referred to Bishnu Prasad Sinha and Another Vs. State of Assam, where we find reiteration of the same position.

11. In view of this above legal position, it is the submission of Mr. Karma Thinlay Namgyal that there is no bar upon the Court to accept the disclosure statement of a co-accused as an evidence against the Appellant particularly when the other evidence available on the records are found reliable.

12. Rebutting the plea raised on behalf of the Appellant that many of the prosecution witnesses are police witnesses and relying upon Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another, , it was submitted that it is not the law that the police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in the material particulars by other independent witnesses and that if the evidence of the police officer inspires confidence and is found to be trustworthy and reliable, it can by itself form the basis of conviction.

13. On the question of some persons not being examined by the prosecution

although named by various witnesses during the course of the investigation of the case, failure to collect the human hair found underneath the bonnet of the car, etc., as per the Learned Additional Public Prosecutor, are not such as to shake the foundation of the prosecution case. As per him, it can at best be a case of defective investigation. Relying upon Hiralal Pandey and Others Vs. State of U.P., it was submitted that unless the lapses on the part of the Investigating Authorities, as pointed out on behalf of the Appellant, are such as to cast reasonable doubt on the prosecution story or seriously prejudice the defence of the accused, the Court would not set aside the conviction on such ground. The irregularity pointed out on behalf of the Appellant do not in any manner give rise to any inference of manipulation or cause prejudice to the Appellant in the light of the other evidence appearing against him.

14. It is then submitted that the Appellant has resorted to giving false answers in his statement recorded u/s 313 Cr.P.C. and that, as held in Mani Kumar Thapa Vs. State of Sikkim, , false answers can also form an additional link in the chain of circumstances. Relying upon Naval Kishore Singh Vs. State of Bihar, it was submitted that Section 313 examination are not to be carried out as an empty formality.

15. The Learned Additional Public Prosecutor took us through the various questions and answers contained in the proceedings u/s 313 Cr.P.C. more particularly, to questions no. 15 to 22, questions no. 55 to 69 and questions no. 99 and 100 to show that the Appellant had failed to explain the incriminating circumstances against him. This as per him, amounts to failure to discharge the onus which lies on an accused u/s 106 of the Evidence Act and that this by itself provides an additional link in the chain of circumstances proved against him.

16. In reply to the contention on behalf of the Appellant that there was non-compliance of Section 293 Cr.P.C. as the report of the Chemical Examiner was not proved in accordance with Section 293 Cr.P.C., it was submitted that it is not obligatory that an expert should necessarily be examined as would appear from the bare reading of that provision. As per him, such contention is clearly misconstrued.

17. Having set the prosecution story to the extent material for the purpose of disposal of this Appeal, the effort on behalf of the Appellant to assail the impugned judgment and the submissions on behalf of the prosecution to sustain it, we may now proceed to examine those to arrive at a finding as to whether the Appellant has been successful in creating any dent in the prosecution case and sustain the inadequacies alleged to exist in the impugned judgment of the Learned Sessions Court.

18. There is no doubt that the case against the Appellant is based purely upon circumstantial evidence. Keeping in view the principle of law set out by the Learned Public Prosecutor which is trite, it is found that the prosecution has indeed been able to prove the circumstances against the Appellant indicated

below by examining the evidence against each of them in seriatim:-

Circumstance (i)

The deceased, Avijit Haobam Singh, had travelled from Gangtok to Siliguri in his Maruti Esteem Car, M.O.I, bearing registration no. MN 1K 2920 driven by himself.

Circumstance (ii)

At Siliguri, the deceased had gone to the Presbyterian Church at about 3 p.m. looking for his friend, Shanti Kumar Singh from Manipur and stayed with Kumar Pariyar, P.W.21.

Circumstance (iii)

On 25-06-2004, when the deceased visited the house of P.W.21, the Appellant and Rudra Thapa, Accused No. 1, had also gone there where P.W.21 introduced them to the deceased.

(a) We may for convenience take these circumstances together and analyse the evidence relevant thereto.

(b) It is in the evidence of P.W.26 that he found the address and cell phone number of one Haobam Ajit Singh in the pocket diary, Exhibit 34, recovered from the pocket of the deceased and when contacted the said Haobam Ajit Singh informed that Avijit Haobam was his younger brother and that he had come to Sikkim along with him in a Maruti Esteem Car bearing registration No. MN 1K 2920 and after 3/4 days of his stay with him at Gangtok the said Avijit Haobam had left for Siliguri in his own car, i.e., the Maruti Esteem Car. It is based on this information that the deceased was identified as "Avijit Haobam". The person who spoke thus to P.W.26 was P.W.11 who in his evidence, apart from reaffirming what he had narrated earlier over phone to P.W.25, further went on to state that on 27-06-2004 at about 6.30 p.m. the deceased had rung him up and informed that he was in Siliguri and was staying there in the Presbyterian Church at Pradhan Nagar with his friend by the name of Rudra Thapa. We may reproduce below the relevant portions of the evidence of P.W.11 and P.W.21:-

Haobam Ajit Singh, P.W.11

... We reached Chandmari, Gangtok at around 11.00 p.m. on 21-6-2004. On 22nd and 23rd June, 2004 my brother Haobam Abhijit remained busy in repairing our family car i.e. MN-1K/2920. On 24-6-2004 myself and my said brother stayed at Burtuk where I worked. On 25-6-2004 at around 12.00 noon my said brother left for Siliguri alone by the said vehicle, from Burtuk. On 27-6-2004 at about 6.30 p.m. my said brother rang (sic) up to me. We had telephonic conversation. I asked him from where he had made a call and as to where he was staying. He informed me over telephone he was at Siliguri and was staying in Presbyterian, Pradhan Nagar, Siliguri. He further informed me that he was staying there with one friend by the name of Rudra Thapa. He further said that he will ring up after sometime.

....

Kumar Pariyar, P.W.21

I have been running the vehicle of Presbyterian church, Pradhan Nagar, Siliguri for the last 4 years. On 25-6-2004 at about 3.00 p.m. one Manipuri boy Avijit Singh came in his Esteem car bearing registration No. MN-1K/2920 in search of one Shanti Kumar Singh who was the Chowkidar of the said Church. On 25-6-2004 when the said Avijit Singh visited my house the two accused persons present in the dock also came to my house. I introduced the said Avijit Singh to both the accused persons.

(c) These witnesses have remained unshaken and firm in their cross-examination thereby fully establishing these circumstances.

(d) From the extract of the evidence of these witnesses, the prosecution story of the Appellant having left for Siliguri on 25-06-2004 alone driving his Maruti Esteem Car bearing No. MN 1K 2920, his going to the Presbyterian Church, Pradhan Nagar, Siliguri meeting Kumar Pariyar, P.W.21 there and staying with him clearly stand established. It also indubitably establishes the fact that the deceased had met Rudra Thapa, Accused No. 1, and the Appellant at the Presbyterian Church and were introduced to the deceased by the said Kumar Pariyar, P.W.21.

(e) Having held so in respect of three circumstances indicated above, we may now proceed to examine the other circumstances.

Circumstance (iv)

The two accused persons and the deceased were in close contact and interacting with each other at Siliguri. When the deceased sought the help of the two accused persons to look for a customer for his vehicle which he wanted to sell, they offered to purchase it themselves on 50:50 basis between them.

Circumstance (v)

On 28-06-2004, the accused persons and the deceased were seen checking the documents of the questioned vehicle and were heard negotiating its price and agreeing at Rs. 1,20,000/-.

Circumstance (vi)

On 29-06-2004, two accused persons boarded the vehicle driven by the deceased informing P.W.21 that they were going to purchase it from the deceased and that they would first go to the house of the Appellant in Soreng, West Sikkim and would return to Siliguri three days later.

Circumstance (vii)

Both accused persons returned to Siliguri earlier than they had stated and when asked by P.W.21 they informed him that the deceased had fled away when the

documents of the purchased vehicle were found to be duplicates.

Circumstance (viii)

The deceased was last seen with the Appellant and Rudra Thapa, Accused No. 1, at 9 a.m. of 29-06-2004 when they left together in the Maruti Esteem Car, M.O.I driven by the deceased.

(a) Circumstances (iv) to (viii) above are also taken up together for convenience and, on a careful examination of the evidence relevant therefor, we find that of P.W.21 most crucial as will appear hereunder:

Kumar Pariyar, P.W.21

... The accused Rudra Thapa used to run a stationery shop behind our Church. As his shop was congested I had allowed Rudra Thapa to keep his bed and personal belongings in my room for a period of one month. On 26.6-2004 I along with Avijit Singh returned home after getting his vehicle repaired. In the said evening both Avijit and myself went to Siliguri market in the said vehicle as the said Avijit Singh wanted to purchase seat covers of the vehicle and some other articles for his brother who was stated to be staying at Gangtok during the relevant time. In fact on the night of 25-6-2004 we all i.e. both the accused persons standing in the dock, the said Avijit Singh and myself had our dinner in my house and slept in my house except Deepak Pradhan who left for his house. Avijit Singh and myself returned to my quarters at about 8.00 p.m. after making some purchases. We had our meals and slept but both the accused persons did not come in my house on the night of 26-6-2004. 27-6-2004 was a Sunday. At about 9.00 a.m. I along with Avijit Singh, two accused persons present in the dock and In-Charge of Presbyterian Church Lalrian Thanga went to Fallawadi Nepali Church for Church Service. In the afternoon we returned to my quarters. As the vehicle developed some defects I along with the said Avijit Singh went to Mattigarh Workshop for repair of the vehicle whereas both the accused persons standing in the dock stayed back in my quarters. We returned from the workshop at about 5.00 p.m. and found both the accused persons sitting in my quarters.

In the same evening Avijit Singh and myself proceeded to my house at Fallawadi and both the accused persons also took their cycles in order to go to their friend Gopal Biswakarma. At about 8.00 p.m. while Avijit Singh and myself were present in my house both the accused persons also arrived there. We all had our dinner in my house on the said night. I also heard both the accused persons having a talk with the said Avijit Singh for the purchase of his vehicle, by the accused persons behind my house. I also heard both the accused persons agreed to purchase the said vehicle of Avijit Singh on 50-50 basis. On 29-6-2004 at about 9.00 a.m. the said Avijit Singh took his vehicle MN-1K/2920 outside the compound of the Church and I put his attache (two suit cases) and other belongings into his vehicle as he wanted to proceed to Gangtok to meet his brother. In fact while the said Avijit Singh was cleaning his vehicle during the day on 28-6-2004 both the accused persons and the said Avijit Singh were checking

the relevant documents of the said vehicle MN-1K/2920. They also agreed and fixed the price of the vehicle at Rs. 1,20,000/-. The said Avijit Singh started his vehicle to proceed to Gangtok. In the meantime the two accused persons appeared there, and boarded the vehicle. They also said that they were going to purchase the said vehicle from Avijit Singh. The said Avijit Singh also said that they would first go to the house of Deepak Pradhan, Soreng, West Sikkim. Both the accused persons standing in the dock informed me that they would be returning on 3rd day of the following month. Thereafter we shook hands and they proceeded in the said vehicle. Both the accused persons in the dock came to my quarters on the 1st day of the following month instead of 3rd day of the month. I asked them about the whereabouts of Avijit Singh. They informed me that they purchased the vehicle from Avijit Singh and the documents produced by the said Avijit Singh in respect of the said vehicle were found to be duplicate and he fled away....

[Emphasis supplied]

(b) Analysing the above evidence in the light of the evidence of Haobam Ajit Singh, P.W.11 reproduced earlier, the prosecution appears to have been successful in establishing that the deceased was in close interaction with Rudra Thapa, Accused No. 1 and the Appellant at Siliguri during the period commencing from 25-06-2004 to 29-06-2004. That the deceased intended to sell his Maruti Esteem Car, M.O.I, for which he sought the help of the Accused No. 1 and the Appellant and, that the accused persons agreed to purchase the vehicle at a cost of Rs. 1,20,000/- on 50:50 basis between them. That at about 9 a.m. of 29-06-2004 the deceased and the accused persons had left for the house of the Appellant at Soreng, West Sikkim, in the same Maruti Esteem Car, M.O.I, driven by the deceased where he was promised payment of price of the vehicle and, therefore, the deceased was last seen with the accused persons on that day.

Circumstance (ix)

On 29-06-2004 a white Maruti Esteem Car bearing Registration No. MN 1K 2920, M.O.I, with three persons on board crossed the Melli Check Post at about 1640 hours informing the Police at the Check Post as they did that they were proceeding to Soreng.

(a) On a careful examination of the evidence of Karma Lhendup Bhutia, P.W.5, Constable posted at the Melli Check Post at the material time, we find that this circumstance stands proved as will appear from his deposition below:-

On 29.6.2004 my duty at Melli Check Post was from 4.00 p.m. to 8.00 p.m. At about 1640 hours one Maruti esteem car bering (sic) registration No. MN-1k/2920 came to Melli Check Post. I stopped the said vehicle and asked the driver as to from where the vehicle came and as to where it was proceeding too. The driver of the said vehicle replied that the vehicle was coming from Siliguri and was proceeding to Soreng. Accordingly, I reported for the said vehicle to the duty NCO present at the Check Post. The duty NCO made entry in the vehicle

movement register. The number of the vehicle and the place from where it was coming and the place where it was proceeding too. There were three persons in the said vehicle including the driver. The vehicle proceeded towards Jorethang. Exhibit-5 is the vehicle movement register of Melli Check Post, for the period 22.6.2004 to 1.7.2004. On 29.6.2004 at 1640 hours there is an entry of vehicle bearing registration No. MN1K 2920 showing it to be proceeding from Siliguri to Soreng. Exhibit-5/a is the entry made in the said vehicle movement register It was entered in the register by Head Constable L.M. Subba. I am acquainted with his handwriting.

(b) The evidence of P.W.5 is found corroborated by Lok Man Subba, Head Constable, P.W.6, on duty at the Melli Check Post on that day as evident from his deposition which reads as under:-

... On 29-6-2004 I was the duty NCO at Melli Checkpost from 12.00 noon to 6.00 p.m. Along with me the other duty constable was Karma Bhutia. I was recording the movement of the vehicle passing through Melli Checkpost. As reported by my duty constable I recorded at 1640 hours that one Maruti Car bearing registration No. MN-1K/2920 came from Siliguri and proceeded towards Soreng. After I recorded the particulars of the vehicle it left Melli Checkpost. Exhibit 5 is the vehicle movement register of Melli Checkpost relating to the period 22-6-2004 to 1-7-2004. Exhibit 5/a is the entry made by me in respect of the vehicle MN-1K/2920 which came from Siliguri and was bound for Soreng on 29-6-2004 at 1640 hours. In the said vehicle three persons were found travelling.

(c) We also find from the evidence of Pradeep Gupta, P.W.10, that a Maruti Esteem Car was seen parked in front of Jorethang Kali Mandir between 10 to 10.30 p.m. under a pole light and a person standing in front of the car.

(d) Therefore, considering the evidence set out above, there can be no manner of doubt that Maruti Esteem Car bearing No. MN 1K 2920, i.e., M.O.I, did cross the Melli Check Post at about 6 p.m. of 29-06-2004 heading for Soreng, West Sikkim from Siliguri with three persons aboard. Further, it can reasonably be inferred that it was the very Maruti Esteem Car, M.O.I, that was seen by P.W.10 parked in front of the Kali Mandir, 16th Mile, Jorethang-Melli Road between 10 to 10-.30 p.m. since the Vehicle Movement Register, Exhibit 5, had not recorded entry of any other vehicle of that make that night.

Circumstance (x)

In the early morning of 30-06-2004 at about 4 a.m., the two accused persons were found sleeping in the Maruti Esteem Car, M.O.I, in front of Hotel Rangeet Valley. A little later, they were seen pushing the vehicle and when accosted by the police patrolling party they produced the vehicle registration certification stating that the driver had gone to have tea.

(a) This circumstance stands fully established by the evidence of Ash Bir Subba, Head Constable, Jorethang P.S., P.W.1, the relevant portion of whose evidence is

reproduced below for convenience:-

... I know both the accused persons present in the dock. On 30-6-2004 I was on bazaar duty from 4.00 a.m. to 8.00 a.m. Along with me one Constable Wangyal Tshering Lepcha was also on duty. While we were on foot patrolling duty we noticed one Esteem Car bearing registration No. MN-1K/2920 parked in front of the waiting shed opposite to Sikkim Nationalised Transport Office at Jorethang Bazaar. It was about 4.10 a.m. when we noticed the said vehicle. We also noticed two boys sleeping inside the said vehicle. We did not disturb them and proceeded on towards Akar bridge, Jorethang. As soon as we reached Jorethang Akar bridge we saw both the boys got up from the said car and started pushing it towards Mazjid lane. We also went near the said car and asked them as to from where they came. They replied that they came from Manipur and that they were going to Don Bosco School, Soreng in order to take their children. Thereafter I demanded to produce the registration certificate of the vehicle. One of the two boys took out the registration certificate and showed it to me. I further asked them about whereabouts of the driver of the said vehicle. They informed me that the driver of the vehicle has gone to the bazaar to have tea. They also informed me that there was starting problem with the vehicle as the battery of the vehicle was weak. They were pushing the vehicle towards Jorethang Bazaar. The accused persons present in the dock were the same persons who were found sleeping inside the car and later pushing the vehicle for repair. Seeing them pushing the vehicle towards Jorethang Bazaar I advised them to take the vehicle across Akar Bridge as there was no workshop at Jorethang Bazaar. Later the two accused persons took the vehicle towards the garrage across the bridge....

Circumstance (xi)

The accused persons were then seen pushing the vehicle across the Akar Bridge at Jorethang towards Melli Bazar as the vehicle would not start.

(a) We find this circumstance established by the evidence of Dawa Gyatso Bhutia, Writer Constable, Jorethang P.S., P.W.2, who was on duty at the Jorethang Akar Bridge Booth, on the material date and time. This is evident from the following portion of his deposition:-

On 30-6-2004 I along with Constable Dawa Gyaltsen Bhutia was detailed for Jorethang Akar Bridge booth duty from 4.00 a.m. to 8.00 a.m. At about 5.00 a.m. Head Constable Ash Bir Subba (PW-1) arrived at our booth near Akar bridge, South Sikkim. Seeing him I asked him as to where he was going in the morning. He replied that he was required to conduct checkings of some vehicle. He further said that there was one white car parked near Rangeet hotel and the same appeared to be suspicious and some checking has to be done about the said vehicle. In the meantime Constable Wangyal Lepcha also arrived there who was on bazaar duty. Head Constable Ash Bir Subba instructed the said Constable Wangyal Lepcha to check the vehicle that was parked near Rangeet Hotel. Thereafter both H/C Ashbir Subba and Constable Wangyal Lepcha proceeded

towards the place where the said white car was parked. They did not returned (sic) to the booth again. At about 7.00 a.m. the two accused persons present in the dock along with 2/3 other persons brought one white Esteem Car bearing No. MN-1K/2920 pushing towards Akar bridge. Seeing this I asked them as to where they were pushing the said vehicle. The two accused persons informed me that the vehicle broke down and that they were pushing the vehicle to the garrage. Accordingly, I suggested them the garrage situated across the bridge.

(b) From the evidence of P.W.2 extracted above, we find that he has also corroborated P.W.1 in full measure as regards circumstance (x) discussed earlier thereby confirming its veracity.

Circumstance (xii)

After giving the battery for being charged at Naya Bazar, the accused persons proceeded for Soreng and upon reaching there, they went to the house of P.W.4 where the Appellant informed him of having purchased a stolen car which they wanted to sell.

(a) It is in the evidence of Biren Oraon, P.W.9, an Electrician in the Sikkim Sangam Auto Works, Naya Bazar, West Sikkim, that accused person had given the car battery for recharge in the early morning of 30-06-2004. Bhim Bahadur Pradhan, P.W.4, on the other hand most categorically states in his evidence that the accused persons had gone to his house at Soreng where the Appellant had asked for his help in selling the car as would appear, from the following portions of his evidence:-

....

On 30th June 2004, one Wednesday the accused Deepak Pradhan along with the other accused present in the dock came to my residents (sic) at Soreng Busty at about 10.00 a.m. In my residence the accused Deepak Pradhan called me to come out of the house and took me to a place about 20 feet away from my residence and informed me that his friend i.e. the other accused present in the dock purchased a car brought from Manipur. The said car subsequently was found to be a stolen can (sic). He further said that the person who sold out the said stolen car returned from Jorethang. The accused Deepak Pradhan further asked me to find out a purchaser of the said car and if not to find out and show him the garage/workshop where they could sell out the parts of the said car. I told the accused Deepak Pradhan that I will not be able to find out such purchaser. At this he requested me to show the workshop where he could sell out the parts of the vehicle. Thereafter the accused Deepak Pradhan and me came back to my home, where the other accused was sitting. Thereafter I took both of them to the workshop at Soreng. And as requested by the accused persons I asked the worker if they would purchase the parts of the vehicle. The workers present in the workshop informed that they would not purchase the parts of the vehicle. From the workshop we came back to my resident (sic). We all had our meals in my residence. After changing their clothes both the accused

persons present in the dock left my home....

Circumstance (xiii)

Having failed in their attempt to sell the car, M.O.I, they returned to Jorethang where they engaged a driver, P.W.12, with the help of P.W.8, a friend of the Appellant.

Circumstance (xiv)

After fitting the recharged battery the two accused persons boarded the vehicle, M.O.I, driven by P.W.12 and left for Siliguri.

(a) The above two circumstances taken together are found to have been proved in the evidence of Mohan Kumar Rai, P.W.8, a friend of the Appellant and Biren Oraon, P.W.9. We may reproduce the relevant extract of their evidence below:-

Mohan Kumar Rai, P.W.8

I know accused Deepak Pradhan but I do not know the other accused present in the dock. The other accused present in the dock was seen with the accused Deepak Pradhan at Jorethang Bazaar on 30-6-2004. On meeting me at Jorethang Bazaar the accused Deepak Pradhan proposed to move about for sometime at Jorethang Bazaar. While we were strawling at Jorethang Bazaar the accused Deepak Pradhan told me that he had one vehicle brought from Manipur. The said vehicle was brought from Don Bosco School, Soreng. On the way the driver of the vehicle fell ill and he was sent to Siliguri for treatment. He further said that in the absence of the driver he (Deepak Pradhan) himself brought the said vehicle to Jorethang from 8th mile. The accused Deepak Pradhan further requested me to find out a driver for him to drive the said vehicle to Siliguri on payment. Thereafter we went to the Taxi Syndicate at Jorethang. I requested one of the drivers present there to arrange a driver for accused Deepak Pradhan. The said driver at Taxi Stand arranged another driver for accused Deepak Pradhan. Thereafter we came to the workshop along with a new driver to drive the vehicle. There was one white car at Naya Bazaar Workshop with its bonnet open. Seeing this (vehicle) the accused Deepak Pradhan said that the battery given for repair was not delivered and he went around in search of the mechanic of battery....

Biren Oraon, P.W.9

... At about 4.00 p.m. the two accused persons accompanied by one driver came to the garrage. The said driver accompanied by the accused persons hails from Jorethang. The said driver used to drive one Commander Jeep bearing No. SK-04/2195 as its second driver. At the relevant time I did not know the name of the said driver. But subsequently I came to know his name as Jaggu. After they came to the garrage I took out the battery from the re-charging machine and fitted in the said car. Thereafter all of them left the garrage including the driver. One of them (the witness pointed out to the accused Rudra Thapa) gave Rs. 20/- as fees for the re-charging the mattery (sic)....

(b) The evidence of P.Ws 8 and 9 stands corroborated in full measure by P.W.12 which is quite evident from the following extract of his evidence:-

... I do not remember the month but the date was 30th day of the month about one year ago and the day was Wednesday I was at the van stand at Jorethang. In the afternoon at about 3.00/4.00 p.m. the two accused persons present in the dock and one unknown man came to the van stand and were asking some other drivers present there to arrange for one temporary driver to drive their vehicle to Siliguri. They were further saying that they were the staff of Don Bosco School at Siliguri and that they had come to Don Bosco School, Chakung, West Sikkim. They further said that they had come from Siliguri and on the way their driver fell ill and had to be sent for treatment. They further said that they needed a temporary driver in order to drive their vehicle to Don Bosco School Siliguri and that their vehicle was parked at Jorethang. The drivers present there at the Van stand at Jorethang suggested me to drive their vehicle from Jorethang to Don Bosco School, Siliguri. I agreed to drive their vehicle and came along with them. On the way one of their friends went away and I came to the two-wheeler shop with the two accused persons. In the workshop the two accused persons showed me the vehicle. Earlier they had informed me that their vehicle was a van but I found it to be one white Maruti Esteem Car bearing registration No. MN-1K/2920. It was parked in a workshop at Naya Bazaar below the old bridge. They offered me the key of the vehicle. There was no battery in the vehicle.

In the meantime one electrician Biren brought the battery from the nearby shop and fitted in the vehicle Thereafter I started the vehicle. The bonnet of the vehicle was opened. On the side of the bonnet I detected some human hair. I asked them as to how the said human hair had come. I further noticed the left side window pane of the vehicle broken. Seeing this I told them that there would be difficulty to pass through Melli Checkpost. At this the two accused persons said that I need not worry as they would manage at the checkpost. Thereafter I started the vehicle and set off for Siliguri We started from Jorethang at about 5.00 p.m. and reached Melli at about 6.00 p.m.

Circumstance (xv)

The vehicle, Maruti Esteem Car bearing No. MN 1K 2920, crossed Melli Check Post at about 6 p.m. with three persons on board informing the Police at the Check Post as they did that they were travelling from Don Bosco, Soreng, West Sikkim to Siliguri.

(a) P.W.7 and P.W.17, the Police Constables stationed at Melli Check Post, on 30-06-2004 have most unequivocally deposed on this circumstance establishing it beyond any doubt. The relevant extract of their evidence set out below:-

Sarman Rai, P.W.7

...On 30-6-2004 my duty at the Melli Checkpost was from 4.00 p.m. to 8-00 p.m. Headconstable Norden Bhutia was the duty NCO during the relevant time. At

about 6.00 p.m. one Maruti Esteem Car bearing Registration No. MN-1K/2920 came from Jorethang side and stopped at the Checkpost gate. I asked the driver of the said vehicle as to from where the vehicle was coming and the destination bound for. The driver of the vehicle informed me that he was coming from Don Bosco School, Soreng and was proceeding to Siliguri. Accordingly, I reported to the duty NCO who recorded the particulars of the vehicle in the vehicle movement register. Inside the said vehicle three persons were there including the driver. Exhibit 5 is the Vehicle Movement Register of Melli Checkpost relating to the period from 22-6-2004 to 1-7-2004. Exhibit 5/b is the entry made by the duty W/C Norden Bhutia. Exhibit 5/b is in the hand writing of Writer Constable Norden Bhutia with which I am familiar being my senior. I can identify the vehicle if I am allowed to do so.

....

Norden Bhutia, P.W.17

.... On 30-6-2004 my duty at Melli Checkpost from 6.00 p.m. to 8.00 a.m. of the following day. I was the duty NCO for the said period and my checker constable Sharman Rai. At about 6.00 p.m. I took over charge of the Melli Checkpost as duty NCO from one Lakpa Sherpa (Writer Constable) Immediately after I took over the charge as duty NCO one Maruti Esteem Car, white in colour came at Melli Checkpost from Jorethang side. My constable Checker asked the driver of the said vehicle as to from where the vehicle was coming and as to where it was proceeding to. The driver informed that the vehicle was coming from Don Bosco School, Soreng and was proceeding to Siliguri. At the relevant time 3 persons were in the said vehicle including the driver. I made the number of the vehicle entered in the Register maintained in the checkpost. I can identify the said register, wherein I made the entry if I am allowed to do so. Exhibit 5 is the said register showing the movement of the vehicles passing through Melli Checkpost. The said vehicle bore registration No. MN-1K-2920. Exhibit 5/b is the entry that I have made in my own hand writing in the register exhibit 5, in respect of the vehicle MN-1K/2920. It indicates that it was coming from Don Bosco School, Soreng, West Sikkim and was proceeding towards Siliguri.

(b) From a bare reading of their evidence, we find that these witnesses have also most unerringly proved the Vehicle Movement Register, Exhibit 5, and entry 5(b) therein recording the movement of Maruti Esteem Car bearing No. MN 1K 2920 in the evening of 30-06-2004.

Circumstance (xvi)

In the early morning of 01-07-2004 Devi Prasad Sharma, Priest of Kali Mandir, 16th Mile, Jorethang-Melli Road, appears at Jorethang P.S. informing of him having seen a dead body lying on the cliff below the road in front of the Mandir.

(a) It has come in the evidence of P.W.25 that Devi Prasad Sharma, the Priest of the Kali Mandir at 16th Mile, Jorethang-Melli Road informed orally at the

Jorethang P.S. at about 0745 hours that he had seen a dead body lying on the cliff below the road in front of the Kali Mandir. The consequent enquiry by O/C, Jorethang P.S., P.W.25, revealed that indeed a dead body was stuck in a bush on the cliff about 30" below the road in front of the Kali Mandir at 16th Mile, Jorethang-Melli Road.

(b) We find that this fact has been recorded in the formal FIR, Exhibit 25, in the depositions of O/C, Jorethang P.S., P.W.25, the I.O., P.W.26 and Ash Bir Subba, P.W.1. In this context, the second part of the evidence of Ash Bir Subba, H/C of the Jorethang P.S., P.W.1, assumes greater significance as he had encountered the Appellant and Rudra Thapa, Accused No. 1, in the morning of 30-06-2004 during his patrolling duty with his constable. It has come in his evidence that he had also followed the police team led by O/C Jorethang P.S., P.W.25, when they had gone to the place of occurrence in the morning of 01-07-2004 for inquiry and that some of the photographs, i.e., Exhibits 2 and 3, recovered from the body of the deceased by P.W.25 tallied with the photograph that was pasted in the registration certificate of the vehicle, Exhibit 1, which the two accused persons had produced when demanded by him in the early morning of 30-06-2004. The relevant extracts of the evidence of P.Ws 25, 26 and 1 are reproduced below for convenience:-

C. Chopel, P.W.25

.... During July, 2004 I was posted as O.C. Jorethang Police Station. I know both the accused persons present in the dock as I had partly conducted investigation of the instant case. On 1.7.04 one Devi Prasad Sharma, Priest of Kali Mandir, 16th Mile Jorethang - Melli Road, Jorethang, came to Jorethang Police Station and verbally reported that on the relevant day in the morning he saw a person lying below the road in front of the Kali Mandir. The same man was lying on the cliff. ...

M.L. Pradhan, P.W. 26

....

On 01.07.2004 my Officer-In-Charge, PI, Chundi Choppel Bhutia registered J. P.S. Case No. 18(7)04 dated 1.7.04 u/s 302 /201 Indian Penal Code against unknown persons on suo motu basis, on the information given by the priest Devi Prasad Sharma of Jorethang Kali Mandir. After registration of the case it was endorsed to me for further investigation. ...

Ash Bir Subba, P.W.1

....

On 1-7-2004 in the morning a report came to Jorethang Police Station saying that one person was found lying dead below the road near 16th mile, Kali Mandhir. The O.C. Jorethang Police Station and other staff proceeded to the place of occurrence. I also followed them. ...

Circumstance (xvii)

The accused persons including the Appellant are arrested at Siliguri on 03-07-2004 and brought to Jorethang P.S. on 07-07-2004.

(a) This circumstance stands established by the evidence of P.Ws 12 and 25. The relevant portions of their evidence are as follows:-

Aitaraj Rai, P.W.12

... Two accused persons present in the dock along with one person who showed toe (sic) park the said vehicle on the ground in front (sic) the said aunty were arrested in my presence and I have signed in their arrests memos. Exhibit 6, 7 and 8 are the arrest memos of the accused persons. Exhibits 6/a, 7/a and 8/a are my signatures....

C. Chopel, P.W.25

... On 2.7.2004 I submitted a requisition marked exhibit- 26 to Officer-In-Charge, Pradhan Nagar, Out post, Siliguri for providing police assistance (sic) for recovery of vehicle bearing registration No. MN-IK/2920(Esttem Car) also to effect arrest of the accused person involve the murder of the deceased Avijit Haovom. Exhibit- 26 is the carbon copy of my requisition and exhibit- 26/a is my signature. With the assistance of the Pradhan Nagar Police Out Post I effected the arrest of accused Rudra Thapa vide arrest memo exhibit-6 he was pointed out by and identified by Aita Raj Rai who drove the Maruti Car mentioned above from Jorethang to Siliguri. Exhibit- 6/a is the signature of said Aita Raj Rai, exhibit- 6/b is the signature of accused Rudra Thapa and exhibit- 6/c is my signature. Vide arrest memo exhibit- 7 & 8i effected the arrest of accused Deepak Pradhann and Rajen Biswakarma on being identified by the said Aita Raj Rai. Exhibit- 7/a and 8/a are the signatures of said Aita Raj Rai, and exhibit 7/b & 8/b are the signatures of Deepak Pradhan, and Rajen Biswakarma respectively. Exhibit. 7/c and exhibit- 8/c are my signatures. All the 3 accused persons were arrested on the information furnished by Aita Raj Rai (driver) who drove the vehicle from Jorethang to Siliguri. ...

Circumstance (xviii)

Rudra Thapa, Accused No. 1's statement recorded u/s 27 of the Evidence Act.

Circumstance (xix)

Based on the above statement, the Police recover the weapon of offence, M.O.VI and its sheath, M.O.VII, from the place shown by him.

(a) The above two circumstances taken together stand proved by the evidence of P.Ws 18, 24 and 26. The relevant portions of whose evidence are reproduced below:-

Dilip Kumar Agarwal, P.W.18

I know the accused Rudra Thapa present in the dock. I also know the another accused present in the dock and his name is Deepak Pradhan. On 7-7-2004 the second O.C. of Jorethang Police Station recorded the statement of accused Rudra Thapa at Jorethang Police Station. During the relevant time one Sunil Prasad of Jorethang Bazaar and myself were present The accused Rudra Thapa further said that he threw the weapon of offence from the said place towards the river side. On the way towards Jorethang side he also threw the sheath of the khukuri below the road. The said Rudra Thapa further said that he could show the places from where he had thrown the weapon of offence and the sheath of the khukuri if he was allowed to do so. Exhibit 13 is the said disclosure statement of the accused Rudra Thapa, that was recorded in our presence at Jorethang Police Station. Exhibit 13/a is my signature. Exhibit 13/b is the signature of Rudra Thapa who signed in our presence. After the disclosure statement was recorded we went to the place of occurrence for recovery. The accused showed the place where he had stated to have thrown the weapon of offence i.e. Khukuri. The said accused (Rudra Thapa) who showed the place was accused Rudra Thapa. On search being conducted one Khukuri was retrived (sic) and the same was seized vide seizure memo exhibit 14. The said khukuri was seized by the Investigating Officer inmy presence and in presence of Sunil Prasad. Exhibit 14/a is my signature and exhibit 14/b is the signature of Accused Rudra Thapa who showed the place Exhibit 14/b was signed by the accused Rudra Thapa in our presence. I can identify the said khukuri seized in our presence. MO-VI is the said khukuri that was seized by the Investigating Officer vide seizure memo exhibit 14 from the place pointed out by the accused Rudra Thapa. On the same day i.e. on 7-7-2004 one sheath of the khukuri was also seized from a place pointed out by the accused Rudra Thapa. The sheath of the khukuri MO-VII was recovered and seized at a distance of about 15 feet from the place of recovery of khukuri. It was recovered towards Jorethang side from the place of recovery of Khukuri near old Gas office. The sheath of the khukuri marked MO-VII was seized vide seizure memo exhibit 15. Exhibit 15/a is my signature and exhibit 15/b is the signature of accused Rudra Thapa, who signed in our presence. The seized articles were placed in white clothes and sealed.

Sunil Prasad, P.W.24

I know both the accused persons present in the dock as I had seen them at Jorethang Police Station. They were under arrest. On 7.7.2004 I had gone to the Jorethang Police Station in connection with my personal matter and found both the accused persons in the Police Station. ... In presence of both of us the statement of accused Rudra Thapa was recorded. ... Thereafter they threw the dead body of the deceased below the road. The accused Rudra Thapa stated that he cut the deceased with the help of the khukuri and threw the same from the place of occurrence. He further said that they themselves pushed and took the vehicle to Jorethang. On the way he threw the sheath of the khukuri below the road. He further said that he could show the places from where he threw the weapon of offence ie. khukuri and the sheath of khukuri. Exhibit- 13 is the said

disclosure statement made by the accused Rudra Thapa which was recorded by the second Officer-In-Charge, Shri M.L. Pradhan. Exhibit- 13/a is the signature of said Marwari Contractor of Jorethang, exhibit- 13/b is the signature of accused Rudra Thapa who signed (sic) in my presence, exhibit-13/c is my signature. On being pointed out by the accused Rudra Thapa a khukuri was recovered and seized from below the road in my presence and in presence of said Marwari Contractor vide seizure memo exhibit- 14. Exhibit- 14/a is the signature of the said Marwari Contractor who signed in my presence and exhibit. 14/b is the signature of accused Rudra Thapa who also signed (sic) in my presence and exhibit- 14/c is my signature. I can identify the said Khukuri pointed out by the accused if I am asked to do so. MO- VI is the said khukuri that was recovered on being pointed out by the accused Rudra Thapa and seized vide seizure memo exhibit- 14 in my presence. MO- VI was recovered from below the road near Kali Mandir Jorethang little above the river Rangeet. MO- VII is the said sheath of the khukuri that was recovered from the place pointed out by the accused Rudra Thapa, which was about 200 feet ahead of the Kali Mandir towards Jorethang Bazaar below the road about 10 feet away from the road. The sheath of the khukuri MO- VII was seized vide seizure memo exhibit- 15 in my presence and in presence of said Marwari contractor. Exhibit- 15/a is the signature of said Marwari Contractor, exhibit- 15/b is the signature of accused Rudra Thapa who signed in my presence and exhibit-15/c is my signature.

M.L. Pradhan, P.W.26

... After the accused persons were arrested by the O.C. Jorethang P.S. I recorded the statement of accused Rudra Thapa in presence of witnesses Dilip Kumar Agarwal and Sunil Prasad on 7.7.2004. ... The accused Rudra Thapa further said that he threw the khukuri (weapon of offence) towards the river. He further stated that after travelling for some distance from the place of occurrence the accused Rudra Thapa threw the sheath of the khukuri below the road. He further stated (sic) that he could show the place from where he threw the weapon of offence and its sheath. Exhibit- 13 is the said disclosure statement recorded by me in presence of witnesses. Exhibit- 13/a is the signature of Dilip Kumar Agarwal, exhibit - 13/b is the signature (sic) of Rudra Thapa, exhibit- 13/c is the signature of Sunil Prasad and exhibit- 13/d is my signature. On being pointed out by the accused Rudra Thapa khukuri MO- VI was recovered and seized vide seizure memo exhibit-14 in presence of witnesses. Exhibit- 14/a is the signature of Dilip Kumar Agarwal, exhibit- 14/b is the signature of accused Rudra Thapa, exhibit-14/c is the signature of Sunil Prasad and exhibit- 14/d is my signature. On the same day the sheath of the khukuri MO- VI was also recovered (sic) from the place shown by the accused and seized in presence of witnesses (sic) Sunil Prasad and Dilip Kumar Agarwal vide seizure memo exhibit-15. Exhibit- 15/a is the signature of Dilip Kr. Agarwal, exhibit- 15/b is the signature of Rudra Thapa, exhibit- 15/c is the signature of Sunil Prasad and exhibit- 15/d is my signature. ...

(b) Another aspect that calls for our consideration is as regards the genuinity of

the weapon of offence, M.O.VI, and the injury found on the neck of the deceased, there being no traces of blood found at the place of occurrence. In this regard, it is observed that the law of evidence does not contemplate the hair splitting manner of appreciation of evidence as propounded on behalf of the Appellant. In cases of the present kind which is based on circumstantial evidence, it becomes necessary for the Courts to arrive at reasonable assumptions founded on the overall evidence that are found credible. The recovery of the weapon of offence, M.O.VI, consequential to the disclosure statement of Rudra Thapa, Accused No. 1, stands established. When we consider the nature of the injury described as "sharp cut injury on the right side of the neck measuring about 7" in length and 4" in depth" as per the inquest report which was "caused by a heavy sharp cutting weapon" in terms of the Medico Legal Autopsy Report, we can reasonably assume that the injury was caused by the weapon M.O.VI. These circumstances when considered with the other circumstances, most unequivocally lead us to conclude that it was Rudra Thapa, Accused No. 1 who had wielded the weapon, M.O.VI and struck the deceased with it and caused his death.

Circumstance (xx)

Blunt denials of the circumstances and refusal of the Appellant to reply to the questions put to him in his examination u/s 313 Cr.P.C.

(a) We are in agreement with the Learned Additional Public Prosecutor that the Appellant has failed to explain the circumstances put to him u/s 313 Cr.P.C. either by giving blunt denials or refusing to answer the questions and that in a case based on circumstantial evidence blunt denials and false answers can form an additional link in the chain of circumstances.

(b) In *Joseph Poulo Vs. State of Kerala*, it has been held as follows:-

14. ... During the time of questioning u/s 313 CrPC, the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see *State of Maharashtra v. Suresh*). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy. ..."

[Emphasis supplied]

(c) In State of Maharashtra Vs. Suresh, relied upon in Joseph (supra), it has been held that "false answer offered by the accused when his attention was drawn to any inculpatory circumstance would render such circumstance as capable of inculpatory him. The Court also held that in such a situation a false answer can also be counted as providing "a missing link" in completing the chain."

(d) Considering the facts of the present case on the anvil of the ratio laid down in the above aforesaid cases the statement of the Appellant made u/s 313 Cr.P.C. being palpably false on the face of the other circumstances established by the prosecution on the basis of reliable and cogent evidence adduced by them as regards the Appellant's role in the commission of offence, we will have to proceed on the basis that the Appellant has not explained the inculpatory circumstances established by the prosecution against him which would form an additional link in the chain of circumstances.

19. It is pertinent to note that the oral evidence extracted above against each of the circumstance could not be contradicted materially as the prosecution witnesses remained firm and unshaken. The documents, more particularly, the vehicle registration certificate, Exhibit 1, driving licence, exhibit 2, identity card, exhibit 3 and the Maruti Esteem Car bearing registration No. MN 1K 2920, M.O.I, exhibited by the prosecution witnesses are found quite reliable. The factum of Rudra Thapa, Accused No. 1, having given the statement u/s 27 of the Evidence Act and the consequent recovery of the weapon of offence, i.e., the "khukuri", M.O.VI and its sheath, M.O.VII, from the spots as shown by him have remained unassailable.

20. We find that each of the circumstance set out above stand established by satisfying the standard of proof beyond reasonable doubt and that those circumstances form an unbroken chain that leads to the sole hypothesis, and none other, that the Appellant and Rudra Thapa, Accused No. 1 had with common intention to rob the deceased of his Maruti Esteem Car had committed his murder in the manner as revealed in the case of the prosecution.

21. Notwithstanding the above position, we may deal with some of the lacunae said to exist in the prosecution case as pointed out by Mr. N. Rai, Senior Advocate, on behalf of the Appellant.

(i) The evidence of P.Ws 1, 2, 5, 6, 7, 17, 25 and 26, the police witnesses alleged to be interested witnesses have been carefully examined with the required circumspection and it is found that they are truthful witnesses having withstood the test of their cross-examinations on all material parts of their evidence. This apart, we also find sufficient corroboration of their evidence in the other evidence available on the record.

As held in the case of Govindaraju (supra) referred to by the Learned Additional

Public Prosecutor the evidence of police witnesses by itself can form the basis of conviction if such evidence inspires confidence and is found to be trustworthy and reliable.

(ii) The argument that the evidence of P.Ws 3, 6, 13, 14, 15, 16, 17, 20, 22 and 23 have to be left out to the ambit of consideration as their evidence were not put to the Appellant in his examination u/s 313 Cr.P.C., in my view, cannot be sustained as, except for the evidence of P.Ws 6 and 17, the others pertain to facts that are peripheral and quite insignificant. So far as the evidence of P.Ws 6 and 17 are concerned, they deal with the circumstance of the Maruti Esteem Car, M.O.I, having entered Sikkim from Siliguri with three persons on board on 29-06-2004 at 6 p.m. and, having left Sikkim with the same number of persons on 30-06-2004 at about 6 a.m. respectively. The evidence of the Head Constable, P.W.6, on duty at the Melli Check Post in the evening of 29-06-2004, is found to have been corroborated on all material particulars by the Constable, P.W.5, on duty with him. Similarly the evidence of the Writer Constable, P.W.17, on duty at that Check Post in the evening of 30-06-2004, stands corroborated by his Constable P.W.7 on duty with him. P.Ws 5 and 7 in fact were the ones who had checked the vehicle and reported to Head Constable, P.W.6 and Writer Constable, P.W.17 respectively who then had made their respective entries Exhibit 5(a) and Exhibit 5(b) in the Register Exhibit 5. We find that the evidence of P.Ws 5 and 7 have been put to the Appellant while being examined u/s 313 Cr.P.C. under questions no. 23 to 25 and 26 to 28 respectively which in substance would include the evidence of P.Ws 6 and 17 thereby rendering the necessity to put their evidence to the accused persons again futile and of no consequence.

(iii) The assertion on the part of the Learned Senior Counsel that the Vehicle Movement Register, Exhibit 5, is a fabricated document, in our view, is unsustainable on the face of the credible evidence of its proof by P.Ws 5, 6, 7 and 17. No doubt, the Register is a common one available in the markets and that it also does not contain the official seal of the Police, but this does not detract from the fact that the entries in that Register were made by the Police Officers in discharge of their official duty.

In Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, a Constitution Bench of the Hon"ble Supreme Court has held that "the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high." This principle was enunciated while interpreting Section 35 of the Evidence Act that provides for relevancy of entry in public record or an electronic record made in performance of duty. Section 35 is reproduced below for convenience:-

S. 35. Relevancy of entry in public record or an electronic record made in performance of duty.--An entry in any public or other official book, register or

record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact.

In the case at hand there is no manner of doubt that the entries in question were made by the concerned Police Officials who are public servants while discharging their official duties. For these reasons, the contention stands rejected.

(iv) So far as the question of Test Identification Parade of the accused persons having not been conducted is concerned, it is our considered view that it is hardly of any consequence to the prosecution case in view of the overwhelming evidence pertaining to the identity of the Appellant available on the record. Ash Bir Subba, Head Constable, Jorethang P.S., P.W.1, had the occasion to see the accused persons for considerable length of time in the early morning of 30-06-2004. Similar is the case with Dawa Gyatso Bhutia, P.W.2 as he had not only seen the accused persons pushing the vehicle towards Naya Bazar at "Akar Bridge" but also had exchanged conversation with them and suggested them to take the vehicle to a garage across the bridge. The identification of the Appellant and Rudra Thapa, Accused No. 1, by these witnesses do not appear to have been contradicted in their cross-examination. We also do not find even a whisper of a suggestion that it was not the accused persons who were seen in the vehicle first by Ash Bir Subba, P.W.1 and later by Dawa Gyatso Bhutia, P.W.2. Bhim Bahadur Pradhan, P.W.4, Mohan Rai, P.W.8, Biren Oraon, P.W.9, Aitaraj Rai, P.W.12, and Kumar Pariyar, P.W.21, who are the other witnesses who identified the accused persons, were well-acquainted with them as would appear from their evidence and their identification by these witnesses have remained unquestioned in their cross-examination.

In *Amitsingh Bhikamsing Thakur Vs. State of Maharashtra*, it has been held that while the necessity of holding Test Identification Parades is desirable, the Court may accept the evidence of identification even without insisting on corroboration. In paragraph 14 of the decision, references have been made to earlier decisions of the Court laying down such approach but suffice it to refer only to the following:

14. "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant u/s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them,

in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad Vs. Delhi Administration, , Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, , Budhsen and Another Vs. State of U.P., and Rameshwar Singh Vs. State of Jammu and Kashmir, .

[Emphasis supplied]

Similar has been the view taken in the case of Malkhansingh and Others Vs. State of Madhya Pradesh, .

Therefore, it follows from the above that even if no Test Identification Parade was held, it is permissible for us to accept the identification of the Appellant and Rudra Thapa, Accused No. 1 by P.Ws 1, 2, 4, 8, 9, 12 and 21 when we find their evidence beyond reproach and reliable. This consideration would also apply as regards the identification of the Maruti Esteem Car bearing registration No. MN 1K 2920.

(v) The contention that the weapon of offence was not sealed at the place of its seizure by the I.O., in our view, also appear to be of no consequence considering the evidence of Dilip Kumar Agarwal, P.W.18, and Sunil Prasad, P.W.24, in their cross-examinations that the weapon of offence, i.e., the "khukuri", M.O.VI, and its sheath M.O.VII, had first of all been retrieved from the places as shown by Rudra Thapa, Accused No. 1, then wrapped in white cloths and stitched with needle and thread and then sealed.

(vi) The contention that the disclosure statement of co-accused Rudra Thapa cannot be used against the Appellant is based on a generally well-accepted position of law which we find re-emphasised in Haricharan Kurmi (supra) relied upon on behalf of the Appellant. However, in that very case it has been held that "the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence."

The principle of law as regards permissibility of relying upon the confession of one accused against another have been found reiterated in Pancho (supra) and Bishnu Prasad Sinha (supra) referred to by the Learned Additional Public

Prosecutor. The law postulates that before a Court relies upon the confession of a co-accused it ought to consider other evidence in order to lend assurance to such confession.

The culpability of the Appellant in the case is fixed by application of Section 34 IPC against him. It is not the case of the prosecution that it was he who had dealt the fatal blow on the deceased but that he had the common intention with Rudra Thapa, Accused No. 1, to rob the deceased of his Maruti Esteem Car, M.O.I after doing him to death. We have alluded to the evidence of P.Ws 1, 2, 4, 8, 9, 12 and 21 who have in most unambiguous terms and in graphic details stated on the role played by the Appellant. There are circumstances that undoubtedly confirm the inculpatory role of the Appellant. From the evidence discussed in detail earlier, we have noted that the Appellant freely indulged in giving false statements to various witnesses, first of them being H/C Ash Bir Subba, P.W.1, to whom he and Rudra Thapa, Accused No. 1, had shown the registration certificate of the Maruti Esteem car to give an impression that they were the owners saying that the driver had gone out to have tea, obviously intending to mean that the deceased whose photograph was pasted on the registration certificate, was the driver. Later, on the same day at Soreng the Appellant gave a false story to P.W.4 that he and Rudra Thapa, Accused No. 1 had unknowingly purchased a stolen car which they wanted to sell. When they returned to Jorethang that evening the Appellant got hold of his friend P.W.8 and asked for his help to engage a driver on a false plea of their driver having left due to illness. On reaching Siliguri he gave another false story to P.W.21 of the deceased having fled away on their finding the documents of the car as duplicates. As discussed earlier, the Appellant had lured the deceased to go to his house at Soreng on a false plea that the price of the vehicle would be paid there. Therefore, the disclosure statement, Exhibit 13, would be relevant only as a corroborative piece of evidence to the other formidable ones appearing against the Appellant that establishes his participation in the commission of the offence.

Connected with the foregoing is also the assertion on behalf of the Appellant that intention of the Appellant cannot be traced to the commission of the offence of murder but could be so only as regards the purchase of the Maruti Esteem Car, M.O.I, as set out in paragraph 6(xiii) while deliberating on the contentions raised on behalf of the Appellant in support of the Appeal. In view of the detailed discussions on the culpability of the Appellant in the commission of the offences, we desist ourselves from repeating those save to the extent that although it may not have been the Appellant who actually landed the deathly blow upon the deceased but, that does not detract from the fact that the Appellant had participated in the series of incidents with Rudra Thapa, Accused No. 1, leading to the murder of the deceased and incidents thereafter. We are thus of the considered view that the conduct of the Appellant that are so glaring would clearly bring him within the ambit of Section 34 IPC and, therefore, also liable for the principal offences under Sections 302 /201 /379 IPC.

We are inclined to agree with the Learned Additional Public Prosecutor that direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the proved facts of the case and proved circumstances as held in Chaman (supra) relied upon by the Learned Additional Public Prosecutor.

In Balram Singh and Another Vs. State of Punjab, , the Hon"ble Supreme Court, relying upon its previous decisions in Badruddin Vs. State of Uttar Pradesh, and Ramashish Yadav and Others Vs. State of Bihar, , has held that "all that the prosecution has to establish is that there was a prior concert or meeting of minds between the accused persons and such prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack."

Following from the above, we are satisfied that the prosecution has been able to establish that there was a plan of the Appellant and Rudra Thapa, Accused No. 1, to commit the offence of which they were charged and, therefore, liable thereunder.

Under such circumstances, the assertion naturally calls for rejection and is accordingly rejected.

(vii) The point that no traces of blood were found either at the place of occurrence or at the spot where the body was retrieved would also be of no consequence in view of the firm evidence appearing against Rudra Thapa, Accused No. 1, as discussed earlier while dealing with circumstances (xviii) and (xix). The innocence of the Appellant stand clearly discounted for the reasons already discussed in the preceding paragraph.

(viii) As far as the identity of the driver named "Jaggu" is concerned the evidence of Biren Oraon, P.W.9, the Electrician, appears to have settled the controversy when it has come in his evidence that "the said driver accompanied by the accused persons hails from Jorethang. The said driver used to drive one Commander Jeep bearing No. SK-04/2195 as its second driver. At the relevant time I did not know the name of the said driver. But subsequently I came to know his name as Jaggu."

The effort on the part of the Learned Senior Counsel to invoke the principle of adverse inference u/s 114(g) of the Evidence Act against the prosecution for non-examination of (a) "Jaggu"; (b) Kiran Pradhan from whom a car stereo, M.O.IV, was seized; (c) the two passengers who boarded the Maruti Esteem Car at Jorethang; (d) Anil Sharma; and (e) Constable Wangyal Tshering Lepcha, in our view, also do not appear to be of much substance. We hold this view, firstly because "Jaggu" being no less than Aitaraj Rai is found to have been examined as P.W.12. Secondly, the rest of the persons only appear to be additional witnesses to the facts already proved by other witnesses.

The other witnesses in whose presence the car stereo, M.O.IV, was seized are P.W.12 and P.W.22 who have been examined by the prosecution.

The two passengers who boarded the Maruti Esteem Car at Jorethang would have been additional witnesses to the fact of the accused persons having left Jorethang in the evening of 30-06-2004 on which P.W.12 is found to have deposed in detail and corroborated by P.W.8 and P.W.21.

Non-examination of Anil Sharma is also of no consequence in view of the evidence of P.W.11 who is the principal witness leading to the identity of the deceased and from whom the initial clue of the deceased having got acquainted with the accused persons at Siliguri was received.

In so far as Constable Wangyal Tshering Lepcha is concerned, he is said to be the one who was with Ash Bir Subba, P.W.1, while on patrol duty in the early morning of 30-06-2004 and we find this evidence to be reliable and convincing considered in the light of the evidence of P.W.2, Writer Constable, Jorethang Police Station who was also on duty at the Jorethang Akar Bridge Booth at the same time as P.W.1.

The cases of Thulia Kali (*supra*) and Guljara Singh (*supra*) are on the general principle of the law of evidence as regards the consequence of non-production of material witness by the prosecution. In the present case, the circumstances obviously are quite different.

(ix) We also do not find any merit in the contention that the CFSL reports, Exhibits 42 to 45 cannot be accepted as valid evidence having not been proved as required u/s 293 Cr.P.C. and that the Scientific Expert was not produced for the purpose.

Firstly, this plea was never raised during the trial. Secondly, on perusal of the Serological Examination Reports, we find that the Officer who examined the samples was of the rank of Junior Scientific Officer. These reports appear to have been accepted as valid pieces of evidence under Sub-Section (1) of Section 293 Cr.P.C. as the competence of that Officer in the light of Sub-Section (4) of Section 293 had not been questioned.

We find support on this view of ours in *Dalwadi Govindbhai Amarshibhai Vs. State of Gujarat*, where a Division Bench of the Gujarat High Court had held as under:-

20.

The record does not show that any request was made by the defence to summon expert of Forensic Science Laboratory to prove the contents of report. No challenge to report was made when it was produced on record during the examination of Investigating Officer, Mr. Mer. Therefore, the argument that Xerox copy of report of Forensic Science Laboratory could not have been relied upon has no substance, and is hereby rejected.

Similarly, in *Shri Phool Kumar Vs. Delhi Administration*, it has been laid down as under:-

3. ... The report of the expert was used as evidence by the prosecution without examining him in court. Neither the court thought it fit nor the prosecution of the accused filed any application to summon and examine the expert as to the subject-matter of his report. The court was bound to summon the expert if the accused would have filed any such application for his examination. That not having been done the grievance of the appellant apropos the report of the expert being used without his examination in court made in the High Court and repeated in this Court had no substance. ...

In any case, the CFSL reports are not the sole evidence on which conviction of the Appellant is being sought for but is rather one of several others. The case of Sonam Tshering Bhutia (supra) relied upon by the Learned Senior Counsel on behalf of the Appellant is quite distinguishable from the facts and circumstances in the present case and, therefore, clearly not applicable.

(x) The attempt on behalf of the Appellant to assail the last seen theory placing reliance upon Mohibur Rahman (supra), in our view, cannot be sustained. The case of Mohibur Rahman (supra) was one where the last seen theory was the singular piece of circumstantial evidence available against the accused and, that the number of days that the accused was last seen with the deceased was unascertainable. Quite apparently, the facts in the present case are different where the deceased was last seen in the company of the accused persons in the morning of 29-06-2004 and his dead body was discovered in the early morning of 01-07-2004. Similarly, in the case of Sanjay Thakran (supra) the circumstance of last seen together could not be taken into account to fasten the guilt on the accused as there was considerable time gap between the persons seen together and the proximate time of crime. In any case, these decisions do not lay down the ratio that in all cases where the duration of time gap between the accused persons seen in the company of the deceased and the detection of the crime is of considerable length the principle of last seen theory cannot be invoked. In the very case of Sanjay Thakran (supra) it has been held that "in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period". It has been further held that "if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence."

As discussed in detail earlier, the deceased was seen in the company of the accused persons continuously from 25-06-2004 until at least 9 a.m. of 29-06-2004. It has come in evidence that they had left Siliguri together on

29-06-2004 and entered Sikkim in the Maruti Esteem Car bearing registration no. MN 1K 2920 through the Melli Check Post at about 6 p.m. of that day. The accused persons left Jorethang in the evening of 30-06-2004 in the very Maruti Esteem Car, M.O.I, driven by the driver, P.W.12, and crossed Melli Check Post at about 6 p.m. on the same day and headed for Siliguri. The body of the deceased was found in the early morning of 01-07-2004. These are circumstances which we are found to have been well-established by reliable evidence. Therefore, the circumstance of the deceased having been last seen in the company of the Appellant and Rudra Thapa, Accused No. 1, in the morning of 29-06-2004 would be a valid circumstance appearing against the Appellant.

(xi) The rest of the contentions placed on behalf of the Appellant by Mr. N. Rai, in our view, are quite insignificant and unsustainable and of no effect on the foundation of the prosecution case and, therefore, stand rejected.

22. For all the reasons stated above, we find no reason to interfere with the impugned judgment.

23. In the Result, the Appeal is dismissed.

24. No order as to costs. Let a copy of this judgment along with the original records of the case be transmitted to the Learned Sessions Judge, South and West Sikkim at Namchi forthwith.