(2011) 03 GAU CK 0050

Gauhati High Court (Agartala Bench)

Case No: Criminal Appeal (J) No. 15 of 2006

Madan Malakar		APPELLANT
	Vs	
The State of Tripura		RESPONDENT

Date of Decision: March 4, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145, 161, 161(3), 162, 164
- Evidence Act, 1872 - Section 114, 25, 26, 27
- Penal Code, 1860 (IPC) - Section 302, 326, 448

Citation: (2011) 5 GLR 696 : (2011) 3 GLT 167

Hon'ble Judges: U.B. Saha, J; A.C. Upadhyay, J

Bench: Division Bench

Advocate: R. Dutta, for the Appellant; D. Sarkar, Public Prosecutor and R.C. Debnath, for the Respondent

Final Decision: Allowed

Judgement

U.B. Saha, J.

The Appellant, who has been tried and convicted u/s 302 IPC and sentenced to suffer imprisonment for life and pay a fine of Rs. 5000/- i.d. to further undergo imprisonment for two years, vide judgment dated 2.12.2002 in S.T. 69(NT/D) of 2001, passed by the learned Additional Sessions Judge, North Tripura, Dharmanagar, has preferred this appeal for setting aside the said judgment and order with a prayer for acquittal.

2. That on 13.6.2001, one Pabitra Malakar (P.W1) lodged an information with the Officer In-charge, Panisagar P.S. Dharmanagar alleging, inter alia, that on 12.6.2001 at about 9 a.m., the accused Madan Malakar along with Nagendra Malakar (since deceased), resident of Barabari, went to Shimul Tilla near a rubber garden to collect wood and later on, at 2.00 p.m., the informant received an information from a person that Nagandra Malakar was lying unconscious beside the road of plantation

(bagan). Thereafter, his son Nakul Malakar and the informant brought Nagendra Malakar to Jalebasa Primary Health Centre by an auto and subsequently, from there, Nagendra was brought to Dharmanagar hospital at the advice of doctor of the said primary hospital, where he was undergoing treatment. In the said FIR, it is also stated that till the date of lodging FIR, whereabouts of Madan Malakar,(the Appellant herein) could not be ascertained.

3. On receipt of the aforesaid information, Panisagar P.S registered a police case being PNS P.S case No. 26/01 u/s 326 IPC and started investigation. When the investigation was going on, the deceased Nagendra succumbed to the injuries on 13.6.2001 and thereafter, the investigating authority added Section 302 IPC and proceeded for further investigation. On completion of the investigation, Sri Padma Sen Chakma, I.O. of the case filed the charge sheet u/s 302 IPC against accused Madan. As the offence involved in the case was cognizable and tribal by the Court of Sessions, the learned Magistrate committed the case to the Court of Additional Sessions Judge, North Tripura, Dharmanagar.

4. Having found a prima facie case, the learned Additional Sessions Judge framed the charge against the accused Appellant u/s 302 of the IPC to which the accused Appellant pleaded not guilty and claimed to be tried.

5. To bring home the guilt of the accused Appellant, the prosecution examined as many as 17 witnesses including the official witnesses, namely, Sri Pabitra Malakar, the informant, (P.W 1), Sri Sushendra Malakar,(P.W 2), a day labor who is known to both the informant and the victim, Sri Ranjan Malakar, (P.W 3), who also knows the informant and the victim, Sri Aranya Malakar (P.W 4), who knows the informant and victim, but knows nothing about the incident, Sri Manindra Malakar (P.W 5), who rushed to the place of occurrence and brought the victim to the hospital for treatment, Sri Paresh Nath (P.W 6), who went to the hospital to see the victim and a seizure witness, Sri Ramesh Ch. Sutradhar(P.W 7) who is also a seizure witness, Sri Abinash Das (P.W 8), an witness to see the victim and the accused last time together and also a seizure witness, Dr. Hirak Chowdhury (P.W 9), a Medical Officer of Jalebasa Primary Health Center who referred the victim to Dharmanagar Sub-Divisional Hospital after giving the victim first aid, Smti Laxmi Malakar, (P.W 10),who knows the victim and has seen the accused going to his house through the sty of her house, Sri Lani Malakar, (P.W 11) who has been tendered by the prosecution, Sri Sushendra Malakar (P.W.12), who while returning with his cows from Shimultilla area at about 11-30 heard the sound of groaning of the victim and went to the place of occurrence thereafter and intimated the same to the people nearby, HC Keshab Deb (P.W 13) is the Head Constable at the Panisagar Police Station who escorted the dead body till post mortem examination is over, Mr. Pradhyut Ch. Dutta, (P.W 14), the Officer In-charge of Panisagar Police Station, who received the written complaint from Pabitra Malakar (P.W. 1) and endorsed the case to S.I. Padma Sen Chakma (P.W. 15), Sri Padma Sen Chakma, SI (P.W 15) is the I.O of

the case, Sri Main Uddin (P.W 16) who is the witness of Inquest report, Sri Manindra Malakar (P.W17) is the Medical Officer in the Dharmanagar Sub-Divisional Hospital who conducted the postmortem examination over the body of the victim.

6. The accused Appellant did not adduce any evidence as his defense was that of total denial. On completion of the evidence of the witnesses, the accused Appellant was examined u/s 313 Code of Criminal Procedure when he denied the allegations made against him.

7. Considering the material on record, and after hearing the learned Counsel of the parties, the learned Additional Sessions Judge recorded the conviction and sentence as stated supra. Being aggrieved by and dissatisfied with the impugned judgment and order, the accused Appellant has preferred the instant appeal.

8. From the trend of the cross-examination, it appears that the defense tried to make a case that the accused Appellant has been suffering from mental disorder for long one years back of the incident and the alleged extra judicial confession was made by the accused when he was in police custody for which the said confessional statement cannot be relied upon for the purpose of conviction. Further it tried to deny the recovery of Dao, the weapon which is alleged to have been used to murder Nagendra as no statement of the accused Appellant was recorded u/s 27 of the Evidence Act.

9. Mr. R. Dutta, learned Counsel for the accused Appellant at the very outset of his submission would contend that the trial Court convicted the accused Appellant only on the basis of the evidence, namely, recovery of weapon, extra judicial confessional statement of the accused and on the principle of last seen together. According to him, out of all the aforesaid three circumstances, two circumstances, namely, the recovery of weapon and the alleged extra judicial confessional statement of the accused Appellant cannot be considered to be ground for convicting as the same is not legally admissible as per the provisions of Evidence Act. Only one circumstances remain that the last seen together which is a weak piece of evidence and on the basis of the same, a person cannot be convicted unless all the circumstances together form a complete chain and from those circumstances, no other hypothesis can be drawn except the conclusion of guilt of accused and such conclusion is fully proved and no other conclusion is at all possible on the basis of available evidence. He also criticized the impugned judgment of conviction passed by the learned Additional Sessions Judge on the ground that the learned Sessions Judge while not in a position to convict the accused Appellant on the basis of the evidence available, relied upon the police record i.e. the case diary and also used the same for convicting the accused Appellant which is not permissible under law in view of the decision of the Apex Court in Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P., wherein the Apex Court while dealing with an appeal relating to the murder of five persons in village Thimmapur, District Warangal, discussed the Court''s power to consider the case diary in trial and particularly he referred to

para-24 and 25, which are reproduced hereunder:

24. A criminal Court can use the case diary in the aid of any inquiry or trial but not as evidence. This position is made clear by Section 172(2) of the Code. Section 172(3) places restrictions upon the use of case diary by providing that accused has no right to call for the case diary but if it is used by the police officer who made the entries for refreshing his memory or if the Court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in Section 161 of the Code and Section 145 of the Evidence Act. Court''s power to consider the case diary is not unfettered. In the light of the inhibitions contained in Section 172(2), it is not open to the Court to place reliance on the case diary as a piece of evidence directly or indirectly. This Court had an occasion to consider Section 172 of the Code vis-�-vis Section 145 of the Evidence Act and Section 162 of the code in the case of Mahabir Singh v. State of Haryana AIR 2001 SCW 2757 (Para 14) and it was stated as follows:

14. A reading of the said Sub-sections makes the position clear that the discretion given to the Court to use such diaries is only for aiding the Court to decide on a point. It is made abundantly clear in Sub-section(2) itself that the Court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the Statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the Court for perusal of the diary u/s 172 of the code is not intended for explaining a contradiction which the defense has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the code, debars the Court from using the power u/s 172 of the code for the purpose of explaining the contradiction.

25. The High Court, however, did not keep the aforesaid legal position in mind and erred in placing reliance upon the evidence of PW-2 to PW-4 by verifying their statements recorded u/s 161(3) of the code from the case diary. It is here that the High Court fell into grave error in using the statements of PW-2 to PW-4 recorded u/s 161(3) of the Code, particularly for contradicting PW-20 without affording any opportunity to him to explain the position. The course adopted by the High Court is impermissible in law as Section 172 of the Code is not meant to be used for the purpose it has been used by the High Court i.e. to overcome the contradictions pointed out by the defense.

10. While placing reliance on the aforesaid judgment of the Apex Court, Mr. Dutta has taken us to the impugned judgment wherein the learned Trial Court recorded, inter alia, "according to the case record, the accused was arrested by the near relatives of the accused and thereafter he had confessed his guilt to all that he had

committed murder of the victim. Thereafter the police arrested him and he had also confessed his guilt to the police and also had stated to the police that he would be able to recover the weapon of commission of murder (dao). He led the police party and recovered the dao in question from a secret place."

11. Taking us to the aforesaid recording of the learned trial Court, Mr. Dutta contended that P.W 1 Pabitra Malakar no where stated in his evidence that the accused Appellant made any confessional statement though the P.W 6 in his cross specifically stated that on getting the said information, he went to the house of Pabitra Malakar (P.W 1) where the accused was kept under arrest. He also submits that P.W. 15, the I.O of the case, in his cross stated that he found the accused was detained by the local people in the house of the informant and P.W 6 Paresh Nath and P.W 1, the informant, were present when the accused had confessed his guilt. Therefore, even according to the prosecution also, at the time of alleged confessional statement, P.W 1, the informant, was there, but the informant neither disclosed the same in the FIR regarding the alleged confessional statement, nor made any statement in the Court relating to such confessional statement of the accused Appellant. Therefore, it can be easily said that the evidence of P.W 6 is not trustworthy, one which cannot be relied upon for convicting the accused Appellant.

12. The learned Counsel for the accused Appellant further urges that from the statement of P.W 15, I.O of the case, it appears that the alleged confessional statement was given in presence of him. Therefore, such statement cannot be used against the accused Appellant as at that time, the accused Appellant was in the custody of police. Hence, the said alleged confessional statement cannot be accepted as the same was not made before the Magistrate or an independent witness in absence of police personnel. He also placed reliance on a decision rendered by a Division Bench of this Court in the State of Assam Vs. Anupam Das, particularly Para-27 of the said report which reads as under:

27. In the light of the above we are of the opinion that the expression "Magistrate" occurring u/s 26 of the Indian Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in police custody is likely to expose the person making the confession to a punishment. This conclusion of ours gains further support from the very scheme of the provisions of Section 25 to 27 of the Evidence Act. Section 25 of the Evidence Act makes a declaration in no uncertain terms that a confession made to a police officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of decisions to the effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to Section 25. While Section 25 prohibits the proof of a confession made to a police officer, Section 26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provisions is made in order to prevent the police from extracting confession from

the accused while he is under custody and ingeniously circumventing the prohibition of law contained u/s 25 by making it appear that the confession was not in face made to a police officer, but somebody else. The scheme of the provisions of Sections 25 to 27 was examined by the Supreme Court in Bheru Singh Vs. State of Rajasthan, wherein at Para 16, the Supreme Court held:

16...By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. Inadmissibility of a confessional statement made to a police officer u/s 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. u/s 164, Code of Criminal Procedure a statement or confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.

13. The learned Counsel for the Appellant has also placed reliance on a decision of the Apex Court in Surinder Kumar v. State of Punjab AIR 1999 SC 215, wherein the Apex Court while dealing with the extra judicial confessional statement noted , inter alia, that

5. Having carefully gone through the entire evidence on record, we are unable to hold that the prosecution has been able to conclusively prove the charge leveled against the Appellant. Coming first to the extra-judicial confession, we find that the evidence of P.W 6, who only testified about it, is improbable and lacking in credence. It does not stand to reason- rather it seems odd- that all the four accused persons should be seized at the same time by a mood to approach P.W 6 to make a joint confession. It is significant to note that they had no particular relationship or connection with P.W. 6, so as to confide in him and take his assistance for surrendering before the police. If really, they wanted to surrender-as is the evidence

of P.W 6-- we fail to understand why instead of going to the Police they would approach him and blurt out a confession before him. Another compelling reason which makes the evidence of P.W 6 in this regard suspect is that even though he was admittedly, close to the family of the deceased, he did not disclose the names of the accused persons to Mrs. Nirmal Pal (P.W 2), the wife of the deceased, who lived at a distance of one furlong from his house and was not aware as to who killed her husband. His claim that he told P.W 10 about the confession on July 5, 1992 is also not corroborated by him (P.W 10). While on this point it is pertinent to mention that in the remand application that P.W. 10 filed on July 10, 1992 after producing the accused before the Magistrate concerned he did not disclose that they had made a confession before P.W 6. From the impugned judgment we find that when this aspect of the matter was brought to the notice of the High Court by the Appellant''s counsel it observed that all details were not required to be given in that application. We are unable to share the above view of the High Court for if really such a confession was made before P.W 6 and told to P.W 10 it was expected that in praying for the remand of the accused, he (P.W 10) would refer the same, for that was the only material on which the prosecution could primarily rely in justification of such prayer. For the foregoing reasons we are unable to accept the claim of P.W 6 that the Appellant and other accused made a confession of their guilt before him.

14. Referring to the aforesaid judgment, Mr. Dutta, learned Counsel for the Appellant submits that in the instant case also, according to P.W 6, the alleged confessional statement was made by the accused Appellant, on their query in presence of all that he had killed Nagendra by a dao, but the said statement is not corroborated by any of the witnesses including the P.W. 1 except P.W 15, the I.O of the case. Therefore, when one witness of the prosecution is not supporting the evidence of other, it would not be proper on the part of the Court to rely upon such evidence of a witness for convicting the accused Appellant.

15. He further urges that the evidence of P.W 8 regarding the last seen together, the accused Appellant with Nagendra, is not corroborated by any other witness, the P.W 8 though in his evidence stated that he saw the accused Appellant with the Nagendra together on 12.6.2001 i.e. the alleged date of incident, did not inform the said story of last seen together even up to 2.30 p.m. on 13.6.2001 when the FIR was lodged and he also no where stated in his evidence that he had disclosed the story of last seen together to any of the prosecution witnesses including the relatives. Hence, such evidence of P.W 8 is improbable being the same is contrary to human conduct.

16. On the point of "Last seen together", Mr. Dutta has placed reliance on a decision of the Apex Court in Venkatesan Vs. State of Tamil Nadu, wherein the Apex Court taking note of its earlier decision in C. Chenga Reddy and Others Vs. State of Andhra Pradesh, in para-11 of the said report, observed thus:

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

17. He further contended that there is no eye witness of the alleged occurrence and the prosecution''s case is wholly based on circumstantial evidence and the prosecution has failed to establish the complete chain of evidence which could lead a conclusion that the accused was the only person who committed offence and none else and also to establish the motive of the accused which is totally absent in the instant case. In support of his aforesaid contention, he placed reliance on a decision of the Apex Court in Varun Chaudhary Vs. State of Rajasthan, particularly Para-23, 24 and 25 of the said report, which are reproduced hereunder:

23. It is also pertinent to note that the prosecution could not establish the purpose for which the deceased was murdered by the accused. Of course, it is not necessary that in every case motive of the accused should be proved. However, in the instant case, where there is no eye witness or where there is no scientific evidence to connect the accused with the offence, in our opinion, the prosecution ought to have established that there was some motive behind commission of the offence of murder of the deceased. It was the case of the prosecution that the deceased, an Income Tax Officer had raided the premises belonging to some scrap dealers and, therefore, he had received some threats from such scrap dealers. It is an admitted fact that the accused are not scrap dealers or there is nothing to show that the accused had been engaged by scrap dealers to commit the offence. Thus, there was no motive behind the commission of the offence so far as the accused are concerned.

24. It is settled legal position that in case of circumstantial evidence, there must be a complete chain of evidence which would lead to a conclusion that the accused was the only person, who could have committed the offence and none else. In the instant case, there is nothing to show that the accused had committed the offence and on the basis of the foretasted material, in our opinion, it would be dangerous to convict the accused. In the case of G. Parshwanath Vs. State of Karnataka, Para 24, it has been stated that " in deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved ...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, where various links in chain are in themselves complete, then the false plea or false defense may be called into aid only to lend assurance to the court.

25. In another case of C. Chenga Reddy and Others Vs. State of Andhra Pradesh, this Court has held that "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

18. He further contended that admittedly the Dao, the weapon allegedly used for killing the deceased was not sent for serological test and P.W 15 admitted in his cross that he had not found any blood stain on the Dao and unless the said dao is examined by the serological test, it cannot be said in any way that the dao which has been allegedly recovered as shown by the accused Appellant is the weapon by which the deceased sustained the serious bleeding injuries. Unless the accused Appellant can be connected with the alleged crime, mere presumption itself would not suffice to pass an order of conviction which, in fact, the learned Trial Court did. In support of his aforesaid contention, he placed reliance on a decision of this Court in Nasir Ahmed v. State of Assam (1996) 3 GLR 27.

19. His further contention before us is that the investigating authority before recovery of the alleged weapon, the dao, did not record any statement of the accused Appellant u/s 27 of the Evidence Act which was obligatory on his part. Therefore, the said story of recovery of weapon at the instance of the accused Appellant cannot be used against him.

20. Mr. Dutta, referring to the evidence of P.W. 9 and 17, two Medical Officers, who have examined the deceased and conducted the autopsy as well as inquest report, contended that the nature of injuries stated in the inquest report and the weapon used are contradictory. According to him, in the inquest report, it is stated that two marks of injuries caused by sharp weapon and in the medical evidence, the prosecution witness , particularly, P.W 17 stated that the injuries caused by both sharp and blunt weapons and such discrepancy itself is a ground for non-believing the prosecution story.

21. Mr. Dutta finally contended that at the time of examination u/s 313 Code of Criminal Procedure, the accused was not asked any question in respect to the evidence adduced by P.W 10 against him. Therefore, the evidence of P.W. 10 cannot be utilized against the accused Appellant.

22. Mr. D. Sarkar, learned P.P while resisting the submission of Mr. Dutta, and supporting the findings of the learned trial Court would contend that if this Court survey the evidence of P.W 8 and 10 together, then the only presumption would be that the accused is the person who caused serious bleeding injuries on the person of the deceased and no other hypothesis is possible. One of these aforesaid witnesses i.e. P.W. 8 had seen him while he was going to the jungle with the deceased and the other i. e the P.W. 10 had seen him while coming back alone and both the witnesses are independent witness. He further contended that the accused Appellant made extra judicial confession of his guilt before the prosecution witnesses prior to reaching of P.W. 15 i.e. the I.O of the case and when the I.O reached that place, those witnesses reiterated the same before the I.O. Therefore, it cannot be said that the accused Appellant made extra judicial confession before the police while he was in custody. He further contended that it is the P.W. 12 who gave information to the relatives and villagers regarding the injured conditions of the deceased to the relatives and the villagers of his village and on the basis of the said information, the accused was arrested by the relatives before whom he confessed his guilt.

23. The learned P.P further contended that the investigating officer is not bound to produce each and every witness of the occurrence as it is his prerogative whom he should examine and produce in the interest of the prosecution case.

24. Mr. Sarkar finally contended that when a case rests upon the circumstantial evidence, the Court should not consider the evidence of any particular witness isolated; rather it would be proper to consider the prosecution evidence as a whole and if from the cumulative effect of the prosecution evidence, it appears that prosecution has been successful to prove its case, then the Court should punish the culprits. According to him, in the instant case, the learned trial Court after taking note of the evidence of all the witnesses convicted the accused Appellant, as prosecution proved its case, hence no interference is called for.

25. In the instant case, the time gap between the point of time i. e the accused and the deceased were last seen and the deceased was found injured prior to his death is so small that the possibility of any person other than the accused Appellant being author of the crime becomes impossible and in such a situation, it would be proper for the Court to believe the prosecution story and upheld the order of conviction and sentence passed by the learned trial Court. From the evidence of the prosecution, no other presumption can be drawn except the presumption of guilt of the accused and in support of his aforesaid contention, he placed reliance on paragraph 31 to 33 of the Apex Court''s decision in State of West Bengal Vs. Mir Mohammad Omar and Others etc., which, for better appreciation, are reproduced hereunder:

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no

process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existing of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

26. It appears from the impugned judgment that the learned trial Court considered three points, via:

(i) Whether the victim Nagendra Malakar died on 13.06.2001 in Dharmanagar hospital on account of injuries which he had sustained on 12.6.2001 at about any time during the period from 9 a.m. to 2 p.m. at Shimultilla and if so whether his death was homicidal in nature?

(ii) Whether such death had been caused by the act of the accused person?

(iii) Whether accused person''s act was done for the cause of death of the victim Nagendra Malakar ?

27. Considering the evidence adduced by the prosecution and the submission of the learned Counsel of the parties, the trial Court held that the prosecution has proved unequivocally that the death of the victim was homicidal in nature and the death of the victim was caused due to severe injuries by the act of the accused Appellant and thus answered the point No. 2 and 3 in positive.

28. Having heard the learned Counsel for the parties and on perusal of the impugned judgment, we are of the considered opinion that in a criminal appeal, it is the duty of the appellate Court to re-appreciate the evidence on record. Therefore, it would be proper for us to survey the evidence on record.

29. P.W 1 Sri Pabitra Malakar, the informant and the brother in law of the deceased whose evidence is hearsay in nature and he did not implicate the accused Appellant. P.W.2, Sri Sushendra Malakar and P.W. 3, Shri Ranjan Malakar, who getting information rushed to the place of occurrence and found the victim lying on the ground with severe bleeding injuries. They also did not implicate the accused Appellant. P.W 4 Sri Aranya Malakar and P.W 5 Sri Manindra Malakar also did not say anything implicating the accused Appellant. Therefore, it is not necessary to discuss their evidence. However, as the learned Counsel for the parties, mainly, placed their argument referring to the evidence of P.W 6,7,8,9,10,12,15 and 17, therefore, it would be profitable to reproduce the salient features of the evidence of those witnesses for coming to the just decision in this appeal. Hence the evidence of those witnesses is reproduced as under:

30. P.W 6 in his evidence stated that on the day of incident, he got information that the victim Nagendra sustained injuries. Thereafter he went to the hospital to see the victim. He confirmed that the victim had died in the hospital. He also stated that on the following day, when the accused Appellant returned home, he was arrested by the relatives and on getting the said information; he went to the house of Pabitra Malakar (P.W 1) where the accused was kept arrested. He further stated that on their query, the accused had confessed his guilt in presence of all that he had assaulted the victim. He went to Shimultilla along with police personnel and the accused who had showed the dao by which he had dealt blows on the victim and the police officer had seized the said dao in his presence after preparing a seizure list and he stood as an witness.

31. In his cross, he stated that the place of occurrence was near about two kilometer from his house and on the date of recovery of dao, the hands of the accused were tied by hand cuff. He reiterated that the accused was near relatives of the informant and the victim. He did not admit that the accused did not confess his guilt in his presence. He also did not admit that the accused had not shown and handed over the dao to the police officer in their presence. He further stated that the accused had recovered it and handed over it to the police officer. He also did not admit that the accused had confessed his guilt for torture upon him by the police officer. He further did not admit that he was not present when the accused had recovered dao and handed over the same to the police officer.

32. P.W 7 Ramesh Sutradhar stated in his chief that he had gone to the place of occurrence as per direction of the police officer. He also stated that the accused had shown the dao to the police officer who had seized it in his presence and he stood as an witness of it. In his cross, he stated that the place where from the dao (Ext. M.O. 1) was recovered was a jungle and it was adjacent to his house and many people were present along with the police officer. He also admitted that there was a handcuff in the hands of the accused person and his waist was tied with a rope. He did not admit that the accused had not recovered the dao from the jungle and

handed over the same to the police officer.

33. P.W 8 Shri Abinash Das stated in his chief that on the date of incident at about 10/11 a.m. the accused and the victim Nagendra Malakar had gone towards Shimultilla and at that time, the accused enquired him what he had been doing and at about 3/3-30 p.m., he had heard that Nagendra Malakar had died. After one or two days of the said incident, he, as per direction of the police officer, went to the place where the accused recovered a dao from a jungle and handed it over to the police officer and he stood as a seizure witness of the said dao. He also identified the accused in the dock. In his cross, he did not admit that he had not seen the accused and the victim going to Shimultilla through the road in front of his house. He also did not admit that the accused did not recover the dao in question in his presence and hand over the same to the police officer.

34. P.W 9 Dr. Hirak Chowdhury was the Medical Officer of Jalebassa Primary Health Centre who stated that on 12.6.2001 the victim Nagendra was produced before him by the local people in injured condition and he referred him to Dharmanagar Sub-Divisional Hospital after giving him first aid as his condition was precarious. In his cross he admitted that he had not enquired how the victim had sustained injuries and he could not collect exactly whether he had intimated the matter to the police station. He also did not admit that he had not examined the victim.

35. P.W. 10 Smt. Laxmi Nama stated that she had seen the accused while he had been going through her sty alone. In her cross, she stated that many people used to go to the rubber garden through her sty. She admitted in her cross that the accused was suffering from mental disorder for long one year back from the incident.

36. P.W. 12 Sri Sushendra Malakar stated that on the date of incident, while he was returning from Shimultilla at about 11-30/12 O''clock, he heard sound of groaning and on hearing the same, he had gone to the place of occurrence and found the victim Nagendra lying on the ground with bleeding injury. He also stated that thereafter he had reported the matter to the local people adjacent to the place of occurrence and the near relatives of the victim and subsequently, the victim was shifted to the hospital and he died there. He further stated that he had found the victim in almost unconscious condition who could not talk. In his cross, he stated that he had found the soil of the area blood stained. He also admitted that on earlier occasion the accused had been suffering from mental disorder.

37. P.W 15 Sri Padmasen Chakma was the Sub-Inspector of Police of Panisagar Police Station who stated that on 13.6.2001, after the case was endorsed to him, he visited the place of occurrence and prepared the hand sketch map along with index and recorded the state of the witnesses u/s 161 Code of Criminal Procedue He also stated that the local people arrested the accused prior to his arrival and after his arrival, he arrested the accused. He further stated that the accused had confessed his guilt to the local people and also to him that he had killed the victim and had

kept the dao in a secret place.

38. This witness also stated that on the next day, the accused led the police personnel to a place from where they recovered the dao in question in presence of the witnesses. He had seized the said dao after preparing the seizure list. After return to the police station, he came to know that the Nagendra Malakar had expired in Dharmanagar hospital and he had rushed there. He examined the dead body and prepared the Inquest Report in presence of witnesses. Thereafter, he filed a prayer before the learned Sub divisional Judicial Magistrate, Dharmanagar to add the Section 302 IPC in the instant case as the victim had expired. After receipt of the post mortem examination report and the report of the Medical Officer from Jalebasa Primary Health Centre, he filed the charge sheet against the accused u/s 302 IPC. He also stated that he had recorded the Statement of the accused and made entry into the G.D. Book of the police station before recovery of the weapon of murder.

39. In his cross, he stated that Nagendra had died at about 10 p.m. and he had not recorded the statement of the victim on receipt of case docket. The informant had shown him the place of occurrence where he had found blood stain. The place where the dao was recovered was known as Nayadron (Madhabpur) near the house of one Ramesh Sutradhar, near about half kilometer away from the place of occurrence. He also found that the accused was detained by the local people in the house of the informant. Paresh Nath (P.W. 6) and the informant (P.W. 1) were present when the accused had confessed his guilt. He did not find any blood stain in the dao and record the statement of the accused separately before recovery of the dao. He took the signature of the accused over the seizure list after recovery of the dao in question. He also stated that he did not file any prayer before the learned Sub divisional Judicial Magistrate, Dharmanagar for recording confessional statement of the accused.

40. P.W 17 is Dr. Manindra Malakar of Dharmanagar Sub-Divisional Hospital who conducted the postmortem examination over the dead body of the victim and found the following injuries over the dead body of the victim.

1. An incised looking wound over the left occipital region of the scalp measuring 6"X 1/2" X 1/2". Direction of the same was backwards.

2. An incised looking wound over the occipital region of the scalp measuring 4 1/2" X 1/2" X 1/2" and its direction was transverse.

He also stated that he found depressed fracture along the wounds position and the brain was lacerated along with fracture area over the

(A) Occipital parietal region measuring 5" X 1 1/2" X 1/2" and

(B) Over the occipital region measuring 4" X 1" X 1/2

41. The Doctor opined that the death of the victim was caused due to coma following intracranial hemorrhage caused for the injuries which were ante mortem and homicidal in nature. He also stated that the assault on the head was solely responsible for the cause of death of the victim and it might be caused by sharp as well as blunt weapon. Sharp portion could be cause by dao and the reverse side of the dao. In his cross, he stated that he had not found any reference in the postmortem examination report that the victim was treated as an indoor patient in the Dharmanagar Sub-Divisional Hospital for his injuries and also did not mentioned in his report whether he had found stitches over the wounds of the victim. He did not admit that he had not conducted the post mortem examination over the dead body of the victim.

42. On careful consideration of the submission of the learned Counsel of the parties and scrutiny of the evidence, it is the admitted position that the whole prosecution case is based on circumstantial evidence, particularly, the theory of last seen together, the learned Trial Court mainly relied upon the evidence of P.W. 6, 7 and 8 and so called confessional statement of the accused on the basis of which the weapon used in the commission of murder was recovered. P.W 6 though in his evidence stated that while he went to the house of P.W 1 Pabitra Malakar, he found the accused was kept under arrest and on their query, the accused had confessed his guilt, inter alia, that he had killed the deceased Nagendra by dao.

43. P.W 15 , I.O. of the case in his evidence corroborated the statement of P.W 6 so far as the arrest of the accused Appellant by the local people. He also stated that the accused confessed his guilt to the witnesses and after reaching there, he arrested the accused where the P.W 6 Paresh Nath and the informant P.W. 1 Pabitra Malakar were present. But on scrutiny of the evidence of P.W 1, it appears that no where he stated regarding the arrest of the accused Appellant by the local people as well as the confessional statement of the accused Appellant. Therefore, if we have to believe the evidence of P.W. 1, then we have to disbelieve the P.W.6 and 15. On the other hand, if we have to believe the evidence of P.W. 15, I.O of the case, then we cannot accept the confessional statement of the accused as admissible being the same was allegedly given when he was under arrest where the P.W 15 was present. We have already noted the observation of this Court in Anupam Das (supra) as well as the observation of the Apex Court in Bheru Singh (supra) and Surinder Kumar (supra) as and when and in what form, the extra judicial confession can be accepted, as relied by Mr. Datta, learned Counsel for the Appellant. Hence, detailed discussion regarding extra-judicial confession is not called for.

44. According to us, the submission of Mr. Datta, inter alia, that as the confessional statement was allegedly given in present of police personnel, such statement cannot be used against the accused Appellant has some force. We have also noted the evidence of P.W 10 Smt. Laxmi Malakar who had seen the accused going through her sty alone, but also admitted that the accused was suffering from

mental disorder for long one year back from the incident. P.W. 12 Sushendra Malakar is the person who had heard the sound of groaning and found the deceased lying on the ground with bleeding injuries. In his cross, he stated that there were two roads adjacent to the place of occurrence. But the trial Court while recording the statement u/s 313 Code of Criminal Procedure did not put any question to the accused Appellant regarding the evidence of P.W 10 and 12. Therefore, the evidence of those witnesses cannot be utilized against the accused Appellant without providing him an opportunity. However, even if the said evidence is taken into consideration, then also that would in no way help the prosecution as the P.W 8 had seen the accused while he was coming from Shimultilla. She nowhere stated that she had seen the accused with the deceased. P.W 12 at all did not implicate the accused Appellant. Therefore, his evidence has also no consequence.

45. Admittedly, the dao which was allegedly recovered at the instance of the accused was not sent for serological examination to prove as to whether the said dao was used in the commission of offence or not. Mere recovery of dao itself cannot be a ground for conviction of the accused, unless it is proved by the prosecution that seized dao was used in the crime and it is the accused Appellant who used the said dao.

46. From the evidence of the prosecution witnesses, it also appears that the deceased was admitted at Jalebasa primary Health Center on the date of incident i.e. 12.6.2001. P.W. 9 Dr. Hirak Chowdhury examined the victim and found only one injury over the body of the victim. Thereafter, the victim was admitted in Dharmanagar Sub-divisional Hospital where the victim was examined by P.W 17 Dr. Manindra Malakar who on examination found the following injuries;

(1) An incised looking wound over the left occipital region of the scalp measuring 6"X 1/2" X 1/2 "" direction before backward.

(2) An incised looking wound over the occipital region of the scalp measuring 4 1/2" X 1/2 " X 1/2 " direction transfers.

Depressed fracture along the wounds position. Brain lacerated along the fracture area (1) over the occipital partial region measuring 5" X 1/2 " X 1/2 " (2) over the occipital region 4" X 1/2 " X 1/2 .

47. According to the doctor, the injury may be caused by sharp as well as the blunt weapon. The sharp operation can be caused by dao and the blunt portion by the reverse side of the dao.

48. It is not necessary for the prosecution that in every case, motive of the accused is to be proved, but when the case is based on wholly circumstantial evidence, particularly, last seen together, we are of the opinion that the prosecution ought to have established that there was some motive behind the commission of offence of murder of the deceased. In the instant case, the prosecution failed to establish the

purpose for which the deceased was murdered by the accused.

49. Mere last seen together cannot be itself a ground for forming an opinion that it is only the accused who has committed the offence. The prosecution has to prove last seen together with other circumstances that except the accused no other person can commit the offence. In the instant case, it cannot be ruled out that some other persons might have been in the rubber garden, as contended by Mr. Datta. There is no doubt that every killing of human being is heinous one and lost to the society, but mere heinous crime or killing of a man itself cannot suggest the Court for convicting a person being accused unless the prosecution is able to connect the said accused with the commission of offence.

50. In the case of State through CBI v. Mahender Singh Dahiya AIR 2011SCW 1916, the Apex Court noted, inter alia, that

the manner in which the crime has been committed in this case, demonstrates the depth to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the Court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the Court. Suspicion no matter how strong cannot, and should not be permitted to, take the place of proof. Therefore, in such cases, the Courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court.

51. The Apex Court has also discussed in the said judgment that in a case of circumstantial evidence, the circumstances from which the conclusion is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

52. In Mahender Singh Dahiya (supra), the Apex Court has taken note of its earlier decisions in Hanumant Vs. The State of Madhya Pradesh, which was subsequently followed in Naseem Ahmed Vs. Delhi Administration, wherein Chandrachud, J., restated the law, inter alia, that

this is a case of circumstantial evidence and it is therefore necessary to find whether the circumstances on which prosecution relies are capable of supporting the sole inference that the Appellant is guilty of the crime of which he is charged. The circumstances, in the first place, have to be established by the prosecution by clear and cogent evidence and those circumstances must not be consistent with the innocence of the accused. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to be totality of the circumstances, Individual circumstances considered in isolation and divorced from the context of the over-all picture

emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect.

53. The cumulative effect of the circumstances, in the instant case, as placed by the prosecution, does not complete chain from the beginning to the ending, rather, the chain has become broken in various stages. The prosecution case is also not totally doubtless when there is some doubt about the involvement of the accused and thus it would not be proper for the court to convict such accused person.

54. In the instant case, firstly neither P.W. 8, Abinash Das nor P.W. 10 Smti. Laxmi Malakar had seen the accused with dao and even if it is considered that the dao which was recovered on the basis of confessional statement of the accused, then question remains whether the said confession is a valid confession or not as we have already stated that the confession before the police personnel while the accused in custody cannot be treated as an extra-judicial confession, in accordance with law. Therefore, if the confessional statement goes, then the recovery of dao at the instance of the accused also goes. Even for the argument sake if it is admitted that a dao was recovered, whether that dao was used or not in the alleged commission of offence, for proving the same, it has to be sent for serological test which has not been done in this case and for non-examination of dao by the chemical expert, a doubt obviously is created and the benefit of that doubt is to be provided in favor of the accused.

55. In Chitra Vijay Singh and Another Vs. State of Chhattisgarh, a Division Bench of Chhattisgarh High Court while considering an appeal, wherein the Appellant of that case was convicted u/s 302 IPC and sentenced for life imprisonment with a fine of Rs. 100/- i. d. to further undergo for one month, acquitted the Appellant, taking note, inter alia, that

the learned Additional Advocate General lastly argued that blood stained clothes, lathi and tangia were seized from the possession of the Appellants on their disclosure statement, therefore, the same were incriminating against them. We note that according to the F.S.L report, it is only said that the blood was there on the above articles but neither the origin nor the group of the blood could be determined. Therefore, it was not proved as to whether it was the human blood or it was the blood of the group of the deceased. The articles, which have been seized, are the common articles (clothes, lathi & tangia) which are found in every house in the village. Therefore, in absence of any other evidence, this evidence alone would not be sufficient to connect the Appellants with crime in question

(emphasis supplied).

56. In the instant case also, dao, the weapon which is alleged to have been used in the commission of offence, though seized as per the alleged discloser of the

accused, but the same was not sent for serological test for proving whether the said dao was utilized at all in the commission of offence or not and in absence of such test, it is very difficult to connect the accused with the alleged offence. More so, the prosecution also failed to explain whether the deceased was in a position to make any discloser of the name of the assailant(s) when he was found in injured condition and whether there was any attempt from the side of the investigating authority for ascertaining as to who is the actual culprit from the deceased before his death.

57. In Nasir Ahmed (supra) while a Division Bench of this Court dealing with an appeal against an order convicting the accused Appellant u/s 302/448 IPC and sentencing him to undergo imprisonment for life, considered the necessity of serological test of seized articles, stating, inter alia, that the seizure of articles, particularly, the weapons and blood stained clothing''s is not a mere formality, its importance must be realized by the investigating agency and such articles must as a rule be further subjected to expert/chemical examination.

58. In the said judgment, the Division Bench also took note of a decision of the Apex Court in the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another, wherein the Apex Court pointed out the primary duty of the police to collect the evidence of commission of offence and observed:

The investigating officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore, the foundation stone on which the whole edifice of criminal trial rests- an error in its chain of investigation may result in miscarriage of justice and the prosecution entails with acquittal. The duty of the investigating officer, therefore, is to ascertain facts, to extract truth from half truth or grabbled version, connecting the chain of events. Investigation is a tardy and tedious process. Enough power, therefore, has been given to the police officer in the area of investigatory process, granting him or her great latitude to exercise his discretionary power to make a successful investigation. It is by his action that law becomes an actual positive force. Often crimes are committed in secrecy with dexterity and at high places. The investigating officer may have to obtain information from sources disclosed or undisclosed and there is no se(sic) procedure to conduct investigation to connect every step in the chain of prosecution case by collecting the evidence except to the extent expressly prohibited by the code or the Evidence Act or the Constitution. In view of the arduous task involved in the investigation he has been given free liberty to collect the necessary evidence in any manner he feels expedient, on the facts and in given circumstances. His/her primary focus is on the solution of the crime by intensive investigation. It is the duty to ferret out the truth. Laborious handwork and attention to the details, ability to sort out through mountainous information, recognized behavioral patterns and above all, to coordinate the effort of different people associated with various elements of the crime and the case are essential. Diverse methods are therefore, involved in making

a successful completion of the investigation.

59. In the instant case, it is not clear to this Court, though the I.O got the blood stain in the place of occurrence, why he did not seize the same and why he did not record the statement of the accused separately before recovery of dao and took the signature of the accused over the seizure list after recovery of the dao in question for proving the fact, inter alia, that it is the accused on whose information and identification, dao was recovered. Recording of the statement of the accused is necessary and non Crl. recording of the statement of the accused and non-production of the G.D. book of the police station where I.O. recorded the statement of the accused before recovery of the weapon of assault also creates a doubt. Therefore, as the G.D. entry has not been produced and proved, the recovery of the weapon of assault at the instance of the accused is also not established.

60. More so, we have no other option except to express our dissatisfaction regarding the findings of the trial Court wherein he has relied upon the police record i.e. the case diary and used the same as evidence for connecting the accused Appellant with the offence which is fully deprecated by the Apex Court vide its decision in Md. Ankoos and Ors. (supra) as relied upon by the learned Counsel Mr. Datta, relevant portion of the judgment has already been reproduced. The part of the case diary relied upon by the trial Court was also not supplied to the accused and as a result, he could not get any opportunity to make out his case so far that part is concerned. Therefore, the case diary cannot be utilized as an evidence, it can only be utilized by the Court to see whether the investigation is properly done or not and also can be used by the police officer who made entry for refreshing his memory and if the police officer is allowed to use the case diary for refreshing his memory, the accused should also be provided the said part so that he can place his case before the Court. As the Apex Court in the case of Md. Ankoos and Ors. (supra) has already discussed in detail regarding the provisions of Sub Crl. Sections (2) and (3) of Section 172 of the Code, we feel it not necessary for reiterating the same, the relevant portion of the judgment has already been reproduced by us.

61. Though the incident involved in the present case is very serious in nature, but for the reasons and discussion made hereinabove and having regard to the settled proposition of law, we have no other alternative except to provide the benefit of doubt to the accused Appellant as it is settled by this time that when two plausible views are possible, the view which favors the accused Appellant that should be accepted. Accordingly, we do so. Consequently, the impugned judgment dated 2.12.2002 passed by the Additional Sessions Judge, North Tripura, Dharmanagar in S.T. 69(NT/D) of 2001 is set aside.

62. In the result, the appeal stands allowed. The accused Appellant be set at liberty forthwith if he is not required in connection with any other case.

Send down the L.C. records immediately.