



IN THE HIGH COURT OF SIKKIM

CRIMINAL JURISDICTION

Crl.A. No. 08 of 20¹¹

State of Sikkim

Appellant(s)
~~Petitioner(s)~~

Versus

Rakesh Rai @ Vishal Rai @
Purna Rai & Ano.

Respondent(s)
~~Opposite party(s)~~

Appellant

For

~~Petitioner~~
(Advocate (s))

Mr. J. B. Pradham, Public Prosecutor with Mr.
Karma Thinlay, Addl. Public Prosecutor and
Mr. S. K. Chettri, Asstt. Public Prosecutor

Respondent

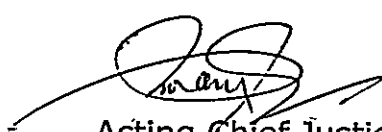
For

~~Opposite Party~~
(Advocate (s))

Serial No.	Date	Order (s) with Signature (s)
1	2	3
01.	30.08.11	<p style="text-align: center;">BEFORE</p> <p style="text-align: center;">HON'BLE MR. JUSTICE S. P. WANGDI, ACTING CHIEF JUSTICE</p> <p>Present: Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor with Mr. S. K. Chettri, Asstt. Public Prosecutor, Mr. D. K. Siwakoti and Mr. Thinlay Dorjee Bhutia, Advocates for the State.</p> <p style="text-align: center;">---</p> <p>Heard.</p> <p>Leave granted.</p> <p>Admit.</p> <p>Issue notice upon the respondents.</p>



Case No.....

Serial No.	Date	Order (s) with Signature (s)
1	2	3
pm		<p>Call for the records of the case from the Courts below.</p> <p>As one of the accused respondents is not in custody, let Non-Bailable Warrant be issued against the respondent no. 2. In the meantime, let warrant of production be issued against the respondent no.1</p> <p>List on 11.11.2011.</p> <p> Acting Chief Justice 30.08.2011</p>



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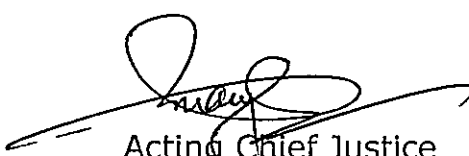
Case No. G.A. No. 08/2011

Serial No.	Date	Order (s) with Signature (s)
1	2	3
02.	11.11.11	<p style="text-align: center;">BEFORE HON'BLE MR. JUSTICE S. P. WANGDI, ACTING CHIEF JUSTICE</p> <p>Present: Mr. J.B. Pradhan, Public Prosecutor with Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor and Mr. S. K. Chettri, Asstt. Public Prosecutor for the State-appellant.</p> <p>Mr. N. Rai, Sr. Advocate with Ms. Jyoti Kharka, Advocate for respondent No. 1.</p> <p>Mr. Dilip Rai, Addl. S.P./Pris. in person</p> <p>SI R.N. Pradhan, H/C D.B. Rana, H.C. Ghana Shyam Chettri along with Accused / Respondent No. 1 Rakesh Rai.</p> <p>PI Karma Chedup Bhutia, NK Manoj Tamang, C. Nim Tenzing Sherpa, C. Ravindra Rai of Gyalshing Police Station, West Sikkim with Accused /Respondent No. 2 Tenzing Tamang.</p> <p style="text-align: center;">---</p> <p>Mr. Karma Thinlay Namgyal, learned Addl. Public Prosecutor submits that accused/respondent No. 2 has since been apprehended in compliance to the order dated 30.08.2011 and is presently in the Court premises. It is informed by the learned Addl. Public Prosecutor that since he is involved in a connected case in the Court of Addl. Sessions Judge at Siliguri and requires to be present on 15.11.2011, it would be convenient if he is remanded to judicial custody at Siliguri.</p> <p>Considered and allowed.</p> <p>Let accused/respondent No. 2 be remanded to the Special Correctional Home at Siliguri .</p> <p>Since Mr. N. Rai, learned Senior Advocate was representing the accused/respondent No. 2 before the trial</p>



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Case No. GI. A. No. 08/2011

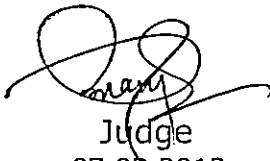
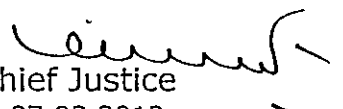
Serial No.	Date	Order (s) with Signature (s)
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		<p>Court, he is requested to represent him before this Court also for convenience.</p> <p>Mr. Rai agrees to the proposal. The Sikkim State Legal Services Authority shall bear the necessary expenditure towards his professional fees as prescribed under the Rules. Let a copy of this order be transmitted to the Sikkim State Legal Services Authority forthwith.</p> <p>Mr. Rai submits that the paper book does not contain the Memo of Appeal and therefore, prays that a direction be issued for its incorporation.</p> <p>Let the Registry ensure that the Memo of Appeal is incorporated in the paper-book.</p> <p>List on 07.03.2012 for hearing.</p> <div> Acting Chief Justice 11.11.2011</div>

Index: Yes/No
Internet: Yes/No
pm/jk



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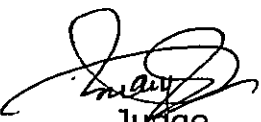
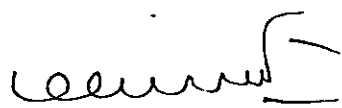
Case No. GA. A. No. 8/11

Serial No.	Date	Orders (s) with Signature (s)
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03.	07.03.12 (Kohli, CJ)	<p style="text-align: center;">BEFORE</p> <p style="text-align: center;">HON'BLE THE CHIEF JUSTICE MR. JUSTICE PERMOD KOHLI HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE</p> <p>Present: Mr. J.B. Pradhan, Public Prosecutor with Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor and Mr. S.K. Chettri, Asstt. Public Prosecutor for the State.</p> <p>Mr. N. Rai, Sr. Advocate with Ms. Jyoti Kharka, Advocate for the respondents.</p> <p style="text-align: center;">...</p> <p>Adjourned at the request of Mr. N. Rai, learned Senior Counsel for the respondents on 28.03.2012.</p> <div style="display: flex; justify-content: space-around; align-items: flex-end;"><div style="text-align: center;"> Judge 07.03.2012</div><div style="text-align: center;"> Chief Justice 07.03.2012</div></div> <p>pm/jk</p> <p>Index : Yes / No Internet : Yes / No</p>



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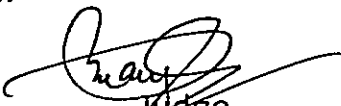
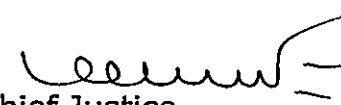
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		<p style="text-align: center;">BEFORE</p> <p style="text-align: center;">HON'BLE THE CHIEF JUSTICE MR. JUSTICE PERMOD KOHLI HON'BLE MR. JUSTICE S. P.WANGDI, JUDGE</p>
04.	28.03.12 (Kohli, CJ)	<p>Present: Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor with Mr. S.K. Chettri, Asstt. Public Prosecutor, Mr. Thinlay Dorjee Bhutia and Mr. D.K. Siwakoti, Advocates for the State.</p> <p>Mr. N. Rai, Sr. Advocate with Ms. Jyoti Kharka, Advocate for the respondent.</p> <p style="text-align: center;">...</p> <p>Heard arguments.</p> <p>Judgment reserved.</p> <p>Learned counsel for the parties are at liberty to furnish the resume of the books relied upon within two days.</p> <div style="display: flex; justify-content: space-around; margin-top: 20px;"><div style="text-align: center;"> Judge 28.03.2012</div><div style="text-align: center;"> Chief Justice 28.03.2012</div></div>
	pm/jk	
	Index : Yes / No Internet : Yes / No	



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Case No.....

Serial No.	Date	Orders (s) with Signature (s)
1	2	3
05.	20.04.12 (Kohli, CJ)	<p style="text-align: center;">BEFORE</p> <p style="text-align: center;">HON'BLE THE CHIEF JUSTICE MR. JUSTICE PERMOD KOHLI HON'BLE MR. JUSTICE S. P.WANGDI, JUDGE</p> <p>Present: Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor with Mr. S.K. Chettri, Asstt. Public Prosecutor for the State.</p> <p>Superintendent of Police, CID, Sikkim Police in person.</p> <p>Ms. Sabina Chettri, Proxy Advocate for the respondent.</p> <p style="text-align: center;">...</p> <p>The Appeal stands disposed off vide Judgment dated 20.04.2012, vide separate sheets.</p> <p>We are informed by the learned Addl. Public Prosecutor that the accused persons are at present in jail undergoing sentences in other cases. The accused No. 1 is lodged in the Sikkim State Jail, whereas the accused No. 2 is lodged in Jalpiguri Correctional Home ^{Special Correctional Home, Siliguri*}. The trial Court will communicate the orders of this Court to the concerned authorities.</p> <p>A copy of this order be furnished to the Superintendent of Police, CID, Gangtok for implementation.</p> <div style="display: flex; justify-content: space-around; align-items: flex-end;"><div style="text-align: center;"> Judge 20.04.2012</div><div style="text-align: center;"> Chief Justice 20.04.2012</div></div> <p>rsr/jk</p> <p>Index : Yes / No Internet : Yes / No</p>

**THE HIGH COURT OF SIKKIM : GANGTOK**

(Criminal Appeal Jurisdiction)

DATED : 20-04-2012

CORAM

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PERMOD KOHLI**

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Criminal Appeal No.8 of 2011

State of Sikkim

... Appellant

Versus

1. Rakesh Rai @ Vishal Rai @ Purna Rai,
S/o Hasta Bdr. Rai,
R/o Gyalshing Kyongsa,
West Sikkim.

2. Tenzing Tamang,
S/o Ram Bdr. Tamang,
R/o Gyalshing Tikjek,
West Sikkim.

... Respondents

For Appellant : Mr. Karma Thinlay Namgyal,
Additional Public Prosecutor with Mr.
S. K. Chettri, Assistant Public
Prosecutor, Mr. Thinlay Dorjee Bhutia
and Mr. D. K. Siwakoti, Advocates.

For Respondents : Shri N. Rai, Senior Advocate with Ms.
Jyoti Kharka, Advocate.

J U D G M E N T

Wangdi, J.

This Appeal is directed against the judgment dated 20-05-2011 passed by the Learned Sessions Judge, South and West Sikkim at Namchi in S.T. Case No.21 of 2004 (hereinafter referred to as the "impugned



judgment") by which the Respondents were acquitted of the offences under Sections 302/34 of the Indian Penal Code (in short "IPC").

○ **2.** The case of the prosecution material for disposal of the Appeal is that on 28-11-2003 at about 0930 hrs. P.W.54, PI S. R. Shenga, the O.C., Kaluk Police Station, West Sikkim, received a telephonic information from the I/C Dentam Out Post stating that one unidentified body of a male had been found below the road near Liching Busty, West Sikkim, which led him to register Kaluk P.S. U/D Case No.11(11)03 dated 28-11-2003 under Section 174 of the Code of Criminal Procedure, 1973, (in short "Cr.P.C.") and to take up its investigation.

▷ **3(i).** The investigation led to the inspection of the place of occurrence located at Dentam-Pelling Road at Liching Busty, about 1 k.m. from the B. B. Lall Suspension Bridge at Dentam, where human teeth and blood were found and discovered a body of a male person lying about 100 feet below the road which was later identified as that of Sonam Dadul Bhutia, son of Kinzang Dadul Bhutia of Chumbong Busty, Gyalshing, West Sikkim. Inquest conducted over the body showed



injuries on the head with the teeth of upper jaw missing. A 'black chunni' was also found lying nearby the place of occurrence. This resulted in the U/D Case being converted into a Criminal Case vide FIR No.25(11)03 dated 28-11-2003 under Section 302 IPC against unknown person *suo moto* and further investigation taken up. A tooth and blood sample of deceased person from mortuary and, control sample of soil and the human teeth found at the place of occurrence were seized in presence of witnesses and forwarded to C.F.S.L., Kolkata, for opinion through the Crime Branch, Sikkim Police, along with some other items with which we are not concerned for the moment.

(ii) Investigation of the case revealed that in the morning of 27-11-2003, one Ms. Bina Subba, daughter of C. B. Subba of Upper Bhaluthang Busty, West Sikkim, dressed in a kurta-pyjama, was proceeding to Sardong Busty to see her elder sister P.W.23, Parvati Subba, carrying packets of "Silam" when on her way at Pelling, at about 1430 hrs., she met accused Praveen Subba and accused Abishek Rai with whom she was familiar with. The accused Praveen Subba owning vehicle No.SK-04/4906 offered to drop her at Sardong Busty. When



they were about to begin the journey, two other persons, namely, P.W.20, Kailash Rai and P.W.19, Deo Man Subba, of Pelling also joined them and all of them proceeded towards Sardong Busty in the said vehicle. Later, when the deceased Sonam Dadul Bhutia, a good friend of accused Praveen Subba, heard of this, he followed them in a Commander Jeep bearing registration No.SK-04/4601 owned and driven by one Dinesh Pradhan, P.W.21. It was said that the said Bina Subba was known not to having a good moral character.

(iii) While thus following, the deceased Sonam Dadul Bhutia found vehicle No.SK-04/4906 parked at Changay (a waterfall of tourist interest) with all its occupants in it. He then asked P.W.21, Dinesh Pradhan and the other two, P.W.20, Kailash Rai and P.W.19, Deo Man Subba, who were accompanying accused Praveen Subba, to return to Pelling, while he joined the said Praveen Subba and Abishek Rai and the girl in the vehicle No.SK-04/4906 and proceeded towards Dentam without dropping the girl at Sardong Busty, which fell on the way and, at Dentam they stopped and had beer, rum and momo in the hotel of one Navin Gurung, P.W.1. They left Dentam at about 1830 hrs. to return to Pelling



in the same vehicle. When they reached Liching Busty situated about $\frac{1}{2}$ k.m. away from the B. B. Lall Suspension Bridge, Dentam, Bina Subba desired to go out to attend the nature's call and got down from the vehicle. The deceased Sonam Dadul Bhutia also got down asking the accused Praveen Subba and Abishek Rai to go back to Dentam to have food.

(iv) On their way to Dentam, Praveen Subba and Abishek Rai came across a Maruti Car with its number plate starting with the word "W" at the B. B. Lall Suspension Bridge proceeding towards Pelling. On reaching Dentam, they again had beer in the hotel of P.W.1, Navin Gurung and started back towards Pelling and, on the way at the Dentam Forest Check Post, they met one Padam Gazmer and P.W.2, Sanjeev Baraily. The four of them instead of going to Pelling went to Mangmo and turned back from the Dentam Senior Secondary School. In their conversation during the return journey, the accused Praveen Subba and Abishek Rai commented that they would kill Sonam Dadul Bhutia if any harm was caused to Bina Subba. On reaching the place where the deceased Sonam Dadul Bhutia and Bina Subba had got down, they found them missing and



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unsuccessfully searched for them in the surrounding areas. On the following day, i.e., 28-11-2003, the dead body of deceased Sonam Dadul Bhutia was found below the road at the same place where he had been dropped and, the girl being untraceable. In the morning of 28-11-2003, accused Praveen Subba and Abishek Rai left for Siliguri in vehicle No.SK-04/4906.

(v) At the initial stage of the investigation, the accused Praveen Subba and Abishek Rai were arrested and vehicle No.SK-04/4906 seized. From the vehicle one wheel wrench, a wrench and one polythene bag containing pink coloured kurta and pyjama and two small packets of "Silam" were recovered and duly seized. Sample of the blood like stains found on the body of the vehicle was also lifted and seized. During the course of further investigation, it transpired that the Maruti Car which the accused Praveen Subba and Abishek Rai had crossed in the late evening of 27-11-2003 on their way to Dentam, was also seen on the same day by P.W.17, Manorath Adhikari, P.W.16, Smt. Tshering Kee Chingapa, P.W.9, Sonam Dorjee Bhutia and P.W.18, Tashi Namgyal Bhutia near the B. B. Lall Suspension Bridge at about 1600 hrs. and, also had

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noticed the registration number of the vehicle as WNC-525. That Maruti Car No.WNC/525 had crossed the Melli Check Post in the night of the same day at 2230 hrs. and had proceeded towards Siliguri. The car which was later located at Siliguri was seized with the help of local police of Siliguri on 23-12-2003 and was found to have been purchased by the Respondent No.1, Rakesh Rai, in the name of his elder brother P.W.40, Man Bahadur Rai, and registered in Siliguri.

(vi) While at Siliguri, the Investigating Officer received a telephonic communication from P.W.46, PI Nima Chader Bhutia of Sadar P.S., Gangtok, informing him that the missing girl, Bina Subba, had been found murdered by the Respondent No.1, Rakesh Rai and others and her body disposed off somewhere near Bagh Pool at Siliguri leading him to proceed there for investigation where he met a team of Police from the Gangtok Sadar Police Station headed by P.W.46, PI Nima Chader Bhutia. It is significant to note that this team had come to Siliguri, West Bengal, with Respondent No.1, Rakesh Rai, in their custody, in connection with a case under Sections 457/380 IPC under Gangtok Sadar P.S. for recovery of a scooter and



car purchased by the accused with the stolen money. On being interrogated, the Respondent No.1, Rakesh Rai, disclosed that he and the other accused persons had killed Bina Subba and disposed of her body. The disclosure statement was recorded in presence of police due to non-availability of independent civilian witnesses, there being none available at the place.

(vii) The statement led to the recovery of the dead body of Bina Subba about 300 feet below the road at Panidhara near Bagh Pool, Maruti Car WNC-525 from the Bhaktinagar Police Station and from it one wheel wrench all at the instance of the Respondent No.1, Rakesh Rai. A written report was thereafter lodged at Matigara Police Station, Siliguri, which registered Matigara P.S. FIR No.331/03 under Sections 302/201/34 IPC dated 24-12-2003 and, later also arrested juvenile accused Roshan Rai, Purna Bahadur Subba and Respondent No.2. Tenzing Tamang and forwarded to judicial custody.

(viii) On the basis of disclosure statement made by juvenile accused Roshan Rai. one wheel wrench was recovered from the Singtam Khola. The disclosure statement of Respondent No.2 Tenzing Tamang led to the recovery of one bag containing one jacket, one



bottle of Horlicks, one wheel wrench, one jack lever, one iron chain, one screw driver, one plier and one small bag from the house of P.W.35, Devi Maya Pradhan at Daramdin Bazar, West Sikkim.

(ix) Investigation revealed that Respondent No.1, Rakesh Rai, purchased Maruti Car bearing registration No.WNC-525 from one Udai Ghosh of Rath Khola, Siliguri, and registered in Siliguri in the name of his elder brother P.W.40, Man Bahadur Rai. That Respondent No.1, Rakesh Rai, juvenile accused Roshan Rai, Purna Bahadur Subba and Respondent No.2, Tenzing Tamang usually stayed in the "Himalayan Rest House", Siliguri.

(x) On 24-11-2003, the four accused persons crossed over to Sikkim from the Rangpo Check Post in the same Maruti Car and reached Gyalshing via Singtam, Rabong and stayed in their house at Gyalshing till the morning of 27-11-2003. On 27-11-2003 at about 1600 hrs., they reached Dentam via Jorethang, Sombaria, Soreng, Kaluk, Bermiok in drunken conditions and stopped to take rum near the B. B. Lall Suspension Bridge at Dentam. After drinking rum, they proceeded to Singsore Bridge and from there drove back towards



Pelling. On their way to Pelling at about 1830 hrs., they crossed Savari vehicle bearing No.SK-04/4906 near the B. B. Lall Suspension Bridge and further on at Liching at a distance of a ½ k.m. away from the Bridge, they saw the deceased Sonam Dadul Bhutia and Ms. Bina Subba sitting by the road side. The accused persons then stopped the vehicle and teased them which angered the deceased Sonam Dadul Bhutia, causing him to slap the Respondent No.1, Rakesh Rai, and in order to frighten the accused persons, he made a call to the Police on his mobile.

(xi) Under such intimidation, the accused persons fled from the place in their Maruti Car but stopped at a distance of about ½ k.m. away and decided to kill the deceased Sonam Dadul Bhutia. Picking up a jack lever, wheel wrench, shock absorber and a chain from the car, they returned on foot to the place of occurrence with the intention to kill the deceased and on meeting the deceased at about 1850 hrs. they repeatedly hit him on his head, mouth and face with the jack lever and wheel wrench causing his death on the spot. As a result of the assault, the deceased lost all his upper teeth. Bina Subba's attempt to intervene failed and her cry for help



went in vain. The accused persons thereafter took the mobile phone of the deceased person and threw his body below the road and after forcing the girl into the Maruti Car headed for Siliguri via Melli Check Post. The recovery of 'black chunni' from the place of occurrence was a clear evidence of the girl having been kidnapped and forced away by the accused persons in their car.

(xii) Later, the four accused persons, namely, Respondent No.1 Rakesh Rai, juvenile accused Roshan Rai, Purna Bahadur Subba and Respondent No.2, Tenzing Tamang, took the girl to Jalpaiguri where the Respondent No.1, Rakesh Rai and the girl Bina Subba stayed in "Hotel India" as 'Amit Rai' and 'Sushma Rai' as per the entries in the hotel register while the others stayed in "Hotel Vishal" as 'Suran Tamang', 'Bishal Chettri' and 'Bishnu Subba'. They checked out of the hotels on 02-12-2003 and went back to Siliguri along with the girl and stayed in the "Himalayan Rest House" occupying rooms No.201 and 301. The Respondent No.1, Rakesh Rai, later sold the Nokia mobile phone of the deceased Sonam Dadul Bhutia to one Pradeep Saha, P.W.30, through one Pradeep Roy, P.W.45, who in turn sold it to P.W.33, Abhijit Ghosh, for Rs.2,200/-. The



Respondent No.1, Rakesh Rai, also sold Maruti Car WNC-525 to P.W.38, Anil Chandra Roy, through the broker P.W.30, Pradeep Saha and P.W.45, Pradeep Roy of Siliguri.

(xiii) Since the registration of the vehicle could not be done in favour of the purchaser as it was in the name of P.W.40, Man Bahadur Rai, the Respondent No.1, Rakesh Rai and Respondent No.2, Tenzing Tamang, returned to Gyalshing to fetch him for the purpose. When they returned to Siliguri with P.W.40, Man Bahadur Rai, the registration of the vehicle still could not be completed due to non-availability of his Identity Card. P.W.40, Man Bahadur Rai, spent that night at the "Himalayan Rest House" with the accused persons where he met the deceased girl. While conversing with the girl, she disclosed her name as Bina Subba. When the Respondent No.1, Rakesh Rai, was asked about the girl he disclosed that he had met her at Dentam with one Agya (brother) and that they had murdered that person and brought the girl with them to Siliguri. On the next day, P.W.40, Man Bahadur Rai, returned to Gyalshing but, a few days later again returned with the Respondents Rakesh Rai and Tenzing Tamang and



completed the registration of the vehicle in the name of the purchaser P.W.38, Anil Chandra Ghosh. This fact was established by the seizure of the Electoral Card of P.W.40, Man Bahadur Rai at Siliguri. When P.W.40 went to the "Himalayan Rest House" in the evening with the Respondent No.1, Rakesh Rai, he did not find the girl and as per his statement recorded under Section 164 Cr.P.C., his brother the Respondent No.1, Rakesh Rai, had informed him that he had also murdered her and had thrown her body below the road near Panidhara, Bagh Pool, Siliguri. While selling the vehicle, the accused persons had retained the wheel wrench, jack lever and other items.

(xiv) On 22-12-2003 all the accused persons went to SNT Office, Siliguri, leaving behind their bag containing their wearing apparels in the "Himalayan Rest House" which were subsequently seized. Later, Respondent No.1 Rakesh Rai was arrested by the team from the Gangtok Sadar P.S. with the help of the local police of Siliguri, while the other three accused persons, namely, juvenile accused Roshan Rai, Purna Bahadur Subba and Respondent No.2, Tenzing Tamang, escaped to Daramdin via Singtam, Rabong and Jorethang. On



the way to Daramdin, the juvenile accused Roshan Rai threw one wheel wrench and a shock absorber (the weapons of offence) into the Singtam Khola near the Old Steel Bridge. The disclosure statement of juvenile accused, Roshan Rai, led to the recovery of the wheel wrench from the river.

(xv) On reaching Budang, 5th Mile, Respondent No.2, Tenzing Tamang and juvenile accused Roshan Rai, went to Soreng and the juvenile accused Purna Bahadur Subba to the house of his aunt P.W.35, Devi Maya Pradhan, at Daramdin. He was later joined by Respondent No.2, Tenzing Tamang and juvenile accused Roshan Rai, where they were apprehended by the police from the Sombaria P.S. The disclosure statement of the Respondent No.2, Tenzing Tamang, led to the recovery of one bag containing a jack lever, a wheel wrench (weapons of offence), one jacket, one bottle of Horlicks, one plier, one chain, one screw driver and one small bag from the house of P.W.35, Devi Maya Pradhan, which were duly seized.

4. The facts and circumstances thus having been made out a *prima facie* case under Sections 302/364/201/34 IPC against Respondent No.1, Rakesh



Rai, juvenile accused Roshan Rai, Purna Bahadur Subba and Respondent No.2, Tenzing Tamang, accused Praveen Subba and Abishek Rai for committing murder of the deceased, Sonam Dadul Bhutia and further kidnapping and committing the murder of the deceased girl, Bina Subba and disposing off her dead body at Siliguri in order to conceal the evidence of murder and kidnapping, charge-sheet was filed against them for their trial in accordance with law.

5. The Learned Trial Court upon consideration of the materials on record found *prima facie* case made out against all the accused persons of having committed offences under Sections 302/34 IPC and accordingly framed charges against them to which they pleaded not guilty and claimed for trial.

6. During trial the prosecution examined as many as 48 witnesses out of the 54 named in the charge-sheet having tendered 6 of them and, exhibited a large number of documents and material exhibits in support of their case and, the Learned Sessions Judge upon consideration of the evidence on record, came to the conclusion that the entire case being based upon circumstantial evidence, the prosecution had failed to



link the chain of circumstances against the accused persons and, by the impugned judgment, acquitted them.

7(i). Before us, Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, assailing the impugned judgment, submitted that the Learned Sessions Judge had failed to take into consideration the glaring evidence that proved the various circumstances beyond all reasonable doubts and that those circumstances formed an unbroken chain leading to the only conclusion that the Respondents were guilty of the murder of the deceased Sonam Dadul Bhutia in furtherance of their common intentions to commit the offence. It was submitted by the Learned Additional Public Prosecutor that the findings contained in the impugned judgment is filled with contradictions and are perverse to the evidence on record. As per him, although the Learned Sessions Judge upheld the validity of statements under Section 27 of the Indian Evidence Act, 1872, of the various accused persons and the consequential recovery of the incriminating articles like the weapons of offence, but fell in error in not considering those as circumstances in the chain of

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circumstances appearing against the accused persons. The Learned Additional Public Prosecutor emphasised that, having regard to the proved circumstances, it was gravely erroneous on the part of the Learned Trial Court to have held that the prosecution had failed to establish by evidence that the offence under Section 302 IPC was committed by them.

(ii) It was further submitted that the Learned Trial Court fell in error in concluding that there was no witness to identify the accused persons and connect them to the crime, when in paragraph 76 of the impugned judgment it had been clearly noticed that P.W.50, Smt. Bhim Sila Gautam, who runs a hotel in Bermiok Bazar in West Sikkim stated that at about 3/4 p.m. of 27-11-2003, 3/4 boys had come to her hotel in a Maruti Car bearing registration No.WNC-525 and had beer and that the Respondent No.2 was one of them although she was unable to identify the others. In complete conflict to this, the Learned Trial Court in paragraph 155 of the impugned judgment, erroneously concluded that P.W.50 could not identify the accused persons.



(iii) It was then submitted that discarding the evidence of P.W.40, Man Bahadur Rai, firstly on the ground that he was declared as a hostile witness and, secondly, that the voluntary nature of his statement under Section 164 Cr.P.C. was made circumspect in view of his deposition that he was under detention of the police in Kaluk P.S. during the period when he had made it, is grossly erroneous and contrary to law. It was submitted that although the witness had been declared hostile, his unshaken evidence most categorically incriminated the Respondents and, under the law of evidence of a hostile witness need not necessarily be discarded on the sole ground of him being declared so. So far as the voluntariness of the nature of the statement under Section 164 Cr.P.C. rendered by P.W.40 is concerned, the Learned Additional Public Prosecutor by making reference to Exhibit 32, form for recording confessional statement, submitted that adequate precautions had been taken by the Judicial Magistrate, West Sikkim, to satisfy herself that the witness was making the confessional statement voluntarily devoid of any compulsion.



(iv) In his evidence which as per him is unimpeachable, P.W.40 has in most categorical terms disclosed about the purchase of the Maruti Car WNC-525 in his name by the Respondent No.1 at Siliguri which he later sold to P.W.38, Anil Chandra Roy. That he also disclosed of the extra-judicial confession made to him by the Respondent No.1 of his having committed the murder of the deceased Sonam Dadul Bhutia and of him having kidnapped the deceased Bina Subba. It was thus submitted that the rejection by the Learned Trial Court of such credible witness was grossly illegal and had caused grave prejudice to the prosecution. The Additional Public Prosecutor then placed the following circumstances which as per him had been proved by the prosecution beyond any reasonable doubt:-

- (i) The deceased Sonam Dadul Bhutia and Bina Subba had proceeded towards Dentam with Praveen Subba and Abishek Rai on 27-11-2003. This fact has been proved by P.W.19, Deo Man Subba, P.W.20, Kailash Rai and P.W.21, Dinesh Pradhan.
- (ii) A Maruti Car bearing registration number alphabets "WNC" was witnessed in the evening



of 27-11-2003 by P.W.16, Tsering Kee Chingapa. This was corroborated by P.W.17, Manorath Adhikari, who was travelling with her. They had also noticed the vehicle parked near the Dentam Bridge and three boys sitting near it drinking something out of plastic bottles. These witnesses had identified the Maruti Car as MO-I.

- (iii) That the Maruti Car WNC-525 crossed the Melli Check Post at 10:30 p.m. on 27-11-2003. This was testified by P.W.12, C/1255 D. P. Subba, who proved the entry in the Check Post Register MO-V. This fact has been corroborated by P.W.13, W/C 1811 Lhakpa Tsh. Sherpa, who was also at the Check Post at that time.
- (iv) The disclosure statement of Respondent No.1, Rakesh Rai, Exhibit 3, on the basis of which tyre lever MO-VI was recovered and seized from inside the Maruti Car WNC-525 vide Seizure Memo Exhibit 2 and the recovery of the dead body of Bina Subba at his instance.
- (v) The disclosure statement Exhibit 10 of the Respondent No.2, Tenzing Tamang, at whose



instance the weapons of offence, namely, jack lever, MO-XIII and wheel wrench, MO-XII, were seized at Daramdin vide Seizure Memo Exhibit 11. This stands fully corroborated by the evidence of P.W.35, Devi Maya Pradhan, from whose house the seizures were made.

(vi) The disclosure statement of Roshan Rai, juvenile convict, Exhibit 8 on the basis of which tyre lever/wheel wrench MO-VII was recovered from the river at Singtam vide Seizure Memo Exhibit 7. P.W.27, Karzang Bhutia, has testified regarding the Seizure of Exhibit MO-VII vide Seizure Memo Exhibit 7 from the Singtam river bed which is corroborated by P.W.28, Ganga Ram Chettri. P.W.26, Dipu Sunar, was the driver who recovered Exhibit MO-VII from the Singtam river has fully corroborated P.W. 27 and P.W.28.

(vii) The statement of Man Bahadur Rai, P.W.40, under Section 164 Cr.P.C. as disclosed in the extra-judicial confession made by the Respondent No.1 of having committed the



murder of Sonam Dadul Bhutia at Dentam and also of the girl Bina Subba.

(viii) Recovery of Nokia mobile phone, MO-VIII from P.W.33, Abhijit Ghosh which was traced to Tikam Sharma, P.W.36, owner of the mobile shop 'Mobile World' at Siliguri who had sold it to one S. D. Bhutia.

(ix) Failure on the part of the Respondents to explain the circumstances put to them under Section 313 Cr.P.C.

(x) Admission of guilt by the juvenile convicts Roshan Rai and Purna Bahadur Subba of the commission of the offence and the resultant conviction by the Juvenile Justice Board.

(v) The Learned Additional Public Prosecutor submitted that the above circumstances which stand fully proved form an unbroken chain that leads to the sole hypothesis of the Respondents having committed the murder of deceased Sonam Dadul Bhutia.

8(i). Relying upon the decision of **State of U.P. vs. Satish : (2005) 3 SCC 114**, it was submitted that since



it has been demonstrated that the Learned Trial Court has ignored admissible evidence, it was permissible for this Court to re-appreciate the evidence for the purpose of ascertaining as to whether any of the accused persons really committed any offence or not. That from the facts and circumstances, there can be no manner of doubt that there are compelling and substantial reasons for interfering with the impugned judgment of acquittal of the Respondents. Reference was also made on this point to the cases of **Krishna Ram vs. State of Rajasthan : (2009) 11 SCC 708** and **Brahm Swaroop and Another vs. State of Uttar Pradesh : (2011) 6 SCC 288**.

(ii) To support his taking resort to the conviction of the two juvenile co-accused, Roshan Rai and Purna Bahadur Subba, as one of the circumstances appearing against the Respondents, the Learned Additional Public Prosecutor, relied upon the judgment of **Bishnu Prasad Sinha and Another vs. State of Assam : (2007) 11 SCC 467** and **Pancho vs. State of Haryana : (2011) 10 SCC 165**, in which it has been laid down that it is permissible to take a confession of a co-accused as a corroborative piece of evidence considered in the light of the other



evidence appearing in the records and may use it to lend assurance to those evidence.

(iii) It was thus submitted that in view of the facts and circumstances placed by him and the position of law obtaining in cases of circumstantial evidence, this was a fit case where this Court should interfere and, upon consideration of the materials on records and by re-appreciation of the evidence, set aside the acquittal and convict the Respondents for the offences charged against them.

9(i). Appearing on behalf of the Respondents, Mr. N. Rai, Learned Senior Counsel, urged that the matter under consideration is an Appeal against acquittal and under such circumstances, presumption of innocence would naturally be attracted in favour of the accused persons and that the Courts would ordinarily not interfere with their acquittal. It was further submitted that the Learned Trial Court while passing the impugned judgment has carefully analysed the entire evidence on record and that the view taken by it is certainly a possible and plausible view. Under such circumstances, it would not be in the interest of justice or in keeping with the settled principle of criminal jurisprudence not to



reverse the decision of the Learned Trial Court. On this proposition, the following decisions were referred to:-

1. **Arulvelu and Another vs. State and Another** : 2010 CRI.L.J. 433 (SC);
2. **Md. Ankoos and Others vs. The Public Prosecutor, High Court of A.P.** : 2010 CRI.L.J. 861 (SC);
3. **State of Rajasthan vs. Talevar and Another** : 2011 CRI.L.J. 3937 (SC);
4. **Rukia Begum vs. State of Karnataka** : AIR 2011 SC 1585;
5. **Brahm Swaroop and Another vs. State of U.P.** : 2011 CRI.L.J. 306 (SC);
6. **Dhanpal vs. State by Public Prosecutor, Madras** : 2009 CRI.L.J. 4647 (SC);
7. **Harijan Megha Jesha vs. State of Gujarat** : AIR 1979 SC 1566;
8. **State of Karnataka vs. Hemareddy and Another** : AIR 1981 SC 1417; and
9. **Sangappa and Others vs. State of Karnataka** : 2010 CRI.L.J. 2017 (SC).

(ii) Mr. N. Rai emphasised the unsustainability of the recoveries made on the basis of the statements under Section 27 of the Evidence Act, made by the Respondents and the delinquent accused Roshan Rai as their voluntariness in making them statements were clearly suspect. It was further submitted that the disclosure statement Exhibit 3 of Respondent No.1, Rakesh Rai, would fall outside the purview of Section 27 of the Evidence Act, as it was recorded on 23-12-2003,



when he was not in custody of the police and was arrested only on 27-12-2003. The statement, therefore, can at best be considered as an illegal confession recorded by the police to make out a false case.

(iii) The disclosure statement, Exhibit 10 of the Respondent No.2, Tenzing Tamang, similarly cannot be accepted as one falling under Section 27 of the Evidence Act, as the articles recovered as a consequence thereof were not in his possession and was only in his knowledge of the existence of those articles in the house of P.W.35, Devi Maya Pradhan, apart from the fact that those articles were not identified as being the weapons of offence.

(iv) That the contradictory statement contained in the disclosure statements Exhibits 3, 8 and 10, falsifies the prosecution case and that the discovery of the articles as a result of those statements is at best a weak evidence not wholly reliable and that conviction cannot be based upon such evidence. In support of his submission, Mr. N. Rai sought to refer to and rely upon the following decisions:-

1. ***Pulukuri Kottaya and Others Vs. Emperor*** : AIR 1947 Privy Council 67;



2. **Salim Akhtar alias Mota vs. State of Uttar Pradesh** : AIR 2003 SC 4076;
3. **Anter Singh vs. State of Rajasthan** : AIR 2004 SC 2865;
4. **Siddique and etc. vs. State of Kerala** : 2006 CRI.L.J. 1109 (Kerala);
5. **Jogendra Nath and Others vs. The State of Assam** : 1977 CRI.L.J. 1309 (Gauhati);
6. **Krishan Mohar Singh Dugal vs. State of Goa** : AIR 1999 SC 3842; and
7. **State of Haryana vs. Jagbir Singh and Another** : AIR 2003 SC 4377.

(v) Relying upon the decision of this Court in **Damber Bahadur Chhetri vs. State of Sikkim : 2010 CRI.L.J. 3076 (Sikkim)**, it was submitted that confessional statement of co-accused cannot be used against another co-accused.

(vi) It was then submitted that the Learned Trial Court had rightly refused to accept Exhibit 26, i.e., the statement under Section 164 Cr.P.C., of Man Bahadur Rai, P.W.40, the elder brother of Respondent No.1, Rakesh Rai, as it also suffered from the same vice as those of the Respondents as not being free from any influence of the police, since it has come in his evidence that during the period he rendered the statement before the Magistrate, he was under detention of the Kaluk P.S., and that he had made the statement at the behest of



the police. Such being the nature of the statements where voluntariness, which is fundamental, is found missing, its rejection by the Learned Trial Court cannot be held to be invalid or unacceptable. Moreover, P.W.40, Man Bahadur Rai, resiled from his statement in Court and that his statement recorded under Section 161 Cr.P.C. during investigation is contradictory to the ones contained in his statement under Section 164 Cr.P.C. In support of his submission Mr. Rai relied upon the following decisions:-

1. ***T. Diwakara and Others vs. State of Karnataka*** : 2006 CRI.L.J. 4813 (Karnataka);
2. ***Jayanti Bhattacharya and etc. vs. State of West Bengal*** : 2006 CRI.L.J. 3414 (Calcutta).

(vii) Mr. N. Rai further went on to urge that the identity of the questioned Maruti Car WNC-525 cannot be accepted in law as being beyond reasonable doubt, in view of the differing colours stated by the prosecution witnesses while describing the one they had seen. It was submitted that while P.W.16 and P.W.17 have stated it to be of 'steel gray colour', P.W.51 and P.W.53 have stated it to be 'ash'. On the other hand, P.W.45 Pradeep Roy who is the purchaser of the vehicle described it as it being of 'sky blue colour'. It is, therefore, his submission that this part of the evidence



called for rejection and was accordingly rejected by the Learned Trial Court.

(viii) It was then submitted that the prosecution story also states about existence of another vehicle, namely, a white Savari, from which also the police had recovered one wrench and wearing apparels of a woman consisting of a pink kurta and pyjama which the prosecution has failed to explain casting grave doubts as to the culpability of the Respondents, because as per him the white Savari had been plied by the accused Praveen Subba and Abishek Rai and not the Respondents.

(ix) By referring to the prosecution story of the Respondents having stayed in the hotels at Siliguri, it was submitted that from the Registers seized by the police it was quite evident that the entries were made either much earlier to the date of the incident or long period thereafter thereby creating grave doubts as regards the prosecution story of their involvement in the commission of the offence.

(x) The seizure of the mobile phone as the one belonging to the deceased Sonam Dadul Bhutia and of it



having changed hands after the alleged sale by the Respondent No.1, can at best be considered as a very weak or a faint evidence to link it with the commission of the offence by the Respondents and, therefore, cannot be accepted as a credible or a reliable evidence against the Respondents.

(xi) As per Mr. N. Rai, P.W.38, Anil Chandra Roy, was unable to identify the Respondents in the Court, the evidence also is not clear as to whether the girl who had accompanied the Respondents was indeed Bina Subba or someone else, there being no clinching evidence at all in proof of this fact. Mr. Rai then submitted that in any case no motive has been proved against the Respondents and that the prosecution evidence far from being reliable were scattered and devoid of any coherence.

(xii) It was submitted that in a case involving circumstantial evidence like the present one, circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and the facts established should be consistent only with the hypothesis of the guilt of the accused. There must be a complete chain of evidence leaving no room for any



other conclusion. As per Mr. Rai, the prosecution had not been successful in proving the case within the scope of this principle entitling the Respondents to acquittal on the benefit of doubt. The decision in the case of **Arun Bhanudas Pawar vs. State of Maharashtra : 2008 CRI.L.J. 1798 (SC)** was cited by Mr. Rai in support of his contention.

(xiii) Relying upon the decision of **Ashish Batham vs. State of Madhya Pradesh : 2002 CRI.L.J. 4676 (SC)**, Mr. Rai urged that when we consider the facts and the evidence of the present case it can undoubtedly be stated that a strong suspicion exists against the Respondents, but it is a settled position that suspicion cannot take the place of proof.

(xiv) Under such circumstances, it was the submission of Mr. Rai that as there was no error in the appreciation of evidence by the Learned Trial Court and that the impugned judgment was well-considered and sound, it did not call for any interference by this Court.

9 **10(i).** We have given anxious consideration to the submissions of the Learned Counsels for the parties, the evidence on the record and the impugned judgment as



we are conscious of the fact that we are dealing with a case under Section 378 Cr.P.C., i.e., Appeal against acquittal. The scope and jurisdiction while dealing with such Appeal, is now well-established. It is no doubt true that the Respondents having had the benefit of acquittal by the Learned Trial Court, presumption of innocence would lie in their favour. However, an Appellate Court's power in such Appeal brings within its sweep the power to review the entire evidence and come to its own conclusion, but, in doing so, it not only is required to consider every matter on record germane to the questions of fact but, if it is to be held that the acquittal by the Trial Court was not justified, a duty also is cast upon it to express the reasons therefor. We may refer to the decisions cited by the Learned Additional Prosecutor in this behalf which are set out below:-

(ii) In the case of ***State of U.P. vs. Satish*** :
(2005) 3 SCC 114, it has been held as under:-

"24. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure



that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See *Bhagwan Singh v. State of M.P.*) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*, *Ramesh Babulal Doshi v. State of Gujarat*, *Jaswant Singh v. State of Haryana*, *Raj Kishore Jha v. State of Bihar*, *State of Punjab v. Karnail Singh* and *State of Punjab v. Phola Singh*."

(iii) In the case of ***Krishna Ram vs. State of Rajasthan*** : (2009) 11 SCC 708, the following proposition has been laid down:-

"15. There cannot be any quarrel with the settled propositions of law that if on appraisal of the evidence and on considering relevant attending circumstances it is found that two views are possible one as held by the trial court for acquitting the accused and the other for convicting the accused, in such a situation, the rule of prudence should guide the High Court not to disturb the order of acquittal made by the trial court. It is also equally well settled that where the material on record leads to a sole and inescapable conclusion of guilt of the accused, the judgment of acquittal will call for interference by the appellate court."

(iv) The principle laid down in the aforesaid cases have been reiterated and further expanded the scope and ambit of the power of review in an Appeal against acquittal in the case of ***Brahm Swaroop and Another vs.***



State of Uttar Pradesh : (2011) 6 SCC 288 as set out under:-

"33. It is well established in law that the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law.

34. Similarly, the incorrect placing of the burden of proof may also be a subject-matter of scrutiny by the appellate court. The court of appeal may not interfere where two views are possible for the reason that in such a case it can be held that prosecution failed to prove the case beyond reasonable doubt and the accused is entitled to benefit of doubt. (*Vide Balak Ram v. State of U.P., Allarakha K. Mansuri v. State of Gujarat, Raghunath v. State of Haryana, State of U.P. v. Ram Veer Singh, S. Rama Krishna v. S Rami Reddy, Sambhaji Hindurao Deshmukh v. State of Maharashtra, Arulvelu v. State, Perla Somasekhara Reddy v. State of A.P. and Ram Singh v. State of H.P.*

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38. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference."

(v) It, therefore, follows from the above that in an Appeal against acquittal, the Appellate Court has wide



powers in exercise of which it is permissible to examine the evidence on the records meticulously. The only fetter in reversing a decision is that, reasons ought to be given while rendering the judgment as to why the acquittal has not been justified, the paramount consideration of the Court being to ensure that miscarriage of justice is prevented. In the backdrop of the above principle of law, we may now examine the case as to whether any interference is called for in the decision of the Trial Court in acquitting the Respondents.

11. This is a case which is solely based upon circumstantial evidence as is common in almost all criminal cases where the offender ensures that the evidence against him is obliterated.

12. On careful examination of the impugned judgment, we find that the Learned Trial Court has not set out the circumstances which appear against the accused persons and, therefore, naturally we do not find any reason for arriving at the conclusion as to why those circumstances have not been proved. We rather find that it is replete with contradictions and conflicts apart from certain vital evidence, appearing against the accused persons, clearly overlooked. In the portion of



the impugned judgment commencing from paragraph 26 that contains analysis of the evidence, the Learned Trial Court has found the evidence of all the prosecution witnesses unshaken but, the conclusion of the analysis appear to be quite vague and nebular on most of the aspects and, in others conflicting and contradictory. In the concluding portion of the impugned judgment commencing from paragraph 111, if we may call it so, we find that the Learned Trial Court has once again repeated the evidence and, has rejected most of them either on grounds which are not supported by any reason or on grounds that are unsustainable on the face of the evidence.

13. In order to illustrate the inadequacy, we deem it essential to consider in some detail the analysis of the evidence by the Learned Trial Court in the impugned judgment at the cost of prolixity of the judgment. While doing so hereunder, dealing with the facts of the case and the details of the evidence shall be avoided for the sake of brevity being repetitive:-

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- (i) P.W.1, Navin Gurung, the owner of "Surya Hotel" at Dentam, deposed of the fact that the deceased Sonam Dadul Bhutia, one girl whose



name he did not know, Praveen Subba and one boy with frail feature, had come to his hotel at around 4.00 p.m. of 27-11-2003 and left after having food, on payment of the bill by the deceased Sonam Dadul Bhutia and, that half an hour later, Praveen Subba returned to his hotel to have some beer. This witness identified the accused Praveen Subba.

- (ii) P.W.2, Sanjeev Baraily, in his deposition stated that in the last week of November, 2003, on a Thursday at about 6.30 p.m., while he and his friends sitting by the fireside after the day's work in a construction work site for the quarters of the Forest Beat Office at Dentam, accused Praveen Subba and accused Abishek Rai came in a Savari Jeep from the Dentam side stopped near them and offered beer. When they refused, they drove on towards the Gyalshing side but, at about 7.30/8.00 p.m. the accused persons returned on the Savari Jeep again from the Dentam side and asked them as to where the marriage house was. At the request of accused Abishek Rai, they accompanied them to Mangmo

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village where the marriage was supposed to be but returned without attending it as the tyre of the vehicle got punctured. While returning after changing the tyre, he and his friends got out at the Forest Check Post and the accused Praveen Subba and Abishek Rai continued on.

- (iii) P.W.3, Phulmaya Chetri, deposed that one night a year ago, i.e., in November, 2003, while in a make shift tent in the cardamom field, she heard someone blowing whistle three times and shouting that a man was killed from the side where the dead body had been found but could not make out whether the voice was that of a male or a female. This witness was not cross-examined.
- (iv) P.W.4, Regmit Lepcha, in her deposition stated that sometime in the evening of the month of November, 2003, when she and her sister were on the road to meet their mother who was coming from Jorethang, a white Savari vehicle came and stopped in front of them and one out of the two boys who were inside it asked them if they could give them a lift which they declined.



They enquired as to whether they had seen a boy and his girl friend in the vicinity of the place and that when they replied in the negative they left in the Savari Jeep and were seen moving around near the Bridge. This witness was not cross-examined.

- (v) P.Ws. 5, 6 and 7, were tendered by the prosecution witnesses without objections raised from the side of the accused.
- (vi) P.W.8, Passang Lama, in his deposition stated that on 27-11-2003, he was driving taxi Jeep No.SK-04/5086 from Jorethang to Intek which is beyond Dentam Bazar to drop passengers. On reaching the Dentam Bridge at about 8.00 p.m., he saw one white Savari parked near it but did not see who the occupants were.
- (vii) In his evidence, P.W.9, Sonam Dorjee Bhutia, stated that about a year ago at around 4.00 p.m., a Thursday, he saw one Maruti Car parked near the Dentam Bridge while returning home from Hee-Patal and identified the Maruti Car, MO-I as that one. Later at about 6.30/7.00

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p.m., when he saw a vehicle moving around across his house with its headlights on he came out of his house to find out. The vehicle which was a white Savari stopped at the place where he was standing and someone from inside it asked him if he had seen a boy and a girl in and around the place and thereafter proceeded towards Pelling.

- (viii) P.W.10, Chandra Bdr. Subba, is the father of the girl Bina Subba, who stated that on 27-11-2003, she had gone to visit her elder sister at Sardong Busty, West Sikkim, and was missing thereafter. That he learnt about her murder near the Coronation Bridge at Siliguri after one month and that he had gone to the place of occurrence on 27-12-2003 and identified the dead body as that of his daughter from the wearing apparels.
- (ix) P.W.11, Dhan Maya Subba, mother of the deceased girl Bina Subba, corroborated the statement of her husband P.W.10 of their daughter Bina Subba going to Sardong Busty to visit her sister carrying two packets of "Silam" and her wearing apparels.



- (x) P.W.12, D.P. Subba, who was a Constable at Melli Check Post testified that on 27-11-2003 one Maruti Car bearing No.WNC-525 had crossed Melli Check Post at about 2230 hrs. from the Jorethang side for Siliguri and proved MO-V, the relevant Check Post Register, where the movement of the said vehicle was recorded at page 40 marked MO-V/a.
- (xi) P.W.13, Lakpa Tsh. Sherpa, a Writer Constable at the Check Post, corroborated the evidence of P.W.12 and proved MO-V as being the vehicle movement register and the relevant page 40 where the entry of Maruti Car No.WNC-525 entered by him as MO-V/a.
- (xii) In his evidence, P.W.14, Constable Dhaney Thami, identified Rakesh Rai and stated that on 22-12-2003, he had accompanied O/C Kaluk P.S. to Siliguri in connection with the Kaluk P.S. murder case. On 23-12-2003, he was informed by his O/C that O/C Sadar P.S. was bringing accused Respondent No.1, Rakesh Rai, to the Coronation Bridge in connection with a murder



case and was suspected to have some link with the Kaluk P.S. murder case and that when they were waiting at the Coronation Bridge, O/C Sadar P.S. arrived with the Respondent No.1, Rakesh Rai, at about 4.00/5.00 p.m. where the O/C Kaluk P.S. interrogated him. During the interrogation, Rakesh Rai made a disclosure statement in his presence and the presence of the staff of Sadar P.S. whereby he stated that about 20/25 days ago, he and the Respondent No.2, Tenzing Tamang, accompanied by his brother went from Jorethang to Gyalshing via Soreng and Dentam by Maruti Car bearing No.WNC-525. On their way they found Sonam Dadul Bhutia with one girl near the Dentam Bridge. When the accused, Rakesh Rai, called out to the said Sonam Dadul Bhutia, he got annoyed and shouted at the accused, Rakesh Rai. They then drove on to a place nearby and parked the vehicle and then returned back to the place of occurrence and assaulted and killed Sonam Dadul Bhutia with a tyre lever and took away the girl to Siliguri and kept her in the "Himalayan Rest House". After 2/3 days, they

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brought the girl in the said Maruti Car and killed her by hitting with a tyre lever near the Coronation Bridge at Panidhara and threw her body below the road. The accused Respondent No.1, Rakesh Rai, showed the place where the body of the girl had been thrown which was 60/70 ft. below the road. He proved Exhibit 3, the disclosure statement given by the Respondent No.1, Rakesh Rai, and MO-VI, the tyre lever seized vide Exhibit 2.

- (xiii) P.W.15, D. B. Subba, a Sub-Inspector of Darjeeling Police, corroborated P.W.14 as regards the recovery of the dead body on the basis of the report received from O/C Kaluk P.S. He identified Respondent No.1, Rakesh Rai, as the one who pointed out the dead body of Bina Subba and the fact of the disclosure statement made by him to the O/C Kaluk P.S.
- (xiv) P.W.16, Tsering Kee Chingapa, a teacher in Pelling Senior Secondary School, deposed that on 27-11-2003 at about 4.00/5.00 p.m., while returning from school to her residence at Dentam, she saw a Maruti Car bearing



registration number beginning with "WNC" parked near the Dentam Bridge and 3/4 boys sitting near it drinking something out of plastic bottle and she identified the Maruti Car, MO-I, as the one seen by her.

○ (xv) P.W.17, Manorath Adhikari, the Junior Engineer, P.W.D., Dentam, who was travelling with P.W.16, corroborated her statement and identified Maruti Car, MO-I, and its colour as "ash colour".

(xvi) P.W.19, Deo Man Subba, testified of the girl Bina Subba having travelled with accused Praveen Subba and others on 27-11-2003 who were later followed by deceased Sonam Dadul Bhutia in the vehicle of Dinesh Pradhan, P.W.21. He also stated that he and Kailash Rai, P.W.20, had returned to Pelling in the vehicle driven by Dinesh Pradhan, P.W.21, while the deceased Sonam Dadul Bhutia went with accused Praveen Subba who had driven the vehicle along with accused Abishek Rai and Bina Subba towards Dentam.

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- (xvii) P.W.20, Kailash Rai and P.W.21, Dinesh Pradhan, corroborated the statement of P.W.19, Deo Man Subba.
- (xviii) Similarly, P.W.22, Tshering Bhutia, testified of the facts stated by the P.Ws.19, 20 and 21, as having been informed by those facts by P.W.20, Kailash Rai.
- (xix) P.W.23, Parvati Subba, deposed of her sister Bina Subba found missing since 27-11-2003, the day she had left house to visit her and, of her having informed the police for help in tracing her.
- (xx) P.W.26, Dipu Sunar, a driver by profession, stated that on 02-01-2004, O/C Kaluk P.S. brought one small boy near Singtam Bridge, East Sikkim, who disclosed to the O/C that he threw a tyre lever and a shock absorber into the river from the Bridge and that on the request of the O/C he recovered the tyre lever from the river identified by him as MO-VII.
- (xxi) In his deposition, P.W.27, Karzang Bhutia, testified that one Roshan Rai gave a disclosure



statement under Section 27 of the Evidence Act to the O/C Kaluk P.S. in the Kaluk P.S. in his presence and in the presence of one Ganga Ram Chettri, P.W.28, stating that he and his friends had killed one boy at Dentam and took the girl who was with him to Siliguri and also killed her at Siliguri with a wheel wrench which he threw into the river at Singtam and that he could show the place from where he had thrown it. After the statement was recorded, at the request of O/C they accompanied the O/C, Kaluk P.S. and the juvenile accused Roshan Rai to Singtam where the juvenile accused Roshan Rai pointed out the place from where he had thrown the wheel wrench which was later extricated from the river with the help of a diver. The wheel wrench was identified by him as MO-VII.

- (xxii) P.W.28, Ganga Ram Chettri, corroborated the evidence of P.W.27, Karzang Bhutia on all material particulars but the Learned Trial Court found that he was confused in his cross-examination.



(xxiii) P.W.29, Narayan Barman, a Constable in the Darjeeling Police Station, witnessed the seizure of one Nokia mobile phone, MO-VIII from the possession of Abhijit Ghosh, P.W.33, in his residence at Mahananda Para, Siliguri, on 08-01-2004 by PI S. R. Shenga, P.W.54, the I.O. of the case. He identified MO-VIII as the cell phone so seized vide Seizure Memo Exhibit 9.

(xxiv) P.W.30, Pradeep Saha, a motor cycle mechanic running a workshop at Sevoke Road, Siliguri, deposed that in the month of November/December, 2003, Pradeep Roy, P.W.45, a fellow mechanic, brought a Nokia mobile phone belonging to his friend 'Purna' for sale as he was in need of money and that he purchased it for Rs.2100/- with the assurance by P.W.45 that its documents would be delivered by 2/3 days but, were not made over as assured. The mobile phone was sold by him a week later to one of his customers for Rs.2200/- and identified the cell phone MO-VIII and the accused Rakesh Rai as 'Purna' from whom he had purchased it. He further went on to depose



that a month and half later 'Purna' brought one Maruti Car bearing registration No.WNC-525 for sale regarding which he informed Pradeep Roy, P.W.45, fixing the price of the vehicle at Rs.45,000/-. He paid Rs.5,000/- as advance towards cost of the vehicle to 'Purna' who left thereafter leaving the Maruti Car in the workshop. He then sold the car to one relative of Pradeep Roy for Rs.45,000/- and a few days later 'Purna' came to his workshop to collect the balance amount. He identified accused Tenzing Tamang, Respondent No.2, as the person who had accompanied the said 'Purna'. In his cross-examination, he stated that all payments were made through Pradeep Roy, P.W.45 and that the colour of the Car was 'blue'. He further stated that he had seen the documents of the vehicle which showed that it belonged to the brother of 'Purna'. In his cross-examination, he confirmed that that he had purchased the cell phone, MO-VIII, and identified 'Purna' to be Rakesh Rai, Respondent No.1 and also Tenzing Tamang, Respondent No.2 as the one who had accompanied him.



Although, the Learned Trial Court has not commented on the quality of the evidence of P.W.30, it can be clearly inferred from its analysis that it was found to be firm and unshaken.

- (xxv) As per the deposition of P.W.31, S. N. Agrawal, on 03-01-2004 when he was on his way to Rinchenpong from his home at Kaluk Bazar, he met the O/C Kaluk P.S. who requested him to accompany him to Kaluk P.S. where he was informed that the Respondent No.2, Tenzing Tamang, who was in police custody wanted to make a statement to which he should stand as a witness. The statement of Respondent No.2 was accordingly recorded by the O/C Kaluk P.S. in his presence. in which it was stated that on a day and date which he could not remember when he along with one Roshan Rai, Rakesh Rai and Purna Subba were going from Dentam towards Pelling they met one girl and a boy near the river at Dentam. They along with Rakesh Rai and Roshan Rai killed the boy by hitting him with a wheel wrench and then took the girl away to



Siliguri and, subsequently killed her also and threw her dead body below the road near the Bagh Pool by the side of "Panidhara". Later when Rakesh Rai, Respondent No.1, was arrested, he and his two friends ran away to Kalimpong and from there Purna Subba went to Daramdin while he and Roshan Rai went to Soreng. In a red bag that he was carrying there was a bottle of Horlicks, one jack lever and one wheel wrench which he kept in the house P.W.35, Devi Maya Pradhan at Daramdin, the aunt of Purna Subba. He identified Exhibit 10 as the disclosure statement of accused Tenzing Tamang. Then he proceeded from the Kaluk P.S. to Daramdin where the police recovered and seized the bag from the house of P.W.35 vide Seizure Exhibit 11 and identified MO-IX as the red coloured adidas bag, MO-X as the jacket, MO-XI as the bottle of Horlicks, MO-XII as the wheel wrench, MO-XIII as the jack lever, MO-XIV as one chain, MO-XV as screw driver and MO-XVI as the pliers.

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- (xxvi) P.W.32, Kalyan Bhowmik, a Constable from the Kotwali Police Station, deposed that on 07-01-2004 he was called to 'Hotel India' situated at Kadamtala, District Jalpaiguri, where the Officers from the Sikkim Police seized one Register from the hotel in the presence of himself and one Nar Bahadur Tamang, P.W.44 and identified MO-XVIII as the Register so seized vide Seizure Memo Exhibit 12.
- (xxvii) P.W.33, Abhijit Ghosh, deposed that in the month of January, 2004, he purchased one Nokia cell phone from Pradeep Saha, P.W.30, for Rs.2200/- which he identified as MO-VIII.
- (xxviii) P.W.34, Sarajit Mazumder, who runs a Hotel-cum-Lodge, namely, 'Vishal' at Kadamtala, Jalpaiguri, deposed that sometime in the last part of 2003 or 2004, one Police Officer from Sikkim seized the Register of his hotel from the possession of his Assistant Manager and identified MO-XVIII as the said Register seized vide Seizure Memo Exhibit 12 wherein he identified the signatures shown to him.



(xxix) P.W.35, Devi Maya Pradhan, in her deposition stated that police from the Gyalshing P.S. came to her house on 29-12-2003 and arrested Bishal the son of her sister. Later in the afternoon, two boys Roshan and Tenzing came in search of her nephew regarding which she informed the police by telephone. The police later arrested the two boys who identified themselves as Roshan and Tenzing. That the two boys had come in search of her nephew carrying a red bag with them which she found below the cot while sweeping the floor but chose to leave it undisturbed. On 03-01-2004, the police personnel came to her house along with the boy named 'Tenzing' who pointed out the bag below the cot as his and was seized by the police with the articles inside.

(xxx) P.W.36, Tikam Sharma, the owner of "Mobile World" at Siliguri, stated that cell phone, MO-VIII, was the one sold to one S. D. Bhutia on 17-05-2003.

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(xxxi) P.W.37, Dr. S. D. Sharma, the Medico-Legal Expert who conducted the post-mortem examination on the body of the deceased,



Sonam Dadul Bhutia. Apart from giving the details of the nature of the injury, he opined that the cause of death was shock as a result of multiple injuries on the face and head produced by 'blunt weapons' and identified Exhibit 13 as the medical autopsy report seized vide Seizure Memo Exhibit 17.

(xxxii) P.W.38, Anil Chandra Roy, stated that he purchased Maruti Car WNC-525 for Rs.45,000/- through the intervention of his friend. Later Pradeep Mondal brought the owner of the vehicle, P.W.40, to the office of the RTO, Siliguri which was later seized by the police on 21-12-2003 from the possession of his younger brother Narayan Roy, P.W.39. He identified MO-I as the same Maruti Car which he purchased from Man Bahadur Rai, P.W.40, through Pradeep Mondal. He identified P.W.40 as the person who had come to the RTO Office, Siliguri.

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(xxxiii) P.W.39, Narayan Roy, corroborated his brother P.W.38, Anil Chandra Roy and its seizure by the police from his possession vide Exhibit 19.



(xxxiv) P.W.40, Man Bahadur Rai, deposed that his brother Rakesh Rai, Respondent No.1, purchased a Maruti Car in his name for the sale of which he had submitted a xerox copy of his Voter Identity Card marked 'X' in the RTO Office at Siliguri. He stated that Respondent No.1, Rakesh Rai, and the Respondent No.2, Tenzing Tamang, had come to Gyalsing in that Maruti Car and in the morning of the next day, he had accompanied them to Siliguri where they went to hotel "Himalayan Rest House" and stayed there together with Purna Subba and his younger brother Roshan Rai. As per this witness during his three visits in connection with the registration of the vehicle at Siliguri, he did not meet any other person except Respondent No.1 and Purna Subba.

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It has been observed by the Learned Trial Court that, in his cross-examination this witness stated that he had given the statement under Section 164 Cr.P.C. to the Judicial Magistrate, West, on being advised by the police and that he had been to Gyalshing Court only



once and further, that he was detained in the police custody for 16 days.

This observation of the Learned Trial Court gives us an impression that it found the statement of the witness under Section 164 Cr.P.C. unreliable as not being voluntary but given under the influence of the police.

(xxxv) P.W.41, Dipankar Debnath, Proprietor of "Himalayan Rest House", Pradhan Nagar, Siliguri, deposed that in the month of December, 2003, one Rai came with his friends and stayed in his hotel. That the said Rai used to come and reside his hotel and as he could not pay Rs.100/- he left his bag behind which was later seized by the police. The police also seized 'check-in' and 'check-out' Register of his hotel identified as MO-XIX in which the accused had entered his address as 12th Mile, Kalimpong and business as the purpose of his visit.

(xxxvi) P.W.42, Dinesh Rajbor, the Manager of the hotel "Himalayan Rest House" by pointing out to the Respondent No.1, Rakesh Rai, stated that he used to frequently stay in the Rest House and



corroborated the evidence of P.W.41 in all material particulars. That he did not remember the date when the Respondent No.1, Rakesh Rai, brought one girl with him along with his friends and stayed in his hotel and identified the Respondent No.2, Tenzing Tamang, as the person who used to come along with Respondent No.1, Rakesh Rai and stayed in his hotel.

(xxxvii) P.W.43, Ashok Ghosh, the former Manager of the "Himalayan Rest House" corroborated the evidence of P.W.42 and by identifying Rakesh Rai as the person who used to visit his hotel and, that during his last visit to the hotel he had come with his friends and a girl. He identified the 'check-in' and 'check-out' Register of the hotel MO-XIX and further stated that they used to say that they were dealers in the business of crockery and that they were from Kalimpong.

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(xxxviii) P.W.44, Nar Bahadur Tamang, a Constable from the Jalpaiguri P.S., identified the seizure of Register of the 'Hotel Vishal' MO-XVIIIA.



(xxxix) P.W.45, Pradeep Roy, identified Respondent No.1 as 'Purna Rai' and corroborated the evidence of P.W.30 Pradeep Saha, P.W.33, Abhijit Ghosh and P.W.36, Tikam Sharma, regarding the sale of mobile phone MO-VIII and also P.W.30, Pradeep Saha, P.W.38, Anil Chandra Roy, P.W.39, Narayan Roy and P.W.40, Man Bahadur Rai, with regard to the facts pertaining the Maruti Car WNC-525 and that the car was recorded in the name of Man Bahadur Rai, the elder brother of Purna Rai.

(xl) P.W.46, Nima Chader Bhutia, PI Gangtok Sadar P.S. deposed that he had arrested Rakesh Rai, Respondent No.1, in connection with a theft case and during investigation it was revealed that the accused had purchased Maruti Car bearing No.WNC-525 'ash' in colour and one scooter bearing No.WB-74/C-1018 with the stolen money and that he had murdered one boy at Dentam, West Sikkim, and kidnapped a girl whom he later murdered near the Bagh Pool, District Darjeeling, West Bengal. On 23-12-2003 when the police party led by him with the



accused person in custody were on their way to Siliguri for recovery of the car and a scooter, they met O/C Kaluk P.S., P.W.54 PI S. R. Shenga, near Bagh Pool. PI Shenga interrogated the Respondent No.1, Rakesh Rai, at the Bagh Pool and, as per the disclosure statement made by the Respondent No.1, the body of the victim girl was recovered on being shown by him.

- (xli) P.W.47, Sonam Bhutia, a Constable posted at Rangpo P.S., stated that on 13-02-2004, P.W.54, S. R. Shenga, seized one 'in-coming' and one 'out-going' Register of the Rangpo Check Post and identified MO-XX and MO-XXI respectively as those Registers for the period 24-11-2003 to 26-11-2003 and 24-11-2003 to 29-11-2003 respectively.

It was noted by the Learned Trial Court that the witness stated that he did not make entries in MO-XXI on 28-11-2003 till midnight.

- (xlii) P.W.48, Bal Bahadur Subba, testified of the I.O. conducting inquest for the dead body of the deceased, Sonam Dadul Bhutia, at the place of occurrence on 28-11-2003 and that besides him



one Bom Bahadur Chettri, resident of Bangten Busty was also present during the inquest. The witness gave the details of the injuries that he noticed on the dead body which was lying in a dry field. Apart from this, he also identified various articles that were recovered from the dead body vide Seizure Memo Exhibit 23. He also stated that the I.O. seized sample of the blood with the soil, MO-XXX, four numbers of teeth and one 'black chunni' with white lining, MO-XXXI, near the road about 100 ft. above the dead body vide Seizure Memo Exhibit 24.

It was noted by the Learned Trial Court that in his cross-examination the witness admitted that he did not see any injury on the lips and nose of the deceased but, there was injury on the places of the mouth where the teeth had fallen and had found the place where the dead body was recovered was slopy and one could sustain injury if he fell. However, the rest of the evidence as per the Learned Trial Court remained unshaken.



(xliii) P.W.49, K. R. Rai, a Police Constable, was able to identify only the accused Rakesh Rai. The Learned Trial Court found that his evidence was with regard to the accused Rakesh Rai being taken to Siliguri to recover a stolen scooter and they having found O/C Kaluk Police Station waiting at Bagh Pool on the way. That the disclosure statement of the accused Rakesh Rai was recorded by the O/C S. R. Shenga, P.W.54, in his presence and in the presence of Constable Dhaney Thami, P.W.14, by which he stated that about 23/24 days ago when he travelled from Siliguri in his Maruti Car bearing registration No.WNC-525 to Jorethang, he met his friend Tenzing Tamang and they travelled together to Soreng. He corroborated P.Ws.14, 15 and 53, as regards the rest of the material evidence in respect of the incident at Dentam when the Respondents had killed a boy and later the girl at Bagh Pool. He identified Exhibit 3 as the disclosure statement made by the Respondent No.1. They found the Maruti Car parked in the Bhaktinagar P.S. which the accused pointed out and from its boot the accused himself took out



and pointed out one tyre lever MO-VI having the inscription 'Kalpana' on it as being the one used by him and his friend in assaulting the deceased Sonam Dadul Bhutia and the girl which the O/C Kaluk P.S. seized vide Seizure Memo Exhibit 2.

The Learned Trial Court noted that the witness in his cross-examination admitted that MO-VI was not described by its length and circumference and such tyre lever could be purchased by anyone having a car and that MO-VI was not sealed and packed. The rest of the evidence-in-chief as per the Learned Trial Court could not be demolished.

(xiv) P.W.50, Smt. Bhim Sila Gautam who runs a hotel in Bermiok Bazar, West Sikkim, stated that in the afternoon of 27-11-2003 at about 3.00/4.00 p.m., a Maruti Car No.WNC-525 came to her hotel in which 3/4 small boys were travelling. Those boys took beer in the hotel and identified Respondent No.2, Tenzing Tamang, as one of them but could not identify the others.

(xiv) P.W.51, Mahendra Sharma, a Home Guard, posted in Kaluk P.S. stated that on 22-12-2003,



the I.O., S. R. Shenga seized a number of articles from the room of the "Himalayan Rest House" at Siliguri of which one Dipankar Debnath, P.W.41, was the Manager. He identified those articles consisting of one Reebok shoe, MO-XXI, one pair of leather shoes, MO-XXII, four numbers of jeans pants, collectively MO-XXIII, four numbers of towels, collectively MO-XXIV, one black vest, one red vest, one brown sweater and one half vest, collectively MO-XXV and one auto reverse cassette player, MO-XXVI which were found packed inside MO-XX. Apart from this, the 'check-in' and 'check-out' Register of the hotel MO-XIX was also seized in his presence and in presence of P.W.53, Head Constable S. K. Chettri, vide Seizure Memo Exhibit 21. He further went on to depose that on the following day, i.e., 23-12-2003, the IO also seized one receipt from MVI, Siliguri in respect of vehicle No.WNC-525, Exhibit 20, one Electoral Identity Card marked 'X', one 'ash' coloured Maruti Car No.WNC-525 and three of its keys vide Exhibit 25.



- (xlvii) P.W.52, Mrs. K. C. Barphunga, Chief Judicial Magistrate, South & West Sikkim at Namchi, deposed of her having examined two witnesses under Section 164 Cr.P.C., namely, P.W.2, Sanjeev Baraily and another Padam Gazmere marked Exhibits 28 and 29 respectively. Later she also recorded the statement of P.W.40, Man Bahadur Rai marked Exhibit 26.

The Learned Trial Court noted that this witness admitted that unlike Exhibits 1 and 30, being the statements of P.W.2 and Padam Gazmere respectively, Exhibit 26 relating to P.W.40, Man Bahadur Rai, did not reflect the specific questions put to the witnesses before recording the statements but, found that the statements were voluntarily made.

- (xlviii) P.W.53, Siva Kumar Chettri, stated that on being instructed by the O/C Kaluk P.S. on 28-11-2003, he went to Melli P.S. in the same evening and brought the accused Praveen Subba and Abishek Rai along with a Savari vehicle bearing registration No.SK-04/4906 to Kaluk P.S. late in the night and that the following morning the O/C



seized the vehicle with the articles found inside it in his presence vide Seizure Memo Exhibit 33. The seized articles consisted of a kurta-pyjama collectively marked MO-IV, two small packets containing 'Silam' marked MO-II and MO-III, a wheel wrench marked MO-XXXII which was found below the seat of the driver, one wrench marked MO-XXXIII, the vehicle Savari SK-04/4906, its keys, route permit of the Savari vehicle and the blood like stains removed with cotton found on the outer body of the said vehicle. He further stated that he and Home Guard Mahendra Sharma, P.W.51, were taken by the I.O. Shenga, P.W.54 to Siliguri for investigation of the case and that on 22-12-2003, the I.O. seized a number of articles contained in a bag from a room of the "Himalayan Rest House" particulars of which have been set out above having also been stated by P.W.51 and, therefore, need not be repeated. He also testified of the I.O. seizing the documents of the Maruti Car WNC-525 from the MVI, Siliguri on 23-12-2003, also deposed by the P.W.51 vide Exhibit 19.

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It was noted by the Learned Trial Court that his evidence could not be demolished in cross-examination.

- (xlviii) P.W.54, S. R. Shenga, who is the Investigating Officer gave his detailed finding of the case and narrated the entire story assimilated from the evidence collected by him. While doing so, he corroborated with all the material evidence given by the various prosecution witnesses.

The Learned Trial Court noted that in his cross-examination he had denied to the suggestion that he had instructed and persuaded P.W.40, Man Bahadur Rai and P.W.2, Sanjeev Baraily, to give statements under Sections 164 Cr.P.C. and that he admitted of the accused Praveen Subba, Abishek Rai, Kailash Rai, Deo Man Subba and Bina Subba proceeding from Pelling to Dentam and the deceased following them in the vehicle driven by one Dinesh Pradhan, P.W.21 and that he met them at Changay falls. He also admitted of the fact that accused Deo Man Subba, P.W.19 and Kailash Rai, P.W.20, returning to Pelling with Dinesh



Pradhan, P.W.21 and accused Praveen Subba, Abishek Rai, the deceased and Bina Subba proceeding to Dentam where they had lunch and some alcohol. That he also admitted of the fact that Bina Subba got off from the vehicle while returning from Dentam to attend to the call of nature and the deceased also got down asking Abishek Rai and Praveen Subba to return to Dentam and, that when the latter two did not find the deceased and the girl where they had been dropped, they returned to Pelling. That when the disclosure statement Exhibit 3 of the accused Rakesh Rai was recorded, no police personnel were present.

14(i). It may be noted that in its analysis the Learned Trial Court found that none of evidence of the prosecution witnesses could be demolished except noting certain aspects in respect of some of them which, in our view, are inconsequential as the substance of those evidence have remained unshaken even on the finding of the Learned Trial Court. As regards the evidence of P.Ws. 8, 9 and 11, except for the bare narration of their deposition, we find that the Learned



Trial Court has not stated anything at all which lead us to conclude that no infirmities were found in them and, indeed even on our own scrutiny of those, we find none.

(ii) After having dealt with the scope and ambit of Sections 302/300/34 IPC and Sections 24, 25, 26 and 27 of the Evidence Act, the Learned Trial Court thereafter appears to have examined the effect of the evidence in the light of those provisions.

(iii) While dealing with the disclosure statement Exhibit 3 of the accused Respondent No.1, Rakesh Rai, we find that the Learned Trial Court rejected the argument of the defence counsel, that on 23-12-2003 when the disclosure statement was recorded, he was not in custody of the police and was arrested only on 27-12-2003, on a categorical finding that the accused Respondent No.1, Rakesh Rai, was already in custody of the Gangtok Sadar P.S. in connection with Sadar P.S. Case No.135(03)03 dated 30-10-2003. This finding is obviously based upon the evidence of the I.O., P.W.54, S. R. Shenga, who has stated that "..... disclosure statement exhibit-3 was recorded by me when he was already arrested in connection with Sadar P.S. Case No.135(03) dated 30-10-2003 under Section 457/380 I



P C and was being taken for the recovery of stolen articles.". And of, P.W.46, Nima Chader Bhutia, the then second Officer-in-Charge, Gangtok Sadar P.S., who has stated in his evidence has deposed that "..... Sadar Police Station Case No.136(10)03 dated 30-10-2003 under sections 457/380 of the Indian Penal Code was endorsed to me by the Officer-in-Charge, Sadar Police Station, Gangtok for investigation. During the course of the investigation I arrested suspected accused Rakesh Rai on 22-12-2003." This as per the Learned Trial Court remained undemolished in cross-examination thereby upholding the validity of the disclosure statement.

(iv) The Learned Trial Court further appears to have accepted the validity of the disclosure statements Exhibit 3 of the Respondent No.1, Rakesh Rai, Exhibit 10 of the Respondent No.2, Tenzing Tamang and Exhibit 8 of the juvenile convict Roshan Rai, but observing that those would be relevant only to the fact discovered and not the self incriminating parts of the statements as being hit by Section 27 of the Evidence Act.

(v) While dealing with the question as to whether the prosecution had been able to link the crime of



murder with the accused persons, the Learned Trial Court noted the following as the only infirmities, rest of the evidence having found to be unimpeachable:-

- (i) The evidence of P.W.14, Dhaney Thami, witness to the disclosure statement, was not accepted which as per the Learned Trial Court had already been discussed in detail earlier.
- (ii) That P.W.16 and P.W.17, Tsering Kee Chankapa and Manorath Adhikari respectively, had identified the Maruti Car as steel gray colour having registration No.WNC-525 parked on the road near Dentam Bridge but the Learned Trial Court found that her evidence did not throw any light on the prosecution case.
- (iii) The evidence of P.W.19, Deo Man Subba was found to be of no support to the prosecution case. Similarly, P.Ws. 20, 21, 22, 23, 26, 27, 34 and 39, did not support the prosecution case.
- (iv) The evidence of P.W.40, Man Bahadur Rai, was rejected because he was declared



hostile by the prosecution and that in his cross-examination he had admitted that he was taken to the Court by the Police and had given the statements before the Magistrate and the police as advised by them. His evidence was found worthless as the voluntary nature of the statement under Section 164 Cr.P.C. was found circumspect.

- (v) P.W.50, Bhim Sila Gautam, could not identify the accused persons.
- (vi) That P.Ws. 16 and 17, although had seen the stolen Maruti Car were unable to identify the accused persons.
- (vii) Although, P.W.36, had stated that he sold mobile phone, MO-VIII, to S. D. Bhutia, which was identified by P.Ws. 30 and 33 as the one sold to them by Respondent No.1, Rakesh Rai, his evidence was found unreliable as the documents of its purchase were not furnished.
- (viii) That the sale of vehicle bearing registration No.WNC-525 by the Respondent No.1 to



P.W.30, Pradeep Saha, has not supported the prosecution case as –

- (a) different colours have been stated with regard to the Maruti Car;
- (b) none could identify the occupants of the vehicle or that they were linked with the crime; and
- (c) some witnesses have seen the vehicle coming from Dentam-Pelling while others had seen it near the Bridge.

- (ix) That there was no evidence whatsoever to link with the accused persons except the disclosure statement of accused Nos.3 and 4, i.e., the Respondents No.1 and 2, respectively, which, however, cannot be admitted in evidence due to the bar created by law and that the entire case is based upon circumstantial evidence.

15(i). The Learned Trial Court has discarded the evidence of P.W.14, Dhaney Thami, witness to the disclosure statement of the Respondent No.1, Exhibit 3, only on the ground that the disclosure statement was



held to be unacceptable for the reasons already discussed in detail. This, in our view, is in clear conflict with the finding of the Learned Trial Court at paragraph 107 of the impugned judgment where it has been held as under:-

"107. P.W-14 Dhaney Thami has stated that the tyre lever was seized by the O.C Kaluk P.S in his presence and in the presence of another person which he identified as M.O-VI. The said weapon of offence was shown by the accused Rakesh Rai himself from inside the Maruti car. The recovery of this article was not demolished in his cross examination."

(ii) The evidence of P.W.16 and P.W.17, were found inconsequential by the Learned Trial Court holding that they did not throw any light on the prosecution case. While arriving at this conclusion, the Learned Trial Court appears to have completely lost sight of the fact that the case is based upon circumstantial evidence even on its own findings and appears to have failed to appreciate that the evidence of those two witnesses is relevant to the fact that a Maruti Car was seen about the time when in the vicinity of the place where the deceased Sonam Dadul Bhutia had been killed and the girl Bina Subba kidnapped, and that they have been corroborated by other evidence quite glaring in the records which are set out hereunder:-



- (a) The evidence of P.W.50, Bhim Sila Gautam, who deposed that at about that time on that day a group of boys had come in a Maruti Car No.WNC-525 and had beer in her hotel at Bermiok, one of whom was identified by the witness as Respondent No.2, with whom she was familiar as a daily wager;
- (b) The evidence of P.Ws.12 and 13, the constables at the Melli Check Post who deposed of the fact that WNC-525, the questioned Maruti Car, had crossed the Melli Check Post and proceeded towards Siliguri;
- (c) The evidence of P.Ws.30, 38, 39 and 45, who have deposed of the purchase of the Maruti Car from the Respondent No.1 although in the name of P.W.40, his brother; and
- (d) The evidence of seizure witnesses, P.Ws.14, 15, 49 and 53 which have been dealt with earlier in *extenso* and, therefore, need not be repeated.



(iii) Apart from the above, there are other evidence that are relevant and corroborate the aforesaid evidence. They are:

- (a) The disclosure statement of Respondent No.1, Rakesh Rai, Exhibit 3, who led the police at Bhaktinagar P.S. and took out the weapon of offence being a tyre wrench from the luggage boot of the Maruti Car parked there; and
- (b) The evidence of P.W.54, the I.O. S. R. Shenga and P.W.39, Narayan Roy who have stated that the vehicle was seized by the Traffic Police of the Bhaktinagar P.S. from Salugara, Siliguri.

The recovery of the tyre wrench from the Maruti Car at the Bhaktinagar P.S. on being shown by the Respondent No.1 as per the Learned Trial Court stands established at paragraph 107 of the impugned judgment, where it has been clearly stated that "the recovery of this article was not demolished in his cross examination".

In our view, considering the entire facts and circumstances, the rejection of the evidence of P.W.16



and P.W.17 by the Learned Trial Court on the ground as stated above is grossly erroneous and perverse. The reasons why their evidence did not support the prosecution case have not been stated.

(iv) We have indicated that the evidence of P.Ws.19, 20, 21 and 22, which, as per the finding of the Learned Trial Court, remained undemolished in cross-examination, are relevant only to the fact of the deceased Sonam Dadul Bhutia and Bina Subba travelling together on 27-11-2003 and having got out at the Dentam Bridge and having disappeared thereafter.

The evidence of P.W.23, Parvati Subba, sister of the deceased Bina Subba, is relevant being corroborative of the prosecution case that the deceased Bina Subba had left on that day for Sardong Busty to meet her as stated by P.W.10 and P.W.11, their parents.

(v) The statement of P.W.26, Dipu Sunar, proves the fact that the juvenile convict Roshan Rai had shown the place at Singtam Bridge where he had thrown the tyre lever into the river which he retrieved by diving, thereby corroborating the evidence of P.W.27, Karzang Bhutia and P.W.28, Ganga Ram Chettri who are the



witnesses to the disclosure statement of the juvenile convict Roshan Rai at the Kaluk P.S., Exhibit 8. This evidence has remained firm and unshaken.

(vi) The evidence of P.W.24, Sarajit Majumdar, supports the prosecution story of the four accused persons going to Siliguri on 28-11-2003 and staying under pseudonymous names in 'Vishal Lodge' as found in the hotel register MO-XVIII A vide Seizure Memo Exhibit 12. The evidence of P.W.39 corroborates the evidence of P.W.38 as regards the purchase of the Maruti Car WNC-525 by him from P.W.40 and the seizure of the vehicle from his possession by the Bhaktinagar P.S.

(vii) The approach of the Learned Trial Court in rejecting the evidence of P.W.40, in our view, is clearly contrary to law and the materials on record. In the first instance, it is a settled principle of law that the evidence of a hostile witness need not necessarily be discarded. All that the Court is required to do is to be more cautious and explore corroborations for reassurance. The plea taken by the witness in his cross-examination ought to have been considered in the light of the glaring evidence of the Chief Judicial Magistrate, P.W.52, whose



evidence sets out the details of the procedure followed by her as prescribed by law. We may reproduce the relevant portion of her evidence which are as follows:-

"..... Thereafter on 31.12.2003 the I.O again submitted another application praying that the statement of witness Man Bdr. Rai also be recorded in connection with the same case. Exhibit- 31 is the said requisition and exhibit. 31/a is my signature. The witness Man Bdr. Rai was thereafter asked several questions as per the prescribed format to ascertain the voluntary nature of his statement and informed he was not bound to make any such statement. He was then giving two days time to reflect after which he was directed to appear on 2.1.2004, if he is still desired to give his statement. Exhibit- 32 consisting of (sic) of 3 pages are the questions put to him bearing my signatures marked exhibit- 32/a & b. Said Man Bdr. Rai thereafter appeared on 2.1.2004 after which I recorded his statement on oath. Exhibit- 26 consisting of 3 pages is his statement bearing his signature already marked exhibit-26/a to c are the singatures (sic) of Man Bdr. Rai and exhibit- 26/d is my signature. Exhibit- 26/e is also my signature undere (sic) the memorandum prepared by me.

....."

(viii) We have examined Exhibit 32, the form for recording confessional statement, which sets out the specific questions put by the Magistrate and the answers given by P.W.40, Man Bahadur Rai which reads as under:-

"FORM FOR RECORDING CONFESSION STATEMENT
BEFORE JUDICIAL MAGISTRATE 1ST CLASS, WEST SIKKIM
AT GYALSHING.

STATEMENT OF P.W/Aced- Man Bdr. Rai
U/S 164 Cr.P.C.

1. Aced/Witness Man Bdr. Rai S/O Hasta Bdr. Rai,
Age 37 is brought by appears on his own of Kyongsa,
West Skm before me at my court at 3.30 hours to



have a statement recorded. A letter memo No. _____ dated 31/12/04 from I.O. Shri S. R. Shenga, Kaluk P.S. P.S. which is attached to the record.

2. Witness is placed in custody of peon Kalu Bhutia and ~~S.I/Head constable~~ is directed to leave the premises. I have satisfied myself that there is no police man in the Court or in any place where the proceeding could be seen or heard except with peon, not concerned in the investigation of the crime as are necessary to guard the witness.

Q.(1). I am a Magistrate and have no concern with the police. Have you understood ?

Answer: YES.

Q.(2). Have you any complaint of ill treatment against the police or other person responsible for bringing you to the court ?

Answer: NO.

Q.(3). I desire to examine you. Do you consent (sic) to it ?

Answer: N.A.

The result of examination is this namely/-

Q.(4). Do you wish to make any statement ?

Answer: YES.

Q.(5). Do you want to consult an Advocate of your choice before proceeding any further ?

Answer: NO.

Q.(6). You are not bound to make a statement or there is no compulsion that you should make a statement. Have you understood ?

Answer: YES.

Q.(7). If you make a statement then it will be taken down and it may be used against you as evidence. Have you understood this ?

Answer: YES.

Q.(8). Have the police or any other person threatened you to make a statement ?

Answer: NO.

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Q.(9). Have the police or any other person promised you that lesser punishment will be awarded to you/accused if you make a statement or that accused will be acquitted?

Answer: NO.

Q.(10). Have the police or any other person given you any allurements to make statement ?

Answer: NO.

Q.(11). Are you are under pressure of the police to make statement U/S 164 Cr.P.C. ?

Answer: NO.

Q.(12). Do you still desire to make statement ?

Answer: YES.

Q.(13). When did it first occur to you that you should make statement and why did it occur to you ?

Answer: From this morning. I want to state all that I know and all that I have heard about the murder.

Q.(14). Why are you making a Statement ?

Answer: Because they, Rakesh, Roshan, Tenzing and Purna Bahadur Subba have committed a murder.

Q.(15). Are you making your statement voluntarily ?

Answer: YES.

Q.(16). Before you make any statement you are given 2 days/~~Month~~ time for reflection. You will not keep in touch with the police. Have you understood all this ?

Answer: YES.

P.W. is informed that he is given 2 days/~~Month~~ time for reflection. He/She is further informed that he will not mixed around with any police or any other person and is accordingly sent home on his own. He shall again appear before me on 2.1.2004 at 09.30 a.m.

Sd/-
SIGNATURE
JUDICIAL MAGISTRATE(WEST)

Sd/-
DATED 31/12/04"



(ix) Apart from the above, even in the deposition made before the Court, he gave the following statement on being cross-examined by the Additional Public Prosecutor and the Counsel for the Respondents:-

"X.X.X. By the learned P.P. Shri J. B. Rai.

In connection with this case police recorded my 161 statement. My statement was also recorded by the Judicial Magistrate, West at Gyalshing under Section 164 Cr. P.C. I had signed on the statement recorded by Judicial Magistrate, West at Tikzuk. Exhibit- 26 consisting of five pages is the said statement given by me to the Judicial Magistrate, West in connection with this case and exhibit- 26/a, b, & c are my signatures thereon. The exhibit- 26 is my true statement that I had given to the Judicial Magistrate, West at Tikzuk, in connection with this case. Marked 'A' consisting of three pages is my statement recorded by the Investigating Officer, under Section 161 Cr. P.C. It is my true statement. The same fact I had stated to the Judicial Magistrate, West at Tikzuk."

"X.X.X. by the accused Nos. 1 & 2 through Id. Counsel Shri Bandhan Rai.

..... It is true that I gave my statement before the Magistrate under the advise (sic) of the police.
It is not a fact that police instructed me as to what I was to state before the Magistrate.
..... It is true that oath was administered to me by the Magistrate before recording my statement. It is not a fact that my deposition today is false."

[underlining mine]

(x) In view of the above, rejection of the statement on the ground of it being made under threat or coercion of the police and, therefore, not voluntary



appears to be baseless and also in complete disregard of the law. Under Section 80 of the Evidence Act there is a presumption of genuineness of a document produced as record of evidence. Section 80 which we may reproduce for convenience reads as under:-

"80. Presumption as to documents produced as record of evidence.— Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

(xi) In the case of ***Madi Ganga vs. State of Orissa*** : ***AIR 1981 SC 1165*** we find support of this proposition where it has been held as under:-

"5. The learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain's submission that the learned Magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. Shri Jain submitted that if the Magistrate had been examined as a witness, the accused might have been in a position to show, by cross-examination that the confession recorded by the Magistrate was not voluntary. The Magistrate has appended a certificate that he was satisfied that the

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confession was voluntary. No circumstance has been brought out in the evidence justifying the calling of the Magistrate as a witness."

[emphasis supplied]

It, therefore, follows from the above that in the present case the entire exercise in examining the Magistrate who recorded the statement Exhibit 26 was an exercise in futility as no circumstances had been brought out to justify calling the Magistrate as a witness. We find from Exhibit 32 that the Learned Magistrate had put all the necessary questions to the accused to satisfy that the confession was voluntary and has also appended the necessary certificate.

(xii) Apart from the above, the finding that P.W.50, Bhim Sila Gautam, could not identify the accused persons is grossly contradictory to her own finding at paragraph 76 of the judgment where it has been noted that the witness identified accused No.4 (Tenzing Tamang), i.e., Respondent No.2, in the present Appeal, as one of the accused although she was unable to identify the others.

(xiii) On the evidence of P.Ws.16 and 17, the Learned Trial Court appears to have overlooked the fact that the evidence of these two witnesses is not as



regards the identification of the accused persons but that of the Maruti Car, relevance of which has already been discussed at length earlier and, therefore, need not be repeated.

(xiv) The rejection of the evidence as regards the mobile phone MO-VIII by P.W.36 having been sold to the deceased S. D. Bhutia on the ground stated, in our view, is unacceptable in law considering the overwhelming evidence of P.Ws.30, 33, 45 and 36, and apparently in conflict with the Trial Court's own finding that their evidence stood undemolished in cross-examination.

(xv) These apart, we notice that the finding is bereft of any material particulars and obviously vague. In order to appreciate this, we may reproduce below the relevant portions of the impugned judgment dealing with the disclosure statements of the various accused persons:-

"104.

Exhibit-3 is the disclosure statement of the accused Rakesh Rai dated 23.12.2003. It is argued by the defence counsel that the alleged statement was recorded on 23.12.2003 but he was arrested only on 27.3.2003. On pain of repetition it is clear from the discussion that custody is a question of fact and not of law. The moment an accused person comes into the hands of a police officer his movements are

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restricted and he is no longer at liberty. When such a condition is reached, it tantamounts to being in the custody of the police. The evidence of the I.O clears the air with regards to the status of the accused Rakesh Rai as to whether he was in custody or not. The I.O has stated "In fact this disclosure statement Exhibit-3 was recorded by me when he was already arrested in connection with Sadar P.S case No. 135(03)03 dated 30.10.2003 under Section 457/380 of the I.P.C and was being taken for the recovery of stolen articles." Thus the accused was already in police custody.

105. The statement of the accused is recorded in the Nepali vernacular which roughly translated would be that:- about 23/24 days ago he went from Siliguri in his vehicle WNC 525 Maruti car alone to Jorethang. At Jorethang he met Tenzing Tamang thereafter they both proceeded to Soreng and from Soreng they went towards Dentam to look around "Sunguray pool". That they were returning towards Geyzing when after crossing the Dentam Bridge about half a kilometer from the bridge and towards Pelling they saw one boy and girl sitting. It was around 7 p.m. As the boy looked like his driver friend Sonam from Pelling he called out to him who responded by using abusive words and assaulted the accused. Quickly the accused and Tenzing got into his vehicle and after reaching a curve on the road they parked their vehicle, took out a tyre lever and went towards the place where the boy and girl were sitting. Then with the tyre lever first Rakesh Rai assaulted the deceased and thereafter Tenzing Tamang assaulted the deceased then they took the girl to Siliguri Himalayan Hotel in the same vehicle and kept her. After 2/3 days they took her in the vehicle near the "Baghpool" and both of them killed her with the tyre lever and threw her below the road. That if the dead body was still there he could show them. He had sold the vehicle and if the vehicle is available he could show the tyre lever also."

106. Exhibit-10 is the disclosure statement of accused Tenzing Tamang which roughly translated would be that:- on a day and date he did not remember he met Roshan Rai, Rakesh Rai, Purna Subba and they went in Rakesh Rai's Maruti car and when they traveled (sic) from Dentam pool they saw one girl and boy sitting. That boy was then killed by him, Rakesh Rai and Roshan Rai with a wheel wrench and shocker by

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assaulting him. That the girl was taken and later near "Baghpool" he and Rakesh Rai assaulted her with a jack lever and killed her and her dead body was thrown below the road. That the vehicle of Rakesh Rai had jack levers one wheel wrench and one shocker. Later Rakesh told him that he had purchased one tyre lever but he did not see it. After two days of killing the girl Rakesh sold his vehicle but not the wheel wrench. Then one day Rakesh was arrested in Siliguri while the three of them escaped to Kalimpong and stayed there. He was carrying a red bag inside which there was one jacket, one horlicks bottle, one jack lever and one wheel wrench. From Kalimpong they all came to Soreng via Singtam. He and Roshan stayed at Soreng whereas Purna went to his maternal aunt's house at Daramdin. After staying in Soreng when he and Roshan were going to Daramdin he put Roshan's small black bag also inside his bag and carried it. On reaching Daramdin in the house of Purna maternal aunt he and Roshan were arrested by the police. The bag that he was carrying was left in the house of the said aunt with the above articles which he said he could show the police.

107. P.W-14 Dhaney Thami has stated that the tyre lever was seized by the O.C Kaluk P.S in his presence and in the presence of another person which he identified as M.O-VI. The said weapon of offence was shown by the accused Rakesh Rai himself from inside the Maruti car. The recovery of this article was not demolished in his cross examination.

108. P.W-26 Dipu Sunar was the driver who dived into the river and recovered M.O-VII the tyre lever. P.W-27 Karzang Bhutia also witnessed the recovery of MO-VII the wheel wrench taken out from the river on the basis of the statement of the accused Roshan Rai. The evidence of the said three witnesses have already been discussed in detail earlier.

.....

110. Thus in the instant case the disclosure statement of the accused persons are relevant only to the fact discovered i.e the tyre lever from the vehicle WNC 0525 and the articles kept in the bag as stated by Tenzing Tamang which include M.O-IX to M.O-XVII from the house of Devi Maya Pradhan. The other self incriminating

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statements cannot be taken into evidence being hit by the provisions of Section 27 as discussed earlier."

[underlining mine]

○ (xvi) When, therefore, the validity of the disclosure statements and the consequential recoveries have been found to be established, we are at a loss to understand as to how the Learned Trial Court has held that those cannot be admitted in evidence. Obviously, they are mutually conflicting and the Learned Trial Court, therefore, has fallen in error in holding so.

(xvii) We are conscious of the law that mere discovery of fact as a consequence of a disclosure statement under Section 27 of the Evidence Act is not relevant and that its relevance must be established by other evidence. Keeping this position of law in view, we find that even if we are to discount the evidence regarding the recovery, it does not detract from the other well-established circumstantial evidence which we find beyond reproach.

9 16(i). This leads us to another aspect of the case faintly raised by Mr. N. Rai, Learned Senior Counsel for the Respondents as regards the recovery of the tyre lever which we find necessary to address as being of



some significance. On the basis of the disclosure statement of the Respondent No.1, Exhibit 3, that of the Respondent No.2, Exhibit 10 and of the juvenile convict Roshan Rai, Exhibit 8, we find that there are three tyre levers that were recovered, namely, MO-VI, MO-VIII and MO-VII respectively, from different places, i.e., MO-VI from the luggage boot of the Maruti Car WNC-525 at the Bhaktinagar P.S., MO-VII from the bag concealed under the bed in the house of P.W.35 at Daramdin Bazar and, from the river bed at Singtam MO-VII. We find that it is not clear as to which of these weapons were used to assault the deceased Sonam Dadul Bhutia and Bina Subba. The question that would then arise for consideration is as to whether this deficiency is such as to vitiate the entire case of the prosecution. In our view, it is not for the reasons stated hereafter.

(ii) Application of the doctrine of probability is not foreign to criminal cases. In Murray's English Dictionary taken from the Law of Evidence by Sarkar, 17th Edition, 2010, probability means "the appearance of truth or likelihood of being realised which any statement or event bears in the light of present evidence". In the

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case of ***State of U.P. vs. Krishna Gopal : AIR 1988 SC***

2154, it has been held as follows:

"13.

It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II" : Glanville Williams : Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342)).

"The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied

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together. The one piece of evidence may confirm the other."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts may be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice."

(iii) We may also note the appreciation of law enunciated in the case of **Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and Others : (2009) 9 SCC 221:-**

"110. Kunal had not only obtained opinion of a large number of experts, he examined some of them including Dr. Anil Shinde PW 9, Dr. Udadia PW 10 and Dr. Salil Kumar Bhattacharya PW 11. The respondents did not examine any expert. They, however, relied upon some authorities to which we have referred to heretofore. The onus of proof, therefore, on a situation of this nature shifted to the respondents.

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111. While we say so we must place on record that we are not oblivious of the fact that the principle of res ipsa loquitur may not be strictly applicable in a criminal case, although certain authorities suggest application of the said principle.



112. In *Spring Meadows Hospital v. Harjol Ahluwalia* this Court has held as under: (SCC p.47, para 10)

"10. Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly."

However, in *Rattan Singh v. State of Punjab* this Court has held: (SCC p.720, para 3)

"3. This, however, does not excuse the accused from his rash driving of a 'blind Leviathan in berserk locomotion'. If we may adapt the words of Lord Greene, M.R.: 'It scarcely lies in the mouth of the truck driver who plays with fire to complain of burnt fingers'. Rashness and negligence are relative concepts, not absolute abstractions. In our current conditions, the law under Section 304-A IPC and under the rubric of negligence, must have due regard to the fatal frequency of rash driving of heavy duty vehicles and of speeding menaces. Thus viewed, it is fair to apply the rule of *res ipsa loquitur*, of course, with care. Conventional defences, except under compelling evidence, must break down before the pragmatic Court and must be given short shrift. Looked at from this angle, we are convinced that the present case deserves no consideration on the question of conviction."

113. In *B. Nagabhushanam v. State of Karnataka* this Court held as under: (SCC p.734, para 12)

"12. Reliance placed by Mr Kulkarni on *Syad Akbar v. State of Karnataka* is not apposite. It proceeded on the basis that doctrine of *res ipsa loquitur* *stricto sensu* would not apply to a criminal case as its applicability in an action for injury by negligence is well known. In *Syad Akbar* this Court opined: (SCC p. 41, para 30)

'30. Such simplified and pragmatic application of the notion of *res ipsa*

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loquitur, as a part of the general mode of inferring a fact in issue from another circumstantial fact, is subject to all the principles, the satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. These are: *Firstly*, all the circumstances, including the objective circumstances constituting the accident, from which the inference of guilt is to be drawn, must be firmly established. *Secondly*, those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused. *Thirdly*, the circumstances should make a chain so complete that they cannot reasonably raise any other hypothesis save that of the accused's guilt. That is to say, they should be incompatible with his innocence, and inferentially exclude all reasonable doubt about his guilt.' "

There cannot, however, be any doubt whatsoever that in the civil appeal the said principle is applicable. It has clearly been held by this Court that the onus of proof would shift on the respondents."

(iv) Again in the case of **Ram Bihari Yadav vs. State of Bihar and Others : AIR 1998 SC 1850** it has been held that the probative value of evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case.

(v) We also find that in the case of **Mangal Hansada vs. The State ; 1985 CRI.L.J. 1589 (Orissa)** it has been held that "it is not necessary in every case that the weapon of attack must have to be recovered in a case of murder and non-recovery of the weapon of



attack would not affect the other evidence if found to be reliable and acceptable".

17. There is another aspect of the matter that requires consideration which is more for the purpose of reminding ourselves of the scope of Section 27 of the Evidence Act. In this context, we may reproduce a passage from the decision of ***Bodhraj alias Bodha and Others vs. State of Jammu & Kashmir : (2002) 8 SCC 45*** which reads as under:-

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"18. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events.



The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Pulukuri Kotayya v. Emperor* is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See *State of Maharashtra v. Damu Gopinath Shinde*). No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given."

18. Considering the above proposition of law, we may now deal with the question before us. We have found that the weapon of offence allegedly used is "tyre lever/wheel wrench". The nature of the injury found on the body of the deceased as indicated in the inquest report Exhibit 4 and the autopsy report Exhibit 13 and, the opinion of the Medico-Legal Expert, P.W.37, Dr. S. D. Sharma, to the effect that the death as being caused by shock due to multiple injuries on the face and head produced by "blunt weapon", clearly leads one to reasonably infer, by application of the doctrine of



probability, that one or all of those weapons were used. This, in our view, is sufficient to set at rest the question. We are reassured of this when we find the other circumstantial evidence, with which we shall deal hereunder, quite reliable and acceptable.

○ **19(i).** We find that Section 34 IPC has been invoked in the present case, there being four persons involved in the commission of the offence. The underlying principle of Section 34 IPC is that common intention between the participants in the crime is an essential element and, such intention implies a pre-arranged plan and acting in concert pursuant to a pre-arranged plan. It is, however, also a settled position that a common intention may develop at the spur of the moment in course of the commission of the offence. Whether all the persons who made some overt attack as a result of which some members of the prosecution party died, shared the common intention to do so would be a question of fact and it is difficult to give any direct proof of existence of such common intention and, can only be inferred from circumstances. In this regard, we may usefully refer to the case of **Ram Asrey vs. State of U.P. : 1993 Supp (4) 218.** In the case of **Balram Singh and Another vs.**

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State of Punjab : AIR 2003 SC 2213 the law as regards

Section 34 IPC has been reiterated reads as under:

"14. The argument of learned counsel that on facts of this case the High Court could not have invoked S. 34 to convict these appellants, seems to be based on the decisions of this Court in *Badrudin v. State of U.P.* (1998 (7) SCC 300) and *Ramashish Yadav and others v. State of Bihar* (1999 (8) SCC 555). In those cases, on facts and noticing the nature of involvement of the accused conviction under S. 34 I.P.C. was found to be improper, hence, set aside the said conviction, but in regard to the applicability of S. 34, it was held that all that the prosecution has to establish is that there was a prior concert or meeting of minds between the accused persons and such prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. This Court in those cases also held that the common intention can also be developed at the spur of the moment but there must be pre-arrangement or pre-meditated concert. In the instant case it is the prosecution case that at the time of the incident when deceased and P.W. 1 were walking towards their house the accused persons out of which A-1 and the appellants herein were armed with deadly weapons, with the help of acquitted accused persons, waylaid the deceased. The prosecution says that while A-1 attacked the deceased, P.W. 1 was prevented by the appellants herein from preventing the said attack on her father and when P.W. 2 came to the spot and tried to help his father, he was also assaulted with a view to thwart his effort to protect his father. This itself goes to show that when these accused persons gathered in front of the house of A-1 and proceeded to assault the deceased, all of them had shared the common intention of causing death of the deceased. Though these appellants did not assault the accused it is clear that the manner in which they were armed and the manner in which they prevented P.Ws. 2 and 3 from protecting their father by causing them grievous injuries also shows that this attack on P.Ws. 2 and 3 was aimed at ensuring that A-1 was done away with, and the deceased did not get sufficient protection, therefore, we are of the considered view that the High Court having acquitted the 3 of accused persons was justified in invoking S. 34 to uphold the conviction of the appellants herein."

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(ii) In the case of ***Pandurang and Others*** vs. ***State of Hyderabad : AIR 1955 SC 216*** it has been held that "all that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference" [underlining supplied]. This law has been followed in the case ***Alakunta Narsimloo and Others*** vs. ***State of Andhra Pradesh : 1994 CRI.L.J. 1721 (A.P.)*** in which a Bench of Andhra Pradesh High Court has held that when a murder takes place, and when there are more than one accused, it is not necessary for the prosecution to lead evidence as to which accused has dealt which blow on what part of the body of the deceased. Any inquiry into the question as to who among the accused has dealt the fatal blow is clearly not warranted. We are persuaded to agree with this proposition of law. Therefore, having regard to the legal position alluded to above, we have no hesitation in holding that the Respondents would be liable under Section 34 IPC also.

20. The detailed analysis of the reasons given by the Learned Trial Court in the impugned judgment has been necessitated in order to satisfy the requirement of law that ordinarily, in an Appeal against acquittal, this



○ Court ought not to interfere, except in circumstances that are compelling and where it is to be ensured that there is no failure of justice. We have already set out the ambit and scope of the powers of an Appellate Court in an Appeal against acquittal in the opening part of this judgment and, therefore, need not be repeated for the sake of brevity.

21. It can be seen that from the discussions as regards the analysis and conclusion of the evidence of the Learned Trial Court, the impugned judgment is bereft of any coherence but rather scattered. Although, it has been correctly found by the Learned Trial Court that the case is solely based upon circumstantial evidence, neither do we find any circumstances set out by the prosecution nor has the Trial Court made any effort to do so, by which it has arrived at the conclusion in paragraph 159 of the impugned judgment that the prosecution had failed to link the chain of circumstances to the accused by any evidence.

✍ **22.** In such a situation, this Court perforce had to undertake the onerous task of examining the entire case as done hereinbefore in order to find out as to whether the prosecution has been successful in establishing the



charges against the Respondents in the light of the evidence on record and, as to the correctness of the findings of the Learned Trial Court contained in the impugned judgment on some of the aspects which, in our view, are vital.

○ **23.** Upon consideration of the matter in the light of the facts and circumstances discussed above, we find that the following circumstances appear to have been proved against the Respondents which include the ones set out by the Additional Public Prosecutor which are as under:-

(i) On 27-11-2003, the deceased Sonam Dadul Bhutia and Bina Subba had travelled towards Dentam with the accused Praveen Subba and accused Abishek Rai.

(a) This fact stands established by the evidence of Navin Gurung appearing as P.W.1, Sanjeev Baraily, P.W.2, Ms. Regmith Lepcha, P.W.4, Passang Lama, P.W.8, Sonam Dorjee Bhutia, P.W.9, Chandra Bahadur Subba, P.W.10, Dhan Maya Subba, P.W.11, Deo Man Subba, P.W.19, Kailash Rai, P.W.20 and Dinesh Pradhan, P.W.21.

9 (b) While the evidence of P.W.1, Naving Gurung, P.W.2, Sanjeev Baraily, P.W.19, Deo Man Rai, P.W.20,



Kailash Rai and P.W.21, Dinesh Pradhan, are direct evidence to the fact of the deceased Sonam Dadul Bhutia and Bina Subba travelling to Dentam from Pelling, the evidence of the others, namely, P.W.4, Regmith Lepcha, P.W.9, Sonam Dorjee Bhutia, P.W.10, Chandra Bahadur Subba, P.W. 11, Dhan Maya Subba corroborate them.

- (ii) On 27-11-2003 Sonam Dadul Bhutia followed accused Praveen Subba and others to Dentam

It was in a white Savari Jeep No.SK-04/4906 belonging to and driven by Praveen Subba, the accused No.1, that the deceased Bina Subba along with P.W.19, Deo Man Subba, P.W.20, Kailash Rai and accused Abishek Rai, had travelled towards Dentam while the deceased Sonam Dadul Bhutia followed them in a vehicle bearing registration No.SK-04/4601 driven by P.W.21, Dinesh Pradhan and caught up with them at Changay. As per the evidence of P.W.21, Dinesh Pradhan, the deceased Sonam Dadul Bhutia, got out of his vehicle and boarded the one driven by Praveen Subba, accused No.1, and proceeded towards Dentam, while Deo Man Subba, P.W.19 and Kailash Rai, P.W.20, boarded his and returned to Pelling. These facts have also been deposed by the accused No.1, Praveen



Subba, P.W.19, Deo Man Subba and P.W.20, Kailash Rai and P.W.21, Dinesh Pradhan, thereby fully corroborating P.W.21. The evidence of other prosecution witnesses referred to above are corroborative of the aforesaid fact.

- (iii) P.W.1, Navin Gurung saw accused Praveen Subba and others in his hotel on 27-11-2003 at Dentam

P.W.1, Navin Gurung, owner of "Surya Hotel" at Dentam Bazar, West Sikkim, deposed that at about 4.00 p.m. of 27-11-2003, the deceased Sonam Dadul Bhutia, one girl whose name he did not know, the accused No.1 Praveen Subba and a boy having frail feature had come to his hotel and had beer, rum and cigarette, etc., spent about 35/45 minutes and, after payment of the bill by the deceased Sonam Dadul Bhutia, they left. Half an hour later, accused No.1 Praveen Subba returned again to his hotel and after having some beer left by a Savari vehicle parked in front.

- (iv) P.W.2, Sanjeev Baraily and his friends saw Praveen Subba and Abishek Rai twice in the late evening of 27-11-2003 in a Savari vehicle

P.W.2, Sanjeev Baraily, a worker engaged in the construction works at the forest beat office at Dentam, deposed of the fact that in the last week of November, 2003 at about 6.30 p.m., accused Praveen Subba and



Abishek Rai with beer bottle in their hands had come in a Savari Jeep from the Dentam side and later at about 7.30/8.00 p.m. the Savari Jeep was again seen coming from the Dentam side and asked about a house where the marriage was taken place. They asked him and his friends to accompany them in search of it at village Mangmo but, returned without being able to attend the marriage. He identified the accused persons in Court.

- (v) P.W.4, Ms. Regmith Lepcha saw accused Praveen Subba and Abishek Rai in a white Savari vehicle at 7.15 p.m. on 27-11-2003 and later moving around near the Dentam Bridge

P.W.4, Ms. Regmith Lepcha, deposed that at the end of November, 2003, on a Thursday at about 7.15 p.m., she was on the road side with her sister waiting for their mother who was returning from Jorethang when a white Savari Jeep came and stopped in front of them and the two boys who were in the vehicle offered them a lift which they refused. These boys introducing themselves as 'Praveen Bhutia' and 'Abishek Lepcha' and, asked whether they had seen a boy and his girl friend in the vicinity of the place. When they informed them that they did not see them they proceeded on saying they were required to attend the birthday party



of their friend and were seen moving around near the Bridge.

- (vi) P.W.8, Passang Lama saw one white Savari vehicle near the Dentam Bridge at 8.15 p.m.

P.W.8, Passang Lama, a driver by profession, while returning driving a taxi jeep from Jorethang to Intek which is across Dentam Bazar, saw one white Savari vehicle near Dentam Bridge at about 8.15 p.m. but did not see its occupants.

- (vii) A white Savari vehicle came to the house of Sonam Dorjee Bhutia at 6.30/7.00 p.m.

P.W.9, Sonam Dorjee Bhutia, deposed that he saw a Maruti Car parked near the Dentam Bridge at about 4.00 p.m. on a Thursday. On that day at about 6.30/7.00 p.m., a white Savari vehicle came to his house and asked him if he had seen one boy and a girl in and around the place and left thereafter heading for Pelling.

- (viii) The evidence of P.W.10, Chandra Bahadur Subba and P.W.11, Dhan Maya Subba, the parents of the deceased Bina Subba is relevant to the extent that their daughter Bina Subba had left her house for Sardong Busty to visit her sister carrying two packets of



"Silam" and a pair of kurta-pyjama and that these articles MO-II, MO-III and MO-IV respectively, identified by P.W.11, Dhan Maya Subba, were the ones carried by their daughter Bina Subba on that fateful day.

(ix) A Maruti Car was seen parked near the Dentam Bridge by Sonam Dorjee Bhutia, P.W.9 at about 4.00 p.m. on a Thursday about a year ago (the deposition having been recorded on 06-11-2004) and identified MO-I parked outside the Court building as the one seen by him.

(x) P.W.16, Tsering Kee Chankapa, a school teacher, Peeling Senior Secondary School, West Sikkim, saw a Maruti Car with steel gray colour bearing registration number beginning with alphabets "WNC" near the Dentam Bridge on 27-11-2003 in the evening at about 4.00/5.00 p.m. while returning from work to her home at Dentam.

(xi) P.W.17, Manorath Adhikari, a Junior Engineer, P.W.D. at Dentam who was travelling with P.W.16 also saw the Maruti Car WNC-525. Both P.W.16 and P.W.17 identified Maruti Car, MO-I parked outside as the one that they had seen.



(xii) P.W.50, Bhim Sila Gautam, who runs a hotel at Bermiok Bazar, West Sikkim, stated that on 27-11-2003 at about 3.00/4.00 p.m. a Maruti Car bearing registration No.WNC-525 in which 3/4 small boys were travelling came to her hotel and the boys had some beer and identified the Respondent No.2, Tenzing Tamang, as one of them who, as per her, was a daily wager.

(xiii) Maruti Car registration No.WNC-525 crossed the Melli Check Post at 2230 hrs. for Siliguri.

P.W.12, C/1255 D. P. Subba posted at Melli Check Post on 27-11-2003, deposed that at about 2230 hrs. one Maruti Car No.WNC-525 crossed Melli Check Post from the Jorethang side and reported to W/C Lakpa Tshering Sherpa, P.W.13, who made the entry in the Register. The Maruti Car thereafter was allowed to pass through the gate and on his enquiry the driver of the Maruti Car informed him that he was travelling from Jorethang and was going to Siliguri. He identified the Check Post Register MO-V and MO-V/a at page 40 as the entry of Maruti Car WNC-525. P.W.13, WC/1811 Lakpa Tsh. Sherpa corroborated the evidence of P.W.12.

(xiv) The disclosure statement of Respondent No.1, Rakesh Rai and recovery of tyre lever from the Maruti Car WNC-525



The disclosure statement of Respondent No.1, Rakesh Rai, marked Exhibit 3 on the basis of which the tyre lever MO-VI was recovered from the luggage boot of the Maruti Car No.WNC-525 in the premises of Bhaktinagar P.S., Siliguri, on being shown by the Respondent No.1. These facts were proved by P.W.14, D. Thami. P.W.49, K. R. Rai, who had also accompanied the Investigating Officer of the case and others to Siliguri during the investigation fully corroborates the evidence of P.W.14. He identified the Respondent No.1 and is one of the witnesses to the recovery of the dead body of Bina Subba at the instance of the Respondent No.1. P.W.53, Siva Kumar Chhetri, Head Constable of Gyalshing P.S., another member of the team accompanying the I.O., is a witness to the recovery of the Maruti Car WNC-525, MO-I from the Bhaktinagar P.S., Siliguri vide Seizure Memo Exhibit 25.

(xv) The disclosure statement of Respondent No.2, Tenzing Tamang, marked Exhibit 10, rendered in the presence of P.W.31, S. N. Agarwal and, the recovery of jack lever, MO-XIII, and wheel wrench, MO-XII, and some other articles from the house of Devi Maya Pradhan, P.W.35, the aunt of juvenile convict Purna



Bahadur Subba at Daramdin vide Exhibit 11. These recoveries were made on being led to the place and shown by the Respondent No.2, Tenzing Tamang, as per evidence given by P.W.31 and P.W.35.

(xvi) (a) The disclosure statement Exhibit 8 of Roshan Rai, the juvenile convict, who is the younger brother of Respondent No.1, and the recovery of the tyre lever/wheel wrench, MO-VII, from the river at Singtam vide Seizure Memo Exhibit 7 on being shown by the juvenile convict Roshan Rai. These facts have been stated by P.W.27, Karzang Bhutia, who witnessed Roshan Rai giving the disclosure statement at the Kaluk P.S. and later the recovery of the Exhibit from the Singtam river.

(b) P.W.29, Ganga Ram Chettri who was with P.W.27 corroborates the evidence of the latter and, P.W.26, Dipu Sunar, corroborates the fact of recovery Exhibit MO-VII from the place in the Singtam river where the objects were thrown as pointed out by the juvenile convict Roshan Rai as it was he who had dived into the river to retrieve it.



(xvii) The statement under Section 164 Cr.P.C. given by P.W.40, Man Bahadur Rai, the elder brother of the Respondent No.1, Rakesh Rai, who has categorically testified of the fact of the Respondent No.1 having purchased in his name the Maruti Car WNC-525 and, the extra-judicial confession made by the Respondent No.1 to him at the "Himalayan Rest House" of him having committed the murder of Sonam Dadul Bhutia at Dentam. This witness has further deposed of the sale of the Maruti Car by the Respondent No.1 to one Anil Chandra Roy.

Anil Chandra Roy appearing as P.W.38, Pradeep Saha as P.W.30 and Pradeep Roy as P.W.45 have corroborated this fact.

(xviii) The Respondents and, the juvenile convicts Roshan Rai and Purna Bahadur Subba, stayed in the "Himalayan Rest House" Siliguri from 09-12-2003 to 21-12-2003.

(a) It has come in the evidence of Dipankar Debnath, P.W.41, the proprietor of the "Himalayan Rest House", that in the month of December, 2003, on 'Rai' (the witness pointed at Respondent No.1, Rakesh Rai), had come with his three friends and stayed in his hotel and as per the entries at Sl. No.2049 of the hotel register MO-XIX they had stayed from 09-12-2003 to



21-12-2003 in Room No.201. Mention also was made of their having stayed in the hotel on other dates which, in our view, is not relevant for the purpose of this case. It is, however, pertinent to note that as per the witness, the Respondent No.1 used to get his name recorded as "Bishal Rai". It is also in his evidence that the Respondent No.1 was unable to pay Rs.100/- and had left his bag, identified as MO-XX, in the hotel which were later seized by the police along with its contents. The evidence has remained firm in cross-examination.

(b) P.W.42, Dinesh Rajbor, Manager of the "Himalayan Rest House", Siliguri in his evidence has unequivocally corroborated P.W.41 and also identified Respondent No.1 as the one who has stayed in his Hotel as "Bishal" and the Respondent No.2 as the one who used to accompany the Respondent No.1 during their stay in the Hotel. Their evidence have further been corroborated by P.W.43, Ashok Ghosh, the former Manager of the "Himalayan Rest House" and also proved the relevant entries in the Hotel Register MO-XIX.

(c) The evidence of P.Ws. 41, 42 and 43, pertaining to the Respondent No.1 and three others having stayed in the 'Himalayan Rest House' during the



period 09-12-2003 to 21-12-2003 assumes significance as it was during that period that the sale transaction of Maruti Car WNC-525 took place and that, as per the evidence of P.W.38, he took delivery of the vehicle on 21-12-2003 in order to go to Salugara, Siliguri, in connection with the marriage of his younger brother, Narayan Roy, P.W.39 from whom it was seized by the Bhaktinagar P.S. on that day along with its documents which included a xerox copy of Voter Identity Card of P.W.40 marked 'X' and receipt in the name of his brother, P.W.38, Exhibit 20.

(d) That the accused checked out from the hotel "Himalayan Rest House" on 21-12-2003 is significant in view of the arrest of the Respondent No.1, Rakesh Rai, a day after i.e., 22-12-2003 as revealed from the evidence of PI, Nima Chader Bhutia, P.W.46.

(xix)(a) The recovery of the hotel registers of 'Hotel India', 'Vishal Lodge' and the 'Himalayan Rest House' being MO-XVIII, MO-XVIII/A and MO-XIX respectively. The entries made in 'Hotel India' and 'Vishal Lodge' show that the four accused persons, namely, the Respondents No.1 and 2, and the juvenile convicts, Roshan Rai and Purna Bahadur Subba, had checked in



on 28-11-2003 onwards and stayed there for a number of days. The seizure of the hotel register of 'Hotel India' Exhibit MO-XVIII has been proved by Constable Kalyan Bhowmik, P.W.32, of Kotwali P.S., West Bengal, and Constable Nar Bahadur Tamang, P.W.44 of Jalpaiguri P.S. The hotel register Exhibit MO-XVIII/A in respect of 'Hotel Vishal' has been proved by P.Ws.34, 32 and 44.

(b) This circumstance has to be considered in the light of the fact that the deceased Sonam Dadul Bhutia and Bina Subba went missing from the evening of 27-11-2003 and on 28-11-2003 Sonam Dadul Bhutia was found dead. Further that in the night of 27-11-2003, the Maruti Car WNC-525 which had been seen in the vicinity of the place where the body of the deceased was found, had crossed Melli Check Post and as per the evidence of P.W.12 it was heading for Siliguri.

(xx) Seizure of Maruti Car WNC-525 at Siliguri.

Next is the seizure of Maruti Car WNC-525 from the possession of P.W.39, Narayan Roy at Salugara, Siliguri on 21-12-2003 by the Bhaktinagar P.S. Then on 23-12-2003, the I.O. S. R. Shenga, P.W.54, seized it from the Bhaktinagar P.S. in presence of P.W.14, Dhaney Thami, P.W.15, D. B. Subba of Darjeeling P.S., P.W.49,



constable K. R. Rai, and P.W.51, Home Guard Mahendra Sharma of Kaluk P.S. and P.W.53 Head Constable S. K. Chettri, Gyalshing P.S.

- (xxi) The Maruti Car WNC-525 was purchased by the Respondent No.1 in the name of his brother, P.W.40, Man Bahadur Rai and sold to P.W.38, Anil Chandra Roy by the Respondent No.1.

These facts have been proved by the evidence of P.W.30, Pradeep Saha who purchased the car by advance payment of Rs.5,000/- for the price fixed at Rs.45,000/- through the broker and fellow mechanic Pradeep Roy, P.W.45; By the evidence of P.W.38, Anil Chandra Roy, the actual purchaser of the Maruti Car, dealing with the broker P.W.45 who brought the owner of the vehicle, P.W.40 in the office of the RTO, Siliguri for the necessary documentary formalities; By the evidence of P.W.39, Narayan Roy, who corroborates of the fact of purchase stated by P.W.38, Anil Chandra Roy, and the seizure of the vehicle from him by the Officer-in-Charge, Bhaktinagar P.S. from his possession for the Seizure Memo Exhibit 19.

- (xxii) Recovery of Nokia mobile phone belonging to S. D. Bhutia

The evidence of P.W.36, Tikam Sharma, considered in isolation is no doubt quite vague as to whether or not



the "S. D. Bhutia" to whom the mobile phone was sold was indeed the deceased "Sonam Dadul Bhutia" or not. However, the evidence of P.W.30, clears this doubt as we find that it was the Respondent No.1, Rakesh Rai, who had sold the very mobile phone to him through P.W.45, the middleman, who in turn sold it to P.W.33, Abhijit Ghosh, from whose possession the mobile phone was ultimately seized. Considering the entire evidence, it stands established that the mobile phone belonged to the deceased Sonam Dadul Bhutia.

(xxiii) The juvenile convicts Roshan Rai and Purna Bahadur Subba, absconding after the arrest of Respondent No.1 and later being apprehended by the O/C Kaluk P.S. at Daramdin.

(xxiv) Recovery of the dead body of Bina Subba based on the disclosure statement of Exhibit 3 of Respondent No.1 and being identified as Bina Subba by P.W.10 and P.W.11 who are her parents.

(xxv) Extra-judicial confession made by Respondent No.1 to his brother, P.W.40 in the 'Himalayan Rest House', Siliguri, during the period of sale and registration process of the Maruti Car when he



categorically disclosed of him and the other three accused persons having killed the deceased Sonam Dadul Bhutia near the Dentam Bridge on 27-11-2003, and their kidnapping of deceased Bina Subba and subsequent killing her also at Panidhara near Bagh Pool, Siliguri.

(xxvi)(a) The nature of the injury sustained by the deceased Sonam Dadul Bhutia found in the inquest report Exhibit 4 and the autopsy report Exhibit 13 which are reproduced in seriatim as under:-

"Inquest Report Exhibit 4

.....
8. Injuries on the body:- one Big injury in head, one injury on fore head, one injury near rt. eye brow, injury on right ear, brushe on both eyes, tooth of upper jaw was found missing.
.....

10. Probable cause of death:- Probably due to injury/injuries caused in head.
.....

Medical Autopsy Report Exhibit 13

- 9
- (1) Triangular contused laceration with clotted blood 2 x 2 x 1 cms over the right side of the forehead 2 cms away from the midline with depressed commuted fracture of the frontal bone, with surrounding contused grazed abrasion in an area of 8 x 6 cms.
 - (2) Irregular contused abrasion in an area of 2 x 1 cms on the left Cheek.
 - (3) Superficial irregular contused laceration in an area of 1 x 1 cms adjacent to the lateral angle of the right eye.



- (4) Irregular contused abrasion in an area of 2 x 1 cms over right cheek.
- (5) Contused laceration of the right ear lobe, horizontally placed dividing the ear lobe into two halves at the level of tragus.
- (6) Extravasation of blood in the upper eyelids of both eyes with sub-conjunctival haemorrhage.
- (7) Multiple small lacerations with surrounding contusions in an area of 6 x 6 cms on the left side of face.
- (8) Contused abrasion in an area of 2 x 2 cms.
- (9) Multiple contused lacerations of both upper and lower lips with commuted fractures of the alveolar margins of both maxilla and mandible anteriorly and loss of three in unison teeth each of both maxilla and mandible. One mobile (uprooted left upper canine) found in the mouth and preserved.
- (10) Multiple contused abrasions in an area of 7 x 6 cms. on the right side of the chin.
- (11) Contused laceration 10 x 1 cms over the parietal region, behind the fronto parietal suture with depressed commuted fracture of the underlying bones and pieces of the bone found embedded in the brain.

All injuries are ante-mortem and fresh before death."

(b) The cause of death as per opinion of the Medico-Legal Expert Dr. S. D. Sharma, P.W.37, is said to have been shock as a result of multiple injuries on the face and head produced by blunt force.

(c) He has deposed that injuries no.1 to 5 and 7 to 11 can be produced by a blunt weapon such as the one marked MO-VI, i.e., the tyre lever.



(xxvii) That the opinion in the C.F.S.L. report Exhibit 40 report of the DNA test of the teeth found at the place of occurrence Exhibit 'B' and, Exhibit 'F', i.e., the tooth preserved by the Medico-Legal Expert during the autopsy of Sonam Dadul Bhutia that the source of Exhibit 'F' and Exhibit 'B' is the deceased Sonam Dadul Bhutia.

(xxviii) Failure of the Respondents to explain the circumstances when put to them under Section 313 Cr.P.C. and choosing to give blunt denials.

(a) In spite of clear evidence, the Respondent No.1, Rakesh Rai, even denied that the Maruti Car, Exhibit MO-I, was purchased in the name of his elder brother P.W.40, Man Bahadur Rai. It is a settled position of law that in a case of circumstantial evidence resorting to giving such false or blunt denials is considered as an additional circumstance appearing against the Respondents. There are catena of decisions to support this view, but it would be sufficient to cite the following:-

(b) In the case of ***Aftab Ahmad Anasari vs. State of Uttaranchal : (2010) 2 SCC 583*** it has been held as under:



"58. This Court further notices that this Court in *Vasa Chandrasekhar Rao v. Ponna Satyanarayana* and *Geetha v. State of Karnataka* while explaining the law relating to circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination under Section 313 of the Code and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused.

59. As indicated earlier, it is proved by cogent and reliable evidence that the appellant had committed rape on the deceased and thereafter murdered her. Here in this case, the incriminating circumstances proved were put to the appellant while recording his statement under Section 313 of the Code of Criminal Procedure. In his further statement, recorded under Section 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt."

(c) We may also refer to the case of **Joseph vs. State of Kerala : (2000) 5 SCC 197**, wherein the following has been stated:

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



and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy.
....." [underlining supplied]

(xxix) Another circumstance of significance appearing against the Respondents is the admission of the juvenile accused persons, namely, Roshan Rai and Purna Bahadur Subba, of having committed the offences under Sections 302/201/34 IPC and their conviction of those charges.

24(i). To sum up the above, we find that –

- (a) the circumstances (i) to (viii) under paragraph 23 establish that the deceased Sonam Dadul Bhutia and Bina Subba had proceeded towards Dentam and had stayed back at Changay near the Dentam Bridge, West Sikkim;
- (b) the circumstances commencing from (ix) to (xxviii) establish that the Respondents accused persons along with the two juvenile convicts had come across the couple and that there was an altercation between them leading to the accused persons killing the



deceased by hitting him with a tyre wrench and thereafter throwing his body below the road;

(c) that the accused persons fled to Siliguri in the late night of the same day taking Bina Subba with them and stayed there in a hotel;

(d) that the accused persons killed Bina Subba at Siliguri. Although, in the present case, we are not dealing with a murder of the girl Bina Subba it assumes relevance to the extent that it was indeed Bina Subba who was with deceased Sonam Dadul Bhutia in the evening of the fateful date as revealed by the evidence of P.Ws. 10, 11 and 23.

(e) that the Respondent No.1 thereafter sold the Maruti Car and checked out of the hotel on 21-12-2003 and was arrested on 22-12-2003 in connection with a case under Sections 380/457 by the Sadar P.S., Gangtok;

(f) that the Respondent No.2 and the two juvenile convicts absconded to avoid arrest.



(ii) The circumstances, therefore, stand proved beyond any reasonable doubt and those circumstances form a complete chain that unerringly leads to the only conclusion and none other than the Respondents along with the juvenile convicts Roshan Rai and Purna Bahadur Subba have committed the murder of Sonam Dadul Bhutia in the evening of 27-11-2003.

25. Having held in the manner aforesaid, it may be noted that most of the points urged by the Learned Counsel have been met while dealing with the various aspects leaving aside some of them of which, the existence of another vehicle, namely, a white Savari, is an important question that calls for consideration. We have held that the incident as regards the white Savari vehicle is relevant only to fact of the deceased Sonam Dadul Bhutia and Bina Subba having travelled towards Dentam and that they had got off together from it at Changay at Liching Busty near the Dentam Bridge and disappeared thereafter. That the deceased Bina Subba travelled in the vehicle is proved by the recovery of the pink kurta-pyjama which she was carrying in a bag with two packets of "Silam" to visit her sister. It is not the case of the defence nor the prosecution that the wearing



apparels were worn by the deceased Bina Subba. It is also not their case that the wheel wrench recovered from the vehicle was the weapon of offence. It has been established that after being unsuccessful in finding the deceased couple in the night of 27-11-2003 the accused Praveen Subba and Abishek Rai returned to Pelling. The effort to create a doubt as to the involvement of the Respondents in the commission of offence, in our view, is mis-placed and, therefore, stands rejected.

26. Doubt was also expressed as to the identity of the Maruti Car WNC-525 in view of the differing colours stated by the prosecution witnesses. In our view, this question is not so grave as to affect the substance of the prosecution evidence. The various witnesses who have described the colour of the vehicle are P.W.15 as per whom it was 'steel gray', P.W.16 as 'ash colour', P.W.30 as 'blue', P.W.45 as 'sky blue' and P.W.46 as 'ash colour'. These descriptions in any case do not detract from the fact that each of the witnesses had identified the Maruti Car Exhibit MO-I when shown to them during the course of their examination. The colours in any case are quite uniform and not conflicting as they are almost



of the same shade. The contention, therefore, stands rejected.

27. The other objection raised by the Learned Defence Counsel as regards the statement of P.W.40, Man Bdr. Rai, having resiled from statement and contradictory to his statement recorded under Section 161 Cr.P.C., appears to be quite unsustainable as we do not find any element of retraction in the statement of the witness as is apparent from his statement in cross-examination extracted earlier. Moreover, the confessional statement made by P.W.40 is not the sole evidence which we are relying upon but, is being considered as one of the corroborative piece of evidence to the other evidence on record. The law as to the extent of proof of a confession has been enunciated most succinctly in the case of **Subramania Goundan vs. The State of Madras : AIR 1958 SC 66** where it has been held as under:-

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"14. The standards of the corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the court must feel that the reasons given for the retraction in the case of a confession are untrue."



In the present case, we do not find any reason stated by the witness for his retraction. We rather find that in his cross-examination he has re-emphasised the fact in categorical terms that he had given the statement before the Magistrate on his own will and volition and that what is recorded in Exhibit 26 reflects his true statement. The submission, therefore, stands rejected.

28. As regards the plea of failure of the prosecution to prove motive against the Respondents raised by the Learned Senior Counsel, we are of the view that this deficiency by itself is not sufficient to weaken the case of the prosecution, as we find that the circumstances established by evidence are sufficient for us to hold that the Respondents are guilty of the offence. It is a settled position of law that motive is not an ingredient for an offence under Section 302 IPC. Moreover, in the case of the ***State of Madhya Pradesh vs. Digvijay Singh : AIR 1981 SC 1740***, it has also been held as follows:-

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"18. It may be that the prosecution was not able to prove the motive for the crime, but that could not possibly matter when the circumstantial evidence on the record was sufficient to prove, beyond any doubt, that it was the respondent and no one else who intentionally caused the death of Smt. Tulsa Bai."



In view of the above, we do not find any substance in this argument and, therefore, stands rejected.

29. There were also a few other points urged on behalf of the Respondents but, we find them insignificant and peripheral. So far as the decisions cited by the Learned Counsel for the Respondents are concerned, we have no hesitation in accepting those but are not applicable to the facts and circumstances of the case. We are rather inclined to accept that the Learned Trial Court has ignored admissible evidence which has given rise to compelling and substantial reason for this Court to interfere with the impugned judgment of acquittal of the Respondents.

30. In the result, the Appeal is allowed and hereby quash and set aside the impugned judgment. Consequently, we convict the Respondents for the offences under Sections 302 and 34 IPC but uphold the acquittal of the accused Praveen Subba and accused Abishek Rai for want of any evidence against them.

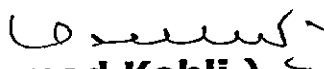
31. As regards the sentence, on careful consideration of the entire facts and circumstances, we find that although the accused persons are quite young,



they appear to be habitual offenders particularly, the Respondent No.1, Rakesh Rai. The cold blooded and heartless manner in which the deceased was killed by them, in our view, renders them undeserving of any leniency. This is compounded by the fact that they have proved themselves to be undesirable influence to the young juvenile accused persons who have since been convicted by the Juvenile Justice Board.

32. Considering all these, interest of justice would be met if the Respondents-convicts are sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.20,000/- each. Failure to pay the fine shall entail further imprisonment of six months against each of them.

33. A copy of this judgment and the records of the Trial Court be transmitted forthwith to the Learned Trial Court for compliance.


(**Permod Kohli**)
Chief Justice
20-04-2012


(**S. P. Wangdi**)
Judge
20-04-2012

Approved for reporting : ☒ Yes/No

Internet : ☒ Yes/No