

The State of Assam Vs Upendra Nath Rajkhowa

Court: Gauhati High Court

Date of Decision: Aug. 6, 1974

Acts Referred: Constitution of India, 1950 " Article 114, 14, 20
Criminal Procedure Code, 1973 (CrPC) " Section 154, 156, 162, 164, 165
Evidence Act, 1872 " Section 21, 24, 25, 26, 27
Penal Code, 1860 (IPC) " Section 201, 302, 309, 34

Citation: (1975) CriLJ 354

Hon'ble Judges: M.C. Pathak, C.J; Baharul Islam, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Pathak, C.J.

The abovementioned Death Reference and Appeals arise out of the judgment and order passed by the learned Sessions

Judge of Goalpara in Sessions Case No. 35 (D) of 1972.

2. Upendra Nath Rajkhowa was charged u/s 302 of the Indian Penal Code for committing murder of Mrs. Putuli alias Putul Rajkhowa and Miss

Nirmali alias Linu Rajkhowa on or about the night of 10-2-70 in the District and Sessions Judge's bungalow at Dhubri and he was also charged

u/s 302 of the Indian Penal Code for committing murder of Miss Jonali alias Luna Rajkhowa and Miss Rupali alias Ruplekha alias Bhanu

Rajkhowa on or about 25th February, 1970 in the District and Sessions Judge's bungalow at Dhubri. He was also charged u/s 201 of the Indian

Penal Code for having caused certain evidence of the said offence to disappear to wit, for burying the dead bodies of the above. mentioned

persons on both the occasions with the intention of screening himself from the legal punishment.

3. Upendra Nath Rajkhowa and Umesh Baishya were jointly charged u/s 302 read with Section 34 of the Indian Penal Code for intentionally

causing the death of Mrs. Putuli alias Putul Rajkhowa and Miss Nirmali alias Linu Rajkhowa on or about the night of 10-2-70 in the District and

Sessions Judge's bungalow at Dhubri in furtherance of their common intention and they were also charged under Sections 302/34 of the Indian

Penal Code for intentionally causing the death of Miss Jonali alias Luna Rajkhowa and Miss Rupali alias Ruplekha alias Bhanu Rajkhowa on or

about 26-2-70 in the District and Sessions Judge's bungalow at Dhubri in furtherance of their common intention.

4. Both of them also were charged under Sections 201/34 of the Indian Penal Code for causing certain evidence of the said offences to disappear

to wit, for burying the dead "bodies of the said persons on both the occasions in furtherance of their common intention.

5. Both the accused have (been tried by the learned Sessions Judge in Session Case No. 35 (D) of 1072 under the said charges and he has

convicted Upendra Nath Rajkhowa under Sections 302 and 201 of the Indian Penal Code and sentenced him to be hanged by neck till death u/s

302 of the Indian Penal Code and no separate sentence u/s 201 of the Indian Penal Code has been passed. The learned Sessions Judge has found

that the prosecution had failed to prove the charges against Umesh Baishya and so he has been acquitted of the charges. Hence this Reference and

the Appeals.

6. The prosecution case briefly is as follows:

Accused Uipendra Nath Rajkhowa joined as District and Sessions Judge at Dhubri sometime in 1969. At first he came to Dhubri alone and stayed

in the Circuit House. Thereafter he shifted to the official residence of the District and Sessions Judge, Dhubri, Rajkhowa's family consisted of

himself, his wife Mrs. Putuli Rajkhowa alias Putul Rajkhowa and his daughters Miss Nirmali alias Linu Rajkhowa, Miss Jonali alias Luna Rajkhowa

and Miss Rupali alias Ruplekha alias Bhantu Rajkhowa. During the Puja holidays of 1969 accused Rajkhowa's wife and the three daughters came

to Dhubri and stayed with him. The two younger daughters namely, Miss Luna and Miss Bhantu were sent back to Gauhati on re-opening of the

College to enable them to pursue their studies. After the departure of Miss Luna and Miss Bhantu for Gauhati, accused Raj- khowa was left with

his wife and eldest daughter Linu. A few days before Magh Bihu which fell on 14th January, 1970, accused Rajkhowa asked Bigan Prosad Rout

(P.W. 3) who was a Peon of the District Judge's Court at the relevant time to cut a wooden post which was standing near the bath room attached

to the bed room of accused Rajkhowa. Accordingly the post was cut. Thereafter accused Rajkhowa asked P.W. Bigan to uproot the whole stump

of the post which was done by P.W. Bigan with the assistance of Md. Sahid Ali (P.W. 15), a peon in the Assistant District Judge's office at

Dhubri and Radha Nath Mali, who was the Mali at the residence of the District and Sessions Judge at the relevant time. Accused Rajkhowa

further asked his Peons not to fill up the pit which resulted by the uprooting of the post as he wanted to grow some flower plants therein (for the

sake of brevity this pit will be referred to as pit No. 1 hereinafter). A few days thereafter accused Rajkhowa got another pit dug by P.W. Sahid

and this was to the east of Radha's quarter within the compound of the District Judge's residence. While this pit was dug the peons were told by

accused Rajkhowa that the pit would be used to plant some Padam flowers brought from Coochbehar (for the sake of brevity this pit will "be

referred to as pit No. 2 hereinafter). As the pit No. 1 was quite near the bath room Mrs. Rajkhowa once asked P.W. Bigan to fill up that pit and it

was so filled up by Bigan, Accused Rajkhowa was then taking his bath. After coming out accused Rajkhowa asked P.W. Bigan as to why he had"

filled up the pit No. 1 and accused Rajkhowa again ordered Bigan to take out the earth from the pit No. 1 which Bigan did.

7. Upendra Nath Rajkhowa retired from service on 2nd February, 1970. On 3rd February, 1970, accused Rajkhowa rang up on the phone

Barada Sarma (P.W. 25) and" asked him to vacate the rented house of accused Rajkhowa at Gauhati. P.W. Barada Sarma is a brother-in-law of

accused Rajkhowa, whose wife is the eldest sister of the wife of P.W. Barada Sarma.

8. On 10th February, 1970. which was the Saraswati Puja Day accused Rajkhowa asked his peons Bigan, Sahid and accused Umesh (who was

orderly of the (District and Sessions Judge at the relevant time at Dhubri) to go out to see Puja. After witnessing Puja P.W. Sahid went to his

house, P.W. Bigan and accused Umesh returned to the District Judge's bungalow. Thereafter P.W. Bigan saw accused Rajkhowa coming back to

the bungalow at about 8-30 P.M. with his wife and the eldest daughter Linu. All the three sat round the fire, talked for some time and after taking

their meals they went to bed. P.W. Bigan and accused Umesh also went to bed. Thereafter Mrs. Rajkhowa and Miss Linu were not seen alive.

9. On the next morning, that is, the morning of 11th February, 1970. pit No. 1 was found in a filled up condition; and accused Rajkhowa told

P.W. Bigan and P.W. Sahid that Mrs. Rajkhowa and Miss Linu had gone to Gauhati and Rajkhowa had seen them off at the Bus Station. P.W.

Bigan having expressed surprise as to how it was that they had so left when there was no talk at all of their going to Gauhati even last evening,

accused Rajkhowa said that they had wanted to go as he had already retired. P.W. Bigan was then sent to Bazar and on coming back he found

that accused Rajkhowa was washing some clothes inside the bath room and the water coming out from the bath room was seen by him to be red

in colour. Having found accused Rajkhowa himself washing the clothes he asked accused Umesh as to why should Saheb do so when there were

so many to perform the task. Accused Umesh replied ""Let Sahebo do so"". The clothes which were washed were spread out by accused Bajkhowa

himself for drying and these were bed-sheets, shirt, pajama and pillow cover.

10. February 11, 1970 was the immersion day of Goddess Saraswati. P.W. 7 Bhabandra Nath Sarmia wiith his wife came to see the immersion of

Goddess Saraswati, While returning home P.W. 7 saw accused Rajkhowa sitting on the eastern verandah of the bungalow and P.W. 7 and his

wife came inside the compound of Rajkhowa, who asked them to take their seat. A little thereafter Mrs. Sarma wanted to go to bath room but

Rajkhowa asked her not to go to the bath room attached to his bed room as that was dirty. Rajkhowa was then alone and he said that his wife and

eldest daughter had¹ gone to Gauhati. On this day P.W. 9 Brahma Avatar also had gone to the bungalow to give estimate of repairing the water

pump and he saw accused" Rajkhowa levelling a pit near the kitchen. Seeing P.W. Brahma Avatar, accused Rajkhowa ran away. Thereafter

accused Rajkhowa came to the front and replied that Sahab was not in the bungalow. Accused Rajkhowa appeared in a group photo taken on

11-2-70 (Material Exit. 10).

11. The two younger daughters of accused Rajkhowa, namely Luna and Bhantu were studying at the relevant time at Gauhati staying in the house

of P.W. 25 Barada Charan Sarma. On 14-2-70 accused Rajkhowa rang tip P.W. Barada Sarma and asked him to send Luna and Bhantu to

Dhubri as he wanted to go to Darjeeling with them. As the examinations were near. P.W. Barada Sarma objected to send. But accused Rajkhowa

said that he was aware of that and they should be sent. So by the afternoon bus they were sent from Gauhati to Dhubri and accused Rajkhowa

himself received them at the Bus Station at Dhulbri. Prior to their arrival accused Rajkhowa told P.W. 6 Golok Chandra Sarma that Mrs.

Rajkhowa and Miss Nirmali could not ultimately go to Gauhati and instead they went to Kokrajhar hearing about some illness of a near relation

namely, Lakhi Goswami, who was then Sub-Deputy Collector at Kokrajhar. The two younger daughters were also told by accused Rajkhowa the

same thing on their arrival. On 24-2-70 accused Rajkhowa rang up P.W. Barada Sarma to vacate the rented house at Gauhati as his wife would

like to stay there. P.W. Barada Sanma vacated the house and wanted to contact accused Rajkhowa several times on phone but every time he was

told by the exchange as no reply. P.W. Bigan saw Luna and Bhantu alive in the company of accused Rajkhowa on 25-2-70 at about 10 A.M. in

the morning for the last time. At about 2-30 P.M. on that day P.W. Bigan saw from the District Judge's office verandah a Black car in front of the

gate of the bungalow and P.W. Bigan saw accused Rajkhowa talking with the driver of that car at the front gate. When P.W. Bigan returned to the

bungalow at about 4/4-30 P.M. he was told smilingly by accused Rajkhowa that he had sent his two daughters to Gauhati in a friend's car as they

were facing much difficulty regarding their education. P.W. Sahid and P.W. Golok Sarma were also told the same thing in that evening. On the

morning of 26th February, 1970, accused Rajkhowa got pit No. 2 filled up by accused Umesh and levelled by P.W. Sahid. On April 13, 1970,

accused Rajkhowa wrote two letters Exts. 30 and 31) to Mr. Barada Sarma and his wife stating that his (Rajkhowa's) family had not come back,

and that he (Rajkhowa) had received a phone call on Saturday night and he would be going to Delhi on Tuesday night. It was also written that

Luna and Bhantu had decided not to appear in their examinations and they would return in Juna after touring. Accused Rajkhowa left Dhubri on

15-4-70 by Siliguri Express. He was then alone. Before leaving Dhubri some of his personal (belongings) were handed over to P.W. Golok Sarma

and P.W. 8 Joy Prakash Chakravarty for keeping them. Accused Umesh Baishya, however, stayed in the bungalow and he continued to reside

there till he was discharged from service in June/July, 1970, by Shri N. K. Choudhury, successor of accused Rajkhowa to the office of the District

and Sessions Judge, at Dhubri.

12. After his departure from Dhubri whereabouts of accused Rajkhowa were not known. In June, 1970, accused Rajkhowa came to the house of

P.W. 10 Satya Prakash Chakravarty, father of P.W. Joy Prakash Chakravarty at Gauripur and stayed there for three nights. On being asked

about the other members of his family, accused Rajkhowa said that they were at Delhi and he himself had come after touring Northern India.

During his stay at Gauripur, accused Rajkhowa had expressed his desire to open an Ashram and P.W. Satya Prakash once had taken accused

Rajkhowa to show a plot for the same. On way back a police vehicle had crossed them seeing which accused Rajkhowa had felt non-plussed and

had sat down as if to urinate. Accused Rajkhowa had told P.W. Satya Prakash Chakravarty and P.W. Joy Prakash Chakravarty that nobody

should know about his visit to their house. While departing accused Rajkhowa on request told P.W. Joy Prakash Chakravarty that he was going to

Siliguri and would stay at Savoy Hotel. But he wanted that nobody should know about it. The relation between accused Rajkhowa and

Chakravarty family was intimate and accused Rajkhowa asked P.W. Joy Prakash Chakravarty to address him as "KAKU". A few days thereafter

P.W. Joy Prakash received a letter (Ext. 12 (1)) from accused Rajkhowa in pursuance of which Joy Prakash went to Siliguri and stayed with

Rajkhowa in Savoy Hotel. Accused Rajkhowa was then alone and on being asked about the members of his family he stated that they were at

Delhi in the house of his cousin and that he would be going to fetch them.

13. The relations of accused Rajkhowa having not known about the whereabouts of accused Rajkhowa and his family, started making enquiries

about them. His brother-in-law P.W. Barada Sarma who was Deputy Inspector General of Police at the relevant time, took initiative in this matter

of making enquiries about accused Rajkhowa and the members of his family. In May, 1970, P.W. Barada Sarma came to Dhubri and contacted

the erstwhile peons of accused Rajkhowa and from them P.W. Barada Sarma learnt that Mrs. Rajkhowa and eldest daughter Linu were sent to

Gauhati by accused Rajkhowa (but on the way they having come to know about the illness of a relation they ultimately went to Kokrajhar.

Regarding the two younger daughters, the peons narrated to P.W. Barada Sarma what they had known from accused Rajkhowa. This made P.W.

Barada Sarma suspicious and he started making investigation.

14. In June, 1970 P.W. Barada Sarma had again come to Dhubri and this time he met P.W. Golok Sarma and P.W. Joy Prakash Chakravarty.

both of whom were and are Assistants in the office of the District Judge, Dhubri. From P.W. Joy Prakash Chakravarty P.W. Barada Sarma could

know that accused Rajkhowa was in Room No. 3 in Savoy Hotel, Siliguri and so on 25th. July, 1970, P.W. Barada Sarma left for Siliguri

accompanied by Apurba Barua brother-in-law of accused Rajkhowa and P.W. 53 D. N. Kahali, the then Officer-in-Charge of Dhubri Police

Station. Apurba Barua is the brother of accused Rajkhowa's wife, so also of P.W. Barada Sarma's wife. They found accused Rajkhowa in

Room No. 3 of Savoy Hotel at Siliguri. On being questioned about the members of his family accused Rajkhowa at first stated that they were in

Central Boarding of (Darjeeling. When he was asked to accompany P.W. Barada Sarma and others to Darjeeling, accused Rajkhowa refused on

the plea that he was having stomach trouble. But ultimately disclosed that they (the members of his family) were not there, This led to further

questions as to where the members of the Rajkhowa's family were, at which accused Rajkhowa stated that he would not be able to tell them

about it verbally. But he could give the same in writing. Then accused Rajkhowa wrote in Assamese in a piece of paper (Ext. 33) that Putul, Linu,

Luna and Bfoantu were not in this world. When he was further pressed about the whereabouts of them accused Rajkhowa stated that his wife had

got seriously injured one evening having fallen down from the (bungalow's verandah and met with her end. Linu also had died in the bungalow due

to over dose of sleeping tablets. Being unable to decide what to do, he had called some Biharis from the Steamer Ghat and got the dead bodies

thrown into the river Brahmaputra for which the Biharis were paid Rs. 500. Accused Rajkhowa further stated that Luna and Bhantu having known

about the death of their mother and eldest sister, committed suicide one evening by jumping into the river Brahmaputra. P.W. Barada Sarma then

asked accused Rajkhowa to make these statements before police as well as before the Magistrate. Accused Rajkhowa agreed to do so. It

appeared to P.W. Barada Sarma that accused Rajkhowa was going to change his clothes, so P.W. Barada Sarma came out of the room. But on

hearing a sound all of them went inside the room and found that accused Rajkhowa had¹ assaulted himself with a knife on his stomach in an

attempt to commit suicide. Accused Rajkhowa was therefore taken to the hospital and an ejahar u/s 309 of the Indian Penal Code was lodged by

Apurba Barua at the Siliguri Police Station in pursuance of which Siliguri Police Station Case No. 48 (8) of 1970 was registered. P.W. Barada

Sarma and his party came back from Siliguri on the same day, that is. 25th July, 1970 and he also brought the belongings of accused Rajkhowa

which were in the Savoy Hotel. While rolling the bedding of accused Rajkhowa, P.W. Barada Sarma found a chit (Ext. 34) under the bed-roll

written in English by accused Rajkhowa to the effect that his wife and three daughters had died and therefore there was no necessity of his

remaining alive. The date below the signature was post dated and the same was 31-7-70. P.W. Barada Sarma was awaiting some days for

information from the Officer-in-Charge of Siliguri Police Station, who was asked to interrogate accused Rajkhowa on his feeling better. But

having no such information he wrote a D. O. letter to the Superintendent of Police. Goalpara at Dhubri (Ext. 36) on 4-8-70 on the basis of which

U. D. Case No. 16/70 was registered at the Dhubri Police Station and the investigation of this U. D. case was taken up by the Officer-in-Charge

P.W. Kahali of Dhubri Police Station. On 7th August, 1970 P.W. Kahali along with P.W. 20, Mukti Pada Das, A.S.I. left for Siliguri in

connection with the investigation of the U. D. Case and interrogated accused Rajkhowa at the Siliguri Hospital both on 8th and 9th August. 1970.

During interrogation on 9th August, 1970, accused Rajkhowa confessed that he had buried the dead bodies of his wife and three daughters with

the help of accused Umesh Baishya in the compound of the official residence of the District Judge at Dhubri. It was further stated that this was

done on the nights of 10-2-70 and 25-2-70 P.W. Kahali drew up an F.I.R (Ext. 20) and also a requisition (Ext. 41) incorporating the above

information derived from accused Rajkhowa and sent both these documents through P.W. Mukti Pada Das to Dhubri. Mukti Pada Das left Siliguri

on 10th August, 1970 but he reached Dhubri next day at about 10 A.M. due to some agitation at Coochibehar. Having reached Dhubri P.W.

Mukti Pada Das handed over the F.I.R. and the requisition to S. I. C. K. Deka (P.W. 46), who was acting as the Officer-in-Charge of Dhubri

Police Station on that day. P.W. C. K. Deka endorsed the requisition in the name of S. I. S. R. Dutta (P.W. 49) and asked him to take immediate

steps for the recovery of the dead bodies from the compound of the District Judge's residence after having obtained the permission from the

Magistrate. P.W. S. E. Dutta obtained the necessary permission and thereafter came to the Judge's bungalow at 11-55 A.M. on 11th August,

1070 with the Magistrate (P.W. 29). In the bungalow P.W. S. R. Dutta contacted P.W. Bigan and on being pointed out by him the two pits were

dug 1½ one near the bath room and the other near Madha's quarter. In each pit two skeletons along with some other materials were found and

these skeletons are said to be of the wife and three daughters of accused Rajkhowa.

15. The recovery of the dead bodies led to the arrest of accused Umesh Baishya at Gauhati on 11th August, 1970 itself who was thereafter brought

to Dhubri on 13th August, 1970. On 11th August, 1970, P.W. 52, Jubed AH S, I. went to Siliguri at 7 p.m. and arrested accused Rajkhowa on

12-8-70 at Siliguri Hospital in connection with the present case. Accused Umesh Baishya was interrogated on 14-8-70 and he stated that he had

kept some sandals buried in the compound of the Judge's bungalow and he would be able to show the same. Accused Umesh was thereafter

brought under custody to the bungalow and five pairs of sandals were recovered on being led by him. At 10 A.M. in the morning of 14th August,

1970, accused Umesh Baishya was forwarded to the Court for recording his confessional statement and the confessional statement was recorded

by a Magistrate on the same date. Accused Umesh Baishya was then sent to Kokrajhar for custody. On 21-8-70 he was brought back for

verification of his confessional statement which was done by Magistrate Hem Bordoloi (P.W. 17).

16. After completion of investigation, charge sheet in the case was submitted on 27-12-71 and both the accused persons were committed to the

court of Session on 25-8-72 for trial. Before the Sessions Court the two accused were charged as stated hereinabove and the case was fixed for

hearing on 13-11-72 but on that day accused Rajkhowa attempted to commit suicide again in the Dhubri Jail and the trial had to be postponed and

a case u/s 309, Indian Penal Code was again registered., In Siliguri Police Station Case No. 48 (8) 70 u/s 309, Indian Penal Code, accused

Rajkhowa pleaded guilty and prayed for mercy and he was convicted and sentenced on 2-12-70 in that case. In the case u/s 309, Indian Penal

Code at Dhubri also accused Rajkhowa was convicted on 27-1-73 on plea of guilty.

17. The prosecution examined 55 witnesses in total and several documents were also proved" in the case. The accused persons pleaded not guilty

to the charges and their defence is complete denial. Accused Umesh Baishya retracted his confessional statement before the committing Magistrate

as well as before the Sessions Court. The defence did not examine any witness.

18. The learned Sessions Judge found that the Confessional statement of accused Umesh Baishya was neither voluntary nor true and there being

no other evidence to connect him with the charges against him, the learned Sessions Judge acquitted Umesh Baishya of the charges. The learned

Sessions Judge, however, found that though there is no eyewitness to the occurrence in the instant case the circumstances proved by the

prosecution are such that these led to the irresistible conclusion that accused Upendra Nath Rajkhowa was guilty of murder of his wife and three

daughters and that the dead bodies were buried by him with the intention of screening him from legal punishment and accordingly the learned

Sessions Judge convicted accused Upendra Nath Rajkhowa under Sections 302 and 201 of the Indian Penal Code and sentenced him as stated

hereinabove.

19. Let us first deal with the Death Reference and the two Appeals by Upendra Nath Rajkhowa.

20. Mr. K. Laihiri, the learned¹ counsel appearing on behalf of Upendra Nath Rajkhowa submits that the trial in the instant case has been vitiated

by non-compliance with Section 465, Criminal Procedure Code, The learned counsel submits that the case was fixed on 13-11-72 before the

Sessions Court for hearing on which date the trial could not proceed because the Jailor informed that the accused attempted to commit suicide in

Jail in the morning of 13-11-72. On 13-11-72 the learned Sessions Judge adjourned the case till 23-11-72 to know about the states of health of

Rajkhowa. On 23-11-72 the Court received a report from the Superintendent of District Jail, Dhubri to the effect that Rajkhowa was then

physically fit but the Civil Surgeon had opined that Rajkhowa might be sent to Tezpur Mental Hospital to be kept under observation of a

Psychiatrist. On the basis of the above facts the learned counsel for the convict submits that it was a clear case in which the learned trial Court

should have [postponed further proceedings in the case as provided u/s 465, Criminal Procedure Code.

21. Section 465 of the Criminal Procedure Code reads as follows:

465. Procedure in case of person committed before Court of Session or High Court being lunatic. (1) If any person committed for trial before a

Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the

jury, or the Court shall, in the first instance, try the fact of such un-soundness and incapacity, and if the jury or Court, as the case may be, is

satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case and the jury, if any, shall be

discharged.

(2) The trial of the fact of the un-soundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

22. In the instant case when the learned Sessions Judge received a report from the Superintendent of District Jail along with a medical certificate

issued by the Civil Surgeon, Goalpara to the effect that Rajkhowa was then physically fit but he should be sent to Tezpur Mental Hospital to be

kept under observation of a Psychiatrist, he by order dated 23-11-72 called for a detailed report from the Superintendent of District Jail as to

what was the basis of the aforesaid opinion of the Civil Surgeon and also directed the Civil Surgeon to mention about the basis and data of his

suggestion that Rajkhowa needed to be examined by a Psychiatrist. A detailed report was obtained on 24-11-72 which gave the basis and data of

the Civil Surgeon's suggestion that Rajkhowa needed to be examined by a Psychiatrist. The learned Sessions Judge after having perused the

report and having heard the Public Prosecutor and the defence counsel fixed the case on 25-11-72 to ascertain as to whether it was necessary at

all to try the suspected fact of unsoundness of mind of Rajkhowa as a preliminary point as enjoined by Section 465, Criminal Procedure Code.

The Superintendent of District Jail was directed to produce Rajkhowa on 25-11-72 in Court for his examination, if necessary. On 25-11-72 the

learned Sessions Judge passed the following order:

25-11-72 ~ 1/2 This case was fixed today to decide as to whether it is necessary at all to proceed u/s 465. Cr.P.C. to determine the fact of

suspected unsoundness of Shri Rajkhowa as a preliminary point in view of the report of the learned Civil Surgeon, Goalpara that Shri Rajkhowa

may "be shifted¹ to the Mental Hospital at Tezpur for observation due to some abnormalities said to have been detected in him. The learned Civil

Surgeon was, therefore, required to attend the Court today and the Superintendent of Jail was also directed to produce Shri Rajkhowa in the

Court.

Before, however the learned Civil Surgeon could be asked to appear in the witness box, Mr. Majumdar, the learned counsel representing Shri

Rajkhowa, submitted that he had a discussion with his client and his client is absolutely fit both mentally and physically to face the trial. It was.

therefore, thought proper to examine Shri Rajkhowa himself before examining the learned Civil Surgeon.

When Shri Rajkhowa came to the witness box, he greeted the Court with folded hands. He appeared quite normal. He was then asked some

questions by the Court. (The questions and answers as recorded in the actual language used are at page 56 of the File).

To the first question as to whether he should be sent to the Mental Hospital for observation as suggested by the Civil Surgeon, Shri Rajkhowa

replied that there was no necessity to do so, as he was quite normal and fit. According to him the act of sending a man like him to Mental Hospital

would be an act of inhuman torture. He was then asked by the Court as to whether he was feeling incapable in any way in making preparation for

his defence in the trial, to which he answered in the negative. In reply to the last question by the Court, Shri Rajkhowa very boldly asserted the fact

of his both mental and physical fitness to face the trial.

The accused then even made a voluntary submission to the Court. He desired that the trial may be fixed in January as he wanted to avoid the year

1972.

From the spontaneous answers of Shri Rajkhowa, his calm and quiet behaviour at the dock, and the submission of the defence counsel. I am quite

satisfied that there is no necessity to proceed u/s 465, as Shri Rajkhowa did not appear at all to me to be of unsound mind, not to speak of his

being incapable to make his defence in the trial.

23. The learned Sessions Judge in his order then considered in detail the basis of the suggestion of the Civil Surgeon that Rajkhowa might be sent

to the Mental Hospital for observation as detailed in his report dated 24-11-72 and came to the conclusion that there was no necessity to take any

further steps u/s 465, Criminal Procedure Code and the trial of the main case was fixed on 8-1-73.

24. Section 465, Criminal Procedure Code lays down that if any person committed for trial before a Court of Session appears to the Court at his

trial to be of unsound mind and consequently incapable of making his defence, the Court in the first instance shall try the fact of such unsoundness

and incapacity and if the Court is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the

case.

25. In the instant case in the report of the Civil Surgeon dated 24-11-72 it was stated that since Rajkhowa attempted to commit suicide twice it

showed that he had developed a suicidal mania. The Civil Surgeon, therefore, while giving him the certificate of physical fitness observed that in his

opinion it was better to give the suggestion to keep Rajkhowa under the observation of a Psychiatrist. The learned Sessions Judge wanted to

ascertain whether it was necessary at all to proceed u/s 465, Criminal Procedure Code to determine the fact of suspected unsoundness of

Rajkhowa as a preliminary point in view of the report of the Civil Surgeon. But after having examined Rajkhowa, in consideration of the answers

given to the questions put by the learned Sessions Judge as well as the voluntary statement of Rajkhowa made on that date before the Court and

his calm and quiet behaviour at the dock and also considering the submission of the defence counsel, the learned Sessions Judge was satisfied that

Rajkhowa did not appear at all to him to be of unsound mind not to speak of his being incapable to make his defence in the trial and in that view he

"held that there was no necessity to proceed u/s 465, Criminal Procedure Code. The defence of Rajkhowa in the instant case has never been that

of insanity at any stage. No one suspected him to be of unsound mind. Mr. T. C. Majumdar, the learned counsel of accused Rajkhowa in the

Sessions Court also submitted that he had a discussion with his client and his client was absolutely fit both mentally and physically to face the trial.

The question of Rajkhowa having been of unsound mind and consequently incapable of making his defence was not raised as such before the

Sessions Court.

26. In this connection, the following observation of the Supreme Court in I.V. Shivaswamy Vs. State of Mysore, may be usefully quoted:

Coming to the second point, no question was raised before the Committing Magistrate that the appellant was insane at the time of the occurrence

or trial and his statement before the Magistrate u/s 364, Cr.P.C. clearly shows that he was sane in mind and able to stand trial. It seems that the

statement of the Standing Counsel before the Sessions Judge made him look into the matter, and quite rightly, but on questioning the accused the

learned Sessions Judge was satisfied that it did not appear to him that the appellant was insane. Section 465. Cr.P.C. requires that there should be

an enquiry within the second limb of the section if it appears to the Sessions Judge that the accused was insane, but if it does not appear to him so

it is not necessary that he should conduct a regular enquiry under the second limb of the section. It is true that the word ""appears"" in Section 465

imports a lesser degree of probability than ""proof"" but this does not mean that whenever a counsel raises a point before a Sessions Judge he has to

straightway hold an elaborate enquiry into the matter. If on examining the accused it does not appear to him that the accused is insane it is not

necessary that he should go further and send for and examine medical witnesses and other relevant evidence. Of course if he has any serious doubt

in the matter the Sessions Judge should hold a proper enquiry.

27. In the instant case we have already found that the learned Sessions Judge has definitely held that he was satisfied that there was no necessity to

proceed u/s 465, Criminal Procedure Code as Rajkhowa did not appear at all to be of unsound mind or incapable of making his defence in the

trial. In the circumstances we find that there is no substance in the submission of the learned counsel for the appellant that in the instant case the trial

is vitiated for non-compliance with Section 465, Criminal Procedure Code.

28. There is no eye-witness in the instant case. The case against Upendra Nath Rajkhowa rests on circumstantial evidence and for that purpose the

prosecution relied on the following 40 circumstances:

(1) Pit No. 1 and Pit No. 2 where the dead bodies were ultimately found on 11-8-70 were dug at the instance of accused Rajkhowa.

(2) A few days after the digging of Pit No. 1 P.W. Bigan had filled up the same on being asked (by Mrs. Rajkhowa) whereat Rajkhowa had

ordered Bigan to take out the earth again from the pit and which was so done.

(3) Rajkhowa continued to live in the official residence of the District Judge after his retirement on 2-2-70 and asked P.W. Barada Sarma on 3-2-

70 to vacate his rented house at Gauhati although he had said that he would stay at Gauhati after retirement. This is what has been stated by

P.W. Barada Sarma.

(4) Mrs. Rajkhowa and Miss Nirmali alias Linu were last seen alive on 10-2-70 before going to bed in the company of Rajkhowa in the District

Judge's bungalow.

(5) In the morning of 11-2-70 Pit No. 1 near the bath room was found in a filled up condition.

(6) On the same morning Rajkhowa falsely stated to P.Ws. Bigan and Sahid that Mrs. Rajkhowa and Miss Nirmali alias Linu had gone to Gauhati

in the early morning to avert suspicion and to make others believe that they were alive. P.Ws. Golok Sarma and Bhaben Sarma were also told the

same thing in the evening of 11-2-70.

(7) In the morning of 11-2-70 Rajkhowa was found to have washed some clothes in the bath room and the water which came out was seen to be

like red earth. These clothes were thereafter spread out by himself to dry.

(8) In the evening of 11-2-70 when Mrs. Bhaben Sarma who had accompanied her husband to Rajkhowa's bungalow had wanted to use bath

room; she was asked by Rajkhowa not to use the bath room attached to his bed room as that was little dirty.

(9) P.W. Brahma Avatar had seen accused Rajkhowa levelling the pit No. 1 and seeing him Rajkhowa had run away and "thereafter Rajkhowa

had himself told Brahma Avatar that he was not in the bungalow.

(10) A few days before the arrival of the two younger daughters from Gauhati Rajkhowa gave a new story that his wife and eldest daughter did not

ultimately go to Gauhati but had gone to Kokrajhar knowing about the illness of one of his relations there to avert exposure of falsity of his earlier

story. Same story was told to the two younger daughters on their arrival at Dhubri on 14-2-70 and to P.W. Barada Sarma on 15-2-70/16-2-70.

(11) On 14-2-70 Rajkhowa asked P.W. Barada Sarma to send Luna and Bhantu to Dhubri though their examinations were near at hand on the

(plea that he would be going to Darjeeling with them.

(12) Rajkhowa had himself received the two younger daughters at the Bus Station.

(13) On 24-2-70 Rajkhowa rang up P.W. Barada Sarma who was told to vacate the rented house at Gauhati on the plea that his wife did not like

to stay there.

(14) From 24-2-70 onwards Rajkhowa avoided to respond to phone calls.

(15) On the morning of 25-2-70 the two younger daughters were last seen alive with Rajkhowa in the District Judge's bungalow.

(16) In the afternoon of 25-2-70 Rajkhowa stated to P.Ws. Bigan, Golok Sarma and Sahid that Luna and Bhantu had been sent to Gauhati in a

friend's car to make others believe that they were alive.

(17) In the morning of 26-2-70 accused Umesh was seen filling up the pit near Radha's quarter in presence of Rajkhowa. Subsequently P.W.

Sahid was called by Rajkhowa to level up the same.

(18) On 13-4-70 Rajkhowa wrote two letters (Exts. 30 and 31) to P.W. Barada Sarma and his wife giving out a new story that his family had not

returned back and he would be going to Delhi to fetch them with a view to make others believe that they were alive.

(19) On 15-4-70 Rajkhowa left Dhubri alone, leaving his personal belongings with P.Ws. Golok Sarma and Joy Prakash. Rajkhowa concealed his

whereabouts thereafter from his relatives till he was found on 25-7-70 at Savoy Hotel at Siliguri.

(20) (a) Rajkhowa had stayed alone from 28-4-70 to 9-5-70 in Summer Boon Hotel, Darjeeling.

(20) (b) Similarly from 7-6-70 to 25-7-70 Rajkhowa had stayed alone in Savoy Hotel, Siliguri.

(21) In June. 1970 Rajkhowa had visited the house of P.W. Satya Prakash at Gauripur and had stayed there for three nights. He had then asked

Satya Prakash. and his son Joy Prakash not to tell others about his visit to their house.

(22) While leaving their house, Rajkhowa at first did not tell about his destination but on being requested by Joy Prakash he stated that he would

stay in Savoy Hotel and told Joy Prakash not to tell others about the same.

(23) A few days after departure from the house of P.W. Satya Prakash, Rajkhowa wrote a letter (Ext. 12 (D) to P.W. Joy Prakash asking him to

come to Siliguri but he told Joy Prakash not to disclose this fact to anybody except the members of his family.

(24) During his stay at Gauripur in June. 1970, P.W. Satya Prakash had once taken Rajkhowa out to show a plot for Ashram and on way back

seeing a police vehicle Rajkhowa had felt non-plussed and had sat down as if to urinate.

(25) (a) On 25-7-70 when P.W. Barada Sarma met Rajkhowa at Savoy Hotel, Siliguri, Rajkhowa at first stated that the members of his family

were in Central Boarding, Darjeeling. On being Dressed to go there, Rajkhowa stated he was having stomach trouble and ultimately stated that

they were not there.

(25) (b) On being further questioned, Rajkhowa wrote Ext. 33 which reads ""Putul, Linu, Luna and Bhantu are not in this earth.

(25) (c) On being asked to state where they were, Rajkhowa stated that his wife had died falling from the verandah of the .District Judge"s

bungalow and Linu died after taking sleeping tablets. Thereafter both the dead bodies were thrown into the Brahmaputra for which the Biharis of

Steamer Ghat were paid Rs. 500. Luna and Bhantu having known about the death of their mother and eldest sister, committed suicide by jumping

into the Brahmaputra.

(26) On 25-7-70 Rajkhowa had attempted to commit suicide at Savoy Hotel for which he had pleaded guilty on 2-12-70 before the trial Court at

Siliguri.

(27) Ext. 34 was found by P.W. Barada Sarma under the bed roll of Rajkhowa when his belongings were collected from the Savoy Hotel. Ext. 34

reads "I am U. N. Rajkhowa, a retired District Judge of Assam. My wife and 3 daughters have expired. There is no use of my being alive.

Sd/- U. N. Rajkhowa, 31-7-70.

(28) (During his stay at Savoy Hotel Rajkhowa did not use to take his meals and on being asked by P.W. Timir Bara Nandi about it, Rajkhowa

had stated that he had committed sin.

(29) In Civil Hospital of Siliguri also, Rajkhowa had not taken meals for a few days and on being asked about the same he used to regret his act.

(30) (a) On 9-8-70 during interrogation by P.W. Kahali, Rajkhowa who was then under police custody had stated that he had buried the dead

bodies of his wife and 3 daughters in the compound of the District Judge"s residence at Dhulbri.

(30) (b) P.W. Kahali drew up a requisition (Ext. 41) on 10-8-70 incorporating the above information and on the basis of the aforesaid information,

four skeletons were recovered by S. I., S. R. Dutta from the compound of the residence of the District Judge. Dhulbri on ,11-8-70.

(30) (c) It has been proved that the skeletons were of Mrs. Rajkhowa. Linu, Luna and Bhantu.

(31) In Pit No. 1, a ring (Material Ext. 1) was found which has been identified to be of Mrs. Rajkhowa.

(32) A shirt (Material Ext. 7) was found in Pit No. 1 which has been identified by P.W. 24 Narayan Razak to be of Rajkhowa.

(33) A pajama found in Pit No. 1 was stained with blood.

(34) Two cots (Material Exts. 11 and 12) which were used by Rajkhowa in the District Judge's bungalow were found to have contained human

blood.

(35) A portion of net (Material Ext. 49) and bed-sheet (Material Ext. 50) among the articles left by Rajkhowa with P.W. Satya Prakash were

found to have contained blood.

(36) Rajkhowa had refused to write as per dictation from Exts. 33 and 34 in order to avoid comparison of the aforesaid exhibits by experts.

(37) Resistance was given by Rajkhowa when S. I., Jubed Ali had gone to arrest him on 12-8-70 at Siliguri.

(38) Accused Umesh has named Rajkhowa also in his confessional statement.

(39) Rajkhowa had attempted to commit suicide on 13-11-72 in Dhubri Jail to avoid trial of this case and had pleaded guilty for the same before

the learned Additional District Magistrate (Judicial) of Goalpara at Dhubri on 27-1-73.

(40) Total denial of all the incriminating circumstances by accused Rajkhowa.

29. Of the above 40 circumstances, the learned Sessions Judge found that the circumstances Nos. 2, 9, 11, 14, 88, 33, 34, 35, 37 and 38 were

not proved and that circumstances Nos. 3, 7, 19 and 29 were partly proved. The learned Sessions Judge further found that the circumstances

Nos. 3 and 29 which were partly proved were not incriminatory against Rajkhowa. Circumstance No. 13 was held to be innocuous. Regarding

circumstance No. 38 the learned Sessions Judge held that the confessional statement of accused Umesh was neither voluntary nor true and

therefore it could not be used against coaccused Rajkhowa. It is thus found that the learned Sessions Judge has relied on circumstances Nos. 1; 4;

5; 6; 8; 10; 12; 15; 16; 17; 18; 20(a); 20(b); 21; 22; 23; 24; 25(a); 25 (b); 25 (c); 26; 27; 30 (a); 30 (b); 30 (c); 32; ,36; 39 and 40.

30. Rajkhowa and Umesh Baishya have been charged for murder of Mrs. Rajkhowa, Miss Linu, Miss Luna and Miss Bhantu.

31. Mr. K. Lahiri, the learned counsel appearing on behalf of accused Upendra Nath Rajkhowa submits that the prosecution has not been able to

prove beyond reasonable doubt that Mrs. Rajkhowa, Miss Linu, Miss Luna and Miss Bhantu are not alive. Thus the first point that requires for

determination in the instant case is whether Mrs. Rajkhowa, Miss Linu, Miss Luna and Miss Bhantu, the wife and the three daughters of accused

Rajkhowa are dead and whether the death of Mrs. Rajkhowa and Miss Linu occurred on or about 10-2-70 and whether the death of Miss Luna

and Miss Bhantu occurred on or about 25-2-70 as alleged by the prosecution.

32. It is correct, as submitted by the learned counsel Mr. Lahiri, that if the prosecution has failed to establish beyond reasonable doubt that the

wife and the three daughters of accused Rajkhowa were dead, the whole structure of the prosecution case would crumble down.

33. Dr. J. C Medhi, the learned Advocate General, Assam, appearing on behalf of the State submits that the deaths of the wife and the three

daughters of accused Rajkhowa have been proved beyond reasonable doubt by

(i) Ext. 33 and Ext. 34.

(ii) the statement made by Rajkhowa before P.W. Barada Sarma on 25-7-70 at Savoy Hotel

(iii) Ext. 36.

(iv) information given by accused Rajkhowa to P.W. Kahali which led to the discovery of the dead bodies.

(v) discovery of dead bodies and their conditions.

(vi) identification of the dead bodies as those of Mrs. Rajkhowa and the three daughters of accused Rajkhowa.

(vii) lapse of time since the four ladies were last seen, and

(viii) conduct of accused Rajkhowa.

34. From the evidence of P.W. 25, Barada Sarma, who is Deputy Inspector General of Police, West Range. Assam, it is found that Rajkhowa's

original home was at Dibrugarh and he has no house of his own there. Rajkhowa used to live at Gauhati in a rented house. His family consisted of

his wife Mrs. Putuli alias Putul Rajkhowa and his three daughters. The eldest daughter was Nirmali alias Linu, who passed M.A. in Sanskrit,

perhaps in 1968. The second daughter was Jonali alias Luna and she was due to appear in B.Sc. examination in 1970. She used to study in

Handique Girls' College, Gauhati. The third daughter was Ruplekha alias Bhantu and she was promoted to 2nd year in College in 1970 and she

was also studying in Handique Girls' College. Thus the family of accused Rajkhowa consisted of himself, his wife and three daughters. It is also in

evidence that Rajkhowa retired as District and Sessions Judge Goalpara on 2nd February, 1970 and his successor N. K. Choudhuri (P.W. 11)

joined on 1-3-70 at Dhubri and stayed in the Circuit House, P.W. 11 shifted to the official residence of the District and Sessions Judge at Dhubri

on or about 25th July, 1970. Rajkhowa left the residential quarter of the District and Sessions Judge, Dhubri on 15th April, 1970 by Siliguri

Express and he was then alone. His wife and eldest daughter Linu were seen with him for the last time in the District Judge's bungalow at Dhubri

on 10-2-70. The two younger daughters Luna and Bhantu were also seen with him on the morning of 25-2-70 for the last time. Thereafter these

four persons were not found alive.

35. Since February, 1970, whereabouts of the wife and the three daughters of Rajkhowa have not been found by any of his relations. In the natural

course of human behaviour Upendra Nath Rajkhowa, who was the head of the family consisting of himself his wife and three daughters, is the

person who should have made or caused an enquiry as to their whereabouts. He retired as District and Sessions Judge only on 2-2-70. On the

morning of 10-2-70 he told P.W. Bigan and P.W. Sahid that Mrs. Rajkhowa and Miss Linu had gone to Gauhati early in the morning and- he also

told P.W. Golok Sarma and P.W. Bhaben Sarma same thing in the evening of 11-2-70. Miss Luna and Miss Bhantu arrived at Dhubri from

Gauhati on 14-2-70 and a few days before that Rajkhowa circulated that his wife and eldest daughter did not ultimately go to Gauhati but had

gone to Kokrajhar knowing about the illness of one of his relations there. The same thing was repeated about his wife and eldest daughter to his

younger daughters when they arrived at Dhubri on 14-2-70. On 13-4-70 Rajkhowa wrote to P.W. Barada Sanaa and his wife giving out a new

story that his family had not returned from Delhi and he also would be going to Delhi to fetch them. P.W. 25 having not heard about the

whereabouts of Rajkhowa and the other "members of his family for about 24 months, in May, 1970 P.W. 25 started doubting the thing to be

mysterious. So P.W. 25 informed Rajkhowa's maternal uncles and other relations on phone. P.W. 25 enquired at Delhi at the house of Ajit

Sarma, a relation of Rajkhowa. Ajit Sarma was working in Oil India and one Uma Sarma had contacted Ajit Sarma being informed by P.W. 25.

36. P.W. 6. Golok Sarma stated that in June, 1970, P.W. Barada Sarma asked him about the whereabouts of Rajkhowa. P.W. 6 further stated

that such a query was made by the Sub-Deputy Collector of Kokrajhar also. The learned counsel Mr. Lahiri submits that the prosecution by not

examining the Sub-Deputy Collector of Kokrajhar left a lacuna as to the question whether Mrs. Rajkhowa and Miss Linu were dead inasmuch as

Rajkhowa stated to some of the P.Ws. that his wife and eldest daughter in February went to Gauhati but on the way learning that one relation of

his was ill, they left for Kokrajhar. The evidence on record shows that this relation is the Sub-Deputy Collector of Kokrajhar and P.W. 6 said

that even that Sub-Deputy Collector of Kokrajhar was also enquiring about the whereabouts of Rajkhowa and the members of his family sometime

in June, 1970. That being the position, there is no substance in the argument that there was any possibility of Mrs. Rajkhowa and Miss Linu

remaining at Kokrajhar in the house of the Sub-Deputy Collector. The subsequent statement of Rajkhowa stating that his wife and eldest daughter

though left for Gauhati but went to Kokrajhar is apparently false statement to mislead the people about the whereabouts of those two persons. Till

25th July, 1970 none of the relations of Rajkhowa knew about the whereabouts of the members of his family. This being the state of affairs it was

quite natural on the part of P.W. Barada Sarma to be suspicious about the whole affairs and therefore he started enquiry. Till then nobody even

thought that the wife and the daughters of Rajkhowa were dead. That the wife and the daughters of Rajkhowa might be dead came to light only on

25th July, 1970 when P.W. Barada Sarma with P.W. Kahali and Aipurba Barua went to Siliguri and met Rajkhowa at Savoy Hotel. Thus we

come to Ext. 33 which is at page 812 of the Paper Book.

P.W. 25 stated in his evidence that on 25th July 1970 he went to Siliguri with P.W. Kahali and Apurba Barua and found Rajkhowa in Savoy

Hotel. When Rajkhowa was asked about the members of his family, he first stated that they were in Central Boarding of Darjeeling. P.W. Barada

Sarma then wanted Rajkhowa to go with them to Darjeeling apparently with a view to meet the members of Rajkhowa's family. Rajkhowa

refused to go on the plea that he had stomach trouble. This necessarily led P.W. Barada Sarma to press him further to go to Darjeeling. Having

been thus pressed to go with them Rajkhowa disclosed that his wife and three daughters were not at Darjeeling. The next question naturally must

have been "If they were not at Darjeeling where were they?" Thus on being asked where they were, Rajkhowa stated that he would not be able

to say it verbally but he could give that in writing and then he wrote in Assamese on a slip of paper as follows: (Original in Assamese

omitted) the English translation of which is as follows:

None of Putul, Linu. Luna and Bhantu is in this world.

37. Mr. Lahiri has challenged the admissibility of this document (Ext. 33) on the grounds that

(i) Rajkhowa has not admitted it to be in his hand-writing and the handwriting expert also has not given any opinion as to whether the writing in

Ext. 33 is in the hand-writing of Rajkhowa or not.

(ii) When Rajkhowa wrote this he might have been out of his mind;

(iii) That Rajkhowa wrote it out of threat and pressure by a person in authority and as such the statement is hit by Section 24 of the Evidence Act

and Section 162, Criminal Procedure Code; and

(iv) that the statement in Ext. 33 is hit by Article 20(3) of the Constitution.

38. P.W. Barada Sarma has deposed that Ext. 33 was given to him in writing by Rajkhowa at the Savoy Hotel, State of Assam v. U. N.

Rajkhowa (Pathak Section 4J Siliguri and that it was written by Rajkhowa in his presence.

39. Barada Sharma used to see letters written by Rajkhowa. Since Barada Sharma knew the handwriting of Rajkhowa and Ext. 33 was written

by Rajkhowa in his presence, even though there is no handwriting expert's opinion regarding the writing of Ext. 33, it is admissible in evidence. In

this connection the following observations of the Supreme Court may be noted. In the case of State of Gujarat Vs. Vinaya Chandra Chhota Lal

Patni, the Supreme Court observed as follows:

In the present case it was proved to the complainant that the various entries in the cheques and the signatures on the reverse of the various

cheques were in the handwriting of the respondent. The complainant was competent to speak about them as the respondent had "been his

employee for a number of years. The complainant had many an occasion to see him write and sign.

* * *

A court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe

for a Court to record a finding about a person's writing in a certain document merely on the "basis of comparison, but a Court can itself compare

the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also

relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting

expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows, that it is not essential

that the handwriting expert must be examined in a case to prove or disprove the disputed writing. It was therefore not right for the learned Judge to

consider it unsafe to rely upon the evidence of the complainant in a case like this, i.e. in a case in which no handwriting expert had been examined

in support of his statement.

In Fakhruddin v. State of Madhya Pradesh AIR 1967 SC 1326 : 1967 Cri LJ 1107 the Supreme Court has observed as follows

Evidence of the identity of handwriting receives treatment in three sections of the Indian Evidence Act. They are Sections 45, 47 and 73.

Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if

it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a handwriting expert

{Section 45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence

which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a

particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the

comparison of handwritings on a scientific basis. A third method (Section 73) is comparison by the Court with a writing made in the presence of

the Court or admitted! or proved to be the writing of the person.

40. In the instant case, we have, as stated above, direct evidence of the handwriting in Ext. 33 to be that of Rajkhowa as P.W. Barada Sarma has

stated that it was written in his presence. In the circumstances, Ext. 33 is admissible in evidence. The finding of the learned Sessions Judge in this

regard is thus found to be correct.

41. Another thing also may be noted here that Ext. 36, which is D. O. No. D. R/C/70/173, dated 4Uh August, 1970 written by P.W. Barada

Sarma to the Superintendent of Police, Hazarika, mentions about this document Ext. 33. In Ext. 36 Barada Sarma wrote as follows:

...As regards his family he first told me that they were in the Central Boarding at Darjeeling, but later disclosed in writing that they did not exist in

this world. His unsigned writing is enclosed.

42. The next submission of the learned counsel is that when Rajkhowa wrote Ext. 33. he was out of his mind. This submission is, however, not at

all acceptable, inasmuch as Rajkhowa while he was pressed to disclose about the where about of the members of his family he stated that he

would not be able to Break out but he would be able to disclose in writing and thereafter he wrote Ext. 33. In our opinion, it cannot be argued that

Rajkhowa was out of his mind while he wrote Ext. 33.

43. The third submission of the learned counsel in this regard is that the document was obtained from Rajkhowa by Barada Sarma using threat and

pressure and, as such, it is hit by Section 24 of the Evidence Act and Section 162 of the Code of Criminal Procedure. We have already observed

under what circumstances Ext. 33 was written by Rajkhowa. On 25-7-70 no case against Rajkhowa regard¹-ing the death or disappearance of

his wife and daughters was registered and investigated. No charge of murder was brought against him prior to that date. Ext. 36 is dated 4-8-70

wherein the facts were stated regarding the alleged suicide of his three daughters and accidental death of his wife and P.W. 25 Barada Sharma sent

Exts. 33 and 34 along with Ext. 36 to the Superintendent of Police, Goalpara, Dhubri with a request to immediately register U. D. Case to start

with and make vigorous and sifting enquiry about the death/disappearance of the family of Raikhowa. When Ext. 33 was written Rajkhowa was

not an accused in any case. Ext. 33 also does not go to show that any confession as such has been made. It only shows that the wife and the three

daughters of Rajkhowa are not in this world. P.W. Barada Sharma though a Police Officer is a relative of Rajkhowa and when Rajkhowa's wife

and daughters were un-traceable and their whereabouts were not known, he wanted to know whether Rajkhowa knew the whereabouts of his

wife and daughters and while he was questioned in this regard, Raikhowa wrote Ext. 33. That being so, we do not think that Ext. 33 is hit either by

Section 24 of the Evidence Act or by Section 162 of the Code of Criminal Procedure.

44. Ext. 33 is not a confession. It is simply a statement of fact and at the most an admission of a fact. In this connection the following observation

of the Supreme Court in the case of Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu, may be quoted:

It is true that in Queen Empress v. Nana ILR 1889 Bom 260 the Bombay High Court, following Stephen's definition of confession, held that a

statement suggesting the inference that the prisoner had committed the crime would amount to confession such a definition would no longer be

accepted in the light of AIR 1939 47 (Privy Council) and the approval of that decision by this Court in Palvinder Kaur's case. In State of U.P. Vs.

Deoman Upadhyaya, (as he then was) referred to a confession as a statement made by a person ""stating or suggesting the inference that he had

committed a crime"". From that isolated observation, it is difficult to say whether he widened the definition than the one given by the Privy Council.

But he did not include in the expression "confession" an admission of a fact, however incriminating which by itself would not be enough to prove

the guilt of the crime in question, although it might, together with the other evidence on record, lead to the conclusion of the guilt of the accused

person. In a later case of Aghnoo Nagesia Vs. State of Bihar, Bachawat, J., after referring to Lord Atkin's observations in Fakala Narayana

Swami's case and their approval in Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator), defined a confession as ""an admission of the

offence by a person charged with the offence"". It is thus clear that an admission of a fact however incriminating, but not by itself establishing the

guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act.

On the authority of these pronouncements by this Court, it is clear that the statement in question did not amount to a confession. It was an

admission of a fact, no doubt of an incriminating fact, and which established the presence of the appellant in the deceased's room tout which

clearly was not barred u/s 26. The Sessions Judge and the High Court were, therefore, right in holding it to be admissible and in relying upon it....

In any view of the matter Ext. 33 is admissible u/s 21 of the Evidence Act.

45. The next submission of the learned counsel is that Ext. 33 is hit by Article 20(3) of the Constitution of India, which reads as follows:

20 (3) No person accused of any offence shall be compelled to be a witness against himself.

We have already observed that no force or threat was used against Rajkhowa in order to make him write Ext. 33. Rajkhowa being the head of his

family was the best person to enlighten others about the whereabouts of his wife and daughters. When questioned he at first stated that they were

in the Central Boarding at Darjeeling and when P.W. Barada Sharma asked him to accompany Barada Sharma to Darjeeling, Rajkhowa

complained of stomach pain and when he was further urged to go to Darjeeling, he stated that they were not at Darjeeling and the natural question

that followed was ""where those persons were?"" to Which Rajkhowa stated that he would not be able to speak out but he would be able to give

out in writing and thus he wrote Ext. 33. So, there is no question of compulsion or force upon Rajkhowa to write the contents of Ext. 33.

46. In The State of Bombay Vs. Kathi Kalu Oghad and Others, the Supreme Court observed as follows:

The question whether Section 27 of the Evidence Act was unconstitutional because it offended Article 14 of the Constitution was considered by -

this Court in State of U.P. Vs. Deoman Upadhyaya, It was held by this Court that Section 27 of the Evidence Act did not offend Article 14 of

the Constitution and, was, therefore, intra vires". But the question whether it was unconstitutional because it contravened the provisions of Clause

(3) of Article 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been raised in one of

the cases before us and has, therefore, to be decided. The information given by an accused person to a police officer leading to the discovery of a

fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving

the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is

concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that

will not be (hit by the provisions of Cl. (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be

held that the provisions of Section 27 of the Evidence Act are not within the "prohibition aforesaid, unless compulsion had been used in obtaining

the information.

In this connection the question was raised before us that in order to bring the case within the prohibition of Cl. (3) of Article 20, it is not necessary

that the statement should have been made by the accused person at a time when he fulfilled that character; it is enough that he should have "been

an accused person at the time when the statement was sought to be proved in Court, even though he may not have been an accused person at the

time he had made that statement. The correctness of the decision of the Constitution Bench of this Court in the case of Mohamed Dastagir Vs. The

State of Madras, was questioned because it was said that it ran counter to the observations of the Full Court in M.P. Sharma and Others Vs.

Satish Chandra, District Magistrate, Delhi and Others, . In the Full Court decision of this Court this question did not directly arise; nor was it

decided. On the other hand, this Court in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , held that the

protection under Article 20(3) of the Constitution is available to a person against whom a formal accusation had been levelled, inasmuch as a First

Information Report had been lodged against him. M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, therefore,

did not decide anything to the contrary of what this Court said in Mohamed Dastagir Vs. The State of Madras, The later decision in our opinion

lays down the law correctly.

In order to bring the evidence within the inhibitions of Clause (3) of Article 20 it must be shown not only that the person making the statement was

an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that (he was compelled

to make that statement. "Compulsion" in the context, must mean what in law is called "duress". In the Dictionary of English Law by Earl Jowitt,

"duress" is explained as follows:

Duress is where a man is compelled to do an act (by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the

threat of being killed, suffering some grievous bodily harm, or "being unlawfully imprisoned (sometimes called menace, or duress "per mines").

Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person." The compulsion in this sense is a physical

objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous

process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a

crime against certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused

person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the

accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the

relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact

exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances

disclosed in the evidence before it.

In view of these considerations, we have come to the following conclusions:

(1) An accused "person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police

custody, with out anything more. In other words the mere fact of being in police custody at the time when the statement in question was made

would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in

conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not

the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be

incriminatory, is not "compulsion".

(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or

written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the

accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writing or showing parts of the body by way of identification

are not included in the expression "to be a witness".

(5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in

Court or otherwise.

(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal

interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of

an offence orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused

person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.

47. In the instant case, when Ext. 33 was written by Rajkhowa, he was not an accused in the case nor was he compelled by physical force or

otherwise to write Ext. 33. When he was put questions about the whereabouts of his wife and daughters, he ultimately wrote out Ext. 33. At the

time of writing Ext. 33, he was not an accused. In consideration of the above observations of the Supreme Court, we are clearly of opinion that

Ext. 33 is not hit by Article 20(3) of the Constitution.

48. Let us now examine the admissibility of Ext. 34. Ext. 34 reads as follows:"Ã~Â¿Â½

I am U. N. Rajkhowa a retired District Judge of Assam. My wife and 3 daughters have expired. There is no use of my being alive.

U. N. Rajkhowa

31-7-70.

Ext. 34, according to P.W. Barada Sharma, as well as P.W. Kahali, was found along with the belongings of Rajkhowa which were in the Savoy

Hotel and which they had brought. Ext. 34 was also forwarded with the D. O. letter Ext. 36 to the Superintendent of Police, Goalpara. There is

some discrepancy as to whether Ext. 34 was found in the Savoy Hotel itself or, this was found afterwards with the belongings of Rajkhowa which

were brought from Savoy Hotel by P.W. Barada Sarma. In his examination-in-chief Barada Sarma stated that they brought back Rajkhowa's

goods and on checking the same afterwards he had received Ext. 34 written in English in his hand. He has identified the signature of Rajkhowa,

which is Ext. 34 (1). In cross-examination, however, he stated that Ext. 34 was found by him in the hotel itself while rolling the bedding below the

bedding roll. P.W. Kahali also has stated that the personal belongings of Rajkhowa lying in the hotel were taken by D.I.G. Sahab and while rolling

the bedding a slip was found dated 31-7-70 and Ext. 34 is that slip. In Ext. 36 after narrating the facts upto the registration of the case u/s 309 of

the Indian Penal Code at Siliguri Police Station against Rajkhowa, it has been stated that later among his belongings a statement signed by

Rajkhowa dated 31-7-70 was found. From the statement of P.W. 25 it appears that Ext. 34 was found afterwards with the belongings of

Rajkhowa. Regarding the finding of Ext. 34 it has been submitted on behalf of the convict that Ext. 34 was not found at Savoy Hotel, Siliguri on

25-7-70. But reading the depositions of P.W. 25 Barada Siarma, P.W. 53 D. N. Kahali and Ext. 36 and the surrounding circumstances it can

safely be held that Ext. 34 was found along with the belongings of Rajkhowa at Savoy Hotel when those belongings were collected by P.W.

Barada Sarma from the hotel on 25th July. 1970. In any view of the matter the fact remains that Ext. 34, was found with the belongings of

Rajkhowa that were found in Savoy Hotel at Siliguri and brought by P.W Barada Sarma, Though Ext. 34 was not made over to Police Station

Siliguri, it was sent to the Superintendent of Police, Goalpara along with Ext. 36.

49. P.W. 3f1 Rajendra Prosad Singh, Government Examiner of Questioned Documents, stated in his evidence that Ext. 34 was written by the

person who had written documents marked as SI. S2. 65-97 and AI to A4. Documents marked AI to A4 have been proved to foe in the

handwriting of Rajkhowa by P.W. 3S Sikendra Nath Brahma, the Head Assistant in the District and Sessions Judge's office at Dhubri and P.W.

19 Narayan Chandra Medhi, a Lower Division Assistant of the same office. These are some pages of depositions "recorded by the District and

Sessions Judge, Goalipara and seized by the Police. P.W. 32 being the Head Assistant of the office of the District and Sessions Judge at Dhulbri

and P.W. 19 being a Lower Division Assistant in the same office they can be safely held to have seen the handwriting of Rajkhowa while acting as

the District and Sessions Judge, and there is no reason to discard their evidence in this regard. Other documents sent to P.W. 38 were signatures

and other writings of Rajkhowa obtained by P.W. 41, Umesh Chandra Dutta, Magistrate, Dhubri on 2-10-70 and 28-10-70 in the office of

Dhubri Jail. These documents were marked by the expert P.W. 38 as SI, S2, S5-S7. By comparison with the admitted documents P.W. 38 came

to the conclusion that Ext. 34 was written by the same person who wrote AI to A4 and SI, Si2, and S5-S7. Ext. 34 was found with the belongings

of Rajkhowa. Considering"" all these facts, in our opinion the learned Sessions Judge correctly held that Ext. 34 was in the handwriting of

Rajkhowa. Ext. 34 was found on 25-7-70 but the date under the signature is written as 31-7-70. The question of post-dating is explained by other

evidence on record. P.W. Kahali stated that P.W. 8 Joy Prakash Chakravarty informed him on 24-7-70 that Rajkhowa would stay in Savoy

Hotel till July. This information was received before P.W. Barada Sharma and others went to Siliguri on 25-7-70. It has "been stated in Ext. 36

that Rajkhowa was likely to stay at SiliRuri according to Joy Prakash Chakravarty, till the end of July. On 25-7-70 Rajkhowa attempted to

commit suicide in the Savoy Hotel. From all this it can be safely held that Rajkhowa decided to end his life while at Savoy Hotel and he kept a slip

Ext. 36 under his bed so that the hotel people might not be put into trouble. From the above facts, in our opinion, the learned Sessions Judge

correctly held that Ext. 34 was in the handwriting of Rajkhowa.

50. The learned counsel for the convict submits that non-examination of Apurba Barua, who went to Savoy Hotel along with Barada Sharma and

Kahali has materially affected the evidence of Barada Sharma. We are, however, unable to accept this submission inasmuch as there is nothing on

record to show that when Ext. 33 was written Apurba Barua was present in the room or that when Ext. 24 was recovered, Apurba Barua was

51. Now we come to the oral statement made by Rajkhowa on 25-7-70 at Savoy Hotel before Barada Sarma.

52. On 25-7-70 being questioned by P.W. Barada Sharma, Rajkhowa wrote Ext. 33 which shows that none of Putul, Linu, Luna and Bhantu was

in this world. Naturally P.W. Barada Sharma asked Rajkhowa about their whereabouts or what happened to them. In reply Rajkhowa stated that

his wife had got seriously injured one evening on falling down from bungalow's verandah and died, at the same time, Linu had died in the bedroom

after having taken sleeping tablets and on not being able to decide what to do, or not to do, he had called (some) Beharis from steamer ghat and

got the dead bodies thrown in the river. The Beharis were paid Rs. 500 for it. Rajkhowa further stated that Luna and Bhantu having known about

the death of their mother and eldest sister, one evening having gone to walk jumped into the Brahmaputra and committed suicide. On getting the

above information from Rajkhowa, Barada Sharma asked him to narrate this before the Police and the Magistrate and asked him to go with them.

Rajkhowa agreed to go and when he was about to change clothes, Barada Sharma came out of the room. Thereafter while in the verandah Barada

Sharma heard a sound inside the room and he along with two other (persons went inside and found that Rajkhowa assaulted himself with a knife

on his stomach. The above statement made by Rajkhowa regarding the manner of death of his wife and three daughters cannot be said to be a

confessional statement. The above statements cannot be said to have been brought out from Rajkhowa under duress. The statements were

voluntary statements made by Rajkhowa. When these statements were made to Barada Sharma, Rajkhowa was not an accused in any case.

Though Barada Sharma was a Deputy Inspector-General of Police, not only as a Police Officer but also as a near relative of Rajkhowa through his

wife, he was anxious to know about the whereabouts of Mrs. Rajkhowa and three daughters. The reasonings given for the admissibility of Ext. 33

hereinabove are equally applicable to the oral statements made before Barada Sharma by Rajkhowa and, in our opinion, these statements are

admissible in evidence.

53. Prior to Barada Sharma's meeting with Rajkhowa on 25-7-70 in Savoy Hotel at Siliguri the whereabouts of Mrs. Rajkhowa and the three

daughters of Rajkhowa were not known to his relatives for roughly about 5 months after Mrs. Rajkhowa and the eldest daughter were seen for the

last time on 10-2-70 and the other two daughters were seen for the last time on 25-2-70. Barada Sharma has stated that when he failed to get

response over the phone from Rajkhowa at Dhubri, he informed the maternal uncles of Rajkhowa and his other relatives. He also made an enquiry

at Delhi in the house of Ajit Sharma, who is a cousin of Rajkhowa, through one Uma Sharma because in the letters dated 1.3-4-70 written by

Rajkhowa to Barada Sharma and Mrs. Barada Sharma (Exts. 30 and 31 respectively) it was stated by Rajkhowa that "he would be leaving for

Delhi tomorrow by night train as the members of his family have not yet arrived". Exts. 30 and 31 are admitted "by Rajkhowa to be in the hand

and these two documents also have been legally proved by P.W. Barada Sharma. Barada Sharma also has stated in his cross-examination that he

had met Lakhi Goswami of Kokrajhar in May itself which shows that the members of Rajkhowa's family could not be in the house of Lakhi

Goswami at Kokrajhar, though on this point some cloud was sought to be cast by the learned counsel for the convict. P.W. 6 Golok Chandra

Sharma also has stated that the Sub-Deputy Collector of Kokrajhar, that is to say, Lakhi Goswami, enquired of him about the whereabouts of the

family of Rajkhowa some time in June 1970. Thus from the materials on record it is quite clear that till the arrival of Barada Sharma with his

companions on 25-7-70 in Savoy Hotel at Siliguri, none of his relatives nor any other person had any idea as to the whereabouts of Mrs.

Rajkhowa and the three daughters and till that date nobody knew whether these four ladies were dead or alive. That the wife and the three

daughters of Rajkhowa might (be dead came to light only from Ext. 33, Ext. 34 and the oral statements made by Rajkhowa before Barada Sharma

on 25-7-70 at Savoy Hotel. Barada Sharma left Siliguri on 25-7-70 giving instructions to the Officer-in-Charge, Siliguri P. S. to interrogate

Rajkhowa and to inform him after Rajkhowa felt better at the Siliguri Hospital. When Barada Sharma did not receive any information from the

Officer-in-Charge, Siliguri, he wrote D. O. No. DR/C/70/17-3 dated 4-8-70 (Ext. 36) to the Superintendent of Police, Goalpara, narrating the

facts from 2-2-70, the date of retirement of Rajkhowa. Barada Sharma's visit to Siliguri on 25-7-70 and about Exts. 33 and 34, with a request to

make vigorous and sifting enquiry about the death/disappearance of the family of Rajkhowa. Accordingly U. D. Case No. 16 of 1970 was started.

Till then nobody knew that Mrs. Rajkhowa and the three daughters were dead. After getting Exts. 33 and 34 there was a strong suspicion that

Mrs. Rajkhowa and the three daughters might have been dead.

54. P.W. 53 Dwijendra Nath Kahali, who was the Officer-in-Charge of Dhubri Police Station from August, 1968 till December 1970, has stated

in his evidence that D.I.G. Barada Sarma came to Dhubri in May, 1970. In May he had no talk with Barada Sarma. In the second or third week

of June when Barada Sarma again came accompanied by his wife, he enquired of P.W. Kahali about the residence of Golok Sarma (O.R.W. 6) a

Lower Division Assistant of the District Judge's office. P.W. Kahali took Barada Sarma to the house of P.W. Golok Sarma. Barada Sarma went

inside the house of Golok Sarma and P.W. Kahali remained outside. After about 40 minutes Barada Sarma came out with some bedding, trunk,

lathi etc. Barada Sarma asked P.W. Kahali to send those articles to the Circuit House adding that those articles belonged to his brother-in-law,

who had gone somewhere. Barada Sarma again came on 23rd July and this time he told P.W. Kahali that Rajkhowa was his brother-in-law and

his wife and eldest daughter had gone from Dhubri on tour but no news of them was available till then. That the other two daughters of Rajkhowa

were also called from Gauhati and their whereabouts were also not known. P.W. Kahali was asked by Barada Sarma to enquire into the matter

confidentially and in course of confidential enquiry P.W. Kahali got a clue on the evening of 23rd July that Rajkhowa's letters were being collected

by P.W. Joy Prakash Chakravarty, a clerk of the District Judge's office. P.W. Kahali went to the house of Joy Prakash Chakravarty on 23rd July

itself but he could not get any important information regarding Rajkhowa and his family. On 24th July P.W. Kahali again went to Gauripur and

questioned Joy Prakash Chakravarty and ultimately succeeded in getting the information that Rajkhowa was in Savoy Hotel at Siliguri and would

stay there till July. Having got the information that Rajkhowa was at Siliguri. P.W. Kahali, D.I.G. Barada Sarma and Atpurha Barua, brother-in-

law of Upendra Nath Rajkhowa left for Siliguri on 25th July, 1970, This was entered in the G. D. Entry No. 722 of the Dhubri Police Station vide

Ext 69 (1). The party arrived at Siliguri between 1-1.30 P.M. At first they went to the Siliguri Police Station and after having some discussion with

the Officer-in-Charge of Siliguri Police Station, they called for the hotel register from the Savoy Hotel which was brought by the Manager. On

checking they found that Upendra Nath Rajkhowa was in Room No. 3 of that hotel and then all the three of them went to the Savoy Hotel and

found Rajkhowa in Room No. 3. He was alone. P.W. Kahali wished him. Having noticed that D.I.G. Barada Sarma started talking with Rajkhowa

regarding the family matters, P.W. Kahali came out and stayed in the verandah just in front of the room. At about 4 PM. P.W. Kahali heard a

sound and D.I.G. Sarma came running saying that Rajkhowa had assaulted himself with a knife on his abdomen. Immediately P.W. Kahali went

into the room and found that D.I.G. Sarma and Apurba Barua had removed the knife and Rajkhowa was pressing his wound by his hand, P.W.

Kahali called the Manager to give first-aid and asked him to inform Police Station and to call for a doctor. P.W. Kahali and Apurba Barua went

to the Police Station where Apurba Barua gave an ejahar in writing and the Officer-in-Charge of the Siliguri Police Station registered a case u/s

309, Indian penal Code. Then the Officer-in-Charge came with S.I., A. C. Pyne to Savoy Hotel along with P.W. Kahali and Apurba Barua.

Thereafter Rajkhowa was taken to the Civil Hospital at Siliguri and the knife was seized. Then Dr. Mukherjee (P.W. 28) Was in the hospital and

P.W. Kahali requested him to give oil possible aid to Rajkhowa. Dr. Mukherjee stated that Rajkhowa's condition was not good and so he should

not be interrogated then. The personal belongings of Rajkhowa lying in the hotel were taken by D.I.G. Barada Sarma. While rolling the bedding, a

slip was found bearing the date 31-7-70 and Ext. 34 was that slip. Ext. 33 was also shown to P.W. Kahali by D.I.G. Sarma on that day. Then all

of them left Siliguri at about 9 P.M. on 25-7-70 and reached Dhubri on 26-7-70 at 5 P.M.

55. P.W. 28 Anil Kumar Mukherjee, who was the Medical Officer attached to Siliguri Sub-Divisional Hospital, has stated consulting the

Admission Register of the Hospital (Ext. 30) and the Operation Register (Ext. 40) that U. N. Rajkhowa, Retd. District Judge, Dhubri was

admitted as an indoor patient having been brought by police on 25-7-70 with the diagnosis of stab injury. He had multiple stab injuries one of

which was found on the upper part of the abdomen. It was deep to the peritoneum. On opening the abdomen he found ligamentum teres and

falciform ligament which contained lot of blood clots. On further exploration it was seen to penetrate the lesser omentum and reached body of

pancreas. Abdominal cavity was filled with blood clot, especially over the left subdiaphragmatic region. The bleeding was controlled, blood clots

cleaned and then the abdomen was closed. Rajkhowa remained as an Indoor patient from 25th July, 1970 to 12th August 1970. For a few days

he did not take any food and after some days he had some post-operation complication. While Rajkhowa was recovering, some police officers

told P.W. Mukherjee that they wanted to take the patient and P.W. 28 Dr. Mukherjee permitted when Rajkhowa was found fit to travel in

ambulance on a stretcher. During his stay in hospital Rajkhowa was being guarded by some police officials.

56. Going through the evidence on (P.W. 218 it is found that Rajkhowa was taken to the Siliguri Civil Hospital after his attempted suicide and his

condition on 25th July, 1970 and a few days thereafter was not such that he could be immediately brought therefrom to Dhubri. In view of the facts

and circumstances of the case and the condition of Rajkhowa on 25th July, 1970 at Siliguri Hospital, we find that there is no justification for the

learned counsel for the convict in his submission that Rajkhowa was left in-humanly and carelessly at Siliguri Hospital by his brother-in-law P.W.

Barada Sarma and P.W. Kahali. In fact Rajkhowa was not in a condition to be brought from Siliguri Hospital on 25th July, 1970 and a few days

thereafter as is found from the evidence of P.W. 28.

57. When D.I.G. Barada Sarma left Siliguri on 25-7-70, he left instructions with the Officer-in-Charge of Siliguri Police Station to interrogate

Rajkhowa at the Hospital when he would feel better and to send information to him. Barada Sarma waited for about 9 days and having no

information from the Officer-in-Charge, Siliguri Police Station he wrote Ext. 36 (D. O. No. DR/C/70/173, dated 4th August, 1970) from Gauhati

to B. N. Hazarika, Superintendent of Police, Dhubri. paragraph 9 of Ext. 36 is to the following effect:

You will no doubt appreciate that the story given out by Shri Rajkhowa at Siliguri about the suicide of his three daughters and accidental death of

his wife needs further probe. I, therefore, requested O/C, Siliguri Police Station to ask Shri Rajkhowa, as soon as he recovers from his injury, to

ascertain the truth behind the death/disappearance of his family. But up till now no further information is forthcoming.

In Ext. 36 D.I.G. Barada Sarma has inter alia referred to his discussion with the Superintendent of Police Shri Hazarika on 24th July, 1970

regarding the whereabouts of Rajkhowa, the facts regarding the family of Rajkhowa as far as known to him after the retirement of Rajkhowa on 2-

2-70, his going to Siliguri and meeting with Rajkhowa at Savoy Hotel and the circumstances under which Exts. 33 and 34 were found, and the oral

information given to Rajkhowa by Barada Sarma regarding the death of his wife and three daughters. In Ext. 36 Shri Sarma directed Shri

Hazarika to immediately register U. D. cases to start with and make vigorous and sifting enquiry about the death/disappearance of the family of

Rajkhowa with further direction that Rajkhowa should be thoroughly interrogated and appropriate steps should be taken so that he did not go

untraced and could not make further attempt to kill himself, Along with Ext. 36, Exts. 33 and 34 were forwarded. After receipt of Ext. 36, U. D,

Case No. 16/70 was registered at Dhubri Police Station and P.W. Kahali took up investigation and he left for Siliguri on 7-8-70 at 9 P.M. in

course of investigation of U. D. Case No. 16/70. P.W. Barada Sarma has proved Ext. 36. Going through Ext. 36 we find that it is not an

information of an offence as contemplated u/s 154, Criminal Procedure Code. U. D. Case is started under the provisions of Section 174, Criminal

Procedure Code. Going through Section 174, Criminal Procedure Code, it is found that U. D. Case is started on receiving information that a

person has committed suicide or has been killed by another, or by an animal, or by machinery, or by an accident, or has died under circumstances

raising a reasonable suspicion that some other person has committed an offence and the Officer-in-Charge is to give intimation thereof immediately

to the nearest Magistrate empowered to hold inquests and he" shall proceed to the place where the dead body of such deceased person is, and

there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation and draw up a report of the

apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what

manner, or by what weapon, or instrument, if any, such marks appear to have been inflicted. U. D. Case is thus registered when some dead body

is found and the information is received to the above effect. The registration of the case normally starts with the receipt of the information of the

death of a person although the dead body may be lying somewhere. In the instant case, however, from Ext. 36 and the evidence of P.W. Barada

Sarma, it is found that after receipt of Exts. 33, 34 and the oral information from Rajkhowa on 25-7-70. a strong suspicion arose about the death/

disappearance of the wife and the three daughters of Rajkhowa but till then no dead bodies were found. Rajkhowa simply stated that the dead

(bodies of his wife and the eldest daughter were thrown into the river Brahmaputra with the help of some Biharis and the other two daughters

committed suicide by jumping into the Brahmaputra So the dead bodies were till then not found or located.

58. Rule 229 of the Assam Police Manual Part V which deals with enquiries into unnatural and suspicious deaths reads as follows:

229. Enquiries into unnatural and suspicious deaths.-

(a) On receipt of information of a death occurring in any of the circumstances mentioned in Section 174(1), Criminal Procedure Code, the Sub-

Inspector, Assistant Sub-Inspector or Head Constable receiving the information will fill up in duplicate the first information form prescribed for

unnatural death cases (Form No. 191 of Schedule XL (A), Part I) recording the informant's statement, as far as possible, in his own words, and

will despatch the criminal to the court officer, through the Circle Inspector for submitting to the Magistrate.

(b) The aforesaid officer should then proceed to the place where the body of the deceased person is, and after holding the inquest prescribed in

Section 174, Criminal Procedure Code, and making such further investigation as may be necessary, will submit his final report. The inquest report,

signed by the police officer and two or more respectable persons, as required by Section 174(2), Criminal Procedure Code, should be attached"

to the final report.

59. Form No. 151 u/s 174, Criminal procedure Code referred to in Rule 229 has the following columns:

1. Station number.
2. Date and hour of information.
3. Name and residence of the person reporting.
4. Name, age and residence of the deceased.
5. Name of place where corpse was found, with distance and direction from Station and out-post.
6. How caused and date and hour of death.
7. Steps taken by the O/C and data and hour of going to the spot.

It is thus found that after starting the U. D. Case the Officer concerned has to go to the place where the dead body is lying and hold inquest etc.

He has to fill up the Form No. 1S1 and forward the report as provided under Rule 229.

60. We have got the report Ext. 36 on which the U. D. Case No. 16/70 was started. But the accompanying form in Form No. 151 has not (been

proved in the instant case. The learned counsel for the convict submits that the filled; UP Form No. 151 in the particular case is in the record which

was brought to our notice. From this Form No. 151 it is found that column No. 1 was filled up by writing ""16/70 dated 5-8-70"" , column No. 2 by

5-8-70 at 4 P.M."" , column No. 3 by ""Shri B. C. Sharma, D.I.G. CW. R.I Gauhati."" column No. 4 by ""Three daughters and wife, of Shri U. N.

Rajkhowa"" , column No. 5 by ""District Judge Residence, Dhubri Town, mile East"" , column No. 6 by ""cause of death not known. Occurrence took

place on 11-2-70 night and on 26-2-70 time not noted"" and column No. 7 by ""S. I. D. N. Kahali, O/C Dhulbri to investigate P1."" This was signed

by the Officer-in-Charge of the Police Station on B-S-"TO. It appears from column No. 5 that the name of the place where corpse was found is

District Judge's Residence, Dhubri Town.

61. The learned counsel for the convict submits that from the contents of column No. 5 of form No. 151, it is clear that dead bodies were already

found on or before 5h8j7O and that being the position, Ext, 36 could not be a genuine document and" further the story of recovery of dead bodies

on 11-8-70 is also false.

62. We have seen Ext. 36 in original. It is found that it bears the seal of the Dhubri Police Station dated 5-8-70 and the endorsement of H.

Bordoloi, (Magistrate) dated 7-8-70. Ext. 36 bears the seal of the Court Inspector of Police, "Dhubri but the date is found to be 7 Aug., 1960, the

year being an apparent mistake in the seal. The form No. 151 also bears the seal of the Court Inspector of Police dated 7th August, 1960, the

year being an apparent mistake in the seal. It is very clear that on 7th August, 1970 Ext. 36 was seen by the Magistrate and initialled. Therefore it

cannot be said that it was brought into existence after 7-8-70. Nowhere in Ext. 36 it is stated that the dead bodies of the wife and daughters of

Rajkhowa were found or located on 25-7-70. Rajkhowa spoke to Barada Sarma of seeing the dead bodies on 10-2-70 and 25-2-70 only. On

being questioned, Rajkhowa stated that on the night of 11-2-70 his eldest daughter committed suicide by taking sleeping tablets and on the same

night his wife died falling from the verandah of his bungalow at Dhubri. He threw their dead bodies in the Brahiriyaiputra with the help of Biharies

from Steamerghat, Dhubri, whom he paid Rs. 500, and his two other daughters on hearing about the death of their mother and eldest sister

committed suicide by jumping in the Brahmaputra on 25-2-70. The alleged dates of death have been entered in the form No. 151 from Ext. 36

itself. From Ext. 36 also it appears that the death of the wife and the eldest daughter took place in the bungalow of the District Judge at Dhubri.

Even though there was no mention that the dead bodies were lying at some place in Ext. 36 the column No. 5 of form No. 161 shows the name of

place where corpse was found to be the District Judge's residence, Dhubri Town. This entry is apparently based on the information found in Ext.

36 itself though there was no mention of the dead bodies lying in the District Judge's residence. This is an apparent mistake on the part of the

person who filled up the form inasmuch, as nothing was stated about the finding of dead bodies in Ext. 36. On the other hand Ext. 36 shows that a

vigorous and sifting enquiry about the death/disappearance of the family of Rajkhowa should be made. From Ext. 36 it is found that D.I.G. Barada

Sarma was not aware even on 5th August, 1970 whether the wife and daughters of Rajkhowa were dead or disappeared. This only shows that the

D.I.G. Sarma was not prepared to accept the statement of Rajkhowa made to him on 25th July, 1970 at Savoy Hotel as to the death of wife and

three daughters and it was also far from his mind till then that Rajkhowa could have committed murder of his wife and daughters because at that

stage such a thinking on the part of Barada Sarma would have appeared nothing but rambling. Considering the contents of Ext. 36, the contents of

the form No. 151 which accompanied Ext. 36 and which came before the Magistrate on 7-8-70 as well as the attending circumstances of the case

it is not at all possible to hold or even to doubt that the dead bodies were found on or before 5th August, 1970. We are therefore unable to accept

the suggestion of the learned counsel that Ext. 36 was not a genuine document and that the dead bodies of Mrs. Rajkhowa and her three daughters

were found by police or investigating agency in the District Judge's residence on or before 5th August, 1970. Since Ext. 36 was written on 4th

August, 1970 and received by the Officer-in-Charge, Dhubri Police Station at 4 P.M. on 5-8-70 and there was no mention of finding of the dead

bodies at any place, it cannot be even assumed or doubted reasonably that the dead bodies might have been found prior to 5th August, 1970. It

may also be mentioned¹ that on receiving Ext. 36, P.W. Kahali went to Siliguri on 7-8-70 and thereafter he interrogated Rajkhowa on 8th and 9th

August, 1970 about the death/disappearance of the members of his family and after receiving some information from Rajkhowa the dead bodies,

to be more precise, the skeletons, were recovered at Dhubri on 11-8-70. If the dead bodies were already found, as suggested by defence, on or

before 5th August, 1970, the entire series of actions of P.W. Kahali and the other P.Ws. engaged in investigation of the case on and from 7th

August, 1970 till 11-8-70 would have to be assumed as a cooked up story fabricated for the purpose, but in view of the facts and circumstances

of the case and the evidence on record such an assumption is not at all permissible, and no reasonable doubt can arise as to the possibility of such

an assumption.

63. We, therefore, hold that Ext. 36 is a genuine document and the U. D. Case regarding the death/disappearance of the wife and three daughters

of Rajkhowa was started on the information derived from Ext. 36 though, in fact, the dead bodies were not found or located when Ext. 36 was

received and produced in Court along with Form No. 151.

64. P.W. Kahali, Officer-in-Charge of Dhubri Police Station, has stated in his deposition that after receiving Ext. 36 he registered U. D. Case No.

16/70, took up investigation and proceeded to Siliguri on 7-8-70 at 9 A. M. He was accompanied by A. S. I. Mukti Pada Das (IP. W. 20). They

went there to investigate the U. D. case as instructed by P.W. Barada Sharma, Their departure is evidenced by G. D. Entry No. 259 (Ext. 70

(1)). They arrived at Siliguri at 12 midnight and contacted Rajkhowa on 8-8-70 at 1-30 P.M. in the Siliguri Civil Hospital. Raj-khowa was then

under police guard and he was in Bed No. 18. On 8-8-70 P.W. Kahali interrogated Rajkhowa in the hospital and he left the hospital at 9-30 P.M.

on 9-8-70, in presence of P.W. Mukti Pada Das, he again interrogated Rajkhowa in the hospital at 7 P.M. and could gather information from

Rajkhowa to the effect that Rajkhowa had (buried the dead bodies of his wife and three daughters in the night of 10-2-70 and 25-2-70 with the

help of accused Umesh Baishya in the compound of the residence of the District and Sessions Judge, Dhubri. Rajkhowa further informed that on

10-2-70 he had buried his wife and eldest daughter and on 25-2-70 he buried his two younger daughters. Having got this information by

interrogating Rajkhowa at 7 P.M. on 9-8-70, P.W. Kahali wanted to bring Rajkhowa with him. But the doctor in the hospital said that it would be

very risky to take Rajkhowa at that stage. So he drew up a First Information Report (Ext. 20) and the Requisition (Ext. 41) and sent these two

documents to Dhubri Police Station through A.S.I. Mukti Pada Das. Ext. 62 is the Command Certificate given to Mukti Pada Das by him. Mukti

Pada Das left Siliguri at 7 A.M. on 10-8-70 and P.W. Kahali left for Rajganj on 11-8-70 to contact some persons who had stayed in Savoy Hotel

with Rajkhowa.

65. Ext. 20 is the first information report in the instant case (Sessions Case No. 35 (D) of 1972). The report by Kahali that was sent through

Mukti Pada Das was received at Dhubri Police Station on 11-8-70 and it was registered as Dhubri P. S. Case No. 11 of 1970 under Sections

302/201/34, I.P.C It was stated in the concluding sentence of the first information report that "U/D Case No. 16/70 was being returned in F. R. as

case turned into murder.

66. The learned counsel for the convict submits that (1) Ext. 20 is not admissible in evidence as it is not the first information report and (2) that

certain portion of Ext. 20 amounts to confessional statement made before & Police Officer and, as such, not admissible in evidence. The learned

counsel submits that the first information report in the case is Ext. 36 dated 4-8-70 and that being the position, Ext. 20 cannot be admitted in

evidence as the first information report.

67. It may, however, be observed that an information to have the status of first information report u/s 154 of the Code of Criminal Procedure must

be an information relating to the commission of a cognizable offence and it must not be vague but definite enough to enable the police to start

investigation. We have already observed that while writing the D. 6. letter (Ext. 36) P.W. Barada Sharma was still in doubt regarding the

death/disappearance of Mrs. Rajkhowa and the three daughters. It was not an information regarding any cognizable case as such. By Ext. 36 P.W.

Barada Sharma wanted the Superintendent of Police to make vigorous and sifting enquiry about the death/disappearance of the family of

Rajkhowa. That being the position, we find that the first information report regarding cognizable offence of murder in the instant case is Ext. 20

and not Ext. 36, as submitted by the learned counsel.

68. The second submission of the learned counsel, however, has substance and we find that the following line in the first information report (Ext.

20) is not admissible and we refuse to take any note of the same:

In course of investigation it reveals that Sri U. N. Rajkhowa with the help of Sri Umesh Chandra Baishya murdered his wife Putuli and three

daughters viz. Linu, Jonali and Ruplekha in between ;11-2-70 to 26-2-70 in the official residence of District Judge, Dhubri.

Excluding the above portion, we find the substance of the first information report as follows: In course of investigation of Dhubri P. S. Case No.

16/70 P.W. Kahali found Rajkhowa lying at Siliguri Civil Hospital in Bed No. 18 undergoing treatment. He was an accused in Siliguri P. S. Case

No. 48 dated 25-7-70 u/s 309, I.P.C. when he was examined in connection with Dhubri P. S. U/D Case No. 16/70. From the interrogation P.W.

Kahali suspected that the dead bodies of the wife and the three daughters of Rajkhowa had been burned in the premises of the District Judge's

residence. P.W. Kahali himself took up investigation of this murder case which has been registered as Dhubri P. S. Case No. 11 of 1070.

69. The learned counsel for the convict submits that Ext. 20 is hit by Section 162 of the Criminal Procedure Code. We find that the statement

made to P.W. Kahali by Rajkhowa was not in course of investigation of the offence of murder. The investigation of the offence of murder started

on the basis of Ext. 20. As such Ext. 20 (excluding the inadmissible portion quoted above) is not hit by Section 162. Criminal Procedure Code.

We have also found that Ext. 20 (excluding the inadmissible portion) is the First Information Report u/s 154, Criminal Procedure Code. That being

the position, Ext. 20 cannot be treated as substantive evidence Ext. 20 shows on what information the investigation of the murder case

commenced. It is settled law that F.I.R. is not substantive evidence, that is to say, it is not evidence of the facts which it mentions, and it cannot be

used as evidence against the maker at the trial if he subsequently becomes accused. In the instant case P.W. Kahali while interrogating Rajkhowa

got the information which was put into writing in Ext. 20 and there was sufficient information for investigation of a murder case on the basis of Ext.

20 which was sent to Officer-in-Charge, Dhubri Police Station and a case was registered.

70. The learned counsel also submits that Ext. 41 is hit by Section 162, Criminal Procedure Code and Sections 25 and 26 of the Evidence Act.

Ext. 41 has been written by P.W. D. N. Kahali, S. I., Officer-in-Charge, Dhubri Police Station, Camp Siliguri (W.B.) on 10-8-70 and it is

addressed to Officer-in-Charge, Dhubri Police Station. After narrating regarding the interrogation of Rajkhowa at Siliguri Hospital in connection

with P/IS, U/D Case No. 16A7O, who was arrested in connection with Siliguri P. S. Case No. 48 (7)/70 u/s 309, Indian Penal Code, the gist of

interrogation was set out. The following portion of Ext. 41 is however found to be inadmissible in evidence:

Shri U. N. Rajkhowa confessed before me to the effect that he along with Shri Umesh Baishya his personal servant killed his wife and eldest

daughter on 10-2-70 night after 12 A.M. i.e. 11-2-70 and also he and Umesh Baishya again killed Jonah"" and Ruplekha the younger two

daughters of Sri U. N. Rajkhowa on 25-2-70.

The above portion of Ext. 41 is not admissible in evidence under Sections 25 and 26 of the Evidence Act. It is also found that the following portion

of Ext. 41 is also hit by Sections 25 and 26 of the Evidence Act unless it is admissible u/s 27 of the Evidence Act.

Further Shri U. N. Rajkhowa confessed that he along with his personal servant Umesh Baishya kept buried the dead bodies of aforesaid wife and

three daughters in the compound of District and Sessions Judge, Dhuturi.

The following is the concluding portion of Ext. 41:

As the accused U. N. Rajkhowa is lying as indoor patient in the Siliguri Hospital under police custody and cannot be taken to Dhubri now, please

search the compound of District and Sessions Judge, Dhubri and recover the dead bodies immediately, please treat this as most urgent.

Ext. 41 was sent along with Ext. 20 through Mukti Pada Das (P.W. 20) to Dhubri Police Station and the Officer-in-Charge of Dhubri Police

Station endorsed Ext. 41 to S. I, S. R. Dutta (P.W. 49); to the following effect:

Please take immediate steps for the recovery of the dead bodies from the compound of the District and Sessions Judge, Dhubri obtaining the

permission from the Magistrate.

When the information regarding Ext. 20 was received and P.W. Kahali took up investigation of the case on the basis of Ext. 20 treating the same

as F.I.R., he found it necessary to make search in the compound of the District and Sessions Judge, Dhubri regarding the dead bodies and

therefore he thought it reasonable to act u/s 165, Criminal Procedure Code requesting the Officer-in-Charge, Police Station to search the

compound of the District and Sessions Judge in order to recover the dead bodies immediately.

71. Section 165, Criminal Procedure Code reads as follows:

165. Search by police officer. (1) Whenever an officer-in-charge of a police station or a police officer making an investigation has reasonable

grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be

found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion

be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so

far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such

station.

(2) A police officer proceeding under Sub-section (1) shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may after

recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate

officer an order in writing specifying the place to be searched and, as far as possible, the thing for which search is to be made; and such

subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in Section 102 and Section 103 shall, so

far as may be, apply to a search made under this section.

(5) Copies of any record made under Sub-section (1) or Sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take

cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the

Magistrate:

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

72. The power to search u/s 165, Criminal Procedure Code is incidental to the investigation of the offence with which the officer is authorised to

investigate. In Ext. 20 it has been "stated that P.W. Kahali after interrogating Rajkhowa in connection with the U. D. Case No. 16/70, suspected

that the dead bodies of the wife and three daughters of Rajkhowa had been buried in the premises of the District and Sessions Judge's residence

to conceal evidence and accordingly, he, by Ext. 20 requested the Officer-in-Charge of Dhubri Police Station to register a case under Sections

302/ 201/34, Indian Penal Code, against Upendra Nath Rajkhowa and Umesh Baishya and intimated that he himself has taken up the investigation

of the case and when he started investigation he could have recourse to Section 165, Criminal procedure Code. By Ext. 41 P.W. Kahali who took

up investigation of the murder case, requested the Officer-in-Charge of Dhubri Police Station to make the search in the compound of the District

and Sessions Judge, Dhubri, for the recovery of the dead bodies. We therefore find that Ext. 41 (Excluding the inadmissible portions as stated

.above) is not hit by Section 162, Criminal Procedure Code.

73. The learned counsel for the convict submits that Ext. 41 is not in pursuance of the provisions of Rule 229 of the Assam Police Manual, Part V.

In our opinion, that has to be so. Because Ext. 41 was not in connection with the U. D. Case No. 16/70, but it is in connection with Dhubri Police

Station Case No. 11/ 70 under Sections 302/201/34, Indian Penal Code.

74. Whether the second inadmissible portion of Ext. 41 is saved by Section 27 of the Evidence Act, it is necessary to examine the evidence on

discovery of the dead bodies.

75. Next we come to the discovery of the dead bodies or the skeletons.

76. P.W. 46 Chandra Kumar Deka has stated in his deposition that on 11-8-70 he was the second officer at Dhubri Police Station. D. N. Kahali

was the Officer-in-Charge then. On 11-8-70 at 10 A.M. he registered a case on the basis of the written ejahar (Ext. 20) which was received

through A.S.I., Mukti Pada Das ((P.W. 20). Mukti Pada Das also had brought a requisition from Kahali addressed to Officer-in-Charge, Dhubri

Police Station which was Ext. 41. He endorsed the requisition (Ext. 41) on the same day to S.I., S. R. Dutta (P.W. 49) to recover the dead

bodies from the compound of the District and Sessions Judge's bungalow after taking permission of the Magistrate. Ext. 41 (1) is that

endorsement, which is in the following terms:

S.I., S. R. Dutta.

Pl. take immediate steps for the recovery of the dead bodies from the compound of the District and Sessions Judge, Dhubri obtaining the

permission from the Magistrate.

S. R. Dutta informed him (P.W. 46) to come to the place of occurrence and he arrived there at about noon. A large number of people had

collected there and he was busy in controlling the crowd. After the inquest was over; S. R. Dutta asked him to send the dead bodies for post-

mortem which he did. He then went to hospital. P.W. 46 has stated in cross-examination that on 11-8-70 he was acting as the Officer-in-Charge

due to the temporary absence of Kahali, who had left for Siliguri on 7-8-70 at 9 A.M. to investigate the U. D. Case No. 16/70. Mukti Pada Das

had also gone with Kahali who came back to Dhubri on 11-8-70 at 10 A.M. and he (P.W. 46) registered a case immediately thereafter.

77. P.W. 49 S.I, Shanti Ranjan Dutta has stated in his evidence that on 11-8-70 he was attached to Dhubri Police Station as S.I. of Police. On

that day Ext. 41 was endorsed in his name by P.W. Chandra Kumar Deka. Having read the requisition and the endorsement he left the Police

Station at 10-30 A.M. and came to Dhubri Court. He first went to D.C. but the latter being absent he went to A.D.M. and prayed to depute a

Magistrate to disinter some dead (bodies suspected to be in the compound of the Judge's bungalow. He moved the A.D.M. in writing, who

ordered Magistrate Shri Halim to attend. He then met Magistrate Shri Halim and Showed the order and the requisition. The original petition was

given by him to the I/O K. H. Deka (P.W. 54). He however stated that the original petition was not found in the case diary. At 11-45 A.M. along

with Magistrate Shri "Halim, he went from the Court to the District Judge's bungalow. There he contacted P.JV. Bigan Prosad who pointed out

the place. Finding new grass there he ordered to dig out the places. Hiranman and other sweepers had dug out the pits. At first a pit was dug near

the bath room of the bungalow about 30" to its west, that is pit No. 1. In that pit dead bodies of two females in rotten condition were found. The

dead bodies were found by him inside the pit and "both the dead bodies were found in a crouched condition and their legs were tied. Some clothes

were found lying above the dead "bodies. One dead body had a ring in its finger, two bronze-gold bangles on right hand and so also one glass

bangle, seven golden bangles and one iron "bangle in left hand. Another dead body's hair was found detached. First dead body's hair on head

was partly intact. He prepared an inquest report on these dead bodies which is Ext. 1. Second pit was dug about 125 cubits from the first pit

towards southwest and the same was dug by Hiranman in his presence. Two dead bodies of females were found inside it. Heads of both were

towards west and they were lying flat. Braids of hairs were also found. One dead body was found with a cloth fastened with a knot round the

neck. Four glass bangles and one jute rope were also found. One dead body had a gown like thing on its person. Ext. 2 is the inquest report. In pit

No. 1 he had found two bronze-gold bangles, one glass bangle in right hand of one dead body, 7 golden bangles and an iron bangle on the left

hand of the same dead body. M. Exts. 2 (1) and 2 (i2) are the bronze-gold bangles. M. Ext. 3 was the glass bangle found in the right hand. M.

Exts. 5 (1) to 5 (7) and M. Ext. 4 were the 7 glass bangles and one iron bangle found on the left hand. A ring M. Ext. 1 was also found in pit No.

1. One white pajama was also found which was sent for chemical examination. One white full shirt containing mark of a washerman was also

found. The mark was as shown in item No. 14 of the seizure list M Ext 7 is that shirt.

78. P.W. 29 Abdul Halim has stated that he was an Extra Assistant Commissioner at Dhubri on 11-8-70 and ha had the powers of the Magistrate

of the First Class. On that date Additional District Magistrate (Executive) asked him to be present at the time of disinterment of come dead bodies

from the Judge's com-"pound. S.I., Dutta showed him the requisition (Ext. 4il). Thereafter he came to the compound of the District Judge"s

bungalow. Some sweepers dug out a pit near the bath room and two skulls, hairs, skeletons, rotten flesh and some clothes, ring, bangles were

recovered from that pit. All these articles were seized. In another pit, two skulls and "bones were similarly recovered. The Police Officer had

prepared two inquests $\tilde{A}\tilde{A}\tilde{A}^{\frac{1}{2}}$ one for each pit and he was then near the police officer. He had gone through the reports and thereafter signed the

same. Exts. 1 (3) and 2 (3) are his signatures along with his endorsements. Police had seized the things, other than the skulls. He was then present

there. He had gone through the seizure list and Exts. 3 (3) and 4 (3) were his signatures on those with his endorsements. His initials appear on Ext.

6 with the remark ""seen"". Ext. 6 (3) is the same. In cross-examination P.W. 29 has stated that A.D.M. had ordered him in writing to go to the

bungalow. He was only asked to be present. He had not submitted any written report to the A.D.M. the inquest was held by police. He went to

the bungalow at about 12-30 p.m. and returned by 4/4-30 P.M. He had taken his; seat on a chair and had walked a little in the compound also.

The inquest, reports and seizure lists were prepared where he had taken his seat. He had sat in the open space on the side of the bungalow. He

had seen the seized articles in the ,pit and the same were brought near him also when the seizure lists were prepared. Police had measured the pits

in his presence. Some parts of skeletons were not intact. When he had seen the skeletons the skulls were not intact with them. 4 sweepers were

there. The articles were not packed" in his presence. He had signed Ext. 6 on 14-8-70 perhaps in Court. The written order of the A.D.M. to him

should be in Court record. It had not smelled much at the time of disinterment though it had emanated some foul smell. The sweepers had brought

the things from the pits. The police officer had noted each item of recovery in the seizure lists.

79. P.W. 39 Hiranman Basfor has stated that he was a sweeper in the Civil Hospital and he had once come to Rajkhowa Saheb"s bungalow to

bring out come dead bodies. He was called by Shanti Ranjan Dutta. He was asked to dig out 2 pits by Shanti Balbu $\tilde{A}\tilde{A}\tilde{A}^{\frac{1}{2}}$ one was near the

verandah of the bungalow. Two dead bodies were brought from one pit and brought bangles, ring, clothes. The first pit was 7/8 cubits from the

bungalow. The dead bodies had no flesh. He had brought out the dead (bodies and taken to Hosipital. Two dead bodies were found in another

pit 12 cubits away from the bungalow. In that pit also the same were in skeletons only. In the second pit bangles, and clothes were found.

Those dead bodies were also taken to Hospital. The menials of the bungalow used to live on one side of the compound. The second pit was 10/12

cubite from those quarters. The bungalow is near Municipal Office, in cross-examination P.W. Hiranman Basfor has stated that three sweepers had

come to the bungalow. They were himself, Hazari and Lacha. They were alive. Hazari works in the thana and Lacha works in the hospital. Shanti

Babu had said that the dead bodies would have to be brought out and they started digging where Shanti Babu asked them to do. In the first pit he

had dug about 6". It was one cubit higher than has height. One pit was found round in shape. Another was length-wise. There was no water inside

any pit. No watch or bag was found inside any pit. Among the clothes were rugs, pillows, quilts and mosquito nets. These were over the dead

bodies, which were one over the other. In second pit only dead bodies were found and no cloth. Hands and feet were intact with the skeletons, so

were the skull in all the dead bodies. In pit No. 1 the dead bodies were one over the other and in pit No. 2 the dead bodies were lying separately.

In the round pit the dead bodies were found in a lying condition, so also in pit No. 2. He gave away the articles to Daroga Babu at the compound.

Some constables were also with Shanti Babu.

80. P.W. 1 Nilkanta Chakravarty, Head Clerk of Govt. H. E. School and P.W. 2 Gopesh Chandra Roy, a businessman were present at the time

of recovering the dead bodies from the two pits. P.Ws. 1 and 2 are the witnesses to the inquest reports Ext. 1 and Ext. 2. They are also the

witnesses to the seizure lists Ext. 3 and Ext. 4.

81. P.W. 11 Nalini Kumar Choudhury was the District Judge at Dhubri till May, 1971. He has stated in his deposition that he joined at Dhubri for

the second time on 1st March, 1970 and he was in dual charge to start with. From June, 1970 he was exclusively in charge of Goalpara District.

Shri Rajkhowa was his predecessor in office. He knew him personally. Shri Choudhury took charge from the Assistant District Judge who had

taken charge from Shri Rajkhowa. Rajkhowa was occupying the official residence when Shri Choudhury came to Dhubri in March, 1970 and he

stayed in the Circuit House. When Shri Choudhury was posted exclusively for the district in June, 1970, the official residence of the District Judge

was lying vacant. Shri Choudhury shifted to the official residence on or about the 25th July, 1970. He had known Bigan Prosad Rout (P.W. 3),

who was his personal orderly at that time. He had known Md. Sahid AH (P.W. 4) as well as Radha, who were grade IV employees in the

District Judge's office. Before the dead bodies were recovered Shri Choudhury went to Goalpara on circuit and returned to Dhubri on 10-8-70

by noon. P.W. Bigan Prosad Rout also accompanied him. Shri Choudhury has stated that while on circuit he had some talk with Bigan Prosad

Rout regarding Rajkhowa. Shri Choudhury told Bigan that there, was a rumour that Rajkhowa was in Siliguri and that he had himself stated that his

wife and daughters had died in Dhubri and their dead bodies were thrown in the Brahmaputra. At this Bigan told Shri Choudhury that Rajkhowa

had got two pits dug - one near the pantry and another near the servants' shed. He further stated that the pits were dug to plant flowers but

suddenly he found both the pits in a filled up condition. After his return on 10th August, 1970 to Dhubri, the dead bodies were recovered on 11th

August, 1970. At the time of recovery he was in Court and after going from Court he saw that the dead bodies were recovered.

82. In cross-examination Shri Choudhury stated that he left for Goalpara perhaps on 2nd or 3rd August, 1970 and Radha and Sahid had

remained in the bungalow. He had returned via Gauhati and he heard about the rumour at Gauhati. On 10th August, 1970 Shri Choudhury knew

from Radha that police had come in his absence and had gone round the bungalow. But they did not report about any question to police to them.

Shri Choudhury did not report to police about what Bigan had stated to him. Shri Choudhury further stated that police had not informed him

anything before digging out the pits. He returned to the bungalow on that day at about 2-3 P.M. and he found the entire people of Dhubri were

practically there. The Superintendent of Police and some other police officers were also there. After Rajkhowa's departure Umesh did not work

with Shri Choudhury.

83. P.W. 3 Bigan (Prosad Rout, who was a peon in the Judge's office, has stated that he had been a peon in the Judge's office for about 51 years,

Shri B. N. Sarma was the first District Judge and then came Shri N. K. Choudhury and thereafter Shri U. N. Rajkhowa. When Shri Bajkhowa

was a Judge he used to reside in his bungalow. He stated inter alia that Shri Choudhury again came as a Judge to Dhubri After staying for about

15 days in the Circuit House Shri Choudhury occupied the bungalow. Once when Shri Choudhury was returning from Goalpara Circuit, he asked

him (P.W. Bigan) whether he had seen any pit inside the compound as Rajkhowa was being suspected to have murdered his wife and daughters.

P.W. Bigan stated that two (big pits were dug out by them at the instances of Rajkhowa Saheb. Next morning police came and on being asked by

Shri Choudhury Saheb, he showed the two big pits to the police. Police had found two dead bodies inside pit No. 1 and similarly two dead bodies

inside Pit No. 2. "Pit No. 1 was the pit near the bath room which was dug by P.W. 3 and Pit No. 2 was dug by Sahid (P.W. 15) at the instance

of Rajkhowa.

84. In cross-examination P.W. Bigan stated that on the date of the recovery of the dead bodies he was in the bungalow, so were Sahid and

Radha. Coming there police started searching for pits. One daroga was there, Superintendent of Police and a few constables were also with them.

They started searching for pits here and there and on getting the same dug them up. A spade of the bungalow was used by them.

85. P.W. 15 Md. Sahid Ali in his deposition has stated that he was a peon in the Assistant District Judge's office and he joined service first when

Shri N. K. Choudhury was a Judge there for the first time. Thereafter Shri U. N. Rajkhowa became the Judge and he was a peon in the District

Judge's office. He was then a day Chowkidar in the bungalow. During night he used to live in his house. He started that he was present when

police had recovered the dead bodies from the bungalow. The dead bodies were found in the pit near the "bath room and in the pit near the

Chowkidar's quarter. At that time Shri Choudhury used to reside in the bungalow.

86. On consideration of the evidence of P.Ws. 1, 2, 3, 11, 15, 29, 39, 46 and 49 as discussed above, inquest reports Exts. 1 and 2 and seizure

lists Exts. 3 and 4, we find that two dead bodies along with some articles were recovered from Pit No. 1 and two dead bodies along with some

articles were recovered from Pit No. 2. The dead bodies were reduced to skeletons.

87. The next point is whether the dead (bodies recovered from Pit No. 1 and Pit No. 2 are the dead bodies of the wife and the three daughters of

Rajkhowa.

88. According to the prosecution the dead bodies were recovered in consequence of information received from Rajkhowa on 9th August, 1970.

We have already found that Ext. 41 is not hit by Section 162, Criminal Procedure Code, The contents of Ext. 41 are substantially the contents of

Ext. 20, the F.I.R. We have already observed that the portion of Ext. 20 as well as the portion of Ext. 41 which have been found to be

inadmissible hereinbefore cannot be taken into consideration. Then again Ext. 20 and consequently Ext. 41 also cannot be taken or used against

the accused as a confessional statement. Ext. 20 being an F.I.R. cannot be treated as substantive evidence. That being so, Ext. 41 is not hit by

Sections 24, 25 and 26 of the Evidence Act. On interrogation of Rajkhowa, P.W. Kahali suspected that the dead bodies had been buried in the

premises of the District Judge's residence to conceal the evidence and accordingly he took action u/s 165, Criminal Procedure Code. In Ext. 41

P.W. Kahali has stated that on interrogation Sri U. N. Rajkhowa confessed that he along with his personal servant Umesh Baishya kept buried

the dead bodies of aforesaid wife and three daughters in the compound of District and Sessions Judge, Dhubri, and as he was at Siliguri at that

time and Shri U. N. Rajkhowa also could not be taken to Dhubri as he was lying ill in consequence of his attempt at suicide on 25th July, 1970,

P.W. Kahali directed the Officer-in-Charge Dhubri Police Station on HO-8-70 to make a search in the compound in order to find out the dead

bodies immediately. Accordingly a search was made and the dead bodies were found.

89. The question now arises whether the statement that Rajkhowa confessed before P.W. Kahali that Rajkhowa along with his personal servant

Umesh Baishya kept buried the dead bodies of aforesaid wife and three daughters in the compound of District and Sessions Judge, Dhubri, is

admissible in evidence?

89-A. Section 27 of the Evidence Act is as follows:

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the

custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby

discovered, may be proved.

The information received from Rajkhowa by P.W. Kahali has been quoted herein-above. In pursuance of the requisition made by P.W. Kahali

vide Ext. 41, the Officer-in-Charge of Police Station at the relevant time directed P.W. S. R. Dutta to recover the dead bodies and the dead

bodies have been discovered accordingly in presence of Magistrate as discussed hereinabove.

90. The first requirement of Section 27 is that the information must come from a person in police custody. The question arises whether Rajkhowa

was in police custody on 9-8-70 on which date P.W. Kahali obtained the relevant information from Rajkhowa by interrogating him at the Civil"

Hospital, Siliguri. Rajkhowa was arrested in connection with Siliguri P. S. Case No. 48 (7) of 1970 u/s 309, Indian Penal Code. When Rajkhowa

attempted to commit suicide at Savoy Hotel, Siliguri, a First Information Report was lodged by Apurba Barua at the Siliguri Police Station u/s 309,

Indian Penal Code and Rajkhowa was taken by Siliguri Police to the Siliguri Civil Hospital and he was kept under police guard. It is quite clear

from the evidence on record that Rajkhowa was in police custody while he was undergoing treatment at the Siliguri Civil Hospital. We have

already noticed the evidence of P.W. 28, Dr. Anil Kumar Mukherjee, the Medical Officer of the Siliguri Sub-Divisional Hospital. P.W. 28 has

stated that Rajkhowa was admitted as an indoor patient having been brought by police on 25-7-70 with the diagnosis of stab injury and he

remained as an indoor patient till 12-8-70. P.W. 28 has further stated that during his stay in Hospital Rajkhowa was being guarded by some police

officials. P.W. 53 Kahali has stated that after Rajkhowa attempted to commit suicide, he and Apurba Barua went to the Police Station at Siliguri

and Apurba Barua lodged a First Information Report in writing and the Officer-in-Charge of Siliguri Police Station registered a case u/s 309 of the

Indian Penal Code and Officer-in-Charge of the Siliguri Police Station came with S.I., A. C. Pyne to the Hotel and Rajkhowa was taken to the

Civil Hospital and the knife was seized. P.W. Kahali has further stated that on 8-8-70 at about 1-30 P.M. he contacted Rajkhowa in the Civil

Hospital of Siliguri and Rajkhowa was then under police guard. P.W. 20 Mukti Pada Das has stated that on 9-8-70 he had gone with P.W. Kahali

to Siliguri Hospital in the evening and at that time Rajkhowa Saheb was under police custody and Kahali interrogated him. It is thus found that on

9-8-70 Rajkhowa was in police custody in the Siliguri Civil Hospital.

91. The learned counsel for the convict has submitted that Rajkhowa was arrested only on 12-8-70 and therefore Rajkhowa could not be in

police custody on 9-8-70. Ext. 58 (1) is the order dated 12-8-70 in Siliguri Police Station Case No. 48 dated 25-7-70 u/s 309 of the Indian

Penal Code. Ext. 58 (1) is as follows:

12-8-70. "Seen the report of the I.O., S.I., A. C. Payne who prays for showing arrest of accused Upendra Nath Rajkhowa who is now in

Siliguri hospital under police guard in connection with this case, for undertaking treatment. Show him arrested accordingly.

To 31-10-70. .

Sd/- Illegible.

The report of the S.I., Pyne referred to in Ext. 58 is in the record of G. R. Case No. 642/70 (reference Siliguri P. S. Case No. 48 of 25-7-70 u/s

309, Indian Penal Code). The report was to the effect that Rajkhowa attempted to commit suicide by a dagger in Room No. 3 of Savoy Hotel,

Siliguri, he was immediately removed to the Siliguri Hospital for treatment of his injury under proper police custody, he might kindly be shown

arrested in the case noted in the margin, he might not be released on bail and that he was still undergoing treatment. Accordingly by order dated

12-8-70 passed by the Magistrate at Siliguri he was shown arrested. The evidence on record conclusively establishes that on 9-8-70 Rajkhowa

was in police custody and he was also accused of an offence, namely, the offence u/s 309, Indian Penal Code, though by order dated 12-8-70

passed by the Magistrate at Siliguri he was shown formally arrested with effect from 25-7-70.

92. In this connection the following observations of the Supreme Court in State of U.P. Vs. Deoman Upadhyaya, are pposite:

There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby

discovered; it is by virtue of the ban imposed by Section 162 of the Cr. P. C, that a statement made to a .police officer in the course of the

investigation of an offence under Ch. 14 by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not

provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same line as under the

Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in

custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an

offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may

appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any

formality before a person can be said to be taken in custody; submission to the custody by word- or action by a person is sufficient. A .person

directly giving to a police officer by word of mouth information which may "be used as evidence against him, may be deemed to have submitted

himself to the ""custody"" of the police officer within the meaning of Section 27 of the Indian Evidence Act; Legal Remembrancer v. Lalit Mohan

Singh ILR 49 Cal 107 : AIR 1022 Cal 342 : 22 Cri LJ 562 Santokhi Beldar and Another Vs. Emperor,

* * * * *

Counsel for the defence contended that in any event Deoman was not at the time when he made the statement attributed to him, accused of any

offence and on that account also apart from the constitutional plea, the statement was not provable. This contention is unsound. As we have

already observed, the expression ""accused of any offence"" is descriptive of the person against whom evidence relating to information alleged to be

given by him is made provable by Section 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the

statement sought to be proved, as a condition of its applicability.

93. The second requirement of Section 27 of the Evidence Act is that the person giving the information must be accused of any offence. In the

instant case when the information was obtained from Rajkhowa he was an accused in the case against him u/s 309, Indian Penal Code. That apart,

in view of the observation of the Supreme Court in State of U.P. Vs. Deoman Upadhyaya, (supra) we respectfully agree with the following

observation of the Bombay High Court in State Vs. Memon Mohamad Husain Ismail and Another,

We are therefore of opinion that the words information received from ""a person accused of any offence"" in Section 27 cannot be read to mean that

he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when

that statement is sought to be received in evidence against him.

That being so, the person giving the information in the instant case is found to be an accused of an offence as contemplated u/s 27 of the Evidence

Act. In consequence of the aforesaid information received from accused Rajkhowa the dead bodies of his wife and three daughters were

recovered from the compound of the District Judge's residence at Dhubri and the relevant evidence on the point has already been discussed

above. The evidence of P.W. 46, P.W. 49 and P.W. 29 goes to show that the dead bodies were discovered in consequence of the information

received from accused Rajkhowa, P.W. Kahali has stated in his deposition that on 9-8-70 he again interrogated Rajkhowa at 7 P.M. and

Rajkhowa stated that he had burried the dead bodies of his wife and three daughters on the night of 10-2-70 and 25-2-70 with the help of

accused Umesh Baishya in the compound of the residence of the District and Sessions Judge, Dhubri and in pursuance of this information the four

dead bodies were recovered as stated hereinabove. The fact of discovery of the dead bodies is relevant to the issues, namely, whether the wife

and three daughters of accused Rajkhowa were dead and whether the four dead bodies discovered were the dead bodies of the wife and three

daughters of accused Rajkhowa.

93-A. Considering the evidence on record we find that the following statement in Ext. 41 is admissible in evidence u/s 27 of the Evidence Act:

Shri U. N. Rajkhowa confessed that he along with his personal servant Umesh Baishya kept burried the dead bodies of aforesaid wife and three

daughters in the compound of District and Sessions Judge, Dhubri.

94. The learned counsel for the convict has submitted that Ext. 41 was not admissible in evidence inasmuch as it was a copy of the statement

recorded by P.W. Kahali on 9h8-70 and the original Statement in the diary of P.W. Kahali has not been produced nor any copy thereof has been

given to the accused Rajkhowa. The submission however has no force inasmuch as the admissible portions of Ext, 41 are not copies of any

recorded statement. Further P.W. Kahali was not asked in cross-examination whether there was a recorded statement regarding the interrogation

of Rajkhowa on 9w8-70 and whether he copied Ext. 41 from that statement. Since these facts were not brought out in the cross-examination, the

present submission of the learned counsel is untenable. After interrogation P.W. Kahali is found to have recorded the admissible portion in Ext. 41

from his memory regarding the information received from Rajkhowa.

95. The evidence on record shows that Mrs. Rajkhowa and Moss Linu were seen alive for the last time on 10th February, 1970 with accused

Rajkhowa and Miss Luna and Miss Bhantu were seen alive for the last time on 25-2-70 with accused Rajkhowa and on both the occasions it

was in the District Judge's bungalow at Dhuri.

96. From the evidence of P.W. 49 Shanti Ranjan Dutta, P.W. 29 Albdul Halim, P.W. 39 Hiramson Basfor, P.W. 1 Nilkanta Chakravarty and

P.W. 2 Gopesh Ch. Roy, P.W. 3 Bigan, P.W. 15 Sahid, and the two inquest reports Exts. 1 and 2 and the seizure lists Exts. 3 and 4 it is found

that in Pit No. 1 dead bodies of two persons in rotten condition were found along with some articles including the following; 1. Two gold bronze bangles and one glass bangle in the right hand of one of the dead bodies.

2. Seven gold bronze bangles and one steel bangle in the left hand of the same dead body.

3. One gold ring, set with five red stones and five white stones. Its shape is like that of a "Shankha" (Shell of a kind of snail) and it is found in the

left ring finger of the same dead body.

4. Two pieces of petty-coats white.

5. One piece of printed pink sari.

6. One piece of blue and white printed sari.

7. Two pieces of blouse, one white and the other red.

8. One piece of silk sari printed with various floral designs. It is also found that when one of the corpse was brought out

a little long hair was found

in the head but some of them had fallen off.

97. In Pit No. 2, two dead bodies in decomposed condition were found. In one of the dead bodies hair was long and while it was being brought

out from the pit some hairs had fallen off and while bringing out the other dead body from the pit the hairs which were long and braided had fallen

off from the head. In Pit No. 2 along with some other articles four red glass bangles were also found.

98. Lastly on the question of identity of the dead bodies we come to the expert's evidence.

99. P.W. 35 is Dr. J. K. Barua. He was Director of Forensic Science Laboratory, Assam in 1970. He is an M.Sc. in Chemistry, Ph.D. in Bio-

Chemistry and has a law degree. He had undertaken 3 years' training course in Bio-Chemistry in the National Orthopaedic Institute of London

and obtained Ph.D. there. Before becoming Director he was Bio-Chemist in the Pasteur Institute of Shillong. Forensic Laboratory in Assam was

established on 2nd April, 1969 and it started functioning in July, 1970. He came to Dhubri on 14th August, 1970 and examined four skeletons

remains at Morgue of Dhubri. P.W. 35 deposed that the skeletons appeared to him to be of female at the first impression (the witness deposed

from a Register). P.W. 35 then looked into the sternum which were found to be of female origin as manubrium portion of the sternum was more

than 1/2 the length of the entire sternum. He also observed that the pelvic bone cavity was of ovoid structure and the sacrum of the vertebral

column was wider in shape and coccyx pendulous. In one body there was union of manubrium with the rest of the sternum body i.e. the entire

sternum had fused into one. He also found four braids of long hairs¹ near each skull of four bodies. From the examination P.W. 35 came to the

conclusion that all the bodies were of females.

100. P.W. 35 with the help of his Assistants and hospital sweepers cleaned the skulls and also some long bones from each of the dead bodies and

packed them and put them in separate packets marking the packets as A, B, C and D. Thereafter they cleaned the skulls and bones in laboratory

and examined the numerous bones for ascertaining the height of each of the dead bodies. From his examination we find that the dead body, the

bones of which are in packet "A" was 153.56 cm. in height, the dead body, the bones of which are in packet "B" was 157.406 cm., the dead

body, the bones of which are in packet "C" was 150.37 cm, and the dead body, the bones of which are in packet "D" was 156.75 cm. in height.

He then took the photographs of the four skulls and they were marked as A, B, C and D as per the packets marks. Negatives of the skulls were

developed and enlarged. Prints of those negatives were made to correspond with the life size of skull.

101. Material Ext. 14 is the group photo of Mr. Rajkhowa, Mrs. Rajkhowa and the three daughters. In the group photo Ext. 14 the photo of Mrs.

Rajkhowa was marked (1), that of Miss Linu was marked (2), that of Miss Luna was marked (3) and that of Miss Bhantu was marked (4). Then

they took photograph of the four faces of photos (1), (2), (3) and (4), From the negatives they made enlargement to as near as life size

enlargement. The skull found in packet "A" was marked as (1), that in packet "B" marked as (2) that in packet "C" marked as (3) and that in

packet "D" marked as (4). After so marking they sent these skulls to the Director, Central Forensic Science Laboratory, Calcutta. The braids of

hair bottles of soil samples, and the group photo material Ext. 14 were also sent to the same officer, P.W. 35 after preliminary examination

agreed with the opinion of the Surgeon who held the post-mortem regarding the sex. Regarding identification of skull, he identified the skull "A"

to be that of (1) in Material Ext. 14, "B" to be of (2) in Material Ext. 14, "C" to be of (3) in Material Ext. 14, and "D" to be of (4) in Material Ext.

14. The witness has stated sacrum is the end portion of the vertebral column. Female sacrum is wider than that of male. Sternum became (used

with the main body at the age of 35 and above. Since the witness has stated that there was union of manubrium with the rest of the sternum body,

that is, the entire sternum had fused into one in one skull it is found that one skull belonged to a person of 36 years or more. The witness also has

stated that the age of person referable to skull No. 4 would be above 18 years.

102. In cross-examination P.W. 35 has stated that this was their first examination of the skeletons in the Institute and the Magistrate had required

him to do the examination and he received the requisition (Ext. 23) at Gauhati. He received the group photo from the Magistrate. He had not

known Mrs. Rajkhowa and her daughters personally. He had established" the identify by comparing the face photos with the photos of the skulls,

He had found the data to be correct up-to 90%. But he wanted to be 100% sure and so he sent the skulls to the Central Forensic Science

Laboratory. The witness has stated that identification could be established by anthropometric measurement, that is, by measuring selected

distances between different facial anatomical land marks and finding out their ratios. For this the photos need not be enlarged to life size. To avoid

mistakes the skulls and photos were enlarged as much as possible to life size. In sternum there were five pieces of bones. He had inspected the

manubrium and when he found that its length was more than 1/3 of body length of sternum, he concluded that it belonged to a female body. The

witness also has stated that the male skull differs from female skull in many respects.

103. At (pages 27-28 of Modi's Medical Jurisprudence and Toxicology, Seventeenth Edition, we find the following:

The sternum in the female is shorter and its upper margin is on a level with the lower part of the body of the third thoracic (dorsal) vertebra, while

in the male it is on a level with the lower part of the body of the second. The sternum body is less than twice the length of the manubrium in the

female, while it is more than twice its length in the male. This is due to the fact that the manubrium in the male is somewhat smaller than that in the

female. The ribs are thinner and have a greater curvature, and the costal arches are larger.

The pelvis affords the best marked and most reliable characteristics for distinguishing sex in over 90 per cent of subjects. The female pelvis is

shallower, wider, smoother and less massive than the male pelvis. The ilia in the female are less sloped, their posterior borders are more rounded,

the anterior superior iliac spines are more widely separated and the great sciatic notches are much wider, forming almost a right angle than in the

male. The female sacrum is short and wide, and is sharply curved forward in its lower half, while the male sacrum is long and narrow, has a uniform

curvature along its whole length and may have more than five segments.

104. P.W. 21 Basudev Bhattacharjee is the Assistant Director, Central Forensic Science Laboratory Cum-Assistant, Chemical Examiner. He has

deposed that he has been Assistant Director since February. 1068 and before that he was a Junior Scientific Officer of Central Forensic

Laboratory. He is an M.Sc. in Zoology and Comparative Anatomy. He has acquired experience under the then Assistant Director for examination

of "biological materials including photographic super-imposition. On 31-10-70 he received 9 parcels from the Director, Forensic Science

Laboratory, Assam under Memo. No. FSL.IV/67/70/984. dated 27-10-70 in connection with the present case. In his deposition he has given the

details of the .articles received in those 9 parcels. On examining the articles he stated the result of his examination as follows:

Each of the four samples of hair contained in packets marked 1 (b), 2 (b), 3 (b) and 4 (b) respectively was identified to be human head hair

probably derived from adult female.

105. Neither arsenic nor any metallic poison could be detected in the hairs samples sent for examination. The report on photographic super-

imposition of skull of each of the four skulls is as under:

(a) There was a correspondence between the anatomical land marks of the skull marked "I" (M. Ext. 18) and the photograph of the deceased face

marked (1) in the group photograph (M. Ext. 14) when photographically super-imposed. It is therefore concluded that skull in question marked

"1" could have been the skull of deceased person shown as (1) in photograph (M. Ext. 14).

(b) There was a correspondence between the anatomical land marks of the skull marked "2" (M. Ext. 20) and the photograph of the deceased

face marked (2) in group photograph when photographically super-Imposed. It is therefore concluded that the skull in question marked "2" could

have been the skull of deceased person shown as (2) in the photograph (M. Ext. 14).

(c) There was a correspondence between the anatomical land marks of the skull marked "3" (M. Ext. 22) and the photograph of the deceased

marked (3) in group photograph (M. Ext. 14) when photographically super-imposed. It is therefore concluded that the skull in question could have

been the skull of deceased person shown in the group photograph as (3).

(d) There was a correspondence between the anatomical land marks of skull marked "4" and the photograph of deceased face marked (4) in

group photograph when photographically super-imposed. It is therefore concluded that the skull in question could have been the skull of deceased

person shown in the photograph as (4).

The report submitted by P.W. 21 to the Director, Forensic Science Laboratory, Assam is Ext. 25.

106. P.W. 21 has stated that in case of skull No. 1 with photo marked (1) in M. Ext. 14 there was a correspondence of Nasion point, sub-nasion

point, prosthion, the canthuses molar prominence. By Nasion is actually meant a point where the two nasal bones meet the frontal bone. By sub-

nasion is meant the uppermost point below the nasal aperture where the two maxillae unite at the mid segittal plane in the skull. Prasthian is the

lower-most point of maxilla at the mid segittal plane. Canthuses are epicenthus and indocanthus, which correspond to outer and inner angles of

eye. The cheek bones are molar prominences. The above correspondence was found in respect of all other skulls and photos.

107. Shri R. C. Bannerjee (P.W. 22) the photographic expert took the photos. Shri Bannerjee had measured the anatomical land marks of the

skull and photos in his presence. After getting the measurements, they arrived at certain ratios and Shri Bannerjee arrived at those figures. In the

skulls the anatomical land marks are at a particular distance from each other. If identical differences in the photos are found there is a further help in

establishing the identity of the deceased. Mr. Bannerjee had sent his report to him (P.W. 21). The ratios indicated a striking correspondence

between the skulls and their respective photos thereby leading them to believe that the skulls were of the same person whose respective

photographs were examined by them.

108. Dr. W. M. Crogman in his book "Human Skeleton in Forensic Medicine" has recommended a skull photograph comparison whenever

possible making allowances for a degree of non- comparability in the head positioning in the photographs as relating to far more precisely oriented

cranial trachings. Important corroborative and possibly conclusive evidence may thus be established.

109. In cross-examination P.W. 21 has stated that in their laboratory other examinations are also conducted. Super-imposition is one of the

methods of identification. There are surer means of identification in general than super-imposition. In this case he had only received the skulls, if

other pieces of skeletons would have been sent to them they would have been in a position to give age, sex and height of the person. They had

definite instructions to find out identity by super-imposition. The term super-imposition means the comparison of skull with a photo and super-

imposition would mean 2 photographs being combined in one $\hat{A} \hat{\cup} \hat{A} \frac{1}{2}$ these two photos are of 2 existing things. They are then brought to the same

plane and enlarged to the same size for purpose of comparison. There are degrees of partiality. It was negligible missing in the present case. He did

not get a perfect contour of the skulls as lower jaws were missing in the skulls and some portion of bony fragments were also missing in all the

skulls. The original contour was therefore partially missing (absent). There are degrees of partiality. It was negligible missing in the present case as

immovable bones were not missing and lower jaw is a movable one only, It could not have been possible to know about the position of lower jaw

from the photographs. The absence of lower jaw would alter the contour partially. Super-imposition would not be imperfect, even if lower jaw is

missing. It is not a fact that super-imposition would be erroneous in such a case. The skulls were marked (1)-(4) as in group photos by the sending

authorities. Nobody of the sending authority was personally present at time of super-imposition for identification. He had taken part in

measurements of the anatomical land marks. He agreed that measurement in skulls were bigger than the measurements in the photos. So the skull

and photos were not brought to the same size. It was however necessary to have done so. In this case the image of the skull was brought to the

size of the photo $\frac{1}{2}$ though this has not been mentioned in his report. Mr, Bannerjee had enlarged the photo of the face from group photo. He

stated that it was not a fact that the skull and the face-photo were not adjusted to same plane. That the negative test of super-imposition is more

emphatic than a positive test.

110. P.W. 22 is Ram Chandra Bannerjee. He is Scientific Assistant at Central Forensic Science Laboratory, He knew P.W. 21, Mr.

Bhattacharjee. He had helped him in preparing a report. He had seen the skulls received in their laboratory. He took measurement of anatomical

land marks of all the skulls. In his deposition he has given the various measurements. P.W. 22 stated that he arrived at the ratio by dividing the

length of two anatomical points in a line with another anatomical points in a line. The witness explained the ratio given in his deposition.

111. Considering the evidence of P.Ws. 21 and 22 we are inclined to hold that .though the super-imposition in the instant case is not perfect we

find that the ratios indicated a striking correspondence between the skulls and their respective (photographs thereby leading to the conclusion that

the skulls were of the same persons whose respective photographs were found in M. Ext, 14.

112. In considering the question whether the four ladies- were dead, the lapse of time since the four ladies were last seen has also to be taken into

consideration. As observed hereinabove, Mrs, Rajkhowa and the eldest daughter were last seen alive on 10-2-70 and the two younger daughters

were last seen alive on 25-2-70 in accused"s residence with the accused. They have not been seen thereafter.

113. P.W. Barada Sarma has categorically stated that in May 19170 he started doubting about the mysterious disappearance of Mrs. Rajkhowa

and the three daughters and so he informed over phone in May, 1070 the maternal uncles and other relations of Rajkhowa, about it. He enquired

about the whereabouts of the four ladies at the house of Ajit Sarma at Delhi, who is the relation of Rajkhowa and who was working in Oil India at

that time. P.W. Barada Sarma also stated that he had met Lakhi Goswami at Kokrajhar in May, 1970 itself. P.W. 6 Golok Chandra Sarma has

stated that KW. Barada Sarma asked him in June. 1970 about the whereabouts of Rajkhowa. Such an enquiry was made by the Sub-Deputy

Collector of Kokrajhar also. The Sub-Deputy Collector had met him in July after Barada Sarma had met him for the first time, and he told the

SutnDeputy Collector that he had purchased a ticket for Rajkhowa up to Siliguri. Considering the evidence on record the defence suggestion that

the four ladies might be still alive either at Gauhati or at Kokrajhar has no rational basis behind it. In consideration of the materials on record the

possibility of the four ladies being alive at Gauhati or at Delhi or at Kokrajhar or at any other place has to be ruled out.

114. On consideration of the evidence on record as discussed hereinabove we are clearly of opinion that Mrs. Putuli alias Putul Rajkhowa, Miss

Nirmali alias Linu Rajkhowa, Miss Jonali alias Luna Rajkhowa and Miss Rupali alias Ruplekha alias Bhantu Rajkhowa are dead and the dead

bodies recovered from the two pits in the compound of the District Judge"s residence at Dhubri in pursuance of the information received from

Rajkhowa are dead bodies of the said four, ladies.

115. The next most important question is whether the accused Rajkhowa and the other accused Umesh Baishya are responsible for the deaths of

these four persons. We will for the present confine ourselves to the case of accused Rajkhowa. In order to come to a conclusion on this issue we

have first to consider whether these cases of death are cases of suicide or homicide. In his oral statement before P.W. Barada Sarma, at Savoy

Hotel, Siliguri on 25-7-70 Rajkhowa gave out a story of accidental death and suicide which has already been discussed above.

116. From Ext. 25 it is found that each of the four samples of hair contained in packets marked 1 (b), 2 (b), 3 (b), and 4 (b) respectively was

identified to be human head hair probably derived from adult female. Neither arsenic nor any metallic poison could be detected in the contents of

the packets marked 1 (b), 2 (b), 3 (b) and 4 (b).

117. From inquest report Ext. 1 it is found that of the two skulls recovered from Pit No. 1, one was found to be broken inwards on the right side

and the other was found to be broken inwards on the left side. From the inquest report Ext. 2 it is found that the two skulls which were brought out

from Pit No. 2, a part of one skull was found broken inwards on the left side and there was a fracture on the left side of the other skull."

118. P.W. 16 Dr. J. N. Talukdar of the Dhubri Civil Hospital who held the post-mortem examination on 11-8-70 at night on the four dead bodies,

has stated that he had prepared four post-mortem reports. Report No. 1 relates to Ext. 1 (A). In this case he found a human skeleton attached

with skull, intact scalp and a "bunch of long hairs 20"". Limb bones were all separated and on examination the doctor found as under:

- (1) Fracture of the right temporal bone with gaping 1"" x 1/2"" with linear fracture of parietal end frontal bones.
- (2) Soft tissues all decomposed and liquified not available.
- (3) Viscera $\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$ all decomposed and liquified not available.
- (4) Lumber vertebra detached.
- (5) Thorax and abdomen liquified. Fracture of the skull was ante mortem and (by heavy blunt weapon.

His report No. 2 relates to Ext. 1 (B). On examination he found as under:

- 1(1) A human skeleton with separation of skull and limb bones.
- (2) Fracture of the left temporal bone with gating 1"" x 1/4"" with linear fracture of parietal bone.
- (3) Soft tissues all decomposed and not available.
- (4) Viscera all decomposed and liquified not available.
- (5) Cervical vertebra detached.
- (6) A bunch of long hairs 12"" found separately.
- (7) Thorax and abdomen liquified - Fracture of the skull was antemortem and caused by heavy blunt weapon.

Report No. 3 relates to Ext. 2 (A) and on examination he found the following:

- (1) A human skeleton with separation of skull and limb bones.
- (2) Fracture of the left temporal bone $1\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}\times 1/2\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$ with linear fracture of frontal and parietal bones.
- (3) Soft tissues all decomposed and not available.
- (4) Viscera all decomposed and liquified not available.
- (5) Cervical vertebra detached.
- (6) A bunch of long hairs ($12\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$) found separately.
- (7) Thorax and abdomen decomposed and liquified.

Fracture of the skull was antemortem and caused by heavy blunt weapons.

Report No. 4 relates to Ext. 2 (B) and the doctor on Examination found the following:

- (1) A human skeleton with separation of skull and limb bones.

(2) Fracture of the left temporal bone 1 1/2x 1/2 with linear fracture of the parietal and frontal bones.

(3) Soft tissues were decomposed and liquified not available.

(4) Viscera decomposed and liquified not available.

(5) Cervical vertebra detached.

(6) A bunch of long hairs (10 1/2) found separately.

(7) Thorax and abdomen decomposed and liquified.

Fracture of the skull was ante mortem and caused by heavy blunt weapon.

119. In the opinion of the doctor the deaths were due to coma as a result of shock and haemorrhage due to injuries sustained and the probable age

of the injuries would be about six months. The witness has stated that the wounds on temporal bones were not depressed. No part of skull bones

were found missing by him. In none of the four skulls the witness found the depressed" wound. The witness has stated that his finding regarding the

age of the injuries was not conclusive. In case of injury on the head, the witness opined, all cases might not result in death. But in the cases

examined by him the death must have occurred immediately. The injuries of the nature found by him could not have been caused after death

because if somebody hit over the skull after death it would not be in the position found by him and in any postmortem fracture there would be

fractures in other parts also. The defence suggestion that the injuries on the skulls could have been caused with the spade when the pits were dug,

has no substance. Had the skull injuries been caused by striking with spade at the time of digging the pits the skulls would have (been broken to

pieces. Again no question was put to Hiram Ras for (TP.W. 39) that while digging the pits his spade struck on the skulls. Considering the

relevant evidence on the point we are clearly of opinion that the deaths of the four ladies could not be the result of suicide (but these deaths are the

result of homicide.

120. Let us now consider whether accused Rajkhowa is responsible for these deaths. As observed above, there is no eye witness to the

occurrences. Prosecution has therefore relied on circumstantial evidence regarding the responsibility of accused Rajkhowa for the deaths of these

four ladies. We have already set down the forty circumstances, the learned Sessions Judge for the reasons stated in his judgment did not place

reliance on the circumstances Nos. 2, 9, 11, 14, 28, 33, 34, 35, 37, 38 wholly and circumstances Nos. 3, 7, 19 and 29 partly. Circumstance No.

38 is the confessional statement in which Rajkhowa was named and the learned Sessions Judge found the confessional statement of Umesh as not

voluntary and not true, in considering the case of accused Rajkhowa we do not propose to take into consideration the circumstance No. 38. We

will, however, consider the confessional statement made by accused Umesh while we deal with the appeal against the order of acquittal.

121. The first circumstance is that Pit No. 1 and Pit No. 2 where the highly decomposed bodies were found on 11-8-70 were previously dug in

the compound of the District Judge's residence at Dhubri, at the instance of accused Rajkhowa. P.Ws. 3 and 15 are the two witnesses on this

point. The evidence of P.W. 11 corroborate the evidence of P.W. 3 on some points. It is not disputed that at the relevant time P.Ws. 3 and 15

were working as jpeons under accused Rajkhowa. Bigan used to do marketing for Rajkhowa and Sahid was & day chowkidar and used to look

after the garden in the bungalow. The, evidence on record shows that Bigan used to sleep in one of the rooms in the bunglow itself and Sahid used

to stay with his family at his house during the night. They are thus found to be natural and competent witnesses to depose regarding the digging of

pits within the compound of the District Judge's residence. These two witnesses are not found to be inimical to Rajkhowa in any way.

122. The learned counsel for Rajkhowa however submits that the evidence of these two witnesses is not reliable inasmuch as the prosecution itself

expressed doubt as to their truthfulness when the prosecution recorded the statements of these two witnesses u/s 164, Criminal Procedure Code, it

cannot be stated as a proposition of law that the evidence of a witness given "before the trial court loses its value or it is doubtful because such a

witness was earlier examined u/s 164, Criminal Procedure Code. The learned counsel has referred to the following observation of the Supreme

Court in this connection made in Baburao Bajirao Patil Vs. State of Maharashtra,

The fact that some of the prosecution witnesses had been examined earlier u/s 164, Criminal Procedure Code, is only a circumstance to be taken

into account in appraising the value of their testimony and the Court has to scrutinise such evidence a little more closely and see if the other

circumstances lend support to it.

The above observation means that when a witness has been examined earlier u/s 164. Criminal Procedure Code, that is also a circumstance to be

taken into account in scrutinising the value of his testimony.

123. The learned counsel for the convict next submits that P.W. Sahid was arrested in connection with this case and later on he was discharged.

P.W. Bigan also is a person who used to reside at night in one of the rooms of the bungalow in question and according to his statement he also

took part in digging Pit No. 1. It is thus submitted that these two witnesses are persons in the nature of accomplices and therefore they are

unworthy of credit and unless they are corroborated in material particulars they should not be believed.

124. The evidence on record however does not show that the two accused persons took any part in the commission of the crime. The pits were

dug at the instance and direction of accused Rajkhowa who was the District and Sessions Judge under whom P.W. Bigan and P.W. Sahid served

as peons. Moreover, P.Ws. Bigan and Sahid were told that flowers would be planted in the pits. They had not the least idea that some murders

would be committed and the pits were dug for the purpose of accommodating the dead bodies. The evidence on record speaks nothing of the

kind.

125. An accomplice is a person" who has concurred in the commission of an offence. The dictionary meaning of an accomplice is a partner in

crime, an associate in guilt. Accomplice signifies a guilty associate in crime or when the witness sustains such a relation to the criminal act that; he

could be jointly indicted with the accused. In two cases however persons who are not particeps criminis have been held to be accomplices, namely

(i) receivers of stolen property have been held to be accomplices of the thieves from whom they receive goods, in a trial for theft, and (ii) where a

person has been charged with a particular offence and evidence of other similar offences by him has been admitted as proving system and intent

and negating accident. (Vide 1954 AC 378, relied on in R.K. Dalmia Vs. Delhi Administration, Hence we hold that P.Ws. Bigan and Sahid

cannot be said to be accomplices in the instant case and their evidence cannot be treated as the evidence of accomplices.

126. P.W. 3 Bigan has stated that in the relevant year he went to his native house during Puja Holidays and when he returned from home he found

that Mrs. Rajkhowa and the eldest daughter of Mr. Rajkhowa were in the bungalow. Umesh Baishya was also there. He was orderly peon and

used to cook meals. Rajkhowa retired on 2nd February, 1970. After retirement Rajkhowa stayed in the bungalow for some time. On the eve of

Magh Bihu (Uruka) a light post near the corner of the bungalow was cut by P.W. Bigan under the direction of Rajkhowa. P.W. Sahid and

Radhanath Mali helped Bigan in uprooting it. He was asked by Rajkhowa to cut the post to use it as a fire-wood on the occasion of Uruka (eve of

Magh Bihu). It may be mentioned here that on the eve of Magh Bihu fire is lit with fire-wood generally in every house as a national festival in the

Assam Valley. The post was used as fuel afterwards, It was a long light post. Rajkhowa asked him to dig out the remaining portion so that nobody

might stumble against it. Accordingly P.W. Bigan, P.W. Sahid and Rfidhnath dug out the stump also. They were asked not to fill up the pit caused

by uprooting the post as Rajkhowa wanted to grow some flower plants therein. Rajkhowa was with them when Bigan dug out the post. Rajkhowa

also got another pit dug by Sahid near Eadha's quarter inside the compound. four or five days after digging of the first pit. Mrs. Rajkhowa asked

Bigan to fill up the pit dug by him and at that time Rajkhowa was taking his bath. Bigan therefore filled up the pit. After coming out Rajkhowa

questioned as to why Bigan had filled up the pit and then Rajkhowa asked Bigan to take out the earth again. Bigan accordingly took out the earth.

127. P.W. 15 Md, Sahid Ali has stated that Rajkhowa came to the District Judge's bungalow at first alone and his family came afterwards at the

time of Durga Puja. Mrs. Rajkhowa and the three daughters of Rajkhowa were with him. Umesh was also with them. After about one week the

two younger daughters left Mrs. Rajkhowa and the eldest daughter stayed Before Magh Bihu Rajkhowa asked Bigan to out an electric post near

the bath room. It was a Sal post. Bigan and P.W. Sahid cut that post. Next day Rajkhowa asked them to remove the whole post from under the

earth and they dug out the stump with the help of a spade. The pit that was caused by uprooting the stump of the post remained unfilled. At the

time of Saraswati Puja he found the pit closed. Another pit was dug by Sahid at the instance of Rajkhowa before Saraswati Puja. The second pit

was dug by Sahid two or three days after digging of the first pit. The second pit was dug behind the Chowkidar's quarter. That place was about 1

cubit deep from before and P.W. Sahid dug it deeper by U to 2 cubits more. Rajkhowa told Sahid that padam flower brought from CoochBehar

would be planted there. From the evidence of P.W. Nalini Kumar Choudhury, who was the District and Sessions Judge at Dhubri at the relevant

time, it is found that on 10th August, 1970 while he was returning after holding circuit court at Goalpara on his way to Dhubri, Bigan who

accompanied him as a peon told him that Rajkhowa had got two pits dug $\tilde{\text{A}}\hat{\text{A}}\hat{\text{A}}\frac{1}{2}$ one near the .pantry and another near the servant's shed in the

compound of the District Judge's bungalow. Bigan further stated that the two pits were dug to plant flowers but he suddenly found that both the

pits were in filled up condition. On consideration of the evidence of P.Ws. 1, 2, 3, 15. 29, 39 and 49 it is clearly found that from these two pits the

dead bodies of the four persons were recovered. There are some minor discrepancies here and there in the talk between P.W. Nalini Kumar

Choudhury and P.W. Bigan but this talk was held while travelling and there are some minor discrepancies also here and there between the

statements of P.Ws. 3 and 15 before court and before police. Leaving aside the minor discrepancies as has been discussed in the judgment of the

learned Sessions Judge, it is proved beyond reasonable doubt that Pit No. 1 and Pit No. 2 were dug at the instance and direction of Rajkhowa in

the compound of the District Judge's residence on the eve of Magh Bihu and a few days thereafter that is to say during the week commencing

from 12th of January 1370.

128. The second circumstance (circumstance No. 4 in the Sessions Judge's judgment) is that Mrs. Rajkhowa and Miss Nirmali alias Linu were

last seen alive on 10-12-70 before going to bed in the company of Rajkhowa in the District Judge's bungalow. This circumstance is proved by the

evidence of P.Ws. Bigan and Sahid. 10-2-70 was the Saraswati Puja Day. Bigan returned to the bungalow after seeing the Puja on 10-2-70 at

about 7 A.M. He saw Rajkhowa coming back at 8-30 P.M. with his wife and eldest" daughter. Bigan then put some fire and the family sat round

the fire and talked. After taking their meals Rajkhowa his wife and daughter went to bed. Thereafter Bigan as well as Umesh went to bed. Next

morning when he got up he saw Rajkhowa was walking in the front verandah and came inside and asked Umesh to prepare one cup of tea adding

that Mrs. Rajkhowa and Miss Linu had been seen off by him at the Bus Station as they had left for Gauhati. When Bigan being curious pointed out

to Rajkhowa that there was no talk last evening about his wife and daughter going to Gauhati, Rajkhowa stated that they had wanted to go as he

had already retired. P.Ws. Sahid, Bhaiben Sarma and Golok Sarma also did not see Mrs. Rajkhowa and Miss Linu on 11-2-70 at the bungalow.

This circumstance is therefore found to be proved.

129. The third circumstance (circumstance No. 5 in the Sessions Judge's judgment) is that in the morning of 11-2-70 Pit No. 1 near the bath room

was found in a filled up condition and this is proved by the evidence of P.W. 3 Bigan and P.W. 15 Sahid and corroborated by the evidence of

P.W. H N. K. Choudhury.

130. The fourth circumstance (circumstance No. 6 in the Sessions Judge's judgment) is that on the morning of 11-2-70 Rajkhowa falsely stated to

P.Ws. Bigan and Sahid that Mrs. Rajkhowa and Miss Linu had gone to Gauhati in the early morning. P.Ws. Golok Sarma and Bhaiben Sarma

were also told the same thing in the evening of 11-2-70. This is proved by the evidence of P.W. 3 Bigan, P.W. 15 Sahid, P.W. 6 Golok Sarma and

P.W. 7 Bhaiben Sarina and this is corroborated also by the evidence of P.W. 25 Barada Sarma and Ext. 36, This circumstance shows that

Rajkhowa wanted to avoid suspicion and make other believe that Mrs. Rajkhowa and Miss Linu had left for Gauhati and they were alive on 11-2-

70

131. The fifth circumstance (circumstance No. 7 in the Sessions Judge's judgment) is that on 11-2-70 Rajkhowa was found to have washed some

clothes in the bath room and spread out the same to dry and this is proved by the evidence of P.W. 3 and P.W. 15.

132. The sixth circumstance (circumstance No. 8 in the Sessions Judge's judgment) is that in the evening of 11-2-70. When Mrs. Bhaben Sarroa

who had accompanied her husband to Rajkhowa's (bungalow wanted to use the bath room, she was asked by Rajkhowa not to use the bath

room attached to his bed room as that was little dirty.

133. The seventh circumstance (circumstance No. 10 in the Sessions Judge's judgment) is that a few days before arrival of the two younger

daughters from Gauhati, Rajkhowa "gave a new story that his wife and eldest daughter did not ultimately go to Gauhati but had gone to Kokrajhar

knowing about the illness of one of his relations there. Same story was told to the two younger daughters on their arrival on 14-2-70 and to P.W,

Barada Sarma on 15-2-70/16-2-70. This circumstance is proved by the evidence of P.W. 3, P.W. 15, P.W. 25 and P.W. 6.

134. We have already found that there was no truth in the statement that Mrs. Rajkhowa and Miss Linu went to Kokrajhar, The relation of

Rajkhowa who was stated to be ill at Kokrajhar is Lakhi Goswami. We have already found that Lakhi Goswami himself was enquiring of P.W.

Golok Sarma in June, 1970 and P.W. 25 Barada Sarma in May, 1970 about the members of the family of Rajkhowa. It is therefore evident that

Rajkhowa was spreading out the false story that his wife and eldest daughter went to his relation at Kokrajhar on 11th February, 1970. He also

falsely stated so to his two younger daughters when they arrived at Dhubri on 14-2-70.

135. The eighth circumstance (circumstances Nos. 11 and 12 in the Sessions Judge's judgment is that on 14-2-70 Rajkhowa asked P.W. Barada

Sarma to send Luna and Bhantu to Dhubri though their examinations were near at hand on the (plea that he would be going to Darjeeling and that

Rajkhowa had himself received the two younger daughters at the Bus Station. The first part of this circumstance is proved by the evidence of P.W.

Barada Sarma and Ext. 36 and the second part is proved by the evidence of P.W. 3, P.W. 15 and P.W. 6.

136. The ninth circumstance (circumstance No. 13 in the Sessions Judge's judgment) is that on 24-2-70 Rajkhowa rang up P.W. Barada Sarma

at Gauhati on the plea that his wife did not like to stay there, it is proved by the evidence of P.W. 25 and Ext. 45 telephonic call ticket and the

evidence of P.W. 34 Rajendra Chandra Chakravarty, Senior Accountant in the Telegraph Department, who has proved Ext, 45. The learned

Sessions Judge had however found that this circumstance was innocuous. But in our opinion this circumstance also has a link in the chain inasmuch

as on 24-2-70 Rajkhowa tried to show to the world that his wife and the eldest daughter were still alive.

137. The tenth circumstance (circumstance No. 15 in the Sessions Judge's judgment) is that on the morning of 25-2-70 the two younger daughters

were last seen alive with Rajkhowa at the District Judge's bungalow, This is proved by the evidence of P.W. 3, P.W. 6 and P.W. 15.

138. The eleventh circumstance (circumstance No. 16 in the Sessions Judge's judgment) is that in the afternoon of 25-2-70 Rajkhowa stated to

P.W. Bigan, P.W. Golok Sarma and P.W. Sahid that Miss Luna and Miss Bhantu had been sent to Gauhati. This is proved by the evidence of

P.Ws. 3, 6 and 15. Rajkhowa stated so in the afternoon of 25th February, 1970 to P.W. Bigan. P.W. Golok and P.W. Sahid in order to make

others believe that Luna and Bhantu were alive.

139. The twelfth circumstance "(circumstance No. 17 in the Sessions Judge's judgment) is that in the morning of 26th February, 1970 accused

Umesh was seen filling up the pit near Radha's quarter in presence of Rajkhowa. Subsequently P.W. Sahid was also levelling the same. This is

proved by the evidence of P.W. 3 and P.W. 15.

140. The thirteenth circumstance (circumstance No. 18 in the Sessions Judge's judgment) is that on 13-4-70 Rajkhowa wrote two letters Exts.

30 and 31 to P.W. Barada Sarma and his wife making out a new story that his family had not returned back and he would be going to fetch them.

This circumstance is proved by the evidence of P.W. 25 and Exts. 30 and 31. This story that the members of his family were at Delhi and

Rajkhowa also was going to Delhi to fetch them was told by Rajkhowa just to make others believe that his wife and daughters were still alive.

141. The fourteenth circumstance "(circumstance No. 19 in the Sessions Judge's judgment) is that on 15-4-70 Rajkhowa left Dhubri alone leaving

his personal belongings with P.W. Golok Sarma and P.W. Joy Prakash. Rajkhowa concealed his whereabouts thereafter from his relatives till he

was found on 25-7-70 at Savoy Hotel of Siliguri. This circumstance is proved by the evidence of P.Ws. 3, 6 and 8.

142. The fifteenth circumstance (circumstance No. 20 in the Sessions judge's judgment) is that Rajkhowa had stayed alone from 28-4-70 to 9-5-

70 in Summer Boon Hotel, Darjeeling and this is proved by the evidence of P.W. 37 Narendra Gajmir, Manager of Summer Boon Hotel,

Darjeeling and P.W. 20 M. P. Das, A.S.I. of Police, Dhubri. Ext. 52 the Hotel Register of Summer Boon Hotel has been proved by P.W. 37.

This circumstance shows that Rajkhowa was trying to conceal himself from his relatives though not from others such as Hotel Manager.

143. The sixteenth circumstance (circumstance No. 20 (b) in the Sessions Judge's judgment) is that from 7-6-70 to 25-7-70 Rajkhowa had

stayed alone in Savoy Hotel, Siliguri and this is proved by the evidence of P.W. 26, Timir Baran Nandi, Manager of Savoy Hotel, Siliguri, who has

proved Ext. 35, the Hotel Register.

(The number of circumstance put in "brackets should be read as the number of circumstance in the Sessions Judge's judgment).

144. The 17th circumstance (circumstance No. 2.1) is that in June, 1970 Rajkhowa had visited the house of P.W. Satya Prakash at Gauripur and

had stayed there for three nights. He had then asked Satya Prakash and his son Joy Prakash not to tell others about his visit to their house. This

circumstance is proved by the evidence of P.W. 8 Joy Prakash and P.W. 10 Satya Prakash.

145. The 18th circumstance (circumstance No. 22) is that while leaving the house of Joy Prakash and Satya Prakash, Rajkhowa at first did not tell

about his destination but on being requested by Joy Prakash, he stated that he would stay in Savoy Hotel at Siliguri and asked Joy Prakash not to

tell others about the same. P.W. 8 and P.W. 10 have proved this circumstance.

146. The 19th circumstance (circumstance No. 2:3) is that a few days after departure from the house of P.W. Satya Prakash, Rajkhowa wrote a

letter Ext. 12 (1) to P.W. Joy Prakash asking him to come to Siliguri but he asked Joy Prakash not to disclose this fact to anybody except the

members of his family. This circumstance is proved by the evidence of P.W. 8, P.W. 10 and Ext. 12 (1) the handwriting of which was identified

"by P.W. 8 and P.W. 25. P.W. 8 Joy Prakash has stated that he joined Government service on 2-2-70 and he was appointed (by Rajkhowa who

retired on 31st January, 1970. (It may be mentioned here that 1st of February, 1970 being a Sunday, Rajkhowa must have made over charge

on 2-2-70). After retirement of Rajkhowa, P.W. 8 had gone to his bungalow. He had also some casual talk with Rajkhowa and asked him to visit

his house if possible. P.W. 8 did not see his family members then. Rajkhowa visited the house of P.W. 8 three or four times. The second visit of

Rajkhowa to the house of P.W. 8 might have been in March, 1970 and Rajkhowa told P.W. 8 during the course of talk with him that members of

his Rajkhowa's family had gone for travelling in northern India. Again in April P.W. 8 met Rajkhowa at Dhuibri. It was before Bohag Bihu and he

met him in his bungalow. He did not meet the members of his family then. When P.W. 8 met Rajkhowa in April 1970 Rajkhowa had asked him to

keep his dak and said that he would collect the same after wards. Sometime in June, 1970 Rajkhowa came to the house of P.W. 8 and there¹ he

stayed for three nights. Rajkhowa told that time that he had come after touring northern India. When asked about his wife and daughters Rajkhowa

told him that they were in Delhi with a cousin. P.W. 8 collected some of Rajkhowa's letters which he handed over to him. That most of the time

Rajkhowa used to stay inside. When Rajkhowa left the house of P.W. 8 after staying there for three nights Rajkhowa did not first say about his

destination but being requested by P.W. 8 Rajkhowa stated that he was going to Siliguri and that he would stay at Savoy Hotel and at the same

time Rajkhowa asked P.W. 8 not to speak to others that he would stay at Savoy Hotel. P.W. 8 also did not tell anybody about that address. P.W.

8 received a letter written by Rajkhowa (Ext. 12 (1)) Which was in the envelope Ext. 12 and the envelope was addressed to P.W. 10 father of

P.W. 8. Ext. 12 (1) also has been proved by P.W. 25 to be in the hand-writing of Rajkhowa. P.W. 8 stated that he used to call Rajkhowa as

"Kaku" on his request. The letter in the envelope was addressed to him (P.W. 8). After receipt of that letter P.W. 8 went to Sdliguri and met

Rajkhowa at Savoy Hotel where he was alone. One outsider was with him in a double bed room. P.W. 8 stayed that night at Siliguri in the same

Hotel. On being asked Rajkhowa said that the members of his family were at Delhi in the house of his cousin and that he would be going to fetch

them. When D.I.G. Barada Sarma asked P.W. 8 about the whereabouts of Rajkhowa, at first P.W. 8 told Barada Sarma that he did not know

about the same as advised by Rajkhowa Ultimately he gave out the whereabouts of Rajkhowa to Barada Sarma. Rajkhowa kept his bedding with

P.W. 8 which was taken by him from the bungalow. P.W. 8 was present in the farewell dinner given to Rajkhowa. which was held at Assam

Sangha Hall. It was held before Saraswati Puja and Rajkhowa, his wife and eldest daughter were present at the dinner. P.W. 8 did not see them

thereafter. P.W. 8 stated that he knew about the missing of Rajkhowa's family memfbers in August from Barada Sarma.

147. It is important to consider Ext. 12 (1). At the top of Ext. 12 (1) it is written as ""confidential"". The letter is written in Assamese with a few

English words here and there. It is addressed to Joy Prakash and the signature is that of "Kaku". We have already noticed that IP.W. 8 addressed

Rajkhowa as "Kaku" at his request. The following is the English translation of Ext. 12 (1):

Confidential

My dear Joy Prakash.

I am distressed not to hear from you for so long.

Has the authority for withdrawal of P.F. come from the A.G. Office? Open and examine all the letters that come from A.G. in my name. If the

authority slip for withdrawal has arrived have the bill prepared by Accountant Chakravarty and (bring it to me for signature. Get this done in such a

way that you may withdraw the amount. Please bring all .papers such as receipt etc. which I will have to sign after making them ready. You need

not tell the office where I am staying.

When you come you need not bring bedding and other clothes. If you come on Saturday from office without going home you will be able to return

by Sunday morning. If you come on Sunday, take leave for Monday. You have no risk nor reason to fear.

Convey my regards to Dada and Boudi. Tender my love to Paribati, Silbi, Ja-yati, Deb and Dhatati. When you come tell others that you are

coming to your paternal or maternal aunt's house. . If you like you may come even if you have not received the withdrawal authority, Of course if

you come for one night there is strain on your health. I will be ""happy if you come.

Tell Dada and Boudi that you have no risk nor reason to fear. Only it should not be disclosed to others except the members of your family.

Finis,

Yours,

Kaku".

148. P.W. 10 also has stated that Ext. 1(2 CD is a letter from Rajkhowa in the name of Joy Prakash and he had1 handed over the letter to him

after reading. Rajkhowa had asked1 Joy Prakash to call him "Kaku". After receiving this letter, Joy Prakash had gone to Siliguri and on return he

had told P.W. 10 that Raj- khowa was in Savoy Hotel. P.W. 8 had1 also carried some dak for Rajkhowa.

149. The evidence on record conclusively proves that Ext. 12 (1) was written by Rajkhowa when he was at Savoy! Hotel, Siliguri because after

receiving" Ext. 12 (1) P.W. 8 went to Savoy Hotel, Siliguri and met Rajkhowa there. In Ext. 12 (1) Rajkhowa has stated that P.W. 8 need not tell

the office (District Judge's office) about the whereabouts of Rajkhowa. It has further been stated that P.W. 8 has no risk nor any reason to fear in

coming to Savoy Hotel, Siliguri. It has also been stated that if P.W. 8 went there he should let others know that he had gone to the house of

paternal or maternal aunt's house. It is also stated in Ext. 12 (1) that P.W. 8 should tell his father and mother that he had no risk or reason to fear

and he should see only that the matter is not disclosed to anybody else except the members of his family. All these go to show clearly that

Rajkhowa wanted to keep his whereabouts as secret from others except the members of the family of P.W. 8 and P.W. 10. From the evidence of

P.W. Kahali it is found that on his first meeting with Joy Prakash, the latter did not tell him about the whereabouts of Rajkhowa but subsequently

on being -pressed P.W. Kahali could know from Joy iPrakash that Rajkhowa was at Savoy Hotel, Siliguri.

150. The 20th circumstance (circumstance No. 24) is that during his stay at Gauripur in June P.W. Satya Prakash had once taken Rajkhowa out

to show a plot for Ashram and on way back seeing a police vehicle Rajkhowa had felt nonplussed and had sat down as if to urinate. This

circumstance is proved by the evidence of P.W. 10 Satya Prakash.

151. The 21st circumstance (circumstance No. 25 (a), (b), (c)) is that on 25-7-70 when P.W. Barada Sarma met Rajkhowa at Savoy Hotel,

Siliguri, Rajkhowa at first stated that his wife and daughters were in Central Boarding Darjeeling. When he was requested to go to Darjeeling,

Rajkhowa pleaded that ha was having stomach trouble but when he was further requested with all seriousness, Rajkhowa admitted that his wife;

and daughters were not at Darjeeling, Naturally P.W. Barada Sarma asked Rajkhowa to tell where his wife and daughters were if they were not at

Darjeeling. Then only Rajkhowa wrote Ext. 30 stating that Putul, Linu, Luna and Bhantu were not in this world. We have already quoted Ext. 33

hereinabove. Then on being asked to state where the wife and daughters were, Rajkhowa made the statement that his wife had died by falling from

the verandah of the District Judge"s bungalow, Linu died after taking sleeping tablets. Both the dead bodies were thrown into the Brahmaputra for

which he paid the Biharis of the Steamer Ghat Rs. 500; Luna and Bhantu having known aibout the death of their mother and eldest sister

committed suicide by jumping into the Brahmaputra. These circumstances are proved "by the evidence of P.W. 26 Barada Saima, P.W. 53 D. N.

Kahali, Ext 34 also has been proved to be in the handwriting of Rajkhowa. We have already quoted Ext, 34 and discussed the contents thereof.

152. From the oral statement made by Rajkhowa to P.W. Barada Sarma on 25-7-70 at Savoy Hotel, Siliguri, one thing emerges that the four

ladies met with death at Dhubri when Rajkhowa was at Dhubri in the District Judge"s bungalow, Even though it is found from the other evidence

on record that this statement of Rajkhowa regarding the manner of death, the cause of death, the place where the dead bodies were thrown or had

fallen after death is found to be fake.

153. Since Rajkhowa knew that his wife and three daughters were dead while he was in the District Judge"s bungalow at Dhubri his action of

telling others that his wife and three daughters were either at Gauhati or at Kokrajhar or at Darjeeling or at Delhi appeared to be a concocted story

made out for consumption by his relatives and other persons. From this circumstance it can legally and logically be concluded that Rajkhowa had

the knowledge of the death of his wife and three daughters while he was at the District Judge's bungalow at Dhuibri and therefore his subsequent

story that the four ladies were either at Gauhati or at Kokrajhar or at Darjeeling or at Delhi is nothing but a concoction for the consumption of his

relatives and other people so that they might not suspect their death. The way in which the story has been circulated that these four ladies were

alive whether at Gauhati or at Kokrajhar or at Darjeeling or at Delhi goes to show that it is not an action of a man who has run mad or who has

lost mental coherence or who is out of mind but it shows that it is an act of mastermind to befool the world that the four ladies were still alive.

154. The 22nd circumstance (circumstance No. 26) is that on 25-7-70 Rajkhowa had attempted to commit suicide at Savoy Hotel after giving out

the news that his wife and three daughters were no more in this world. Rajkhowa had pleaded guilty on 2-12-70 before the trial court at Siliguri of

the offence u/s 309, Indian Penal Code. This circumstance is proved by the evidence of P.W. 25, P.W. 53 and P.W. 26 and further corroborated

by the evidence of P.W. 28 Dr. A. K. Mukherjee and Ext. 39 the Admission Register of the Hospital.

155. The 23rd circumstance (circumstance No. 27) is that Ext. 34 was found by P.W. Barada Sarma under the bed roll of Rajkhowa when his

belongings were collected from the Savoy Hotel. We have already discussed the contents of Ext. 34. This circumstance is proved by the evidence

of P.W. 25 and P.W. 53. We have also found that Ext. 34 is admissible in evidence.

156. The 24th circumstance (circumstance No. 30 (a), (b) is that on 9-8-70 during interrogation by P.W. Kahali, Rajkhowa who was then under

police custody stated that he had burned the dead bodies of his wife and three daughters in the compound of the District Judge's residence at

Dhubri. P.W. Kahali drew up a requisition (Ext. 11) on 10-8-70 incorporating the above information and on the basis of the said information four

skeletons were recovered by P.W., S. R. Dutta from the compound of the District Judge's residence at Dhubri on 11-8-70. This circumstance has

been proved by the evidence of P.W. 53 Kahali, P.W. 20 M P. Das, P.W. 28 Dr. Mukherjee and Ext. 41 the requisition which have already been

discussed hereinabove at length, Ext. 62 the Command Certificate, Ext. 20 the F.L.R., G. D. Entry No. 406 and (by the evidence of P.W. 46 C.

K. Deka, P.W. 49 S. R. Dutta, P.W. 29 Magistrate Halim, P.W. 1 Nilkanta Chakravarty, P.W. 2 Gopesh Ch. Roy, P.W. 39 Hiramson Basfor,

P.W. 3 Bigan Prosad Rout, P.W. 15 Md. Sahid Ali and P.W. 11 N. K. Choudhury.

157. The 25th circumstance (circumstance No. 30 (c)) is that the four skeletons recovered from the two pits within the compound of the District

Judge's residence at Dhubri were those of Mrs. Rajkhowa, Miss Linu. Miss Luna and Miss Bhantu. This circumstance is proved by the evidence

on record which we have discussed hereinabove.

158. The learned Sessions Judge relied on circumstance No. 32 which is that a shirt (M. Ext. 7) was found in pit No. 1 which has been identified

by P.W. Narayan Rajak to be of Rajkhowa. This circumstance has been proved by the evidence of P.Ws. 1, 2, 29, 39, 49 and 24.

159. P.W. 24 has stated that he used to wash clothes of Rajkhowa Saheb, He gave marks on clothes washed by him. He remembered the mark

which he had put on the clothes of Rajkhowa which he washed. The washerman's mark on Material Ext. 7 was given by him and it was M. Ext. 7

(1). It was the mark given on the clothes of Rajkhowa. That this shirt Material Ext. 7 was previously given to P.W. 24 to wash.

160. In cross-examination P.W. 24 has stated that he did not remember how long he had washed clothes of Rajkhowa. That they give different

marks on the clothes of different persons. That he has "been deposing from memory regarding the mark on the cloth. He remembered the marks of

those persons whose clothes he washed on monthly basis. He had not put the other marks which appeared on the shirt and those might have been

given by other washerman. P.W. 24 was shown many clothes in the police station but he found only one mark tallying with his mark. There were

many washermen in Dhubri and they also gave such marks which means different washermen used different marks of their own. He used to wash

clothes of Rajkhowa only and the clothes of Mrs. Rajkhowa and her daughters were never given to him. He used to wash shirt, pajama, hawai

shirt and long pant and he had given one identification mark in all those clothes. At that time he alone used to wash the clothes of Raikhowa. He

denied the suggestion that the mark was not his.

161. It has not (been challenged in cross-examination that P.W. 24 did not use to wash the clothes of Rajkhowa while he was District and

Sessions Judge at Dhubri. Nor has it even been suggested that P.W. 24 identified the mark as his own at the instance of police. In cross-

examination he has stated that he did not wash the clothes of any police officer. There is no reason to disbelieve the evidence of P.W. 24.

162. The learned counsel for the convict has submitted that no reliance can be placed on the evidence of identification of Material Ext. 7 &) by

P.W. 24 inasmuch as no test identification was held (before a Magistrate.

163. P.W. 24 has stated that the mark M. Ext. 7 fl) was given by him on the cloth of Rajkhowa. Regarding the identification of the mark M. Ext. 7

(1) by P.W. 24 it is not necessary that any test identification parade should have been held before a Magistrate, because what was identified by

P.W. 24 was a mark which he himself put on the shirt. This is like identifying one's own handwriting on a document. The witness has stated that he

deposed regarding the identifying mark from his memory.

164. In Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu, the Supreme Court dealt with a case in which the accused was charged u/s

302, Indian Penal Code and the trial court and the High Court found the accused in that case guilty of the charge u/s 302, Indian Penal Code and

sentenced the accused to death. There was no direct evidence to establish the charge against the accused. But the prosecution relied on

circumstantial evidence and one of the circumstances was that the towel M.O. 6 belonging to him was found lying near the dead body of the

deceased which was identified by the washerman as belonging to the accused, This circumstance was accepted by the Supreme Court.

165. We are, therefore, not impressed by the learned counsel's submission that a test identification before a Magistrate was essential regarding the

identifying mark of the washerman in the instant case. P.W. 24 was competent to say about the mark given by him and which he remembered.

P.W. 24's evidence is that this mark M. Ext. 7 fl) was given on the clothes of Rajkhowa and we do not find any ground to disbelieve this

statement of P.W. 24. In the result we find that the learned Sessions Judge correctly held that M. Ext. 7 was proved to belong to accused

Rajkhowa by reliable evidence. This is the 26th circumstance proved against the accused.

166. The 27th circumstance [circumstance No. 39] is that Rajkhowa attempted to commit suicide on 13-dl-72, the first date of hearing of the case

before the learned Sessions Judge, in Dhubri Jail to avoid trial of the case and he pleaded guilty of the offence u/s 309", Indian Penal Code before

the learned Additional District Magistrate ((Judicial), Goalpara on 27-d-73 (vide G. R. Case No. 1331/72 of Dhubri).

167. The above 27 circumstances" are the main circumstances proved against . accused Rajkhowa to establish the charges levelled against him.

168. At this stage the conduct of accused Rajkhowa may (be considered. The evidence on record is that on 10th February 1970 the wife and the

eldest daughter of Rajkhowa were last seen with him and on 25-2-70 the two younger daughters were last seen with him and thereafter these four

persons have not been found alive. Rajkhowa told P.W. 6 Golok Sarma a few days after the Saraswati Puja in 1S70 that his wife and the eldest

daughter had gone to Gauhati. Thereafter before the two younger daughters had come afterwards Rajkhowa told P.W. 6 that his wife and the

eldest daughter did not ultimately go to Gauhati but they had to go to Kokrajhar knowing about the illness of a Sub-Deputy Collector there who

was a relation of Rajkhowa. Thereafter Rajkhowa told P.W. 6 that his two younger daughters had "been sent to Gauhati in a friend"s car. Similarly

Rajkhowa told P.W. 3 Bigan that his wife and the eldest daughter had gone to Gauhati on the day following the Saraswati Puja. After the coming

of the two younger daughters to Dhubri, one day Rajkhowa told Bigan that the two younger daughters had gone to Gauhati in a friend"s car as

they are facing much difficulty at Dhulbri regarding their education. Similarly Rajkhowa told P.W. 15 Sahid that his wife and the eldest daughter

had left for Gauhati in the morning following the Saraswati Puja Day. In Ext. 30 and Ext. 31 the two letters dated 13-4-70 written by Rajkhowa to

Barada Sarma and Mrs. Barada Sarma respectively it was stated by Rajkhowa that his wife and daughters have not yet arrived and he will leave

for Delhi by night train on the next day and that Rajkhowa received phone call from his wife and daughters. It is thus found that since after the

dates of occurrences Rajkhowa has been consistently trying to tell others that his wife and daughters are alive and they are either at Gauhati or at

Kokra-jhar or at Delhi. These statements have been found to be false and these show that Rajkhowa was trying to make his relatives and other

persons believe that his wife and daughters were alive even after the dates of occurrences. On 25-7-70 also Rajkhowa tried to convince Barada

Sarma that his wife and daughters were at Darjeeling. From the oral statement made to P.W. 25 Barada Sarma on 25-7-70 it is found that

Rajkhowa knew that his wife and three daughters were dead while he was in the District Judge"s bungalow at Dhubri. A man of the status of

District Judge not giving information to police regarding the deaths of his wife and three daughters whether by accident or by suicide and at the

same time making consistent attempts to let the outside world know that his wife and three daughters were alive somewhere are circumstances

which go to show that he must have some hand in their deaths.

169. On a consideration of the 27 circumstances as discussed hereinabove and the conduct of accused Rajkhowa in suppressing the deaths of his

wife and three daughters from others, the irresistible conclusion is that Rajkhowa is responsible for the deaths of his wife and three daughters. The

chain of circumstances proved in the instant case and the conduct of Rajkhowa lead to the only conclusion that he was responsible for the deaths

of his wife and three daughters.

170. At this stage the law laid down by the Supreme Court relating to circumstantial evidence may be considered.

171. In Hanumant Vs. The State of Madhya Pradesh, the Supreme Court had observed as under:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt 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. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the

one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a

conclusion consistent with the innocence of the accused and it must (be such as to show that within all human probability the act must have been

done by the accused.

172. In Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator), the Supreme Court has observed as follows:

In order to establish the charge u/s 201, (Penal Code), it is essential to prove that an offence has been committed, and mere suspicion that it has

been committed is not sufficient that the accused knew or had reason to believe that such offence had been committed and with the requisite

knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information

respecting such offences knowing or having reason to believe the same to be false.

173. In Anant Chintaman Lagu Vs. The State of Bombay, the Supreme Court has observed as follows at page 523 (of AIR) = (at p. 705 of Cri

LJ):

Circumstantial evidence in this context means a combination of facts creating a net-work through which there is no escape for the accused,

because the facts taken as a whole do not admit of any inference but of his guilt. To rely upon the findings of the medical man who conducted the

post-mortem and of the chemical analyser as decisive of the matter is to render the other evidence entirely fruitless. While the circumstances often

speak with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading, No doubt, due weight must be

given to the negative findings at such examinations. But, bearing in mind the difficult task which the man of medicine performs and the limitations

under which he works, his failure should not be taken as the end of the case, for on good and probative circumstances, an irresistible inference of

guilt can be drawn.

174. In M.G. Agarwal Vs. State of Maharashtra, the Supreme Court has observed as follows:

It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's

conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the

circumstances proved in the case are consistent either with the innocence of the accused¹ or with his guilt, then the accused is entitled to the benefit

of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish (between facts which may be

called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the (proof of basic or primary

facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these "basic or

primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that

evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of

guilt of the accused person or not, and in dealing with this aspect of the (problem, the doctrine of benefit of doubt would apply and an inference of

guilt can be drawn only if the [proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.

175. In the *The State of Andhra Pradesh Vs. I.B.S. Prasada Rao and Others*, the Supreme Court has observed as follows:

In regard to the question of the effect and sufficiency of circumstantial evidence for the /purpose of conviction, it is now settled law that before

conviction based solely on such evidence can (be sustained, it must be such as to be conclusive of the guilt of the accused: and must be incapable

of explanation on any hypothesis consistent with the innocence of the accused. But this does not mean that before the (prosecution can succeed in

a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested (by the accused, however extravagant and

fanciful it might be. Before an accused can contend that a particular hypothesis to his innocence has remained unexcluded by the facts proved

against him, the Court must be satisfied that the suggested hypothesis is reasonable and not far-fetched. Further, it is not necessary that every one

of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied

upon by the prosecution may not be decisive in itself, and yet if that fact, along with other facts which have been proved tends to strengthen the

conclusion of his guilt, it is relevant and has to be considered. In other words, when deciding the question of sufficiency, what the Court has to

consider is 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

those facts taken together, is conclusion in establishing the guilt of the accused, the conviction would be justified even though it may be that any

one or more of those facts by itself is not decisive.

176. In *Awadhi Yadav and Another Vs. The State of Bihar*, the Supreme Court has observed as follows:

The case against the appellants in respect of the charge under Sections 302/34, rests on circumstantial evidence. No one has witnessed the

murder. That part of the case rests entirely on circumstantial evidence. The High Court has held that the circumstances established are not sufficient

to convict the accused persons other than the appellants for offence under Sections 302/34, I.P.C. The question is whether the High Court was

justified in holding that the evidence is sufficient to convict the appellants under that charge. Before a person can be convicted on the strength of

circumstantial evidence the circumstances in question must be satisfactorily established and the proved circumstances must bring home the offence

to the accused beyond reasonable doubt. If those circumstances or some of them can be explained by any other reasonable hypothesis then the

accused must have the benefit of that hypothesis. But in assessing the evidence imaginary possibilities have no place. What is to be considered are

ordinary human probabilities.

177. In the matter of appreciation of the evidence the following observations of the Supreme Court in *Himachal Pradesh Administration Vs. Om*

Prakash, are apposite:

In appreciating the evidence against the accused the prime duty of a court is firstly to ensure that the evidence is legally admissible, that the

witnesses who speak to it are credible and have no interest in implicating him or have ulterior motive.

* * * * *

The benefit of doubt to which the accused is entitled is reasonable doubt – the doubt which rational thinking men will reasonably, honestly and

conscientiously entertain and not the doubt of a timid mind which fights shy – though unwittingly it may be – or is afraid of the logical

consequences, if that benefit was not given or as one great Judge said it is "not the doubt of a vacillating mind that has not the moral courage to

decide but shelters itself in a vain and idle scepticism." It does not mean that the evidence must be so strong as to exclude even a remote possibility

that the accused could not have committed the offence. If that were so the law would fail to protect society as in no case can such a possibility be

excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether.

It is for this reason the phrase has been criticised. Lord Goddard. Section 4 in Rex v. Kritz (1950) 1 KB 82 said that when in explaining to the jury

what the prosecution has to establish a Judge begins to use the words "reasonable doubt" and to try to explain what is a reasonable doubt and

what is not, he is much more likely to confuse the jury than if he tells them in plain language. "It is the duty of the prosecution to satisfy you of the

prisoner's guilt." "What in effect this approach amounts to is that the greatest possible care should be taken by the Court in convicting an accused

who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution, The

mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt. This then

is the approach.

178. In The State of Punjab Vs. Hari Singh and Another, the Supreme Court has observed as follows:

The ordinary presumption is that a witness speaking under an oath is truthful unless and until he is shown to be untruthful or unreliable in any

particular respect. The High Court, reversing this approach, seems to us to have assumed that witnesses are untruthful unless it is proved that they

are telling the truth. Witnesses, solemnly deposing on oath in the witness-box during a trial upon a grave charge of murder, must be presumed to

act with a full sense of responsibility of the consequences of what they state. It may be that what they say is so very unlikely or unnatural or

unreasonable that it is safer not to act upon it or even to disbelieve them.

* * * * *

It is true that the statement of a witness that he had got up to urinate just before a murder was committed, so that he could witness the murder,

looks suspicious. But, the statement is not, for that reason, necessarily untrue."

* * * * *

As human testimony resulting from widely different powers of observation and description, is necessarily faulty and even truthful witnesses not

infrequently exaggerate or imagine or tell half truths, the Courts must try to extract and separate the hard core of truth from the whole evidence.

This is what is meant by the proverbial saying that Courts must separate "the chaff from the grain". If, after considering the whole mass of evidence,

a residue of acceptable truth is established by the prosecution beyond any reasonable doubt the Courts are bound to give effect to the result

flowing from it and not throw it overboard on purely hypothetical and conjectural grounds.

* * * * *

Indeed, it is very difficult to find a witness whose evidence is so flawless that it has to be wholly, completely and unqualifiedly accepted. We think

that the High Court had, without saying so, ignored the principle repeatedly laid down by this Court in appraising evidence, that Courts do not, in

this country, act on the maxim "¶¶falsus in uno falsus in omnibus". In considering the effect of each allegation proved to be incorrect or the

likelihood of its being true or untrue, we have to view it in the light of a whole setting or concatenation of facts in each particular case.

179. Applying the above tests of appreciation of evidence and appreciation of circumstantial evidence we are clearly convinced that the 27

circumstances considered above and which have been fully established by the (prosecution evidence on record we find that the circumstantial

evidence in the instant case is of a conclusive nature and tendency and the circumstances proved exclude every other hypothesis except the one

sought to be proved, that is to say, convict Rajkhowa committed the murder of his wife Mrs. Putuli alias Putul Rajkhowa and the three daughters,

namely, Miss Nirmali alias Linu Rajkhowa, Miss Jonali alias Luna Rajkhowa and Miss Rupali alias Ruplekha alias Bhantu Rajkhowa. The chain of

circumstances established in the evidence as discussed hereinabove leaves no reasonable ground for a conclusion consistent with the innocence of

accused Rajkhowa. The circumstances proved against accused Rajkhowa and the chain of circumstances and the nature of circumstances and his

conduct show that within all human probability the murder of his wife and three daughters must have been committed by accused Rajkhowa, may

be along with accused Umesh Baishya, whose case will be considered hereafter.

180. The learned counsel for the convict has submitted that P.W. Bigan and P.W. Sahid may not be relied upon. We have already considered that

these two witnesses cannot (be said to be accomplices in the act of murder with which the convict has been charged. These two witnesses appear

to be the natural witnesses and the evidence of P.W. Bigan has also on some material points been corroborated by the evidence of P.W. N. K,

Choudhury. On consideration of the law of appreciation of evidence of a witness in a criminal case and considering the evidence of these two

witnesses in details we do not find that they are unreliable or their evidence may not be relied upon. Here and there in the evidence of a witness

there may be some apparent mistake, some minor discrepancy, But that would not make the witness unreliable as had been observed by the

Supreme Court.

181. The learned counsel also has submitted that no motive has been proved in the instant case and as such it casts a doubt as to the fact whether

accused Rajkhowa without any motive could have committed such crime. It is also submitted by the learned counsel that accused Rajkhowa is

admittedly a loving husband and a loving father. So the prosecution having failed to establish any motive of the crime the Court should be reluctant

to place reliance on the evidence against /accused Rajkhowa. It is not necessary that motive must be proved by the prosecution in every criminal

case. Of course if motive is sought to be established by evidence on record and the motive is found to be false on consideration of the evidence,

then it may have some effect on the prosecution case sought to be made out; because no motive has been proved that will not by itself affect the

prosecution case. In this connection the following observations of the Supreme Court in *Rajinder Kumar and Another Vs. The State of Punjab*,

may be considered:

What moved Rajinder Kumar to commit this dastardly deed is not clear. The strained relations between Tonny's father Ravinder on the one hand

and Rajinder on the other because the former had asked Rajinder to stop his visits as mentioned in the first circumstance specified above does not

explain his action. Let us assume, however, that even this evidence of strained relations had not been given. That can be no reason for doubting

the evidence as regards the other circumstances that has been adduced or for hesitating to draw the inescapable conclusion from them. The motive

behind a crime is a relevant fact of which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the

evidence. The circumstances which have been mentioned above as proving the guilt of the accused Rajinder are however not weakened at all by

this fact that the motive has not been established. It often happens that only the culprit himself knows what moved¹ him to a certain course of

action. This case appears to be one like that.

182. In *Yeshwant and Others Vs. The State of Maharashtra*, the Supreme Court has observed:

The discovery of the true motive for a crime is not imperative in every case.

183. In *Atley Vs. State of Uttar Pradesh*, the Supreme Court has observed as follows:

The other contentions raised on behalf of the appellant need no serious consideration because they relate to mere appreciation of evidence and do

not raise any question of principle. For example, it was said that the evidence led on behalf of the prosecution did not clearly establish the motive

for the crime. It was said that it was true that the deceased was the discarded wife of the appellant who had taken a second wife but that there was

no clear evidence of any serious quarrels between the husband and the wife.

That is true; and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was

guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion, if the prosecution had (proved by clear

evidence that the appellant had reasons of his own for getting his first wife out of the way, that would have lent,, additional assurance to the

circumstantial evidence pointing to his guilt. But the fact that the prosecution has failed to lead such evidence has this effect only, that the other

evidence bearing on the guilt of the accused has to be very closely examined.

184. The learned counsel for the convict also has addressed us on the effect of non-examination of Radha, Apurba Barua, Lakhi Goswami and

Ajit Sarma. Of course it would" have been better if Radha would have been examined and his evidence could have corroborated the digging of Pit

No. 2, But other witnesses on the point have been examined and there is no reason to discard the evidence of those witnesses. So we find that

non-examination of Radha does not materially affect the prosecution case. Regarding the submission as to non-examination of Lakhi Goswami, we

have already discussed that Lakhi Goswami himself was enquiring about the whereabouts of the family of Rajkhowa after the occurrences and so it

is simply fantastic to suggest that the wife and the three daughters of Rajkhowa could be with Lakhi Goswami, and his non-examination therefore

does not affect the prosecution case in any way. Regarding the non-examination of Ajit Sarma we have already observed that he was contacted by

Barada Sarma through Uma Sairia and the whereabouts of the wife and the three daughters of Rajkhowa could not be Known from that source

also. Regarding non-examination of Apurba Barua, the order she of the case shows that the prosecution tried to produce this witness on several

dates and the prosecution took all necessary steps but ultimately Apurba Barua did not turn up to depose before court and the materials on record

show that he other avoided attendance in Court. His evidence could have corroborated the evidence of P.W. 25 and P.W. 53 on one or two

points here and there. But the other evidence adduced by the prosecution is conclusive on those points and Apurba Barua"s non-examination also

does not affect the prosecution case.

185. The learned counsel for the convict also has submitted that there was some irregularity in conducting investigation but in view of the provisions

of Section 551 and Section 156 of the Criminal Procedure Code, we do not find any substance in the submission of the learned counsel even if

there be some irregularities in investigation.

186. Section 551 of the Criminal Procedure Code reads as follows: ""S. 551. Powers of superior officers of police.Ã-Ã½ Police officers superior in

190. In the result the order of conviction and sentence (passed by the learned Sessions Judge is upheld and the Reference is accepted: The

Criminal Appeals No. 44 (J) of 1973 and No. 62 of 1973 stand rejected.

191. Let us now consider the appeal against the acquittal of Umesh Baishya.

192. We have already set out the charges levelled against accused Umesh Baishya. On consideration of the evidence against him the learned

Sessions Judge has observed that the prosecution has failed to bring home the guilt to accused Umesh Baishya, and he was entitled to an acquittal.

The State has preferred Government Criminal Appeal No. 19 of 1973 against the order of acquittal.

193. At the outset Mr. R. C. Choudhury appearing on behalf of Umesh Baishya as Amicus Curiae, has submitted that since the learned Sessions

Judge on consideration of the evidence on record has acquitted Umesh Baishya, the presumption of innocence of an accused in a criminal trial has

been reinforced and the order of acquittal should not be interfered with unless there are compelling reasons for doing so. On the question of

powers and duties of the High Court in an appeal against an order of acquittal and the mode of exercise of that power, the Supreme Court has

observed in Noor Khan Vs. State of Rajasthan, as follows:

The appeal "before the High Court was one against an order of acquittal. But as explained by the Judicial Committee of the Privy Council in Sheo

Swarup v. Emperor 61 Ind App 398 : (AIR 1934 PC 22 : 36 Cri LJ 786

Sections 417, 418 and 423 of the Code gives to the High Court full power to review at large the evidence upon which the order acquittal was

founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed * * * * *

But in exercising the power conferred by the Code aid before reaching its conclusions upon fact the High Court should and will always give proper

weight and consideration so such matters as (1) the views of the trial Judge as to the credibility of the witnesses: (2) the presumption of innocence

in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; ("3) he right of the accused to the

benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of

seeing the witnesses.

194. On this question the Supreme Court h-s observed in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, as follows:

Before dealing with the merits of the contentions, we may perhaps make a few preliminary remarks (provoked by the situation presented by this

case. An appellant aggrieved by overturning of his acquittal deserves the final court's deeper concern on fundamental principles of criminal justice.

The present accused, who have suffered such a fate, have hopefully appealed to us for a loaded approach against guilt in consonance with the

initial innocence (presumed in their favour fortified by the acquittal that followed. We are clearly in agreement with this noble proposition, stated in

American Jurisprudence at one time (not now, though) as implied in the rule against double jeopardy, in the British system as a "branch of the

benefit of reasonable doubt doctrine and in our own on the more logical socially relevant and modern basis, that an acquitted accused should not

be put in peril of conviction on appeal save where substantial and compelling grounds exist for such a course. In India it is not a jurisdictional

limitation on the appellate court but a judge-made guideline of circumspection. But we hasten to add even here that, although the learned Judges of

the High Court have not expressly stated so, they have been at pains to dwell at length on all the points relied on by the trial court as favourable to

the prisoners for the good reason that they wanted to be satisfied in their conscience whether there was credible testimony warranting, on a fair

consideration, a reversal of the acquittal registered by the court below. In law there are no fetters on the plenary power of the Appellate Court to

review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo,

informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the

homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and

comprehensive consideration. In our view the High Court's judgment survives this exacting standard.

195. Keeping in view the above principles of law, let us examine the case of accused Umesh Baishya.

196. On consideration of the evidence on record we have already found that Mrs. Rajkhowa and her three daughters are dead and that Mrs.

Rajkhowa and her three daughters met with unnatural death. Before the Sessions Judge the prosecution mainly relied on the confessional statement

of accused Umesh Baishya for proving the charges against him. The learned Sessions Judge has observed that the confessional statement is neither

voluntary nor true. He has observed that the first part of the confessional statement somewhat gives the motive of the crime so far as Rajkhowa is

concerned and it stops there. The learned Sessions Judge has observed:

To my mind this part of the confession has been purposely put in the mouth of this accused to because de hors of it there is nothing in the evidence

of any of the P.Ws. to explain the motive of the crime so far as Rajkhowa is concerned; and the same might have worried the investigating agency.

197. The learned Sessions Judge further observes—

According to me this part (first part) of the confession deserves to be rejected out-right not only because there is absolutely nothing in the

entire record to corroborate even an infinitesimal part of it but also because it is inconceivable that educated young girls would indulge in such

activities and would not even take care to bolt the door from inside allowing such easy chance of detection of their highly objectionable activities.

198. The confessional statement Ext. 16 is at pages 542 to 553 of the Paper Book. The actual statement is at pages 547 to 553, It is a long

statement giving details of facts.

199. From the first part of the confessional statement it is found that Umesh Baishya was working in the house of Shri Rajkhowa since July 15,

1969. At first he worked for his family at their Gauhati residence and at that time Mrs. Rajkhowa, her three daughters and Umesh Baishya were at

the Gauhati residence. Thereafter he has made some statements relating to some behaviour of himself with the two younger daughters and so on.

The learned Sessions Judge, as quoted above, has observed that the first part puts in some motive on the part of accused Rajkhowa for

committing the offence. According to the learned Sessions Judge some of the facts stated regarding the relation of Umesh with the two younger

daughters were shocking to the conscience of civilised society and therefore those must be held to be untrue.

200. So far as the first part of the confessional statement regarding Umesh's relation with the two younger daughters, there is no evidence on

record to corroborate. In the instant case the prosecution has not as such relied on any motive for the crime. Whether the first part of the

confessional statement so far as it relates to Umesh's relation with the two younger daughters is proved to be true or proved to be false that does

not in our opinion make the second part of the confessional statement per se involuntary and untrue. The second part of the confessional statement

is quoted below:

On February 10, Saheb asked me if I could kill a man. He said he would give me Rs. 1000 and a job for that. In January, I had taken Rs. 200

from Judge Saheb and had remitted it home. At first, I said I could not do it, later Saheb said "I am with you. You need not fear." Then I said I

could do it. That was the day of the Saraswati Puja. After witnessing Saraswati Puja idols, I came back and went to bed at 10 O'clock. While

talking for the first time about killing a man, Saheb had told me that he had already collected iron rod, and had advised me to get up silently and do

the job as soon as I was asked to do so. Accordingly Saheb got up and woke me up during the night. Getting up, I went along with Saheb to his

room. Memsahab and Linu Baidev were sleeping under the same blanket. Saheb brought two iron rods and handed me one and kept one himself.

The heads of Linu and Memsahab were showing a little from under the blanket. I struck the head of one of them while Saheb struck the head of

the other. After delivering one blow, I heard a little noise made and dealt another blow. Immediately both died. We carried the two of them to

bathroom. Thereafter, we burned the two dead bodies one by one in a pit which has formerly been the site of an electric pole. Then we went to

our respective beds. Saheb had another servant named Mrigan. In the morning, Saheb told me loudly within earshot of Mrigan that he had bought

tickets and sent Aideo (Madam) and Linu to Gauhati early in the morning. At about 7 O'clock on the night of 14th February. Saheb made a phone

call to his Gauhati residence. Jonali received the call. Saheb asked them to come over and stay there until the College opened and to start the

following morning and added that he would be waiting for at the motor stand at six. Accordingly Saheb went to the motor stand and escorted

home Jonali and another. Saheb told the girls that their mother and elder sister had gone to Kokrajhar. At noon of February 25, Saheb brought

one wine bottle and kept it in the Kitchen. I poured a little from it and drank. After I had drunk, Saheb again took away the bottle. A little later

Saheb asked me if I could kill Bhantu and Jonali alias Luna. He adds that he too would be along with me. I was intoxicated and said I could do it if

I got money. Saheb said that he would give me Rs. 1000 more. He then called me to bed room. Bhantu and Luna were asleep at the time. As

before, Saheb himself took one iron rod and handed me another. I hit Bhantu twice in the head and Saheb struck Bhantu's head once. Thereafter

we strangled the girls, (sic) We put the dead bodies in "bath room and locked it. When Saiyed Ali and Radha Chowkidar came in the afternoon,

Sahefo said that a car had come from Gauhati and he had sent the girls in that. At night after dinner, Saheb complained of illness and asked me to

sleep in his room. Round about midnight (12 O'clock), we took away the girls one at a time and buried them in a pit near the Mali's (gardener)

quarter. Saheb gave away the Memsahab's and his daughters' clothes to the Chowkidar's wife.

201. Let us consider a few facts leading to the confessional statement.

202. While Rajkhowa was serving as District and Sessions Judge at Dhubri, Umesh (Baishya was his personal peon, Umesh Baishya was with

Rajkhowa till his departure from Dhubri after retire- ment. After iRajkhowa's de,parture, Umesh Baishya did not work under the succeeding

Sessions Judge Shri N. K. Choudhury. The dead bodies were recovered from the compound of the District and Sessions Judge on 11-8-70 and

on the same day at about 11-30 P.M. Umesh was arrested at Gauhati in one Robin Dutta's house by P.W. 45 Nityananda Dutta, who was the then

Officer-in-charge of Gauhati Police Station, under the direction of D.I.G. P.W. 45 was at that time making over charge to P.W. 44 Abdul Basat.

After arrest Umesh Baishya was brought to the Gauhati Police Station and P.W. 45 made over Umesh Baishya to P.W. 44 Abdul Basat. P.W. 44

Abdul Basat has stated that on 11-8-70 he was attached to Gauhati Police Station and was taking charge from S.I. Nitya Dutta. On that day S.I.,

Dutta had brought accused Umesh Baishya under arrest to the thana at about 1-30 P.M. Then C.I. East directed him (P.W. 44) to record the

statement of Umesh which he did. Next day that is on 12-8-70 at 10-15 A.M., Abdul Basat produced Umesh before the Magistrate at Gauhati

as directed by C.I. Praying for his police custody for 712 hours. AJDM. Sri K. C. Majumdar allowed the prayer. On 12-8-70 S.I., Pabitra Deka

of Dhubri Police Station brought accused Umesh Baishya from Gauhati to Dhubri. They arrived at about 8-30 P.M. and Umesh Baishya was kept

in police lock-up. On 14-8-70 at 7-20 A.M. S. R. Dutta interrogated Umesh who stated that he buried some sandals in the [District Judge's

compound. He was brought to the District Judge's compound where Umesh Baishya produced some sandals from underground in a place within

the District Judge's compound. Umesh Baishya was then forwarded to Court for recording his confessional statement and he was produced at the

Court at 11 A.M. on 14-8-70 before Magistrate Hem Bardoloi (P.W. 17). The Magistrate gave time for reflection upto 3 P.M. and then

recorded the confessional statement. The recording was finished at 3-30 P.M. and Umesh Baishya was sent to Kokrajhar Judicial custody. On

21-8-70 Umesh Baishya was produced before the Magistrate (P.W. 17) at Dhubri and Umesh Baishya volunteered to show the places

mentioned in the confessional statement for verification.

203. We are now to consider whether the confessional statement of Umesh Baishya that was recorded by P.W. 17 is voluntary at the first

instance.

204. In his examination u/s 342, Criminal Procedure Code by the Committing Magistrate, accused Umesh Baishya replied as under—

Q. It has been alleged in evidence against you that you confessed before the Magistrate that on 10-2-70 last, at night, when Memsahab Putli Devi

and Linu had been lying asleep, you and the other accused had struck one of them with an iron rod and that you had killed her by striking her once

again when you had found her making sound.

Ans. I cannot say what I told. I did not confess voluntarily.

Q. Did you confess that on 25-2-70 last, as per direction of the other accused, you had killed Bhanu and Luna by assaulting them with an iron

rod and that you had strangled both of them later on?

Ans, I did not confess.

Q. Do you want to say anything more?

Ans. I have nothing more to say.

205. It may be observed that before the Committing Magistrate there was no complaint made by accused Umesh Baishya about the police torture

or influence for making the statement.

206. In his statement u/s 342, Criminal Procedure Code before the Sessions Judge the accused Umesh Baishya stated as follows:

Q.~^~½ The then S.D.M., P.W Hem Bordoloi has stated that on 14-8-70 last you made a voluntary confession before him. What have you got to

say?

Ans.~^~½ i did not state anything.

Q.~^~½ He stated that Ext. 16 was that statement and that from Ext. 16 (14) to Ext. 16 (23) were your signatures thereon. What have you got to

say?

(The Exts. are shown to the accused).

Ans.~^~½ I cannot say whether or not these are my signatures.

Q.~^~½ He has further stated that after that on last (torn) you took him to the place of occurrence and showed him the places you had mentioned in

your confessional statement. What have you got to say?

Ans.~^~½ I did not take him. He took me there.

207. P.W. Hem Chandra Bordo-loi's evidence is that he was an A.C.S. Officer of senior scale. In 1970 he was at Dhubri as S.D.M. (Ex). On

14-8-70 at about 11 AM, accused Umesh Chandra Baishya was produced by constable No. 16612, Girin Chandra Roy and constable No. 895,

Raja Shah, for recording his confessional statement. He warned the accused and gave him time to think whether he would confess or not. He

explained to him that he was a Magistrate and he was not bound to confess; and in case he confessed the same would be used against him.

Thereafter he gave him time upto 3 P.M. to reflect. During this period he was kept in custody of Satish Ch, Sarkar a peon in his chamber, No

police officer was in that chamber. After 3 P.M. he went to that chamber and asked him many questions whose answers convinced him that he

was going to make a voluntary confession. He has recorded the material questions only in his memorandum Before he confessed, he had again

warned him that he was not bound to confess and if he was doing so voluntarily, then only he would record his statements. On being satisfied that

he was confessing voluntarily, he recorded the same. Ext. 16 is that memorandum which consists of seven sheets including the forms. Ext. 16 (i) to

Ext. 16 (13) are his signatures on it. The accused signed the statement after it was read over to him. Exts. 16 (14) to 16 (23) are his signatures on

it. P.W. 17 noted in the memorandum that the accused did not complain of any mal-treatment to him. After recording his confession he had at first

ordered to send him to local hajrat; but at the prayer of the police he ordered to send him to Kokrajhar Jail. On 21-5-70 accused Umesh was

produced (before him for verification of his confession. The accused was handed over to Khedu Mahato, Chowkidar of Court and Biswanath

iPrasad. The accused was then asked that if he wanted to show voluntarily the places mentioned in the confessional statement he could do so.

Then the accused took him to the P.O. and showed him the places mentioned in the statement following which a sketch was (prepared by him

along with Index, which is Ext. 19. That the accused was not accompanied by any police officer. The accused had stated to him that after his

arrest he was brought to Dhubri on 13-8-70.

208. On going through the evidence of P.W. 17 and two statements of the accused recorded u/s 342, Criminal Procedure Code, we find no-

allegation that accused Umesh Baishya was tortured, coerced or influenced by police or any other agency to make confessional statement as

recorded by the 1 Magistrate. The accused has not stated that he was coerced, influenced or tortured by police or others. He did not state before

the Magistrate or before the Sessions Judge that police mal-treated him and therefore he had to make the confessional statement. Simply he has

stated that he has not voluntarily made the confessional statement. But that leads to nothing. No doubt he stated that he had not made the

voluntary statement "but this statement does not at all lead to the conclusion that there was mal-treatment, coercion or influence by police or any

other outside agency. The Magistrate has specifically recorded that there was no mal-treatment.

209. While considering the voluntariness and truth of the confessional statement the learned Sessions Judge has made a wrong approach. Before

considering whether a statement is true or not the first thing to be ascertained is whether the statement is voluntary. If the confessional statement is

found not to be voluntary then it is not admissible in evidence and therefore the question of it being true or otherwise, need not be considered. The

learned Sessions Judge found the first part of the confessional statement absurd and therefore he came to the conclusion that the confessional

statement could not be voluntary and then he found as follows:

In the case at hand, however, a part of the statement is not only untrue, but as already stated smacks of involuntariness and of police pressure.

This observation of the learned Sessions Judge is not warranted in law. Even though the first part may be untrue, because the prosecution could

not produce any corroborating evidence and even if it is shocking to the civilised notion of morality and paternal behaviour that would not

necessarily make the second part involuntary.

210. The learned counsel for the accused has strenuously submitted that from the time of arrest of accused Umesh Baishya on 11-8-70 at Gauhati

till the recording of confessional statement at Dhubri on 14-8-70 accused Umesh Baishya was in police custody and therefore he was not able to

free himself from the police influence and on that ground the confessional statement should be held to be involuntary. Sufficient time for reflection,

it is submitted, was not allowed to the accused before making confessional statement or in other words, he was not in jail custody from his arrest

till making of confessional statement and therefore the confessional statement should not be treated as voluntary. No doubt accused was arrested

at Gauhati on 11-8-70 and he was produced before the Magistrate at Dhubri for recording his confessional statement on 14-8-70. The evidence

on record shows that after he was arrested on 11-8-70 he was produced before the Magistrate on 12-8-70 at Gauhati and thereafter he was

taken to Dhubri which is about 275 K.M. from Gauhati. When the accused was produced before the Magistrate at Gauhati there is no complaint

by the accused about the police torture, inducement, threat or coercion. He was taken from Gauhati to Dhubri and arrived at about 8 P.M. on

13th August, 1970 and next day, that is, on 14-8-70 at about 11 A.M. he was produced before the Magistrate at Dhubri for recording the

confessional statement. Accused was again produced before the Magistrate at Dhubri on 21-8-70 for verification of the confessional statement

and on that day also the accused did not complain of any police torture etc. It may also be observed here that the confessional statement was

recorded before P.W. Kahali arrived at Dhubri from Silliguri. The detailed facts of his investigation were not yet known to the investigating agency

at Dhubri till the arrival of Kahali. In the circumstances, the question of tutoring "by prosecution for making confessional statement is wholly ruled

out. This confessional statement is a long one and gives the details of things which are known to the maker of the confessional statement only. No

other person could know about these things except accused Raj khawa.

211. In *Pyare Lal Bhargava Vs. State of Rajasthan*, the Supreme Court has observed as follows:

The first question turns upon the interpretation of the provisions of Section 24 of the Evidence Act and its application to the facts found in this case.

Section 24 of the Evidence Act lays down that a confession caused by inducement, threat or promise is irrelevant in criminal proceedings under

certain circumstances. Under that section a confession would be irrelevant if the following conditions were satisfied: (1) it should appear to the

court to have been caused by any inducement, threat or promise; (2) the said threat, inducement or promise must have reference to the charge

against the accused person; (3) it shall proceed from a person in authority; and (4) the court shall be of the opinion that the said inducement, threat

or promise is sufficient to give the accused person grounds which would appear to him reasonable in supposing that he would gain an advantage or

avoid any evil of a temporary nature in reference to the proceedings against him.

212. In the instant case the accused at no stage complained of police torture, coercion or influence for making the confessional statement. That

being the position, in our considered opinion, the confessional statement Ext. 16 is voluntary and admissible in evidence.

213. The confessional statement has, however, been retracted by the accused. If a confessional statement is found to "be true then a retracted

confession also may be relied upon. But as a rule of prudence if a confessional statement is retracted" at later stage sufficient corroboration of

the confessional statement should be found before it may be acted upon.

214. In the instant case we find that on the following points the retracted confession is corroborated.

215. Accused Umesh Baishya was a servant of Raj khowa at his Gauhati residence and subsequently he served as peon of the District Judge at

Dhubri and was living in the District Judge's residence at Dhubri at the relevant time. (The evidence of P. Ws. 3 and 15 proves it), the two

younger daughters were sent from Dhubri to Gauhati and Mrs. Rajkhowa and eldest daughter were there at Dhubri at the relevant time, the dead

bodies of the four persons were found in pit No. 1 and pit No. 2 within the compound of the District Judge's residence at Dhubri, the injuries on

the four skulls as proved by the medical evidence, two dead bodies were found buried in the pit where there was an electric post formerly, and

two dead bodies were found buried in a pit near Mali's residence that is pit No. 2, Rajkhowa told that Mrs. Rajkhowa and Miss Linu were sent in

the morning of 14th February, 1970 to Gauhati, Rajkhowa asked Jonali and Bhanu to come to Dhubri and he went to receive the two girls at the

motor station, Rajkhowa stated that mother and the eldest daughter went to Kokrajhar, and so on.

216. P.W. 17 Hem Chandra Bordo-loi, the Magistrate, who submitted the verification report stated that on 28-5-70 accused Umesh was

produced before him for verification of his confession. The accused was handed over to Khedu Mahato, Chowkidar of court and Biswanath Pra-

sad. The accused was then asked that if he wanted to show voluntarily the places mentioned in the confessional statement he could do so. Then the

accused took him to the place of occurrence and showed him the places mentioned in the statement following which a sketch was prepared by him

along with Index which is Ext. 19. Ext. 19 (1) is his signature and Ext. 19 (2) is the signature of accused Umesh Baishya.

217. Ext. 19 is the memorandum "prepared by the Magistrate describing the compound and the rooms etc. of the District Judge's bungalow at

Dhubri where the occurrence is stated to have taken place in the confessional statement of accused Umesh Baishya. In the Index we find some

portions are inadmissible. In item A which is described as the bed room that portion is only admissible. In item B which is described as dressing

room that portion only is admissible, the remaining portion is inadmissible. Similarly in item C1 where it has been described as the door is only

admissible and the remaining portion is inadmissible. In item G which has been described as the bed room that portion is admissible and the

remaining portion is not admissible. Items "M" and "N" with their descriptions are not admissible in evidence.

217-A. P.W. 17 has stated towards the end of the Index as follows: "I have shown above the places as shown to me by accused Sri Umesh

Chandra Baishya during verification of his confessional statement." Ext. 19 is admissible in evidence u/s 9 of the Evidence Act.

218. In Deep Chand Vs. The State of Rajasthan, , the Supreme Court has observed as follows:

Section 9 of the Evidence Act says that facts which establish the identity of anything or person whose identity is relevant, are relevant in so far as

they are necessary for that purpose. These two sections (Section 164, Cr.P.C. and Section 9 of the Evidence Act) deal with different situations :

Section 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during

investigation or before trial; Section 9 of the Evidence Act, on the other hand makes certain facts which establish the identity of a thing as relevant

evidence for the purpose of identifying that thing. If a statement of a witness recorded by a Magistrate in derogation of the provisions of Section

164 will go in as evidence under; Section 9 of the Evidence Act, the object of Section 164 of the said Code will be defeated. It is therefore,

necessary to resort to the rule of harmonious construction so as to give full effect to both the provisions. If a Magistrate speaks to facts which

establish the identity of anything, the said facts would be relevant within the meaning of Section 9 of the Evidence Act; but if the Magistrate seeks

to prove statements of a person not recorded in compliance with the mandatory provisions of Section 164 of the Code of Criminal Procedure,

such part of the evidence though it may be relevant within the meaning of Section 9 of the Evidence Act, will have to be excluded. By such a

construction of the provisions a satisfactory solution could be evolved.

* * * * *

These are weighty observations and we respectfully adopt them. But this decision does not preclude a Magistrate from deposing to relevant facts if

no statute precludes him from doing so either expressly or impliedly. Neither the Evidence Act nor the Code of Criminal Procedure prohibits a

Magistrate from deposing to relevant facts within the meaning of Section 9 of the Evidence Act.

* * * * *

It is, therefore, clear that the memorandum prepared by the Magistrate describing the present condition of the hcrUiP and the evidence given by

him on the basis of that memorandum would be relevant evidence u/s 9 of the Evidence Act; but the statements made by Suraj Bhan to the

Magistrate said to be not recorded in the manner proscribed by Section 164 of the Code of Criminal Procedure would be inadmissible.

219. It is thus found that barring the inadmissible portion as stated herein-above, Ext. 19, the memorandum of verification, along with the Index is

admissible in evidence in the instant case and it goes to corroborate the confessional statement on the points of identification of the compound and

the rooms etc. of the District Judge's bungalow and the compound thereof as mentioned in the confessional statement.

220. We have already found while discussing Rajkhwa's case that the dead bodies recovered were proved to be those of the wife and the three

daughters of iRajkhwa. This also goes to corroborate the confessional statement on the relevant point.

221. In Ram Prakash Vs. The State of Punjab, the Supreme Court has observed as follows:

It will be clear from the terms of this section (Section 30 of the Indian Evidence Act) that where more persons than one are being tried jointly for

the same offence, a confession made by any one of them affecting himself and any one of his co-accused can be taken into consideration by the

court not only against the maker of the confession but also against his co-accused. The Evidence Act nowhere provides that if the confession is

retracted, it cannot be taken into consideration against the co-accused or the confessing accused. Accordingly, the provisions of the Evidence Act

do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. Not a single

decision of any of the courts in India was placed before us to show that a retracted confession was not admissible in evidence or that it was

irrelevant as against a co-accused. An examination of the reported decisions of the various High Courts in India indicates that the preponderance

of opinion is in favour of the view that although it may be taken into consideration against a co-accused by virtue of the provisions of Section 30 of

the Indian Evidence Act, its value was extremely weak and there could be no conviction without the fullest and strongest corroboration on material

particulars. The corroboration in the full sense implies¹ corroboration not only as to the factum of the crime but also as to the connection of the co-

accused with that crime. In our opinion, there appears to be considerable justification for this view. The amount of credibility to be attached to a

retracted confession, however, would depend upon the circumstances of each particular case. Although a retracted confession is admissible against

a co-accused by virtue of Section 30 of the Indian Evidence Act, as a matter of prudence and practice a court would not ordinarily act upon it to

convict a co-accused without corroboration.

222. Considering the entire evidence in the case as a whole and the second part of the confessional statement, we find that there is sufficient

corroboration in material particulars to the confessional statement and as such we find that the confessional statement is true. The reasonings given

by the learned Sessions Judge for holding that the confessional statement was not voluntary and not true are not at all sustainable in law. Giving

anxious consideration to the evidence on record and the confessional statement of accused Umesh Baishya and the relevant law on the point we

hold that the confessional statement in the instant case is both voluntary and true and it can safely be acted upon.

223. (The learned counsel for the accused pointed out that in the confessional statement the name of the servant of Rajkhowa has been stated to

be "Mri-gan". Going through the entire evidence we find that a person by the name of "(Bigan", that is P.W. 3 was the peon in the District Judge's

bungalow. So apparently there was some mistake in recording this name "Marigan" instead of "Bigan". Similarly the other peon's name has been

given in the confessional statement as "iSayed Ali" and in evidence the peon has been named as Sahid Ali (P.W. 15). The evidence on record

clearly shows that the names of the two peons of the District Judge's bungalow were Bigan and Sahid and these were pronounced slightly in a

different way and recorded as Mrigan and Sayed Ali. These are not real or material discrepancies as such. On consideration of the entire

evidence on record we are clearly convinced that the two peons named in the confessional statement are Bigan if P.W. 3) and Sahid Ali (P.W. 16)

though their names have been recorded as Mrigan and Sayed Ali.

224. The learned counsel for the accused has submitted that in the confessional statement it has been stated that, Rajkhowa took one iron rod and

handed over another to Umesh Baishya. Umesh Baishya hit Bhanu twice in the head and iRajkhowa struck Bhanu thereafter and then they

strangled the girls. The learned counsel on the basis of this statement submits that the two accused struck on iBhanu"s head thrice and not on the

other girl"s head and so there was some discrepancy here. We have, however, found that" there were marks of hitting on the four skulls and there

might be some slight mistake here. But this does not falsify the confessional statement as such.

225. The two accused persons were charged under Sections 302/34 Indian Penal Code and under Sections 201/34, Indian Penal Code.

Considering the relevant evidence on the point as discussed hereinabove and taking into consideration the confessional statement of accused

Umesh Baishya, which is found to be voluntary and true and in which Umesh Baishya has squarely and clearly implicated himself as well as

accused [Rajkhowa as committing murders of the wife and the three daughters of Rajkhowa and also as burying the dead bodies in the two pits,

we find that the prosecution has been able to establish the charges u/s 302/34, Indian Penal Code and under Sections 201/34, Indian Penal Code,

beyond all reasonable doubt against accused Umesh Baishya. Accordingly, we, set aside the order of acquittal of Umesh Baishya passed by the

learned Sessions Judge.

226. It may be observed here that we have found accused Upendra Nath Raikhowa to "be guilty under Sections 302 and 201, Indian Penal Code

on the evidence on record excluding the retracted confessional statement of Umesh Baishya. We would like, however, to observe that since we

have found the confessional statement of accused Umesh Baishya to lbe voluntary and true and it has received full and strong corroboration in

material particulars both as to the crime and Raj-r khowa"s connection with that crime, the retracted confessional statement may be taken into

consideration against accused Rajkhowa also in accordance with law.

227. In the result the Government Criminal Appeal No. 19 of 1973 is allowed and the impugned order of acquittal of accused Umesh Baishya

passed by the learned Sessions Judge is set aside. Accused Umesh Baishya is convicted under Sections 302/34, Indian Penal Code and under

Sections 302/34, Indian Penal Code and he is sentenced to imprisonment for life under Sections 302/34, Indian Penal Code. No separate

sentence is passed under Sections 201/34, Indian Penal Code. The accused-respondent Umesh Baishya shall now surrender to the "bail bond to

serve out the sentence.

Baharul Islam, J.

228. I agree