

(2022) 05 GAU CK 0012

In the Gauhati High Court

Case No : Criminal Appeal No. 170 Of 2020, 66 Of 2021

Md. Jalaluddin And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 09-05-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 202, 302, 365, 379
Code Of Criminal Procedure, 1973 — Section 161, 313
Evidence Act, 1872 — Section 25, 106

Citation : (2022) 05 GAU CK 0012

Hon'ble Judges : Suman Shyam, J; Malasri Nandi, J

Bench : Division Bench

Advocate : H R A Choudhury, I A Talukdar

Final Decision : Dismissed/Disposed Of

Judgement

Suman Shyam, J

1. Heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. A. Ahmed and Mr. I.A. Talukdar, learned counsel appearing for the appellants. We have also heard Ms. S. Jahan, learned APP, Assam, who has appeared on behalf of the State of Assam. None has appeared for the informant.

2. The two appellants in Criminal Appeal No. 170/2020 viz. Md. Jalaluddin and Md. Sakil Ahmed have jointly preferred the aforesaid appeal assailing the common judgement and order dated 30/12/2019 passed by the learned Additional Sessions Judge (FTC), Sonitpur, Tezpur in Sessions Case No. 127/2018, convicting both the appellants under Sections 302/201/379/34 of the Indian Penal Code (IPC) for committing the murder of Santosh Rai throwing away the dead body from the hill top and also for stealing the vehicle. The appellants have been sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 10,000/- each for committing the offence under Section 302/34 of the IPC with default stipulations. Both the appellants/accused persons were also sentenced to undergo rigorous imprisonment for a period of 7 (seven) years and

also to pay fine of Rs. 5,000/- each for the offence committed under Section 201/34 of the IPC and to undergo rigorous imprisonment for 3 (three) years for the offence committed under Section 379/34 IPC. It appears that subsequently, one of the appellants, viz. Md. Sakil Ahmed has preferred a separate appeal against the impugned judgement which was registered as Criminal Appeal No. 66/2021.

3. The prosecution case, in a nutshell, is that at around 05:00 p.m. on 29/04/2017, the two appellants had hired a Swift Dezire vehicle belonging to the PW-6 for going to Shillong and on the way, they had murdered the driver Santosh Rai, threw his body down the hill and took away the vehicle. The stolen vehicle was later recovered from the custody of appellant No. 1 Md. Jalaluddin at Badarpur more than a year later. However, the driver Santosh is still missing.

4. On 01/05/2017, Md. Ainul Haque i.e. the owner of the Swift Dezire vehicle bearing No. AS07-D/9009 had lodged an ejahar before the Officer-in-Charge of Tezpur Sadar Police Station informing that on 29/04/2017, at around 5 p.m., his driver went to Shillong with his Car but since 10 p.m. of that evening, he had lost contact with the driver, who had not returned back with the vehicle. Since he was waiting for the car along with the driver, hence, there was delay in lodging the ejahar.

5. Upon receipt of the ejahar dated 01/05/2017, Tezpur P.S. Case No. 790/2017 was registered under Section 365/379 of the IPC and the matter was entrusted to S.I. Abdul Momin of Tezpur Police Station for carrying out investigation. After about 9 months from the date of commencement of the investigation the stolen vehicle was recovered at Badarpur from the possession of appellant No. 1 Md. Jalaluddin. He was arrested by the Badarpur Police on 28/03/2018 and the vehicle was seized on 29/03/2018 by S.I. Romen Baruah of the Tezpur P.S. Based on the statement of accused Jalaluddin, the co-accused Sakil Ahmed was also arrested around 15 days later. A TIP was conducted, whereby the accused Jalaluddin was identified by PW 5 as one of the persons who had come to the Taxi Stand on 29/04/2017 to hire the vehicle. On conclusion of investigation, the Investigating Officer (IO) had submitted charge sheet against both the accused persons under Sections 365/379/201/302 of the IPC. Since it was a case triable by the Sessions Court, the matter was committed to the Court of the learned Additional Sessions Judge (FTC), Sonitpur. Charges were framed against both the accused persons under Sections 365/379/202/302/34 IPC by the learned trial Court and the same were read over and explained to the accused persons but since they had denied the charges brought against them and claimed to be tried, the matter went up for trial.

6. The prosecution case is entirely based on circumstantial evidence. In order to prove the charges brought against the two accused persons, the prosecution had examined as many as 12 witnesses including the two I.O.s who had conducted the investigation in the case as PWs 10 and 11 as well as the S.I. of Police of Tezpur Police Station who had seized the stolen vehicle on 29/03/2018 as PW-12.

After recording of evidence of the prosecution witnesses, the statement of the accused persons were recorded under Section 313 of the Cr.P.C. whereby, they had denied all the incriminating circumstances put to them. The defence side, however, did not adduce any evidence. On conclusion of trial, the learned Court below had convicted the accused persons for the offences punishable under Section 302/201/379/34 of the IPC and sentenced them in the manner indicated above. However, both the accused persons were acquitted in respect of the charge framed under Section 365 of the IPC.

7. By referring to the evidence available on record, the learned senior counsel for the appellants has argued that the corpus delicti could not be found by the IO and from the evidence on record, the death of the deceased has also not been established. In the absence of any evidence to show that the driver of the vehicle Santosh Rai had suffered death, far less a homicidal death, the charges brought against the accused under Section 302/201/34 IPC would not be sustainable in the eye of law. Mr. Choudhury has further argued that from the evidence brought on record by the prosecution side, considerable doubt arises as to whether, the vehicle had actually left for Shillong from the house of the owner or from the Taxi Stand, as claimed by the prosecution. The learned counsel for the appellant has also argued that there are enough materials available in the case diary to show that it was the PW-6 i.e. the owner of the vehicle who had taken the car to Shillong on the date of the incident thereby causing a serious dent on the prosecution story. Contending that the accused Jalaluddin, having been exposed to the prosecution witness even before holding the TIP, the process of identification of the accused through TIP stood vitiated. Moreover, the learned senior counsel for the appellant has argued that there was no proper seizure of the vehicle at Badarpur and therefore, it is doubtful as to whether the Police had actually seized the vehicle from the possession of appellant Md. Jalaluddin.

8. It has also been argued by the appellant's counsel that the prosecution has failed to establish the last seen together circumstance so as to implicate the accused persons. Moreover, the learned Sessions Judge has also failed to consider the explanation furnished by the accused persons while recording their statement under Section 313 Cr.P.C. Mr. Choudhury, therefore, submits that the evidence brought on record by the prosecution is sufficient to prove the charge brought against the accused persons by means of circumstantial evidence and, as such, both the accused persons deserve to be acquitted. In support of his above arguments, Mr. Choudhury has placed reliance on the following decisions :-

- (i) (2010) 15 SCC 588 (Madho Singh Vs. State of Rajasthan).
- (ii) (2013) 12 SCC 551 (Rishi Pal Vs. State of Uttarakhand).
- (iii) (1984) 4 SCC 116 (Sharad Virdhichand Sarda Vs. State of Maharashtra).

9. Responding to the above, Ms. Jahan, learned APP, Assam has submitted that from the testimonies of PWs 5 and 7, it has been cogently established that both the accused persons had come to the taxi stand on the date of the occurrence

and hired the vehicle driven by Santosh Rai so as to go to Shillong. At around 10 p.m. in the evening, the driver of the vehicle went missing along with the vehicle and about a year later, the vehicle was seized from the possession of the appellant no.1 Jalaluddin at Badarpur. She submits that the above circumstances have been firmly established by the prosecution by leading evidence. Ms. Jahan has also argued that the accused persons had committed a gruesome crime. Therefore, taking note of the evidence on record, the learned Court below has rightly convicted the appellants by the impugned judgement dated 30/12/2019, which does not call for any interference from this Court.

10. We have considered the arguments advanced by learned counsel for both the parties and have also analyzed the evidence available on record. As noted above, there is no eye witness to the occurrence and the prosecution case is entirely based on circumstantial evidence.

11. PW-1 Sri Rajendra Das was the Gaonburah of the village and he has deposed that the incident took place in the year 2017. Being the Gaonburah, the Police from Tezpur Police Station had asked him to accompany them to Shillong in connection with the investigation of a murder case and accordingly, he along with other persons and accused Jalaluddin went to Shillong. Somewhere in between Shillong and Maulai, accused Jalaluddin had shown the place where they had murdered the driver Santosh Rai by strangulating him with the help of a 'churni' and thereafter, had thrown the dead body down the mountain. PW-1 has further stated that they went to the local Police Station and a Magistrate was also called at the spot. In the presence of Magistrate also, the accused Jalaluddin had shown the place where the dead body was thrown. The complete process was video graphed. Accused Jalaluddin has also narrated, in presence of the Magistrate and the local Police, the manner in which, he and another person (Sakil) had committed the murder of Santosh Rai while driving the vehicle which was hired by one of his associates from Tezpur. During his cross examination, PW-1 has denied the suggestion made by the defense side that accused Jalaluddin had never disclosed anything regarding the murder of Santosh Rai or about throwing the dead body between Borapani and Maulai

12. PW-2 Sri Rupan Ahmed was working as Security Guard in the same company where co-accused Sakil Ahmed was working and it appears that he was also arrested by the Police in connection with the above case. PW-2 has stated that he knew accused Sakil Ahmed. About 4/5 months ago, when he was serving at Bangalore as a security guard, Sakil called him over phone and made a query as to whether he could get employment at Bangalore. He then informed Sakil that he could get a job of security guard at Bangalore. Sakil went to Bangalore and joined as a security guard. After 8/10 days, one day at around 8 p.m., the Bangalore Police had apprehended Sakil, took him to the Police Station and interrogated him. Sakil was then sent to jail. Police seized the mobile phone of Sakil vide seizure list Ext. 2, which bears his signature.

13. Sri Kartik Barman, who is the brother of the wife of Santosh Rai, was

examined as PW-3. This witness has deposed that the incident took place about a year ago. On 29/04/2017, his sister Anima Rai had called him over phone and enquired about his location. He told her that he was in Shillong. Then his sister told him that her husband Santosh Rai also went to Shillong but he had not returned. Santosh went to Shillong driving the car of Ainul Haque. After returning from Shillong and having come to know that Santosh has not returned with the car, he along with the owner of the car Ainul Haque, had informed the Police at Tezpur. After about one year, a driver of Jonaki Taxi Stand, Tezpur, while making a trip to Hailakandi, had noticed the missing car which was earlier driven by Santosh Rai. He took a photograph of the car and uploaded the same in the Face Book. Immediately, the matter was informed to the Tezpur Police Station. Police went to Hailakandi and seized the vehicle and had also arrested the accused Jalaluddin, who is present in the Court. After about 30-45 days, he had accompanied the Police, accused Jalaluddin and Secretary of the village to a place called Ryndang, located in between Barapani and Shillong and accused Jalaluddin had shown the place where the dead body of Santosh Rai was thrown, after killing him. At that time, local Magistrate from Shillong was also present. During his cross examination, this witness could not be shaken.

14. PW-4 Smt. Anima Rai is the wife of Santosh Rai. She has deposed that her husband used to drive the car of Ainul Haque (PW-6) bearing no. 9009 (Swift Dezire, colour white). On 29/04/2017, her husband had informed her that he would be going to Shillong. She received the last call from her husband at about 8 p.m. from Jorabat. Next day, early in the morning, she rang up her husband but the phone was found to be switched off. She had made several attempts and also called the owner of the car to look out for her husband. The owner of the car also found the mobile phone of her husband in a switched off mode. So, he came to her residence to enquire as to whether her husband Santosh Rai had returned home. After about one year, a driver from Tezpur could identify the car while going to Silchar and informed the other drivers of the taxi stand. Immediately, the Police was informed and accused Jalaluddin was apprehended and the car was seized. PW-4 has also deposed that after some days, Police had apprehended accused Sakil from Bangalore. She had gone to the Police Station to see them.

15. PW-5 Seikh Nazrul is a driver from Jonaki Taxi stand. He has deposed that he knew the informant in this case as well as the accused persons. He also knew Santosh Rai @ Raju. The incident took place on 29/04/2017. On that day during the evening hours, he was standing at the taxi stand i.e. opposite Flora Restaurant at Tezpur. At that moment, both the accused persons came to the taxi stand in an e-rickshaw. Noticing them, and believing that they might have come to hire a taxi, he and Santosh Rai came forward. Accused Jalaluddin told them that they will go to "NEIGRIHMS" hospital at Shillong with a patient. Jalaluddin was speaking in Hindi. The other accused was silent. When he tried to enquire as to where was the patient to be taken to Shillong, the accused did not talk much but bargained with Santosh Rai for fare. Jalaluddin told Santosh Rai that they

would be paying him Rs. 4800/- and also provide meal and accordingly took away Santosh. Jalaluddin was carrying a black coloured bag. After Santosh Rai left, he told his colleagues at the taxi stand that he did not like the conduct of the two persons who had hired the vehicle. On the next morning, Ainul Haque came to the stand and informed that mobile phone of Santosh Rai was found switched off. Ainul lodged the ejahar. After about one year, one of their colleagues had gone to Badarpur carrying an official who was transferred from Tezpur to Badarpur. On reaching Badarpur, he had noticed the car of Ainul and immediately informed his taxi stand, who in turn, had informed the Tezpur Police. The Tezpur Police took the initiative to seize the vehicle at Badarpur and accordingly, came to Badarpur along with the owner of the car and brought back the vehicle. After about four days, the person who had financed Ainul for purchasing the vehicle had met him and asked him to accompany him to the Police Station to see the vehicle so recovered. When he reached the Police Station, he had noticed Jalaluddin in a handcuff. He could not immediately identify accused Jalaluddin as one of the persons who had come to hire the vehicle from the taxi stand on 29/04/2017. This witness has further stated that he came to know from the Police that Jalaluddin was claiming to have purchased the vehicle from another person. PW-5 has stated that he had clarified before the Police that it was Jalaluddin and another person who had hired the vehicle on the day of the occurrence. After meeting Jalaluddin at the Police Station, he spoke to him and asked as to why, he had killed Santosh. Jalaluddin replied back by questioning him as to why he was asking him after everybody had completed the investigation. PW-5 has also stated that he spoke to Jalaluddin in Hindi and he also replied in Hindi. Thereafter, on the request of the Police, he went to the Jail premises and identified Jalaluddin in presence of Magistrate. After some days, Jintu Deka, a policeman from Tezpur Police Station had shown him a photograph in his mobile and asked him whether he could identify the person. Then he told the Police Officer that it was the photograph of the associate of Jalaluddin who was present when the vehicle was taken on hire. After some days, Police called him to the Police Station and on reaching there he saw the other accused Sakil. Police had told him that they apprehended Sakil from Bangalore. He could identify Sakil, who was the associate of Jalaluddin when the vehicle of Santosh was being hired. Sakil had asked him whether he had noticed the black bag carried by Jalaluddin on that day and when he answered in the affirmative, Sakil told that there was a "dagger" inside the bag. Sakil had also told him that when they crossed Barapani, Jalaluddin had stabbed Santosh Rai in the neck and pierced the dagger from the one side to other like doing "Halal". Then, Jalaluddin had pressed the head of Santosh Rai near the handbrake of the vehicle and that there was lot of blood inside the vehicle. Jalaluddin had asked him to clean the floor of the vehicle and also the knife. Sakil also told that he then cleaned the floor of the vehicle with his shirt. Thereafter, they threw the dead body of Santosh Rai down the mountain.

16. During his cross examination, PW-5 has denied the suggestion made to the

effect that he did not state before the Police that "in my presence, Sakil asked me whether I noticed the black bag carried by Jalaluddin on that day. When I said that I noticed the bag, Sakil told that there was a dagger (Churi) inside the bag. Sakil told that when they crossed Borapani, Jalaluddin with the dagger stabbed Santosh in the neck and pierced the dagger from one side to other side like doing 'Halal'. Then, Jalaluddin pressed the head of Santosh near the hand brake of the vehicle. There was lot of bleeding inside the vehicle. Then, Jalaluddin asked him to clean the floor of the vehicle and also the knife. Then, he (sakil) cleaned the floor of the vehicle and knife with his shirt. Thereafter, they threw the dead body of Santosh down the mountain."

17. PW-6 Ainul Haque is the informant in this case. He is also the owner of the vehicle. PW-6 has deposed that the incident took place on 29/04/2017. Santosh Rai used to drive his vehicle (Swift Dezire) bearing No. As-07-D-9009. On the day of the occurrence, during the evening hours, Santosh had informed him over phone that he was going to Shillong for a work. Till 10 p.m. Santosh was in contact with him but in the morning he found his phone switched off. Suspecting that something might have gone wrong, he informed his friends and relatives and also enquired with the family members of Santosh. On 01/05/2017, he lodged the FIR. PW-6 has further stated that during that year, in the month of May, one of his friends, whose name is Raju, called him over phone and informed that he had seen his vehicle at Karimganj and had asked him to give his WhatsApp number. Immediately, he gave his number to his friend Raju who had sent the photograph of the vehicle. He had confirmed that the photograph was of his vehicle and immediately informed the Tezpur Police, who, in turn, had informed the Badarpur Police Station. On the next day, Police informed him that the vehicle had been located and seized by Badarpur Police. He, along with some of his friends and Police from the Tezpur Police Station went to Badarpur. Then the Badarpur Police handed over the vehicle. He had returned with the vehicle and Jalaluddin to Tezpur. Police had found the vehicle in the custody of Jalaluddin at Badarpur. On the next day, Nazrul of taxi stand had identified the accused as Jalaluddin who is the person who had hired the vehicle on 29/04/2017. Nazrul had also told that another person was there with Jalaluddin. After about 22 days, he came to know that the associate of Jalaluddin had also been apprehended. This witness had stated that Sakil spoke in Hindi and told him that he had committed the offence but Jalaluddin had stabbed Santosh Rai in a manner like committing "Halal". They committed the murder after crossing Barapani, Meghalaya and threw the dead body from the mountain.

18. During his cross examination, PW-6 has denied that he had not stated before the Police that "Till 10.00 PM he was in contact with me. In the morning I found his phone switch off. Suspecting something wrong, I informed all my friends and relatives. I also asked the family member of Santosh. On 01/05/2017 I lodged an FIR. We searched for the vehicle and Sanotsh but, could not succeed. This year in the month of May, one of my friend whose name is Raju called me over phone and informed that he saw my vehicle at Karimganj and asked me to give

my WhatsApp number. Immediately I gave a number of my friends to which Raju send a photograph of my vehicle. I confirmed the photograph is of my vehicle and I immediately informed the Tezpur PS. The police of Tezpur informed the Badarpur PS and on the next day informed me that my vehicle has been located and seized by Badarpur Police. I with some of my friends and police of Tezpur went to Badarpur. Then, police of Badarpur handed over the vehicle. We with vehicle and Jalaluddin came to Tezpur. Police found the vehicle in custody of Jalaluddin at Badarpur. On the next day, Nazrul of Taxi Stand identified the accused Jalaluddin who hired my vehicle on 29/04/2017. Nazrul also told that another person was with Jalaluddin. After about twenty days police informed me that associate of Jalaluddin was also apprehended. I went police station and noticed the other accused namely Sakil. Sakil spoke in Hindi and told me that he did not commit the offence, but, Jalaluddin has stabbed Santosh by knife like committing "Halal", because police also know the facts.

19. PW-7 Md. Abdul Mazibur is another driver who used to operate from the same taxi stand at Tezpur. This witness has also deposed that he knew Santosh Rai (Raju) and also the accused Jalaluddin. On the day of the occurrence, he was available at the Jonaki Taxi Stand, Tezpur town. He had noticed that Jalaluddin was talking to Santosh regarding hiring of a vehicle. He had also noticed that other colleagues also went forward and started bargaining with the accused regarding the vehicle fare. But the accused did not give any importance to Nazrul and went on talking to Santosh. As such, he did not go near them. After some time, Santosh left with the accused by driving the vehicle. On enquiry, Nazrul told him that Santosh had left for Shillong for a trip. After 2/3 days, he came to know that Santosh had not returned back with the vehicle. Ainul (PW-6) had also informed that the vehicle and the driver were missing. After many days, one of the colleagues noticed the vehicle of Ainul Haque somewhere in Silchar and sent the photograph. Thereafter, Ainul Haque had informed the matter to the Police and the Police, along with Ainul Haque, went to Silchar and brought back the vehicle with Jalaluddin. After some days, Police had asked him to come to the Police Station and accordingly, he went there and informed the Police that he had noticed accused Jalaluddin talking to Santosh, from a distance. He also told the Police that Nazrul had also talked with the accused on the day of occurrence. During his cross examination, PW-7 has stated that he was not personally aware as to which place Santosh had gone but he came to know that the Tezpur Police had apprehended Jalaluddin as he was found driving the vehicle of Ainul. He could not say if Santosh was alive or dead.

20. PW-8 Md. Jiaul Haque is the brother of the informant. He has corroborated the version of PW-6 to the extent that the incident took place on 29/04/2017 at about 5 p.m. on which date, Santosh Rai went to Shillong with the vehicle but did not return. His brother (PW-6) had informed him about the matter and also intimated all friends, relatives. After about 9 months, the vehicle was found at Karimganj. Then his brother went to Karimganj along with the Police and brought back the vehicle which was a Swift Dezire. Police also apprehended Jalaluddin in

connection with the case.

21. PW-9 Smt. Niroda Rai is the mother of Santosh Rai. She has deposed that her son used to drive the vehicle of Ainul Haque. On the date of occurrence, he went to Shillong with passengers. At about 7-8 p.m. he had called them up over phone while he was at Jorabat. Since then, there is no trace of her son. After about six months, one friend of her son had noticed the vehicle at Karimganj and informed the police. The owner of the vehicle had brought back the vehicle from Karimganj. He went to the Police Station and saw accused Jalaluddin. Police had traced out the other accused, who told that it was Jalaluddin who had stabbed her son near Barapani (Meghalaya). Till date, the dead body of her son could not be traced out. During cross examination, this witness has denied the suggestion that she has not stated before the police that "on the day of occurrence, he went to Shillong with passengers. At about 7/8 PM he called to us over phone and informed that he is in Jorabat. Thereafter, there is no trace of my son. After about six months one friend of my son noticed the vehicle in Karimganj and informed the police. The owner of the vehicle brought back the vehicle from Karimganj. I went to the police station and noticed accused Jalaluddin. Police traced out the other accused. The other accused told that Jalaluddin stabbed my son nearby Barapani, Meghalaya."

22. PW-11 Md. Abdul Momin was posted as Sub-Inspector of Police at Tezpur Police Station. PW-11 has deposed that on 01/05/2017, he had received an ejahar lodged by one Ainul Haque (PW-6) reporting about a missing vehicle and the driver. The Officer-in-Charge, Tezpur Police Station registered the FIR and endorsed the matter to him for investigation. Accordingly, he had visited the place of occurrence, issued W.T. Message to all the Police Station of the State and also submitted a prayer to the Superintendent of Police for obtaining the Call Detail Record (CDR) of the mobile phone of the driver. He had also recorded the statement of witnesses, viz. Ainul Haque, Kartik Barman, Guljar Hussain, Monir Ahmed, Jiaul Haque. The CDR of the mobile phone of Santosh showed calls upto Shillong road and thereafter, the mobile was switch off. In the meantime, he had retired from service as a result of which, the case diary was handed over to the Officer-in-Charge.

23. During his cross examination, PW-11 has stated that he had retired from service on 31/03/2018. The case diary was with him till his retirement. The investigation of the case did not progress since June, 2017 till the date of his retirement. The PW-11 has also brought on record the alleged contradictions in the statement of prosecution witnesses in the following manner :-

Witness Anima Rai did not state before him during investigation that "my husband made the last call at around 8.00 PM from Jurabat. In the early morning I rang my husband, but, the phone was found switch off. I made several attempt and also called the owner of the car. The owner of the car also finding the mobile of my husband in switch off mode, came to my residence to enquire whether my husband has returned. As we could not connect with my husband, we informed

the police. After about one year, one driver of Tezpur could identify the car of my husband while going to Silchar and informed the other driver of Taxi Stand. Immediately the police was informed, the accused Jalaluddin was apprehended and the car was seized. After some days, police apprehended the accused Sakil from Bangalore. After arrest of both the accused, I went to police station to see them. The accused Sakil said to me that he has not committed the crime but, Jalaluddin has stabbed my husband from behind and threw the dead body from the mountain between Shillong and Borapani" The IO has however, stated that "she stated before me that her husband left for Shillong and thereafter his phone found in switch off mode".

The IO has also stated that PW-3 Kartik Barman did not state before him that on 29-04-2017 "My sister Anima Rai called me over phone and enquired about my location. I told her that I was in Shillong. She then told me that her husband Santosh Rai also went to Shillong, but, has not returned. Santosh Rai went to Shillong driving the car of Ainul Haque (informant). After returning from Shillong and also coming to know that Santosh has not returned with the car, I along with owner of the car namely Ainul Haque informed the police of Tezpur. After around one year one driver of Jonaki Taxi Stand, Tezpur while making a trip to Hailakandi noticed the car driven by Santosh Rai, I took a snap of the car and uploaded in Facebook. I immediately informed the matter to Tezpur PS. The police immediately seized the vehicle at Hailakandi and also apprehended the accused Jalaluddin who is present in the Court today. After about 30/45 days he accompanied the police of Tezpur, accused Jalaluddin and Secretary of their village to a place named Ryndang located between Borapani and Shillong. Accused Jalaluddin informed that in that place he threw the dead body of Santosh Rai after killing him. At that time Magistrate of Shillong was also present. Jalaluddin informed that Santosh Rai was strangled by a "Surni" (piece of clothe)."

The PW-5 Seikh Nazrul did not state before him "that after one year of the incident, one of my colleagues went to Badarpur taking an official transferred from Tezpur to Badarpur and noticed the vehicle of Santosh/Ainul. On my visit to Tezpur PS, I noticed Jalaluddin was in handcuff, regarding identifying accused Jalaluddin inside the jail premise in presence of Magistrate thrice, that police officer Jitu Deka showed him a photograph and he identified the same to be the accomplice of Jalaluddin, that I after meeting Jalaluddin at police station talked with him why he killed Santosh. Then Jalaluddin replied that why he was asking him after everybody had completed the investigation, that I identified Sakil in the police station and informed the police that he was the person who was with Jalaluddin when the vehicle of Santosh was hired. In my presence, Sakil asked me whether I noticed the black bag carried by Jalaluddin on that day. When I said that I had noticed the bag, Sakil told that there was a dagger (Churi) inside the bag. Sakil told that when they crossed Borapani, Jalaluddin with the dagger stabbed Santosh in the neck and pierced the dagger from one side to other side like doing "Halal". Then, Jalaluddin pressed the head of Santosh near the

handbrake of the vehicle. There was lots of bleeding inside the vehicle. Then, Jalaluddin asked him to clean the floor of the vehicle and also the knife. Then, he (Sakil) cleaned the floor of the vehicle and knife with his shirt. Thereafter, they threw the dead body of Santosh down the mountain". According to the IO, PW-5 also did not state before him that accused had hired the vehicle on 29/04/2017 but, he stated before him that two Hindi speaking boys hired the vehicle and if produced he can identify them.

PW-11 has deposed that the information regarding the incident after one year of occurrence is not applicable in connection with his part of investigation, because prior to that he retired from service.

PW- 11 has further deposed that PW- 6 Ainul Haque did not state before him that "This year in the month of May, one of my friend whose name is Raju called me over phone and informed that he saw my vehicle at Karimganj and asked me to give my WhatsApp number. Immediately I gave a number of my friends to which Raju send a photograph of my vehicle. I confirmed the photograph is of my vehicle and I immediately informed the Tezpur PS. The police of Tezpur informed the Badarpur PS and on the next day informed me that my vehicle has been located and seized by Badarpur Police. I with some of my friends and police of Tezpur went to Badarpur. Then, police of Baarpur handed over the vehicle. We with vehicle and Jalaluddin came to Tezpur. Police found the vehicle in custody of Jalaluddin at Badarpur. On the next day, Nazrul of Taxi Stand identified the accused Jalaluddin who hired my vehicle on 29/04/2017. Nazrul also told that another person was with Jalaluddin. After about twenty days police informed me that associate of Jalaluddin was also apprehended. I went police station and noticed the another accused namely Sakil. Sakil spoke in Hindi and told me that he did not commit the offence, but, Jalaluddin has stabbed Santosh by a knife like committing "Halal".

24. PW-10 Sri Jitu Deka took over the investigation in connection with Tezpur PS Case No. 790/2017 from PW-11. He has deposed that the case diary was handed over for investigation to him on 30/03/2018. S.I. Romen Borah of Tezpur Police Station went to Badarpur in connection with this case and seized the car involved in the incident along with the accused Jalaluddin. After bringing back the car and accused Jalaluddin, S.I. Romen Borah had handed over the case diary. Thereafter, he again recorded the statement of the other witnesses including the statement of Jalaluddin. He had also made a prayer before the learned CJM, Sonitpur seeking police custody of accused Jalaluddin and the prayer was granted. During interrogation, accused Jalaluddin had disclosed that another accused, viz. Sakil Ahmed was also involved in the incident and informed that Sakil was at Itanagar. He, along with Jalaluddin and staff went to Itanagar in search of Sakil Ahmed but could not find him there. This witness has further stated that members of Jonaki Taxi Stand, Tezpur, viz. PW-5 and PW-7 had identified accused Jalaluddin to be the person who had hired the vehicle driven by the victim Santosh. They had also informed that another person was there

with Jalaluddin when the vehicle was being hired. He had immediately recorded the statement of both these persons. Since Seikh Nazrul had earlier stated before the previous IO that he could identify the person who took the vehicle from Santosh, he had produced accused Jalaluddin before the Magistrate and had also prayed for conducting a TIP. Accordingly, on 07/04/2018, the learned JMFC, Tezpur had conducted a TIP in the premise of Central Jail, Tezpur from 3.30 PM to 3.50 PM. After conducting the TIP, the Magistrate had submitted a report. According to PW-10, accused Jalaluddin had confessed about his involvement inside the Police Station in presence of Sarkari Gaonburah, Sri Rajendra Das of Kolibari and Kartik Barman. Rajendra Das and Kartik Barman accompanied them to the place of occurrence near Barapani, Shillong. After reaching Barapani, they enquired with the local Police as to whether there was record of any unnatural death in the recent past and the Police reported that no such case was registered in last one year. Jalaluddin told that he could show the place of occurrence and the place where he threw the dead body of the victim. He then submitted a prayer before the local Magistrate to accompany them during the process. Then, one Ms. B. Pakyntein, MCS, Executive Magistrate, Shillong town as well as Police had accompanied them to the place of occurrence. They proceeded towards the place of occurrence as led by accused Jalaluddin who showed them the place in between Barapani PS and Moulai PS where they had killed the victim and threw the dead body and also the mat of the car. According to PW-10, the entire process had been video graphed and he had recorded the statement of the witnesses present at that time. However, he could not recover the dead body as it was a steep mountain and about 2/3 hundred feet below, there was a river. Moreover, the incident took place about a year back. He accordingly, prepared a search list and after returning from Shillong, produced the accused before the Magistrate. The IO has further stated that the co-accused Sakil Ahmed could be tracked by the Police on the basis of the statement made by Jalaluddin. Sakil was arrested from Skyline Apartment, Bijoyalakshmi Nagar at Bangalore, where he was working as a security guard.

25. During his cross examination, PW-10 has replied that the place of occurrence is mentioned as the residence of the complainant Ainul Haque from where the vehicle had left. Ext. A was the sketch map prepared by the previous IO on 01/05/2017.

26. PW-12 Sri Romen Borah was the S.I. of Police, who had gone to Badarpur and seized the vehicle belonging to PW-6 and returned back to Tezpur along with the seized vehicle. PW-12 has deposed that on 23/08/2018, he had proceeded to Badarpur in connection with Tezpur PS case No. 790/2017 as per instruction of the Officer-in-Charge of Tezpur Police Station. He had seized the vehicle (Swift Dezire) kept in the premise of Badarpur Police Station bearing Registration No. AS-07-D-9009 along with the key and the documents which were found from the possession of accused Jalaluddin. The documents were Registration Certificate, Voter's ID of Jalaluddin, one Inner Line permit, one Micromax mobile hand set with SIM. Ext. 9 was the seizure list which contains his signature. Material

Exhibits 3, 4 and 5 are the voter's ID card, Inner Line permit and micromax mobile hand set along with the SIM.

27. During cross examination, PW-12 has stated that there were two APBn personnel, two UB Constables and one Home Guard, who had accompanied him to Badarpur based on separate command but he did not know their names nor was the separate command available in the case diary. On 29/03/2018, at around 7 a.m. he had entered the Badarpur Police Station but he has not collected documents from the Badarpur Police Station regarding the steps taken by the police for recovering the vehicle. PW-12 has also stated that the car was in the campus of Badarpur Police Station and he had not made any entry in the case diary as to when and from which place the vehicle was recovered.

28. According to the prosecution, while in police custody, accused Jalaluddin had disclosed about the involvement of accused Sakil and based on such disclosure, the police had arrested him after about 15 days from Bangalore, where the co-accused Sakil Ahmed was working as a security guard. In the meantime, TIP was conducted on accused Jalaluddin in the Central Jail premises of Tezpur wherein, the PW-5 had identified him. PWs- 5 and 7 had also recognized co-accused Sakil Ahmed as the other persons who had accompanied accused Jalaluddin to the Jonaki Taxi Stand on 29/04/2017 for hiring the vehicle driven by Santosh Rai. The dead body of Santosh Rai could not be recovered. It is in the above factual backdrop that this Court is called upon to answer the question as to whether, the prosecution has succeeded in this case in establishing the charges brought against the appellants beyond reasonable doubt. Since elaborate arguments have been addressed by the appellants' counsel on the effect of absence of corpus delicti, we deem it appropriate to deal with the said aspect of the matter first in point of time.

29. By a number of judicial pronouncements of the Apex Court, law has been well settled that recovery of corpus delicti is not a *sin-e-qua-non* for establishing a murder charge. What is, however, essential for the prosecution to prove is the *factum* of homicidal death of the victim. In the case of *Ram Gulam Chaudhury and others Vs. State of Bihar* reported in (2001) 8 SCC 311, the Supreme Court, while expounding the law on the subject, has held that it is not at all necessary for a conviction for murder that the corpus delicti be found. But undoubtedly, in the absence of corpus delicti, there must be direct or circumstantial evidence leading to the inescapable conclusion that the person had died and the accused are the persons who had committed the murder.

30. In *Rama Nand and others vs. State of Himachal Pradesh* reported in AIR 1981 SC 738, the Supreme Court has held that in a case when corpus delicti is not available and discovery of dead body is impossible, the circumstances required to be proved must be of a clinching and definitive character, unerringly leading to the inference that the victim concerned has met with a homicidal death.

31. The aforesaid principle has been reiterated in a subsequent decision rendered in the case of Sanjay Razak Vs. State of Bihar reported in (2019) 12 SCC 552, wherein it has been observed that it is not an invariable rule of criminal jurisprudence that the failure of the Police to recover the corpus delicti will render the prosecution case doubtful entitling the accused to acquittal on benefit of doubt. It is only one of the relevant factors to be considered among all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behavior. It was held in the facts of that case that the failure of the Police to recover the dead body was not much of consequences in the absence of any explanation by the appellant both with regard to the victim being last seen with him coupled with the recovery from his house of the belongings of the deceased.

32. In the case of Rishi Pal (Supra) relied upon by Mr. Choudhury, the Supreme Court has made the following observation in para 14 on the absence of corpus delicti, which is reproduced below for ready reference :-

"14. In the absence of corpus delicti what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of corpus delicti will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder. That is precisely the position in the case at hand. There is no evidence either direct or circumstantial about Abdul Mabood having met a homicidal death. The charge of murder levelled against the appellant, therefore, rests on a rather tenuous ground of the two having been last seen together to which aspect we shall presently advert when we examine whether the two being last seen together is proved as a circumstance and can support a charge of murder."

33. What crystallizes from the aforementioned decisions is that recovery of corpus delicti is not essential in every case so as to establish a charge brought under Section 302 of the IPC. However, the factum of homicidal death of the deceased must be established by the prosecution in a convincing manner, either by direct evidence or by circumstantial evidence. There must be clinching evidence brought on record by the prosecution to prove that the victim is no longer alive. The mere fact that the victim had gone missing and is traceless would not be sufficient to meet this requirement in the absence of recovery of corpus delicti.

34. In the present case, as noticed above, we find that the following circumstances have been clearly established by the prosecution by adducing evidence brought on record :-

I. PW-6 Ainul Haque is the registered owner of the vehicle (Swift Dezire) bearing Regn. No. AS-07D-9009.

II. On 29/04/2017 at around 5 p.m. in the evening, two persons had come to the

Jonaki Taxi Stand, Tezpur and hired the vehicle for dropping them at Shillong.

III. Santosh Rai was the driver of the stolen vehicle.

IV. Santosh Rai had called up his home at around 8 pm in the evening from a place called Jorabat which falls on the way to Shillong.

V. The driver Santosh Rai was accessible in his mobile phone till about 10 p.m. on that night and thereafter, he went traceless from a place near Shillong.

VI. The CDR traces his mobile phone only upto a place near Shillong.

VII. The vehicle of PW-6 was found in the possession of Jalaluddin after about 9 months and the same was seized by the Tezpur Police from Badarpur and brought back to Tezpur along with Jalaluddin.

35. In so far as the last seen together circumstance of the accused persons and the victim is concerned, the two prosecution witnesses, viz. PWs- 5 and 7 have categorically identified both the accused persons as the ones who had come to the Jonaki Taxi Stand on 29/04/2017 and negotiated with Santosh Rai for hiring the vehicle. Thereafter, they hired the vehicle and left for Shillong. PW-5 had also subsequently identified Jalaluddin in the TIP conducted in presence of a Magistrate. As noticed above, the stolen vehicle was also recovered from the custody of accused Jalaluddin near Badarpur. There is no proper explanation from the accused persons on the last seen together circumstances or as to how, Jalaluddin had got the custody of the vehicle which was driven by the victim Santosh Rai. Although Jalaluddin has claimed to have purchased the vehicle yet, the materials on record does not support such a claim. There is no doubt or dispute about the fact that the missing vehicle (Swift Dezire) belongs to the PW-6 and he had not transferred the vehicle to any other persons including the accused persons. Moreover, even the papers seized along with the vehicle showed that the registered owner of the vehicle was PW-6.

36. The extra-judicial confession of the accused Jalaluddin has been brought on record by the PW-1. According to PW-1, the confession was made by Jalaluddin in presence of a local Magistrate. His evidence finds due corroboration from the testimonies of PW-3 and PW-

10. There is also no cross-examination of these witnesses on the above point. As such, although the Magistrate has not been examined as a witness, yet, the fact that the accused Jalaluddin had made the confession before PWs- 1 and 2 in presence of a Magistrate stands firmly established. Therefore, the extra-judicial confession of the accused Jalaluddin of having killed Santosh and his body having been thrown from the mountain near Shillong, in our opinion, would be admissible in evidence and would not be hit by Section 25 of the Evidence Act since it was made in immediate presence of a Magistrate.

37. It is no doubt correct that the corpus delecti has not been recovered in this case. In the circumstances of the case, it was impossible for the IO to recover

the dead body of Santosh. But the recovery of the stolen vehicle from the custody of the accused Jalaluddin, in our considered opinion, is the clinching evidence to show that the victim was no longer alive. Victim Santosh was evidently the driver of the vehicle and there is sufficient evidence to show that he had left for Shillong on the date of the occurrence with two passengers, who have later been identified as the appellants/ accused persons. Since the date of occurrence, Santosh has gone traceless. The CDR also shows that his mobile was finally switched off near Shillong on the date of occurrence. Had Santosh been alive, it would not have been possible for the accused to steal the vehicle and keep its custody for such a long period of time. Atleast, the mobile phone of Santosh would have been traceable.

38. From the evidence available on record, it is therefore, clear that the two accused persons, in a pre-planned manner, had hired the vehicle driven by Santosh Rai on the pretext of travelling to Shillong and on the way, they had eliminated the driver Santosh thrown away his dead body and had stolen the vehicle. What happened thereafter, are matters within the special knowledge of the accused persons and the prosecutions cannot be expected to prove such facts by adducing evidence. The burden of proving facts within their special knowledge was squarely on the accused persons but they have failed to discharge such burden cast under Section 106 of the Evidence Act. The failure on the part of accused Jalaluddin to offer plausible explanation as to how he got the possession of the vehicle can certainly be seen as an additional link in the chain of circumstances which stood proved against the accused persons.

39. In the case of Madho Singh (Supra) relied upon by Mr. Choudhury it has been held that in the absence of proof of homicidal death, the accused persons could not be convicted merely on the last seen together theory. However, we are of the view that the conviction of the accused persons in this case is not only based on the last seen together theory but there are corroborating evidence available on record to prove the charge brought against them. As such, the ratio laid down in Madho Singh (Supra), in our view, would not be applicable in the facts of this case.

40. Accused Sakil was an accomplice to the crime which fact has also been established from the evidence on record. The fact that it was none other than Sakil, who had accompanied accused Jalaluddin to the Taxi stand on the date of occurrence and then left in the vehicle driven by Santosh has also been cogently established by the prosecution. Sakil did not report the incident to the Police but ran away to Bangalore after the occurrence. The above fact clearly shows the meeting of mind of the two accused persons in committing a heinous offence punishable under the law. Therefore, the learned trial court, in our opinion, has rightly convicted both the accused persons with the aid of section 34 of IPC.

41. By referring to the evidence of the IO (PW-11) the learned counsel for the appellants had made an attempt to impress upon this court that there were material contradictions in the testimonies of PWs 3, 4, 5 and 6 thereby rendering

their evidence as untrustworthy. However, from a careful analysis of the materials available on record we find that the IO had recorded the statements of these witnesses soon after the occurrence. At that point of time, neither the stolen vehicle had been recovered nor were the accused persons taken into custody by the Police. We find that the contradictions and omissions in the evidence of PWs- 3, 4, 5 and 6 projected from the testimony of the IO basically relate to those circumstances unfolding after the recovery of the stolen vehicle and arrest of the accused Jalaluddin, which events took place about a year after the occurrence and certainly, on a date after the statements of those witnesses were initially recorded by the IO under section 161 CrPC. Naturally therefore, these witnesses had not stated about such facts to the Police while recording their statements under section 161 CrPC. In view of the above, it cannot be said that there are material improvements/ contradictions in the testimony of Pws 3, 4, 5 and 6 on such counts.

42. We are in agreement with the learned senior counsel for the appellants that there are some lapses in the investigation conducted by the IO. In our opinion, the Police ought to have carried out the investigation with greater degree of promptitude and foresight. A careful reading of the testimonies of the two IOs, viz. PWs-10 and 11, go to show that after registering the police case and recording the statement of some of the witnesses, there was practically no progress in the investigation until such time, information was received from some source as regards the missing vehicle being spotted near Badarpur. This period was crucial for the IO to look out for vital evidence so as to more convincingly establish the factum of death of the victim but for reasons not discernable, no attempt appears to have been made by the IO to collect such evidence. We also fail to understand as to why the Police did not do enough to trace out the missing vehicle which was apparently plying inside the State of Assam. From the materials available on record we also do not find the involvement of any superior Police Officer who could be seen to have supervised and monitored the progress of the investigation. It was after the lapse of about one year from the date of occurrence that the PW-12 had seized the vehicle from the premises of Badarpur Police Station on 29/03/2018 and also arrested the accused Jalaluddin. Notwithstanding the above, we find that evidence available on record is sufficient to sustain the conviction of the accused persons and therefore, benefit of lapses, if any, in carrying out investigation in this case cannot go in favour of the accused persons. It is to be borne in mind that the prosecution is required to prove the charge beyond reasonable doubt and not beyond "all iota of doubt" [see *Karan Singh vs State of Uttar Pradesh and Others*, 2022 0 Supreme (SC) 173]. In our opinion, the prosecution has succeeded in proving the charge brought against the appellants beyond reasonable doubt.

For the reasons indicated herein above, we are of the view that the learned trial court has rightly convicted both the appellants/ accused persons and sentenced them as aforesaid. Therefore, there is no good ground for this court to interfere with the impugned judgement dated 30-12-2019.

The conviction and sentence awarded to the appellants is hereby affirmed.
Consequently, Criminal Appeal No. 170/ 2020 stands dismissed.
Criminal Appeal No. 66 of 2021 stands disposed of accordingly.
Send back the records.