

HIGH COURT OF TRIPURA
A G A R T A L A

CRL.A. No. 65 of 2010.

Appellant:

Sri Bijoy Deb @ Manti
Son of Lt. Matilal Deb
Resident of Dwarband
P.S. Silchar, Assam.

By Advocate :

Mr. P. Roy Barman,
Mr. Samarjit Bhattacharjee

Respondent:

The State of Tripura,
to be represented by the
Public Prosecutor
Gauhati High Court
Agartala Bench, Agartala

By Advocate :

Mr. R.C. Debnath, Addl. P.P.

CRL.A. No. 75 of 2010.

Appellant:

Sri Asish Ghosh,
son of Sri Ashutosh Ghosh,
of Moshauli, P.S. Kumarghat,
North Tripura.

By Advocate :

Mr. P. Roy Barman,
Mr. Samarjit Bhattacharjee

Respondent:

The State of Tripura,
to be represented by the
Public Prosecutor
Gauhati High Court
Agartala Bench, Agartala

By Advocate :

Mr. R.C. Debnath, Addl. P.P.

**BEFORE
THE HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
THE HON'BLE MR. JUSTICE S. TALAPATRA**

Date of hearing : **05.08.2013 & 12.08.2013.**

Date of delivery
of Judgment & Order : **09.10.2013**

Whether fit for reporting : **No**

JUDGMENT & ORDER

The appeals being CRL.A. 65 of 2010 filed by Sri Bijoy Deb @ Manti and the appeal being CRL.A. 75 of 2010 filed by Sri Asish Ghosh under Section 374 of the Code of Criminal Procedure, 1974 (*the Cr.P.C in short*) are directed against the judgment and order of conviction and sentence dated 10.09.2010 and 14.09.2010 delivered in S.T. 22(NT/K) 2007 by the Additional Sessions Judge (First Track Court), North Tripura, Kailashahar. Hence the appeals are taken up together for disposal by a common judgment. By the said impugned judgment and order the appellants have been convicted under Section 302/201/34 of the Indian Penal Code and sentenced to rigorous imprisonment for life and to pay a fine of Rs.,1000/-, in default of payment of fine, to suffer further rigorous imprisonment for 1(one) month for the offence punishable under Section 302 of the I.P.C read with Section 34 of the I.P.C. and to suffer rigorous imprisonment for 3(three) years with a fine of Rs.1,000/-, in default of payment of fine to suffer further 1(one) month rigorous imprisonment for the offence

punishable under Section 102 of the I.P.C. read with Section 24 of the I.P.C.

2. We have heard Mr. P. Roy Barman learned counsel appearing for the appellants and Mr. R.C. Debnath, learned Addl. P.P. appearing for the State.

3. Briefly stated the prosecution case as surfaced from the records is that one *suo-mutu* complaint was filed by Sri Kamalendu Bhowmik (PW-15), a Sub-Inspector of Kumarghat Police Station disclosing that on 25.12.2005 the duty officer of Kumarghat Police Station received an information that foul odour was emitting from an abandoned well within the house of one Digendra Ghosh, a residing of West Moshauli and the villagers were suspecting that it might so happen that a dead body had been thrown into the abandoned well. He entered the said information in the General Diary (G.D) vide Kumarghat P.S. G.D.E No. 966 dated 25.12.2005 and one Debasish Saha, a Sub-Inspector of the Fatikroy Outpost was asked to verify the information. The said police officer had visited that place and confirmed that the foul odour was emitting from the said abandoned well. It has been disclosed in the said compliant that on prolonged interrogation one Ajanta Ghosh, daughter of Digendra Ghosh, had confessed that about one month before from that day her brother namely Debasish Ghosh, Bijoy Deb and one girl from Shillong with 'Mongolian face' had come to

their house. Debasish and Bijoy used to stay at Shillong for their livelihood. After passing one night Debasish and Bijoy with help of Asish Ghosh had murdered that girl who was about 20-22 years old, and had buried the dead body in the abandoned well. After such information, the said police officer, the complainant, the Sub-Divisional Police Officer, Kailashahar, the Deputy Magistrate and Collector, Kumarghat and one Medical Officer who was the in-charge of Kumarghat P.H.C had rushed to that locality. Based on the statement and the identification of Ajanta Ghosh, the said abandoned well was disinterred and a semi decomposed body of a female was recovered from the said well. The dead body was tagged by heavy stone. As per the direction of the Officer-in-Charge of Fatikroy outpost the inquest of the dead body was carried out and the postmortem examination was conducted on that spot by the said Medical Officer in presence of Sri R. Das, Deputy Collector and Magistrate. Thereafter, the said dead body was cremated. The following persons were accused of committing the said gruesome murder:

- (i) Sri Debasish Ghosh @ Debai. (the proclaimed absconder).
- (ii) Sri Asish Ghosh & (iii) Sri Bijoy Deb (the appellants).

4. Based on the said *suo-mutu* complaint as filed by PW-15, the Kumarghat P.S. Case No.99/2005 was registered

under Sections 302/201/34 of the I.P.C. against the appellants and taken up for investigation. After completion of the investigation, the charge sheet was filed and on taking cognizance, the Chief Judicial Magistrate committed the said case by the order dated 13.03.2007 to the Court of the Sessions Judge, North Tripura, Kailashahar as the offence under Section 302 of I.P.C. is exclusively triable by the Court of Sessions. The Sessions Judge thereafter transferred the said case to the Court of the Additional Sessions Judge, North Tripura, Kailashahar (Fast Track) for trial. It is to be noted here that the co-accused namely, Debasish Ghosh could not be apprehended by the police at any point of time and accordingly, the case against him was adjourned *sine die*. However, two other persons namely, Smt. Ajanta Ghosh and Smt. Anjana Ghosh were investigated in connection of that case. The Additional Sessions Judge, North Tripura, Kailashahar framed the charge only against the present appellants under Section 302/34 of the I.P.C and under Section 201 read with Section 34 of the I.P.C. and had discharged the other accused persons. The proclaimed offender is still on run or in the hiding. The appellants pleaded their innocence and claimed to be tried.

5. As the appellants pleaded not guilty, the prosecution to substantiate the charge has adduced as many as

23 witnesses and introduced 16 documents and 5 material objects in the evidence.

6. After the evidence of the prosecution's witnesses was recorded the appellants were separately examined for their response to the incriminating materials those surfaced. After hearing the prosecution and the defence at length, the Additional Sessions Judge has returned the finding of conviction against the appellants.

7. Mr. P. Roy Barman, learned counsel appearing for the appellants has stoutly contended that the evidence as led by the prosecution as at best created suspicion against the appellants. However strong the suspicion may be that cannot substitute the requirement of proof beyond reasonable doubt. According to him, the impugned judgment and order as passed by the trial Court is based on surmise and conjectures and in defiance to the said salutary principles of criminal justice. He has further contended that the identity of the female corpse has not been at all established by the prosecution, even though the cause of death has been ascertained by the Medical Officer (PW-14) who conducted the postmortem examination in and around the place of recovery. According to the said medical expert, the cause of death is Asphyxia and that was homicidal in nature. Mr. P. Roy Barman, learned counsel has lambasted the judgment of conviction contending that on the basis of 'last

seen' together, the said finding of conviction has been returned by the trial Court but the fundamental requirements as postulated by the apex Court in regard to appreciation of the evidence on 'last seen' together have not been at all established. While dilating further he has contended that the oral testimonies of Smt. Puja Acharya (PW-20), Sri Milan Joshi (PW-21) and Sri Nirmal Das @ Tapu (PW-16) have been given their undue weightage. The core of their testimonies does not lead to any definite inference as to the identity of the female corpus delicti or involvement of the appellants. He has further submitted that whether the missing girl from Shillong is the deceased or not has been left unanswered. There is no evidence in this regard. In absence of such proof, the entire prosecution case is bound to cave in. He has submitted that even the parents of the deceased girl were not examined by the Investigating Officer nor were they cited as the witness nor summoned by the Court to give their deposition. Thus the prosecution has miserably failed to establish the identity of the female corpus.

8. Mr. P. Roy Barman, learned counsel appearing for the appellants has finally submitted that the Additional Sessions Judge, Kailashahar has relied on the inadmissible evidence such as the oral testimonies of PW-3 (Sri Prasenjit Ghosh), PW-4 (Sri Jayanta Das) and PW-5 (Sri Nawadip Das)

who heard the relevant fact from the co-accused. Such statement was exculpatory in nature. Apart that, the oral testimonies of PW-7 (Sri Nidhuban Chandra Dey), PW-9 (Sri Karunamoy Dey) and PW-10 (Sri Sajal Roy) should not have been relied by the Additional Sessions Judge, Kailashahar for returning the finding of conviction inasmuch as the inculpatory statements made by the appellant Asish are clearly hit by the provisions of Section 25 of the Evidence Act. Mr. P. Roy Barman, learned counsel has further submitted that the prosecution case having based on the circumstantial evidences has fallen through for not forming a complete chain of the circumstances, excluding the hypothesis of innocence and irresistibly indicating at the guilt of the appellants. Apart that, he has criticized the manner in which the examination of the appellants were conducted under Section 313 of the Cr.P.C. According to him, such examination has caused serious prejudice to the appellants.

9. To buttress his contention he has relied on a decision of the apex Court in **Paramjeet Singh @ Pamma vs. State of Uttarakhan**, reported in **AIR 2011 SC 200** where the Apex Court has held that:

13. Thus, the law on the point may be summarised to the effect that in a criminal trial involving a serious offence of a brutal nature, the court should be wary of the fact that it is human instinct to react adversely to the commission of the offence and make an effort to see that such an instinctive reaction does not prejudice the accused in any way. In a case where the offence

alleged to have been committed is a serious one, the prosecution must provide greater assurance to the court that its case has been proved beyond reasonable doubt.

Circumstantial Evidence:

14. Though a conviction may be based solely on circumstantial evidence, this is something that the court must bear in mind while deciding a case involving the commission of a serious offence in a gruesome manner. In *Sharad Birdhichand Sarda v. State of Maharashtra* : AIR 1984 SC 1622, this Court observed that it is well settled that the prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. This Court also discussed the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone and held as under:

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

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

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved;
and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. A similar view has been reiterated by this Court in *State of Uttar Pradesh v. Satish*, (2005) 3 SCC 114; (AIR 2005 SC 1000; 2005 AIR SCW 905); *Krishnan v. State represented by Inspector of Police* (2008) 15 SCC 430; (AIR 2008 SC (Supp) 2010; 2008 AIR SCW 4065; *Ramesh Bhai and Anr. v. State of Rajasthan* (2009) 12 SCC 603; (AIR 2009 SC (Supp) 1482; 2009 AIR SCW 3534); *Subramaniam v. State of Tamil Nadu* and

Anr.: (2009) 14 SCC 415: (AIR 2009 SC (Supp)1493:2009 AIR SCW 3550); and Babu v. State of Kerala JT 2010 (8) SC 560: (2010 AIR SCW 5015), observing that the evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable.

10. In **Musheer Khan @ Badshah Khan and Anr. v. State of Madhya Pradesh**, reported in **2010 2 SCC 748** the Apex Court has held as under:

45. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In *Nibaran Chandra Roy v. King Emperor* : 11 CWN 1085 it was held that the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

54. The same principles have been followed by the Constitution Bench of this Court in *Govinda Reddy v. State of Mysore* : AIR 1960 SC 29 where the learned Judges quoted the principles laid down in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh* : AIR 1952 SC 343. The ratio in *Govind (supra)* quoted in para 5, p. 30 of the reports in *Govinda Reddy (supra)* are: "5.....'10.....in cases where the evidence of a circumstantial nature, the circumstances [which lead to the conclusion of guilt should be in the first instance] fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be [shown] that within all human probability the act must have been [committed] by the accused.

The same principle has also been followed by this Court in *Mohan lal Pangasa v. State of U.P.: State of U.P.*"

11. In **Sahadevan and Anr. vs. State of Tamil Nadu**, reported in **AIR 202 SC 2435** has been pressed to hold that:

"Where the Court finds that the prosecution evidence suffers from serious contradictions, is unreliable, is ex facie neither cogent nor true and the prosecution has failed to discharge the established onus of proving the guilt of the accused beyond reasonable doubt, the Court will be well within its jurisdiction to return the finding of acquittal."

12. **Tanviben Pankaj Kumar Divetia Vs. State of Gujarat**, reported in **1997 7 SCC 156** has been relied on by Mr. P. Roy Barman, learned counsel appearing for the appellants to reiterate the position of law that:

"every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions."

13. While refuting the submission as advanced by Mr. P Roy Barman, learned counsel appearing for the appellants Mr. R.C. Debnath, learned Addl. P.P. appearing for the respondent has submitted that Sri Bijoy Deb and the proclaimed offender, Debasish Ghosh were residing in a rented house at Shillong and one girl namely, Anjali Garo was frequently visiting their house and there developed a love affairs between Anjali and Bijoy. The oral testimonies of PW-11 (Sri Babul Das) and PW-16(Sri Nirmal Das) @ Tapu have unwaveringly proved that one girl of Shillong namely, Anjali Garo was seen with the appellants and Debasish in the village, Moshauli. He has further submitted that from the testimonies of PW-20 (Smt. Puja Acharya), PW-21 Sri Milan Joshi, PW-22 (Smt. Sarita Chowhani) who are the residents of Shillong, it has been proved that the accused Bijoy and Debasish were the tenant of PWs-20 and 21. PW-20 and PW-21 had confirmed that they noticed that Anjali used to visit the house of PW-20 and there had been love affairs between Anjali and Bijoy. The oral testimonies of PW-16 (Sri Nirmal Das) and PW-11 (Sri Babul Das) have been successfully used by the prosecution to establish the 'last seen together' in Moshauli. Mr. Debnath, learned Addl. P.P has further relied on the testimonies of PW-3 (Sri Prasenjit Ghosh), PW-4 (Sri Jayanta Das) and PW-5 (Sri Nawadip Das) for showing how they have supported the prosecution case. He has also referred

and relied on the oral testimonies of PW-7 (Sri Niduban Chandra Dey), PW-8 (Sri Nidan Malakar), PW-9 (Sri Karunamoy Dey) and PW-10 (Sri Sajal Roy) in whose presence the appellant Asish had confessed of committing the murder of the said girl and led to discover the wrist watch belonging to the deceased girl. Apart that, he has submitted that all the accused persons immediately after recovery of the dead body were found absconding and only after massive search, the Investigating Officer had managed to arrest the appellants from Silchar and Kailashahar respectively. Mr. Debnath, learned Addl. P.P has submitted that the 'last seen together' is proximate to the projected day and time of commission of the murder. 'Proximate' cannot be given a highly constricted meaning, it has to be understood in the context of the case. The 'last seen together' and recovery of the dead body shall not be intercepted by disjointing event. Identification of the deceased has been established beyond reasonable doubt. Moreover, the recovery statement as made by one of the appellants has established another incriminating circumstance. Even though the abscondance by itself is not a substantive evidentiary material to convict someone but definitely such abscondance is a relevant circumstance in the chain of the circumstances to prove the guilt of the accused.

14. Mr. Debnath, learned Add. P.P. has contended further that by means of photograph of the deceased, her

identity has been established. The submission of Mr. P. Roy Barman, learned counsel appearing for the appellants that the proximity of the 'last seen together' and the time of homicide have not been established is based on total non-consideration of the evidence. Mr. P. Roy Barman has submitted that the projected day of the commission of the murder has not been established by the prosecution. The appellants cannot be allowed to take resort to such plea inasmuch as the prosecution case is well founded. The statement of Ajanta Ghosh as made in front of several witnesses and the medical opinion are consistent and there is no discrepancy or difference at all as regards the projected day of death. Moreover, the appellants have not come out with any explanation in the trial on the face that the deceased girl was found last in their company. They have not either by way of cross examination or by adducing witness made any endeavour whatsoever to show that after the 'last seen together' the deceased was seen by any other witness or what Mr. P. Roy Barman has tried to indicate that the said girl might be living anywhere. Mr. R.C. Debnath, learned Addl. P.P. has further submitted that when the plea that the girl namely, Anjali Garo is still living is advanced the burden of proof gets immediately shifted to the appellants to show from records that the girl is still living or found living after the projected day of the commission of murder. Such defence as it appears has not been sought to be led, not even in their

examination under Section 313 of the Cr.P.C. Nowhere in their statement as recorded under Section 313 the appellants have projected such plea. Such plea is not only assumptive but has no root in the circumstances of the case whereas the prosecution has established every incriminating episodes such as;

(i) the deceased girl is the girl namely, Anjali Garo from Shillong.

(ii) the dead body of the girl has been disinterred from a well from the house of another co-accused Debasish Ghosh.

(iii) the deceased girl was last seen in the accompany of Debasish and the appellants.

(iv) the discovery statement showing the place of murder by Ajanta Ghosh in presence of the witnesses.

(v) recovery of the semi-composed dead body of Anjali from the abandoned well situated in the house of co-accused.

(vi) the cause of death of the deceased being homicidal in nature.

(vii) the motive from the love affairs between the deceased and the appellant, Bijoy.

15. Mr. R.C. Debnath, learned Addl. P.P. has submitted that the motive of the murder though has not been definitely established but it can be presumed that the appellants had problems with Anjali as regards their relation. Absence of the definite proof of motive in a case of the circumstantial evidence cannot entirely dislodge the prosecution case. According to Mr. Debnath, learned Add. P.P that the circumstances have definitely pointed at the guilt of the appellants and other co-

accused Debasish Ghosh. When those circumstances are taken cumulatively, as those circumstances have formed a chain so complete, there is no escape from the inference that the offence has been committed by the appellants and the proclaimed offender and none else. No other hypothesis, except the guilt of the appellants is probable on scrutiny of the evidence. According to Mr. Debnath, learned Addl. P.P. the circumstances has been proved are not liable to any other inference. He has finally submitted that the 'last seen together' is not only incriminating circumstance against the appellants but that incriminating circumstance has been corroborated by the other incriminating circumstances in the chain. He has submitted that the law in this regard is well settled and the prosecution has proved their case based on the circumstantial evidence, in consonance with what the Apex Court has enunciated in **Bodhraj Reddy vs. State of Andhra Pradesh**, reported in **2002 Cri.L.J. 4664** as under:

"Last seen theory comes not play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime comes impossible. When there is a long gap and possibility of the persons coming into between exists and in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of the guilty..."

16. In this case there is no evidence to show that after the deceased was 'last seen together' with the appellant and

Debasish she was found alive. Rather it has been established that the deceased girl was living with them at night and thereafter her dead body was found from the abandoned well of the house of one of the accused. The long gap between the recovery of the dead body and the projected day and time of murder is immaterial for drawing up an any adverse inference against the appellants, when there is no evidence, as regards possibility of the other person being the author of the murder.

17. Mr. Debnath, learned Addl. P.P. appearing for the state has placed reliance on decision which has been relied on by the Additional Sessions Judge. In **Matru @ Girish Chandra Vs. State of U.P.**, reported in **AIR 1971 1050** the Apex Court has held that:

"The act of absconding is not doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Generally the Courts consider it a very small item in the evidence for sustaining conviction. It cannot certainly be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused.

18. Mr. Debnath, learned Add. P.P. has also relied on another decision of Delhi High Court in **Shanti Lakara Vs. State**, reported in **2009 Cri.L.J. 4589** where it has been held that:

"The act of the accused in absconding from the date when the dead body of Birendra Kaju was recovered upto the date of her arrest is relevant

fact probablisising the guilt intend of her mind. Such a conduct is relevant under the Provision of Section 8 of the Indian Evidence Act.

19. The appellants have not made any endeavour to show from the records, as Mr. Debnath, learned Addl. P.P. has continued to submit, to show that the appellants or the co-accused Debasish were not absconding at all.

20. While appreciating the rival contentions as projected by the learned counsel for the parties, we have scrutinized the evidence carefully. It appears that the fact relating to the recovery of the semi decomposed body of a female from the abandoned well of the house of Digendra Ghosh, father of the co-accused Debasish Ghosh situated in the village of West Moshauli has been well established and it has been further established the inmate of that house who had not informed the police about the 'bad smell' emitting from the said abandoned well nor had they voluntarily come to co-operate with the police.

21. PW-14, Dr. Subrata Roy in his deposition has stated that on 26.12.2005 he along with the Executive Magistrate and with the police went to the house of Digendra Ghosh and in his presence dead body of a female approximately aged 18 years was recovered from the abandoned well. In presence of the Executive Magistrate and the police officers and other persons of the locality he had conducted the postmortem examination

over the dead body on the spot. The dead body was found partly decomposed. Neck was tied by a heavy cloth and one side of the said cloth was fastened with a big stone. Ligature mark over neck could not be detected as the dead body was partly decomposed. On examination of the dead body he had opined that the cause of death was due to cardio respiratory failure as a result of asphyxia due to pressure on larynx and tracheae. In the postmortem report (Exbt.8) he has clearly commented that the death was homicidal in nature. However, he has admitted that he did not mention the probable date of death in the postmortem examination report.

22. PW-20, Smt. Puja Acharya has stated that the appellant Bijoy Deb was known to her and she had identified the appellant Bijoy Deb. She has also stated that Debasish and her brother Dipak were also known to her. On 04.04.2004, the appellant Bijoy, Debasish and Dipak had entered in her house as tenants. But in the year 2005, Bijoy had started living separately in a single room of her house. Her neighbour Smt. Sarita Chowhani (PW-22) had a maid servant namely, Anjali, who started working as a maid servant in the house of Sarita from the month of January, 2005. She had noticed that the love affairs had developed between Bijoy and Anjali. One day she saw both of them in the room of her house where Bijoy Deb was staying as a tenant. So she told Bijoy not to call Anjali

in her house in future and also told him to leave her house. After three days accused Bijoy Deb left her house keeping his room under lock and key and did not return. It was probably in the month of November, 2005 both the appellant Bijoy and the co-accused, Debasish left her house. After one week Bijoy came back to her house and after staying two weeks he again left her house without informing her. In the month of November, 2005, Anjali had also left the house of Sarita and till date she did not return. The appellant Bijoy, the co-accused Debasish and Anjali left her house and the house of Sarita in the month of November, 2005. After about one month, one police officer visited her and asked about Debasish and Bijoy. At that time she came to know that Anjali was taken to Tripura and was murdered by Debasish, Bijoy and Asish. She has again stated that she never saw Asish. The police again came to her house and showed a photograph and after seeing the photograph she identified the same to be Anjali Sangma. She has identified the photograph as Exbt. M.O. 4. Her statement was corroborated by her husband Sri Milan Joshi (PW-21).

23. The oral testimony of PW-22, Smt. Sarita Chowhani is relevant for purpose of identification of the deceased. She has stated that she had engaged Anjali as the maid servant on 17.01.2005. She had discharged Anjali from her work in the month of last October or first week of November, 2005. Her

close neighbour Puja Acharya(PW-20) had complained to her against Anjali that Anjali used to visit her house to meet her tenant Bijoy Deb and also told that her character was not good. After getting the complaint she had discharged Anjali. Subsequently, she came to know from the Police Officer that Anjali was taken to Tripura and was murdered. She has also identified the photograph of Anjali (Exbt.M.O.4).

24. PW- 16 Sri Nirmal Das and PW-11 namely, Sri Babul Das are the vital witnesses. PW-11 in his deposition has stated that one day about one and half years ago in the afternoon, he along with Akhil Das and Jogendra Das were gossiping under a banyan tree alongside the village road. At that time they found Bijoy Deb and Debasish Ghosh along with a girl of Shillong were passing by that road. After one month a dead body of a girl was recovered from the well of Digendra Ghosh and he came to learn from the brother-in-law of Digendra Ghosh, namely, Ratan Ghosh that his nephew Debasish and Bijoy brought a girl from Shillong. PW-11 has identified Bijoy Deb in the T.I. Parade. After 4/5 days of the said T.I Parade, Bijoy Deb was brought to their village by Darogababu and in presence of the local persons, Bijoy had stated that he along with Debasish had committed the murder of the girl and after murdering her they buried her dead body inside the well.

25. PW-16, Sri Nirmal Das has stated that he knew Asish Ghosh of Laljhuri and Bijoy Deb of Silchar. He was working at Shillong from 2001 to 2005 as a salesman in a cloth shop. He himself along with Bijoy, Debasish and Dipak Ghosh were also residing in that house. Thus he knows Bijoy Deb since 2003. They also worked at Shillong. He has stated that he saw one girl, namely, Anjali belonging Garo community used to come in the room of Bijoy and he had also seen Anjali closely talking to him. Anjali worked as the maid servant in the house of one Marowari family in front of his rented house. He had seen that girl, Anjali frequently visiting Bijoy and Debasish in their room. In the middle part of the year 2005 he left Shillong and started residing at Laljhuri. After 4/5 months one day he saw Bijoy and Debasish were moving in their village along with the said girl, Anjali. Thereafter, he saw only Bijoy and Debasish in their village, but did not see Anjali with them. After about one month he had heard that a dead body of a girl was found in the well of Digendra Ghosh, which is situated near their house. He has stated that he heard that the girl was brought by Debasish from Shillong. He had identified the appellants in the dock.

26. PW-3, Sri Prasenjit Ghosh has stated that on 25.12.2005 he was working as a rifleman under the 4th

battalion T.S.R at Laljhuri. On that day, in the evening they got a wireless message from Kumarghat P.S. that bad odour was emitting from an area in West Moshauli. He along with 11(eleven) jawans of TSR from the Laljhuri camp had proceeded and reached there on 8.30 pm. and found the in-charge of Fatikroy Outpost and other police staffs who had already arrived there. Thereafter, they went to the house of Digendra Ghosh of Moshauli and the Officer-in-Charge had started searching the house of Digendra Ghosh. He has stated that he noticed that an abandoned well was covered by fresh earth and branches of trees. The Officer-in-Charge asked Digendra Ghosh and his family members regarding that place, but they had refused to disclose anything. After thorough interrogation, Ajanta Ghosh, the daughter of Digendra Ghosh told that her brother Debasish, Bijoy and another had brought a girl from Shillong and murdered the said girl. Her dead body had been buried in the well by her brother and his friend Bijoy Deb and another. He has stated that Ajanta Ghosh had stated that to the Police Officer.

27. PW-4, Sri Jayanta Das, a close neighbour of Digendra Ghosh and PW-5, Sri Nawadip Das have stated in the same tune of PW-3 in regard to the disclosure of fact by Ajanta Ghosh in presence of them. PW-4 and PW-5 have stated further

that they had seen appellant Bijoy moving in the village with Debasish and Asish.

28. PW-7, Sri Nidhuban Chandra Dey, PW-8, Sri Nidan Malakar, PW-9, Sri Karunamoy Dey and PW-10 Sri Sajal Roy have stated that one day the police officer brought with them the appellant, Asish in front of the shop of Jyotirmoy Das near Noagaon School and Asish had confessed that Debasish, Bijoy and he himself had committed the murder of the girl who was brought from Shillong and her dead body was buried in the well of Digendra Ghosh. They have also vouched that Asish had stated that the ornaments of the deceased girl were taken by Bijoy Deb and Debasish Ghosh and the wrist watch was taken by him. The said wrist watch recovered at the instance of Asish, had been identified as Exbt.M.O.2 and the said episode of recovery of the wrist watch of the deceased girl was also corroborated by PW-23, the Investigating Officer of the case.

29. PW-23, Sri Debasish Saha has made a detailed statement in the Court that how he conducted the investigation. He has confirmed the recovery of partly decomposed dead body of a female from the abandoned well situated in the house of Digendra Ghosh covered by fresh earth and loose mud. Having received the information as noted and after entering the said information in the General Diary (GD) he had proceeded along with his staffs towards West Moshauli to

verify the information. Ultimately, he got the place wherefrom the stinking odour was coming out. After prolong interrogation, one inmate of the house, namely, Ajanta Ghosh had revealed that Debasish, Bijoy and Asish Ghosh had murdered the girl of Shillong and they buried the dead body in the well. On the following day the Officer-in-Charge of Kumarghat Police Station along with one Executive Magistrate and the Medical Officer, one sweeper, one photographer had come to that spot and the dead body was disinterred from the abandoned well after removing the earth. The inquest was conducted in presence of the Executive Magistrate and other persons. The Medical Officer namely, Dr. S. Roy had conducted the postmortem examination of the dead body on the spot. Thereafter, the Officer-in-Charge, namely, Kamalendu Bhowmik (PW-15) lodged a *suo-mutu* complaint (Exbt.9). He has further stated that he had made several attempts to arrest the accused persons but he found that the accused persons were absconding. Ultimately, he was able to arrest the appellants from Silchar and from Kailashahar. During investigation he had arranged T.I. Parade of the accused Bijoy Deb and also recovered the wrist watch of the deceased girl from the possession of the appellant, Asish who led discovery of that article.

30. PW-19 Sri Ganesh Deb, Upa- Pradhan of Laljuri Gaon Panchayet is another important witness for the

prosecution case. He has categorically stated that he knows the accused persons for long. Bijoy was working at Shillong since one and half years from the date of occurrence and he has stated further that he had witnessed Debasish Ghosh and Bijoy were moving with a tribal-faced girl in their village. He has stated that the age of the girl was about 18/20 years. He had seen them moving around the village for 2-3 days and most importantly he has stated in the trial that *'thereafter one month the dead body of the said girl was recovered from the abandoned well of Digendra Ghosh and I was present there at the time of recovery of the dead body. I have seen that a big stone was fastened with the dead body by her 'orna' and also dressed her what I have seen earlier with the girl while she was moving along with Debasish and Bijoy. After about 6/7 months from the date of recovery of the dead body, O/C Fatikroy Outpost came to our village and told me that he had arrested a person in connection with the murder of the girl whose body was recovered from the abandoned well of Digendra Ghosh and requested me to attend in T.I. Parade at Kailashahar jail. On that day Darogbabu brought myself, Babul Das and Akhil Das from our village. In presence of a Magistrate, T.I Parade was held inside the Kailashahar jail and I was called to identify the suspect i.e. present accused Bijoy Deb who was mixed with 8-10 persons almost in a same height and figure. After seeing all of them I could identify the present accused Bijoy Deb by*

touching his body.' That part of the evidence was also supported by the Judicial Magistrate, namely, Subhasish Sharma Roy (PW-13). In his presence T.I parade was conducted. Apart that, he has identified the seized articles including the 'orna', one cardigan and one red and black shirt which according to PW-19 in the wearing of the deceased girl when he saw her last time.

31. The other witness Sri Nidhu Rn. Das, PW-1 who dug out the dead body from the said abandoned well.

32. PW-4, Sri Jayanta Das is a villager who witnessed the digging out of the dead body from the said abandoned well from the house of Digendra Ghosh.

33. PW-4, Sri Jayanta Das has stated that after the police was led to the house of Digendra Ghosh, he had seen Ajanta Ghosh being interrogated by the police. Initially Ajanta Ghosh had stated that she had no knowledge but on prolonged interrogation by the Police Officer in his presence Ajanta told that his brother and his friend Bijoy brought one girl from Shillong one day about one month back and thereafter they murdered the girl and buried her inside the well. In the next morning he came to learn that a dead body of a girl was recovered from the well of Digendra Ghosh. He has admitted that he had also seen Bijoy Deb and Ashis in their village.

34. Sri Nabadip Das, PW-5 is a witness to digging out of the dead body from the abandoned well and he has claimed that in his presence Ajanata Ghosh, daughter of Digendra Ghosh had stated to the Police Officer that her brother and Asish Ghosh brought the girl and murdered her. He was also witness to the inquest.

35. PW-6, Sri Nirendra Malakar is also witness to the digging out of the dead body and witness to the seizure of the wearing apparels of the deceased (M.O.1 series) which were identified by him as the wearing apparels of the deceased in the trial. He has confirmed to have seen the deceased wearing the said dress during her lifetime.

36. PW-8, Sri Nidan Malakar is a witness to the episode when the appellant, Asish was brought by the Police Officer to identify the place of the occurrence. According to this witness, the appellant demonstrated how they had murdered the said girl and thereafter buried her. He was also the witness to the recovery of the gold-coloured wrist watch (Exbt.M.O.2) as recovered having been led by the appellant, Asish.

37. PW-9, Sri Karunamoy Roy has replicated what the PW-8 has stated in the court. Apart that, he was also witness to the recovery of the said wrist watch. According to the prosecution that article belonged to the deceased.

38. PW-10, Sri Sajal Roy has also stated in the similar vein. He was also the witness to the seizure of the said wrist watch.

39. PW-12, Sri Gourgopal Sinha is the person who had photographed the entire demonstration of the appellant Bijoy in the place of occurrence showing how he and the other accused persons had killed the said girl. He has identified that compact disc which was available at Exbt.M.O.3 and the seizure list containing the incidence of the seizure was also identified by him. But he has admitted that the original C.D was not handed over to the Officer-in-Charge of Fatikroy outpost and it is still in his custody.

40. PW-13 is the Judicial Magistrate, namely, Subhasish Sharma Roy. He has stated that how he had conducted the identification parade in respect of Bijoy Deb. He has identified the respective reports in respect of Bijoy Deb and identified as Exbt.6 and Exbt.7 series.

41. PW-15, namely, Sri Kamalendu Bhowmik, the Police Officer from the Kumarghat Police Station has stated that after receiving the information from one Nripendra Malakar of Amrapassa that bad smell was coming out from the abandoned well of Digendra Ghosh and a dead body might be found in the said abandoned well, he had directed one Sub-Inspector of

police to enter the said information in the G.D. and accordingly, the said information was recorded as the G.D. Entry No.966 dated 25.12.2005. Thereafter he had directed the Sub-Inspector, Debasish Saha (PW-23) to verify the information and accordingly PW-23 went there and disinter the dead body of Anjali @ Nilam Sangma. He has submitted that he lodged one suo-mutu F.I.R. and the investigation was carried out in full swing.

42. PW-17, Sri Jyotirmoy Das has stated that how the appellant Asish had narrated the occurrence of murder and how he had concealed the wrist watch of the deceased girl to his house. He had identified Asish Ghosh in the dock.

43. PW-18, namely, Sri Ranjit Das is a Deputy Collector who had the authority of Executing Magistrate. In his presence the inquest and postmortem was conducted.

44. After the survey of the oral testimonies what this Court has found that while the appellants were examined under Section 313 of the Cr.P.C. they have refrained from giving any explanation for the incriminating conduct as proved by PWs in their defence, neither did they adduce any evidence to disprove the prosecution case. What has surfaced from the prosecution evidence is that one girl with the Mongolian face was found in the company of the appellants and the other proclaimed

offender namely, Debasish Ghosh but after sometime the said girl was not found in the company of those persons, particularly in the company of Bijoy Deb and Debasish Ghosh inasmuch as after the projected date of occurrence Bijoy and Debasish were found in the said village. PW-23, the Investigating Officer has proved that he had collected a photograph of Smt. Anjali @ Nilam Sangma from her parents and that photograph was shown to PWs-20, 21 and 22 who had stated that was the same girl who used to work as the maid servant in the house of PW-22 and was having love affairs with the appellant Bijoy.

45. PWs-20, 21 and 22 have appeared in the Court and supported the prosecution version. After seeing the Exbt. M.O. 4 series, the photograph of Anjali @ Nilam Sangma they have also narrated their own version how that girl was mixing with the appellant, Bijoy. As regards the identification of the deceased the testimony of PW-16, Sri Nirmal Das @ Tapu is of the paramount importance. He is the only witness who had witnessed the deceased in the company of the appellant, Bijoy and Debasish at Shillong and also in his village Moshauli. He has identified Anjali of Shillong as the girl who was in the company of the appellants in the village Moshauli. If his oral testimony is read with the oral testimony of PW-19 it would be amply clear that the deceased was none but Anjali @ Nilam Sangma. There is no doubt that after interrogation of Ajanta

Ghosh what she had stated in presence of the witnesses to the Police Officer cannot be used against the accused persons inasmuch as she was co-accused in the case. However, those witnesses had definitely proved that Ajanta had divulged the very information to the Police Officer and that had facilitated the investigation. Subsequent conduct followed by the said information is admissible in the evidence under Section 8 of the Evidence Act.

46. Based on the said information when the Police Officer had searched the house of Asish, Bijoy and Debasish it was found that they had been absconding. Abscondance by itself may not be a substantive evidence but there cannot be any division of opinion that that piece of evidence can be considered in the chain of circumstances for appreciation. It has been clearly established that both Bijoy and Debasish had intimate relation with the deceased and they had brought the girl in the village Moshauli and stayed there for few days and only thereafter, the girl went missing and her dead body was recovered from the abandoned well of Debasish's house. It is revealed from the evidence that the deceased was 'last seen together' in the company of Debasish and the appellants. None of the appellants has made any endeavour to explain their conduct to disprove the theory of last seen together. There cannot be any doubt that it is not only a case of last seen

together but also disinterring the dead body of that girl from the house of one of the accused persons. Thus this recovery of the dead body from the house of Debasish has shifted the burden to the appellant, Bijoy to give an explanation inasmuch as his staying with Debasish has been successfully proved by the prosecution. So far the involvement of Asish is concerned, that is very sketchy as none of the PWs-20, 21 and 22 have stated anything about Asish or anybody has stated that Asish can be attributed with any motive. However, the meeting of minds of Bijoy and Debasish has been apparent by the circumstances, in the killing of the said girl, but the discovery of the wrist watch at the instance of the appellant Asish has been lost in the lurch inasmuch as there had been no endeavour to prove that the wrist watch belonged to the deceased. It would only be repeatative to say that the statement made by the appellant Bijoy or the appellant Asish in the custody of the police is definitely hit by Section 25 of the Evidence Act. The fact relating to the discovery of the wrist watch could have been admitted in evidence under Section 27 of the Evidence Act but as the wrist watch has not been proved to be the wrist watch of the deceased, this piece of evidence ultimately would not help the prosecution. Apart that, we are not persuaded by the submission of Mr. P.Roy Barman, learned counsel appearing for the appellants that the identity of the deceased has not been established or that the theory of the

last seen together will not have any manner of application in the present context. What we have observed that the episodes starting from the house of PW-20 and the episodes in village Moshauli and ultimately the recovery of the dead body had formed a well-knit chain of circumstances which has excluded the innocence of the appellant, Bijoy Deb. However, that cannot be stated about the appellant, Asish. Even though there is a strong suspicion about the role of Asish but in the statement of PW-23 it has been found that Asish was arrested from his house. Such circumstances cannot be used against Asish. Even though Bijoy Deb was arrested from his house but that was not ordinary place of residence. He was not found in his known place of residence at Shillong when the police searched. But on secret information, he was arrested from his house somewhere else. Even though Debasish Ghosh is the proclaimed offender and his role has also been appreciated by us while appreciating the role of the appellants, but not in detail for the reason that in future for such observation he may suffer certain amount of prejudice if he is put to the trial.

47. In the result, we are of the considered view that the criminal appeal No.65 of 2010 as filed by the convict, Bijoy Deb @ Manti is liable to be dismissed and accordingly, it is dismissed. He shall suffer the sentence as imposed by the trial Court. However, on benefit of doubt the appellant, Asish

Ghosh, the appellant in the Criminal Appeal No. 75 of 2010 is acquitted from the charge. As corollary to this, the appeal being Criminal Appeal No. 75 of 2010 stands allowed.

48. In the result the impugned judgment and order so far it is related to the appellant, Asish Ghosh stands interfered with and set aside. The appellant, Asish Ghosh shall be released forthwith if he is not wanted in any other case.

Send down the LCRs forthwith.

JUDGE

CHIEF JUSTICE

Sujay