
(2023) 08 GAU CK 0027

Gauhati High Court

Case No: Criminal Appeal (J) No. 82 Of 2019

Janglu Majowar

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision: Aug. 11, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 302, 448
- Code Of Criminal Procedure, 1973 - Section 161, 164, 313
- Evidence Act, 1872 - Section 25, 26, 27

Citation: (2023) 08 GAU CK 0027

Hon'ble Judges: Lanusungkum Jamir, J; Mridul Kumar Kalita, J

Bench: Division Bench

Advocate: D Saikia, B Bhuyan

Final Decision: Allowed

Judgement

1. Heard Ms. Debashree Saikia, learned Amicus Curiae for the appellant. Also heard Ms. Barnali Bhuyan, learned Additional Public Prosecutor,

Assam for the Respondent No.1. None has appeared for the Respondent No.2.

2. This Jail Appeal has been preferred by the appellant Shri Janglu Majowar, through Superintendent, District Jail Sivasagar, against the judgment

dated 19.12.2018, passed by the learned Sessions Judge, Sivasagar in Sessions Case No. 208 (S-N) of 2016 (arising out of GR Case No. 560/2015),

whereby the present appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment of life

and to pay a fine of Rs. 5,000/-, in default of payment of fine to undergo simple imprisonment of another period of two months.

3. The facts relevant for adjudication of this Criminal Appeal (Jail), in brief, are as follows:

(i) That, on 21.05.2015 one Shri Bijoy Chik lodged an FIR before Officer-in-charge of Gelaakey Police Station, inter-alia, alleging that on that day at

around 7.30 pm appellant Janglu Majowar, entered into the house of the elder brother of the first informant, namely Monku @ Mantu Garh and his

wife Chalu Garh and killed both of them by hacking them with a
dao and when the appellant was leaving the house after committing the

offence, the first informant asked him to stop but the appellant fled away and later on he appeared in the police station.

(ii) On receipt of the said FIR, the Officer-in-charge of Gelaakey Police Station registered Gelaakey P.S. Case no. 132/2015 under Section 448/302 of

the Indian Penal Code and he himself took up the investigation of the said case. Ultimately, on completion of the investigation, charge-sheet was laid

under section 448/302 of the Indian Penal Code against the present appellant, in the Court of learned Sub-Divisional Judicial Magistrate (M), Nazira,

Sivasagar, who, in due course committed the said case to the court of learned Sessions Judge, Sivasagar.

(iii) The present appellant faced the trial remaining in judicial custody. On 03.02.2018, after considering the materials on record and after hearing both

sides, learned Sessions Judge, Sivasagar framed charge under Section 302 of the Indian Penal Code against the present appellant. When the said

charge was read over and explained to the present appellant, he pleaded not guilty to the said charge and claimed to be tried.

(iv) During the course of trial the prosecution side examined 13 (thirteen) prosecution witnesses. The accused was examined under Section 313 of the

Code of Criminal Procedure, 1973, during which he denied the truthfulness of the testimony of prosecution witnesses and pleaded his innocence.

However, by the judgment, which is impugned in the instant appeal, the present appellant was convicted, by the learned Sessions Judge, Sivasagar,

under Section 302 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- and in

default of payment of fine to undergo simple imprisonment of another period of two months for committing offence punishable under Section 302 of

the Indian Penal Code.

4. Before considering the rival contentions of learned counsel for both the sides, let us go through the relevant evidence which is available on record.

5. PW-1, Dr. Pradip Kumar Saikia, who is the doctor, who conducted the post-mortem examinations of the dead bodies of both the deceased, has

deposed that on 22.10.2015 while he was working as Senior Medical & Health Officer at Sivasagar Civil Hospital, he examined the dead body of

Monku Garh, son of late Chakal Garh, in connection with Gelakey P.S. Case No. 132/2015 under sections 448/302 of the Indian Penal Code, on police

requisition. His findings, which are relevant for the instant case, are reproduced herein below:

1. External appearance:

Medium built. Rigor mortise present.

2. Injuries:

(i) Sharp deep cut injury over the left shoulder joint. Size 10 cm.

(ii) Sharp deep cut injury over the anterior surface of left forearm. Size 7 cm.

(iii) Sharp deep cut injury over left middle of the back. Size 2.5 cm.

(iv) Sharp deep cut injury over the left face extending upto the left side of neck. Size 10 cm.

(v) Sharp deep cut injury over the left face. Size 2.5 cm.

(vi) Right cheek sharp cut injury. Size 2.5 cm. Clotted bleeding present over the face and neck.

3. More detailed description:

The cut injuries over the left forearm (anterior surface), Size 7.5 cm is of serious enough severing the left radial artery which caused profuse bleeding.

Another sharp cut deep injury over the left face extending upto the left side of the neck is also of serious enough severing the major vessels of neck

and caused profuse bleeding.

4. Opinion: In my opinion the person died due to cerebral anoxia following hypovolumic shock (haemorrhage) as a result of vessels injuries and it is

ante mortem in nature.

PW-1 exhibited the post-mortem examination report as Exhibit-1 and his signature as Exhibit-1 (1). He has also exhibited the counter signature of Dr.

Ripun Borpujari, the then Joint Director, Health Services, Sivasagar as Exhibit-1 (2).

6. PW-1 has further deposed that on that day i.e., on 22.10.2015, he also conducted post-mortem examination of the dead body of Bogi Nayak @

Chalu, wife of late Montu Garh, on police requisition, in connection with Gelakey P.S. Case No. 132/2015 under Sections 448/302 of the Indian Penal

Code. His findings, which are relevant for the instant case, are reproduced herein below: -

1. External appearance:

Medium built. Rigor mortise present.

2. Injuries:

(i) Sharp cut injury over the left lateral chest wall. Size 15 cm.

(ii) Sharp cut injury over the dorsal aspect of left hand up to bone. Size 10 cm.

(iii) Sharp cut injury over left shoulder (Size 5 cm) and over Right shoulder approximate (Size 7.5 cm).

(iv) Right mid-part of back upto bone. Sharp. Size 10 cm. Clotted blood present.

6. Muscles, bones and joints :

Injury - muscles are cut in all injuries along with tendons of left hand.

Disease or deformity - Nil

Fracture - Nil.

7. More detailed description:

As all cut injuries are sharp and deep. There were profuse bleeding from the all the sites and enough to cause hypovolumic hemorrhagic shock.

8. Opinion: In my opinion the woman died due to cerebral anoxia following hypovolumic hemorrhagic shock as a result of multiple cut injuries and it is

ante mortem in nature.

PW-1 exhibited the post-mortem examination report as Exhibit-2 and his signatures thereon as Exhibit-2 (1). He also exhibited the counter signature of

Dr. Ripun Borpujari, the then Joint Director, Health Services, Sivasagar as Exhibit-2 (2).

He has further stated that the injuries found on the dead bodies must be caused by sharp cutting object like dao, knife etc. and the injuries found on

both the dead bodies are sufficient to cause instant death of normal person.

During cross-examination, PW-1 has stated that he has not mentioned the age of the injuries and approximate time of death. He has also stated that

the injuries found might be caused by one or multiple sharp cutting objects.

7. PW-2, Shri Bijoy Chik, who has lodged the first information report (FIR), has deposed that the deceased Monku @ Mantu Garh was his cousin and

he resides in the same campus where deceased lived, but in different rooms. He has stated that on 21.10.2015, at about 8.00 pm on the eve of Durga

Puja, when he came out of his room, he saw accused Janglu leaving their campus. PW-2 recognized him in the light of nearby Krishana Temple

situated opposite to his house. PW-2 found the door of Montu Garh open and when he looked through the open door, he noticed that Monku @ Mantu

Garh and Chalu Garh were lying in a pool of blood. PW-2 made hue and cry and his mother and other family members came there. Other neighboring

people also came there. VDP Secretary was informed and someone from village also informed police. Thereafter, ambulance was called and Monku

@ Mantu Garh and Chalu Garh were taken to Gelakey Hospital. Later on PW-2 came to know that both the injured died and their dead bodies were

brought to the police station. He has also stated that he heard that the appellant Janglu Majowar had surrendered at the police station. PW-2 has

further deposed that police seized one dao during investigation and he exhibited the seizure list as Exhibit-4 and his signature thereon as Exhibit-4 (1).

During cross-examination PW-2 has stated that he cannot say for what reasons the incident of killing happened. He has also stated that he saw the

accused while he was going out through the road connecting his house. He has further stated that he cannot say who wrote the FIR but it was written

at the police station and he is not aware about the contents of the FIR. He has also stated that police recovered the (sic-dao) from jungle on the river

side.

8. PW-3, Sri Akash Chik, who is the brother-in-law of the deceased Monku @ Mantu Garh has stated that, on 21.10.2015, at about 8.00 pm, when he

was sleeping in his house, he heard hue and cry from the residence of Mantu Garh and when he went there, he found huge gathering there and saw

that Mantu Garh and his wife were lying inside their house.

9. PW-4, Shri Ratan Chik, has deposed that he resides at a distance about of 60 to 70 feet from the house of deceased Mantu Garh. On 21.10.2015, at

about 7.00 p.m. when he was at his residence, his brother-in-law Mohan Garh informed him that accused Janglu Majowar has killed Monku @ Mantu

Garh and his wife Chalu Garh by cutting them. On knowing about this, PW- 4 came to the residence of the deceased persons and saw a huge

gathering of people there. Someone from the gathering told him that accused has killed Monku @ Mantu Garh and his wife Chalu Garh. He has

further stated that VDP Secretary informed the Police and after sometime Police had arrived there. Police conducted inquest over the dead body and

the PW-4 also put his signatures on the inquest report as a witness. PW-4 has also stated that the accused Janglu had surrendered at the Police

Station. He has further stated that during investigation Police also seized one Dao as shown and led by accused Janglu Majowar from garbage at

“Bargach Tiniali, PW-4 exhibited the seizure list as Exhibit-5. He has stated that Janglu Majowar has shown the place where the Dao was kept

hidden by him. He has also stated that the accused brought Police to that place. He has also stated he and Bijoy Chik (PW-2) accompanied the Police

to the place of recovery of Dao.

During cross-examination, he has stated that he put his signature in the seizure list at the Police Station and he cannot say about the contents of the

seizure list.

10. PW-5, Smt. Galu Chik, who is the sister of the deceased Monku @ Mantu Garh, has deposed that on 21.10.2015 at about 7.30 pm, VDP

Secretary Tileswar Nayak sent Pradip Garh to her house who informed her that accused Janglu Majowar has killed Monku @ Mantu Garh and his

wife Chalu Garh by cutting them. On knowing about this, she came to the residence of the deceased persons and saw their dead bodies were lying

inside their house.

During cross-examination, she has stated that she has not seen the incident of assault on her brother and her sister-in-law.

11. PW-6, Sri Babulal Chik, has deposed that the deceased Monku @ Mantu Garh was his niece(sic). On 21.10.2015, at about 7.00 pm when he was

sleeping in his house, he heard hue and cry at the residence of Mantu Garh and when he went there he found huge gathering. He has stated that the

VDP Secretary Tileswar Nayak had informed him that there was a quarrel and he heard that Mantu Garh and his wife Chalu Garh were lying dead

inside their house. At this stage, he was declared hostile by the prosecution side and permission was granted to the prosecution side to cross-examine

him.

During cross-examination by the prosecution side, PW-6 has denied that on 21.10.2015 while giving his statement to Investigating Officer to the case

he had stated that “today at about 7.30 pm, on hearing hue and cry, I went there and saw that Sri Janglu Majowar of our same line, flee away from

the house of Monku. On entering the house of Monku, I saw that Monku @ Mantu Garh and his wife Chalu Garh were lying dead inside their house. I

learnt that accused Janglu after cutting them, flee away from that place. He has also denied that the Exhibit-6 is his statement given to Police and

Exhibit-6 (1) is the relevant part of his statement.

During cross-examination by defense side, he has stated that he had not stated before Police that he saw the accused fleeing away from the house of

the Mantu Garh.

12. PW-7, Rajan Chik, has deposed that on returning from the house of his father-in-law, he came to know from his wife that Monku @ Mantu Garh

and his wife Chalu Garh were killed by accused Janglu Majowar.

13. PW-8, Shri Tilak Handique, ASI (Assistant Sub-Inspector) of Police, has stated that on 21.10.2015, he was posted at Gelakey Police Station as an

ASI of Police and on that day when he was in-charge of the Police Station and Home Guard, namely, Firoz Hussain was performing sentry duty, at

about 8.30 pm accused Janglu Majowar came to Firoz Hussain and informed him that he has committed murder. On this Firoz informed PW-8 about

the said matter and PW-8 called Janglu Majowar inside the Police Station office room. PW-8 has further deposed that on his asking Janglu Majowar

confessed before him that he came to surrender by committing murder of two persons at Modi Nagar Tea Estate. On knowing about this, PW-8 made

a GD Entry and informed the matter over phone to the Officer-in-Charge of the police station Sri Ashim Bora and the accused was kept under

custody of sentry Firoz Hussain. PW- 8 has further stated that on his further asking about the weapon, the accused had stated that the weapon that he

used one dao for cutting two persons and has kept the dao inside the road side jungle near Tiniali on the Bagan Road. After sometime, the Officer-in-

Charge returned to the police station with dead bodies of two persons and he interrogated the accused Janglu Majowar during which the accused had

stated that he can show where he had kept the dao hidden. PW-8 has further deposed that he along with Officer-in-Charge and other police personnel

and local people went to the place as led by the accused and as shown by him, where the Officer-in-Charge has recovered one dao from road side

jungle at Bagan Tiniali. PW-8 has exhibited the said dao as Material Exhibit-1 and the abstract copy of GD Entry No. 568 dated 21.10.2015 as

Exhibit-7.

During cross-examination, PW-8 has stated that the accused Janglu Majowar came to the police station empty handed. He has answered in negative

to certain suggestive questions put to him by learned counsel for the accused.

14. PW-9, HG Firoz Hussain, has stated that on 21.10.2015 when he was performing sentry duty at Gelakey Police Station from 8.00 pm to 12.00 mid

night, at about 9.00 pm accused Janglu Majowar came there and informed him that he came there after committing murder. On this, he informed the

matter to officer-in-charge, over phone, who was outside the police station. At that time ASI Tilak Handique was the In-charge of the Police Station,

PW-9 had also informed him about the matter. PW-9 has stated that the accused was taken inside the Police Station room and after about 20 minutes

the Officer-in-Charge arrived there and interrogated the accused.

15. PW-10, Mukesh Bhumiz, has deposed that on the date of incident, at about 11.00 pm, when he returned home he heard hue and cry in their line

and when he went there he heard that Monku @ Mantu Garh and his wife Chalu Garh were murdered. On the next day, at about 8.00 am, he went to

Gelakey Police Station and Police conducted inquest over the dead body of Mantu Garh and he put his signatures on the inquest report, which he has

exhibited as Exhibit-8(1).

16. PW-11, Mr. Sameer Chik, has deposed that on the date of incident at about 7:30 pm, when he was at his home he heard hue and cry in his line.

Thereafter, when he went to the house of Monku he saw that Monku @ Mantu Garh and his wife Chalu Garh were murdered. He has deposed that

on next day he went to Police Station, where Police conducted inquest over the dead body of Monku Garh and he put his signatures on the inquest

report which is exhibited as Exhibit-8(ii).

17. PW-12, Shri Sunil Garh, has deposed that on the next day of incident he went to Gelakey Police Station and saw dead bodies of Monku @ Mantu

Garh and his wife Chalu Garh there. He has further stated that the Police conducted inquest over the dead body of Chalu Garh in his presence. PW-

12 exhibited the inquest report as Exhibit-5 and his signatures thereon as Exhibit-5(ii).

18. PW-13 Shri Ashim Bora, Inspector of Police, who is also the Investigating Officer in this case has deposed that on 21.10.2015 when was posted

as Officer-in-Charge of Gelakey Police Station, at about 8:15 pm he received one information over telephone from unknown persons regarding murder

at Modi Nagar Tea Estate, Line No. 17. On getting the said information he made a GD Entry No. 567 dated 21.10.2015 in the General Diary of

Gelakey Police Station and took up the investigation himself. Said GD Entry has been exhibited as Exhibit-9 by PW-13. He has further deposed that

thereafter, at about 8:30 pm, he arrived at the residence of Mantu Garh and his wife Chalu Garh at Line No. 17 of Modi Nagar Tea Estate and saw

Mantu Garh and his wife Chalu Garh were alive in injured condition. He sent both of them to Gelakey PHC for treatment. He inspected the place of

occurrence and drew a rough sketch map of the place of occurrence which is exhibited as Exhibit-10 and recorded the statement of witnesses who

were available there. Later on, he got the information that both the injured have expired in the hospital. PW-13 has further deposed that he instructed

his accompanying staff to bring the dead bodies to the Police Station. He has further stated that in his absence ASI Tilak Gogoi (sic) was kept as In-

charge of the Police Station and he came to know that accused Janglu Majowar had surrendered at Police Station. Later on, he returned to Gelakey

Police Station. PW-13 has further deposed that on the same night, at about 10:00 pm, he received one written FIR from Bijoy Chik and on receipt of

the said FIR, Gelakey PS Case No. 132/2015 was registered under section 448/302 of the Indian Penal Code and PW-13 himself took up the further

investigation of the case.

19. PW-13 has further deposed that on finding the accused at Police Station he interrogated him and recorded his statement under Section 161 of

Cr.P.C. In his statement made before the PW-13 the accused confessed his guilt of committing murder of Mantu Garh and his wife Chalu Garh and

has also stated that "I entered the house of Montu and finding both of them, I cut randomly both of them with a Dao and on start of hue and cry I

came out of the house and flew away with the Dao. While coming, I throw the Dao near Bagan Tiniali. It is a fact by cutting I have killed both of

them. I can show the dao." PW-13 exhibited the said statement of Janglu Majowar as Exhibit-11. PW-13 has further deposed that after recording

the above statement he along with Police staff, the accused Janglu Majowar and other local people went to Bagan Tiniali for recovery of Dao. On

going there as shown by the accused, PW-13 had recovered from one Dao from the road side jungle near Bagan Tiniali. PW-13 has further deposed

that he seized the Dao at the place of recovery in presence of witnesses. He has exhibited the seizure list as Exhibit-4 and his signatures as Exhibit-

4(3). He has also exhibited the seized Dao as Material Exhibit-1. Thereafter, the accused was arrested. PW-13 has further stated that on next day

morning, he conducted the inquest of the dead bodies of Mantu Garh and his wife Chalu Garh. He exhibited the inquest report of the dead body of

Mantu Garh as Exhibit-8. He has stated that in the inquest report, there was mention of injuries marks found on face, head, hand and leg. He has also

exhibited as Exhibit-5 the inquest report conducted over the dead body of Chalu Garh. He has stated that in the inquest report there was mention of

injuries marks on face to neck, abdomen area and right hand. PW-13 has further stated that he sent both the dead bodies for post-mortem examination

and later on collected the post-mortem report. Thereafter, on completion of the investigation PW-13 laid the charge-sheet against the accused Janglu

Majowar under Sections 448/302 of the Indian Penal Code which is exhibited as Exhibit-12.

PW-13 has also stated that during investigation, he recorded the statement of Shri Babulal Chik on 21.10.2015, during which the said witness stated

that “today at about 7.30 pm, on hearing hue and cry, I went there and saw that Sri Janglu Majowar of our same line, flee away from the house of

Monku. On entering the house of Monku, I saw that Monku @ Mantu Garh and his wife Chalu Garh were lying dead inside their house. I learnt that

accused Janglu after cutting them, flee away from that place.” PW-13 exhibited the said statement as Exhibit-6 and the relevant part of his statement

as Exhibit-6(i). PW-13 also exhibited his signatures as Exhibit-6(ii).

During cross-examination, PW-13 has deposed that when he reached the place of occurrence, the injured were not in a position to speak they were

like in a comma stage. He has further deposed that he has not sent the accused for recording his confessional statement under section 164 Cr.P.C.

He has also stated that the person who gave the initial information to him did not disclose his name. He has also stated that he has not prepared the

sketch map of the place from where the “dao” was recovered. He has also stated that he did not send the seized dao for serological test to the

forensic science laboratory, Guwahati.

20. Ms. Debashree Saikia, learned Amicus Curiae, has submitted that in the instant case there is no eye witness to the incident of alleged assault on

Mantu Garh and his wife Chalu Garh and the entire prosecution case is based on circumstantial evidence only. She has submitted that the

circumstances on which learned Sessions Judge has relied upon to come to the finding of guilt of the appellant were mainly (a) that PW-2 (Bijoy Chik)

had seen the accused leaving their campus and he has seen the accused while he was going out through the road connecting their house, (b) that the

accused surrendered before Gelakey Police Station on his own, (c) that the dao, which was allegedly used for committing the offence, was recovered

on the basis of disclosure statement of the accused and on being led and shown by the accused himself.

Learned Amicus Curiae has submitted that based on above three circumstances, learned Sessions Judge has convicted the present appellant under

Section 302 of the Indian Penal Code without considering the fact that when the case of prosecution is based only on circumstantial evidence the

chain of circumstances from which the conclusion of guilt is to be drawn should be fully established, however, in the case in hand, the chain of

circumstances which is required to prove the guilt of the present appellant has not been fully established beyond reasonable doubt by the prosecution

side.

Ms. Debashree Saikia, learned Amicus Curiae, has submitted that the first missing link in the said chain of circumstances is the weapon of offence

itself as the dao, which was shown to have been recovered on being led by the present appellant, was not sent for serological test to any forensic

laboratory to ascertain as to whether it was actually the weapon of offence which was used for commission of offence involved in this case. She has

also submitted that no attempt was made by the Investigating Officer to collect the finger prints of the present appellant and to cross-match it with any

such finger print available on dao, nor any attempt was made to collect and cross-match any blood stains available on dao with the blood of the

deceased to come to a conclusive finding that the seized dao was actually used for commission of the alleged offence.

21. Ms. Debashree Saikia, learned Amicus Curiae, has also submitted that there are contradictions in the testimony of seizure witnesses as regards

the place from where the dao was recovered which creates doubt regarding the seizure of the weapon of offence. She has submitted that one of the

seizure witnesses, namely, PW-2 has stated during cross-examination that the Police have recovered the same from the jungle on the river side,

whereas, the other seizure witness, namely, PW-4 has stated in his testimony that the dao was recovered from the garbage at "Bargach Tiniali".

Learned Amicus Curiae has further pointed out that PW-4 has stated during his cross-examination that he signed on the seizure list at the Police

Station and he cannot say about the contents of the seizure list and, therefore, the testimony of both the seizure witnesses becomes unreliable. In

support of her contention, learned Amicus Curiae has cited a ruling of this Court in *Geju Praja -Vs- State of Assam and Others*, reported in

MANU/GH/1448/2018, wherein this Court has observed that mere seizure of a weapon (dao) would not automatically go to show that the seized weapon was used in committing offence.

22. Ms. Debashree Saikia, learned Amicus Curiae, has also submitted that the Police have not recorded the exact words used by the appellant in the

panchnama (seizure list). She points out to the seizure list which is exhibited as Exhibit-4 and shows that the seizing officer has simply mentioned in the

seizure list that "I, SI, A Bora do hereby seize the below noted articles on being led by accused Janglu Majowar from the heading place. The

seizure is made in present of following witnesses... without mentioning therein the exact words used by the appellants which he had stated on the

basis of which the discovery of fact under Section 27 of the Indian Evidence Act was made. In support of her contention, learned Amicus Curiae has

cited ruling of Hon'ble Supreme Court of India in *Ramanand -vs- State of U.P.*, reported in *AIR 2022 SC 5273*, wherein it was

observed as follows:-

"53. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he

would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating

officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police

station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place

where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent

witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the

panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the

Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement

was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other

article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along

with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from

that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process

would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as

contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is

deficient in all the aforesaid relevant aspects of the matter.

Learned Amicus Curiae has submitted that in the instant case the procedure prescribed by Hon'ble Supreme Court of India in aforementioned

ruling for preparation of seizure list (Panchnama) in case where seizure is made on the basis of disclosure made under Section 27 of the Indian

Evidence Act has not been followed by the Investigating Officer, hence, the evidence of discovery should not be accepted. Learned Amicus Curiae

has also submitted that the appellant during his examination under Section 313 of the Code of Criminal Procedure, 1973, in answer to question no. 17

put to him, has stated that police took him with them and he has not shown the place and 'dao' to them and that Bijoy along with police recovered

the dao from that place.

23. Learned Amicus Curiae, has also submitted that the prosecution side failed to bring anything on record regarding motive of the appellant for

committing the alleged offence. She has submitted that as this case is based only on circumstantial evidence, it was incumbent on the prosecution side

to bring on record the evidence regarding motive in commission of the alleged offence. She has submitted that the evidence regarding motive for

commission of an offence, in a case which is wholly based on circumstantial evidence, provides a crucial link in the chain of circumstances leading to

the guilt of the accused. She has further submitted that in a case where the chain of circumstances is so complete, so as not to leave any reasonable

ground for any conclusion consistence with innocence of the accused, motive may not be so much important, however in cases like the instant one,

where the chain of circumstances is not complete and it does not lead only to conclusion of the guilt of the accused, evidence regarding motive

becomes important, which in the instant case the prosecution had failed to bring on record. To support her contention, learned Amicus Curiae has cited

a ruling of Hon'ble Supreme Court of India in "Nandu Singh vs. State of Madhya Pradesh" reported in 2022 Livelaw (SC) 229, wherein

another ruling of Hon'ble Supreme Court was cited namely, "Shivaji Chintappa vs. State of Maharashtra" reported in (2021) 5 SCC 626,

wherein it was observed as follows:

"Though in a case of direct evidence motive would not be relevant, in a case of circumstantial evidence motive plays an important link to complete

the chain of circumstances".

24. Learned Amicus Curiae also submitted that as regards surrender of the accused in the police station, even if it is accepted that the appellant

surrendered in the police station and confessed his guilt before police, no clarification has been given as to why the Investigating Officer took no steps

for recording his confessional statement under Section 164 of the Code of Criminal Procedure, 1973. She submitted that as any confession made to

police and in custody of police is hit by Section 25 and 26 of the Indian Evidence Act, 1872 hence, the Investigating Officer ought to have taken steps

for recording the confessional statement of appellant under Section 164 of the Code of Criminal Procedure, 1973, had the appellant had actually made

any such confession.

Learned Amicus Curiae has also pointed out to the cross-examination of PW-1 i.e., the doctor who conducted the post-mortem examination of the

dead bodies of the deceased persons, wherein he has stated that he has not mentioned the age of injuries and approximate time of death from the time

of post-mortem leaving a lacuna in the prosecution case as regards the time of commission of alleged offence.

25. Learned Amicus Curiae has further submitted that the investigation in this case is full of lapses and though it is true that every defect of

investigation may not be fatal to the prosecution case, however, when the prosecution case fails to stand on its own legs and there is insufficient

materials on record to come to the conclusion guilt of the accused, the defect in investigation will be fatal to the prosecution's case. She has

submitted that the prosecution side has failed to prove the circumstances, beyond reasonable doubt, which leads only to the conclusion of the guilt of

the accused. She has submitted that the prosecution side has failed to fulfil the conditions laid down by Hon'ble Supreme Court of India in

"Sharad Birdhichand Sarda v. State of Maharashtra", reported in (1984) 4 SCC 116, wherein it was observed as follows:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be

fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not

only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji

Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrLJ 1783] where the observations were made: [SCC

para 19, p. 807: SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can

convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on

any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

26. On the other hand, Ms. Barnali Bhuyan, learned Additional Public Prosecutor, submitted that the prosecution case is based primarily on (a) last

seen theory (b) surrender of the accused person at the police station, immediately after the occurrence of the offence, and (c) leading to discovery

under Section 27 of the Indian Evidence Act, 1872. Learned Additional Public Prosecutor has also submitted that though there may be procedural

irregularities and lapses on the part of the Investigating Officer, however, in the instant case, such lapses are not fatal to the prosecution case as the

evidences of the prosecution witnesses has proved the charge against the appellant beyond reasonable doubt. Learned Additional Public Prosecutor

has also submitted that though in the instant case, there is no evidence regarding motive of commission of offence, however, failure of prosecution side

to lead any evidence to show motive for commission of offence is, in itself, not fatal to the prosecution's case.

27. Learned Additional Public Prosecutor has submitted that the PW-2 saw the accused Janglu leaving their campus, where he resided along with

deceased Mantu Garh, but in different rooms, in the light of nearby Krishana Temple situated on the other side of his house. Learned Additional Public

Prosecutor also submitted that though PW-6 was declared as hostile, however, his entire evidence would not go and his testimony during cross-

examination by the prosecution, wherein he has corroborated the testimony of PW-2, may be used by the prosecution side. She has also stated that

PW-2 has stated before Investigating Officer of this case, during investigation, that on 21.10.2015, at 7.30 pm, he saw Janglu Majowar flee away from

the house of Manku. On entering the house of Manku, he saw Manku Garh and his wife were lying dead inside their house and he came to know that

accused Janglu after cutting them flee away from that place. Learned Additional Public Prosecutor submitted that this testimony of PW-6

corroborates the testimony of PW-2. Learned Additional Public Prosecutor also submitted that the testimony of Investigating Officer, i.e., PW-13 as

well as testimony of ASI Tilak Handique (PW-8) and that of Firoz Hussain, PW-9 shows that the appellant surrendered before Gelakey Police Station

immediately after the incident and thereafter recovery of dao which is the weapon of offence, on the basis of statement of the appellant, are

circumstances sufficient enough along with last seen theory to convict the accused. Learned Additional Public Prosecutor cited ruling of the

Hon'ble Supreme Court of India in "Podyami Sukada v. State of M.P.", reported in (2010) 12 SCC 142, wherein it was observed that there is

no legal bar to base conviction on the basis of the testimony of hostile witness but as a rule of prudence, the court requires corroboration by other

reliable evidence.

28. Ms. Barnali Bhuyan, learned Additional Public Prosecutor submitted that the appellant was seen leaving the campus of deceased persons

immediately after the incident is a strong circumstance pointing towards his guilt. She cited ruling of Hon'ble Supreme Court of India in

“Ajitsingh Harnamsingh Gujral v. State of Maharashtra”, reported in (2011) 14 SCC 401, wherein it was observed as follows:

“27. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive

and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes

impossible, vide Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082] , State v. Mahender Singh Dahiya [(2011) 3 SCC 109 :

(2011) 1 SCC (Cri) 821] and Sk. Yusuf v. State of W.B. [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620]

Learned Additional Public Prosecutor has submitted that in the instant case also the time gap between the alleged offence and when the appellant was

seen by PW-2 and PW-6, leaving the campus of deceased persons is so small that the possibility of any person other than the appellant being author of

the crime becomes impossible, hence, the only inference which may be drawn under the present circumstances is the guilt of the accused.

29. Learned Additional Public Prosecutor also cited ruling of the Hon'ble Supreme Court of India in Paramjit Singh v. State of Punjab, reported in

(2007) 13 SCC 530, wherein it was observed as follows:

“A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation.”

Learned Additional Public Prosecutor also cited ruling of the Hon'ble Supreme Court of India in “Karnataka vs. K. Yarappa Reddy”,

reported in (1999) 8 SCC 715, wherein it was observed as follows:

“19. It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in

the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even

suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the

investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating

officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court

is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the

case.

Learned Additional Public Prosecutor has also cited a ruling of the Hon'ble Supreme Court of India in "V. K. Mishra and Another vs.

Uttarakhand and Another", reported in (2015) 9 SCC 588, wherein it was observed as follows:

"38. The investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of

the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not

be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions.

30. Having heard rival contentions of learned Amicus Curiae as well as learned Additional Public Prosecutor and after perusing the materials on

record including the impugned judgment, we are of the considered opinion that there is no dispute at bar regarding the affirmative finding of the

learned Sessions Judge, Sivasagar that the death of Montu Garh and his wife Chalu Garh was homicide in nature. However, let us now examine as to

whether there is sufficient evidence on record for the conclusion, arrived at by the learned Sessions Judge, Sivasagar, that the present appellant

namely Janglu Majowar had committed murder of Monku @ Montu Garh and his wife Chalu Garh.

31. Admittedly, there is no eye witness to offence alleged against the present appellant. The entire prosecution case is based on circumstantial

evidence only. As it appears from the impugned judgment, as well as from the submissions made by learned Amicus Curiae and by learned Additional

Public Prosecutor, the prosecution case is, mainly, based on, the following, three circumstances, namely -

(a) Firstly, that just after the incident PW-2 and PW-6 saw the appellant leaving the campus where deceased used to stay;

(b) Secondly, that the appellant surrendered at Gelakey Police Station immediately after the incident on his own;

(c) Thirdly, that recovery of dao (weapon of offence) on the basis of statement made by the appellant.

The question to be decided in this appeal as to whether the above three circumstances were fully established in the present case and whether they are

of conclusive nature and tendency. Further, whether the said circumstances are consistent only with the hypothesis of the guilt of the present appellant

and whether it excludes every other possible hypothesis except the guilt of the present appellant. Further, it is to be seen as to whether the said

circumstances form a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

appellant and whether it shows that in all human probability the alleged offence must have been done by the accused.

32. Though, learned Additional Public Prosecutor has tried her best to rope in the testimony of PW-6 (who was declared as hostile) to support the

prosecution case, however, if we go through the testimony of PW-6 including the cross-examination by the prosecution side, it appears that PW-6 has

nowhere stated, while deposing as a witness during the trial, that he saw Janglu Majowar fleeing away from the house of Manku. Even during his

cross-examination by the prosecution side, he has only denied making of any such statement before the Investigating Officer. The mere fact that the

Investigating Officer, while deposing as PW-13, has stated that PW-6 has made such a statement during investigation before him would be of no use

to the prosecution side unless PW-6 himself admits making of such a statement. The judgment of Hon'ble Supreme Court of India in "Podyami

Sukada v. State of M.P. (Supra)Ã¢â¬¬, cited by learned Additional Public Prosecutor, wherein it was observed that there is no legal bar to base conviction

on the basis of the testimony of hostile witness would have been of some use for prosecution side had the hostile witness had admitted making any

such statement of seeing Janglu Majowar fleeing away from the house of the deceased persons, however he has not made any such statement during

his testimony before the Court , neither he has admitted making of such statement before the Investigating Officer during trial as was suggested to him

by the prosecution side.

33. When a witness is declared as hostile, he is allowed to be cross-examined by the party who calls such a witness mainly for the purpose so that

such a party could get a testimony more favorable to its case or else for discrediting the credibility of such a hostile witness. It is true that merely

because of the fact that a witness has turned hostile, whole of his testimony may not be discarded, however, what may be used or discarded is his

testimony alone. Nothing may be read in the testimony of such a hostile witness if he had not stated so himself on oath. In the instant case also PW-6

has not admitted regarding making any statement that he saw appellant Janglu Majowar fleeing from the house of the deceased. Under such

circumstances, merely because the Investigating Officer has stated that PW-6 has stated before him that he saw Janglu Majowar fleeing from the

house of the deceased, would not make the testimony of PW-6 is of any use for the prosecution side.

34. What remains is the testimony of PW-2 where he had stated that when he came out of his house he saw appellant Janglu Majowar leaving

Ã¢â¬¬our campusÃ¢â¬¬ (i.e., the campus where PW-2 resides), where he resided in different room with Mantu Garh. If we peruse Exhibit-10, which is the

sketch map of the place of occurrence, which shows that in between the house of deceased Manku Garh and the informant Bijoy Chik (PW-2), there

is another house of one Akash Chik, who has deposed as PW-3 in the trial before the Sessions court. It also appears that in Exhibit-10 (the sketch

map) total five houses are shown in that campus, four houses [i.e., the house of deceased Mantu Garh, house of Akash Chik (PW-3), house of Bijoy

Chik (PW-2), house of Rajan Chik (PW-7)] on the southern side of the Modinagar Tea Estate 17 no. line road, and one house [i.e., house of Babulal

Chik (PW-6)] and one temple on the northern side of Modinagar Tea Estate 17 no. line road. Thus, it appears from the sketch map that the campus

where the houses of deceased and the first informant Bijoy Chik were situated, there were other houses too and even if we believe the testimony of

PW-2, it appears that he saw appellant leaving their campus only. He has not stated that he has seen the accused coming out of the house of the

deceased Montu Garh @ Monku. He only saw the appellant going through the road connecting his house. Though in paragraph no. 35 of the impugned

judgment, learned Sessions Judge has stated that the defence failed to dislodge the evidence of PW-2 that he has seen the appellant while going out of

the house of the deceased persons, however, it appears from the discussion made herein before, that there is no such admissible evidence on record to

show that the appellant was going out of the house of the deceased. PW-2 has only stated that he saw the appellant leaving the campus going through

the road connecting his house, which in the light of Exhibit-10 i.e., the sketch map, exhibited by the Investigating Officer in this case at no stretch of

imagination may be regarded as PW-2 witnessing the appellant going out of the house of the deceased persons. As observed by Hon'ble Supreme

Court of India in "Ajitsingh Harnamsingh Gujral v. State of Maharashtra" (supra), the last seen theory comes into play only where the time gap

between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the

possibility of any person other than the accused being the author of the crime becomes impossible, however, in the instant case, we have seen that

there is no credible evidence on record to show that the appellant was seen with the deceased persons before they were found lying inside their house

in injured condition. There is also no credible evidence to show that the appellant came out of the house of the deceased persons. The evidence of

PW-2, even if it is believed, only points out to the fact that appellant was seen going out of the campus through the road connecting the house of PW-

2, this evidence does not lead to the inference that the appellant was coming out of the house of the deceased persons, more so, when there were

houses of other persons too in the said campus. Hence, we are of the considered opinion that the last seen theory is not applicable to the instant case.

35. Though, the learned Additional Public Prosecutor has submitted that the surrender of the present appellant at the Gelakey police station

immediately after the occurrence of the offence is also an incriminating circumstance which point towards involvement of the present appellant in the

offence alleged against him, however, if we peruse the statement of the present appellant recorded under Section 313 of the Code of Criminal

Procedure, 1973, it appears that the present appellant though has admitted that he went to police station on knowing about the incident to enquire as to

how his name got involved with the alleged incident of assault, but on reaching police station he was apprehended by police and kept confine in the

lock up and was physically assaulted.

36. It also appears on perusal of the impugned judgment that in paragraph No. 38 of the impugned judgment learned Sessions Judge, Sivasagar has

also regarded this circumstance of accused going to Gelakey Police Station after the incident as a pointer towards his involvement in the alleged

offence.

37. There is no dispute at the bar regarding the observation made by learned Sessions Judge, Sivasagar in paragraph No. 37 of the impugned judgment

that so far as the confession made by the present appellant before police (i.e., PW-9 and PW-13) is concerned, same is hit by Section 25 and 26 of the

Indian Evidence Act. Thus, even if the explanation given by the present appellant, during his examination under Section 313 of the Code of Criminal

Procedure, 1973, for going to the police station is disbelieved and we exclude the confession made by the accused before police what remains is only

the fact that he went to the Gelakey Police Station after the incident.

38. Now, the question is even if this circumstance i.e., the present appellant going to the Gelakey Police Station after the incident, is regarded as an

incriminating circumstance against him, then whether the same along with the other circumstances forms a chain of evidence so complete, so as not to

leave any reasonable ground for conclusion consistent with the innocence of the present appellant. We will discuss the same later part of the

judgment.

39. Let us now examine, as to whether the evidence regarding the last circumstance, i.e., disclosure statement given by the present appellant before

police, which led to the finding of a dao and subsequent seizure of the same from the place shown by the present appellant may be relied upon or not.

40. The appellant during his examination under Section 313 of the Code of Criminal Procedure, 1973, has stated that police took him to Bargach Tiniali

and recovered the dao however, he has also stated that he had not shown the place from where the dao was recovered and it was Bijoy (PW-2) who

along with police recovered the said dao from that place. If we peruse the Exhibit-4 which is the seizure list of one 2 feet 3 inch long naga dao fitted

with a bamboo handle, it appears that it has been stated in the said seizure list (Exhibit-4) that the seizing officer seized the articles shown in the

seizure list on being led by the accused Janglu Majowar. However, PW-2, who is also the seizure witness has nowhere stated in his deposition that

the present appellant stated before police that he threw the dao at the place from where it was recovered and that was recovered by police from the

place on being led by the present appellant.

41. The Investigating Officer ought to have recorded the disclosure statement as well as prepared the seizure list in the manner as laid down by

Hon'ble Supreme Court in Ramanand -vs- State of U.P. (Supra) and quoted in paragraph No. 22 of this judgment herein above. Even at the risk

of repetition, it may be again stated that in Ramanand -vs- State of U.P. (Supra), Hon'ble Apex Court has observed that in the seizure list

(panchnama) the exact statement or rather the exact word uttered by the accused should be incorporated in the first place of the seizure list by the

Investigating Officer in presence of two independent witnesses so as to lend credence that a particular statement was made by accused expressing

his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of

offence has been hidden. It is observed by the Hon'ble Supreme Court that once the first part of the panchnama is completed, thereafter the

police party along with the accused and two independent witnesses would proceed to the particular place as may be led by the accused. This is how

the law expects the Investigating Officer to draw the discovery panchnama as contemplated under Section 27 of the Indian Evidence Act.

42. However, in the instant case it appears that though the Investigating Officer has exhibited the statement of appellant as Exhibit-11, which was

recorded during investigation, where the appellant is shown to have stated that "he threw the dao near Tiniali of Tea Estate and that he can show

the dao", however, the same was not recorded in presence of independent witnesses and no signatures of two independent witnesses were taken on

the said disclosure statement as mandated by Hon'ble Supreme Court in Ramanand -vs- State of U.P. (Supra). Neither the seizure list (Exhibit-4)

was prepared as per the procedure prescribed by Hon'ble Supreme Court as what exact words were uttered by the present appellant while

making disclosure statement is not stated in the said seizure list, neither signatures of two independent witnesses were taken thereon. This, considering

the fact that as during his examination under Section 313 of the Code of Criminal Procedure, 1973, the present appellant has denied making any

disclosure statement and denied leading police to the place from where dao was recovered makes Exhibit-11 and Exhibit-4 a doubtful piece of

evidence, and for the said reasons, we are reluctant to accept the evidence of discovery.

43. Thus, even if we accept the evidence to the effect that the present appellant went to police station after the incident and a dao was recovered

later on from Bargach Tiniali. These two circumstances, along with the fact that the present appellant was seen in the campus, by PW-2, where the

residence of the deceased persons is situated, in our considered opinion do not form a chain of evidence so complete so as not to leave any reasonable

ground for the conclusion consistent with the innocence of the present appellant and to come to a conclusion that in all human probability the act must

have been done by the present appellant.

44. Even if we assume that a dao was recovered from Bargach Tiniali, there is no admissible evidence on record to show that the said dao is actually

the weapon of offence which was used for killing Monku Garh and Chalu Garh. No steps have been taken by Investigating Officer for forensic

examination of the dao which was seized by the Investigating Officer by Exhibit-4 and no explanation has been given by the Investigating Officer for

not sending the seized dao for forensic examination.

45. Thus, there is no admissible evidence, on record, to link the seized dao with the offence alleged in this case. Ruling cited by learned Amicus Curie

of a Division Bench of this Court in *Geju Praja -Vs- State of Assam and Others* (Supra), wherein it was observed that mere seizure of the

weapon would not automatically go to show that the seized weapon was used in committing the offence is applicable in the instant case as in the

instant case also there is no admissible evidence to link the seized dao with the offence committed in the instant case.

46. Thus, we have seen that the prosecution side has failed to fully establish the circumstances from which conclusion of guilt of the present appellant

is to be drawn.

47. As it is a primary principle that the accused *must be* and not merely *may be* guilty before a Court can convict him and that the

distance between *may be* and *must be* is long and divides a vague conjectures from sure conclusions, we are of the considered view that

the circumstances which the prosecution side has been able to bring in this case are not enough to form chain of evidence so complete so as not to

leave any reasonable ground for the conclusion consistent with the innocence of the present appellant and under the circumstances on failure of the

prosecution side to present all the circumstantial evidence from which only the guilt of the present appellant could have been fully established, we are

constrained to give the benefit of doubt to the present appellant and hold that the prosecution side has been failed to prove the guilt of the present

appellant beyond all reasonable doubt and accordingly, we acquit him of the offence charged.

48. This appeal is accordingly allowed and the impugned conviction and sentence of the appellant are hereby set aside. The appellant be set at liberty

forthwith if his detention is not required in connection with some other case.

49. Before parting we appreciate the assistance rendered by Ms. Debashree Saikia, learned Amicus Curiae in this appeal, she may be given the

honorarium admissible under prevailing rules.