

GAHC010140872008



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A. 7/2008

1:KARTIK CHAKRABORTY
S/O SHANTI BHUSAN CHAKRABORTY, R/O NILIBARI, PS. DHALIGAON,
DIST. BONGAIGAON, ASSAM.

2: JABED ALI
S/O LT. MD. MOTIOR
R/O NILIBARI
PS. DHALIGAON
DIST. BONGAIGAON
ASSAM.

3: ALI AKBOR
S/O LT. TAMIJUDDIN SK
R/O DANGTOL BAZAR
PS. DHALIGAON
DIST. BONGAIGAON
ASSA

VERSUS

1:THE STATE OF ASSAM

Advocate for the Petitioner : MR.N DUTTA

Advocate for the Respondent : PP, ASSAM

Linked Case : Crl.A. 8/2008

1:AJAY CHAKRABORTY
S/O LT. ARUN CHAKRABORTY
R/O SOUTH DHALIGAONCHOINGAPOTA
PS. DHALIGAON
DIST. BONGAIGAON

ASSAM.

VERSUS

1:THE STATE OF ASSAM

Advocate for the Petitioner : MR.B K MAHAJAN

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE UJJAL BHUYAN
HONOURABLE MR. JUSTICE NELSON SAILO

JUDGMENT

Date : 21-12-2018

(Ujjal Bhuyan, J.)

Heard Mr. B. K. Mahajan, learned counsel for the appellants and Mr. H. Sharma, learned Addl. Public Prosecutor, Assam.

2. The two appeals have been preferred against the judgment and order dated 13.11.2007 passed by the learned Additional Sessions Judge (FTC), Bongaigaon in Sessions Case No.25(d)/2001 convicting the accused persons under Sections 120(B)/460/302/34 IPC and sentencing them to rigorous imprisonment for 10 years and fine of Rs.5000 each with a default clause for the offence under Section 460IPC; for the offence under Sections 120(B)/302 IPC imprisonment for life and fine of Rs.5000 with a default stipulation; and for the conviction under Sections 302/34 IPC, they were sentenced imprisonment for life and to pay fine of Rs.5000 with a default clause. It was ordered that sentences would run consecutively in respect of convict Shri Ajay Chakraborty and concurrently for the other convicts, namely, Shri Kartik Chakraborty, Javed Ali and Ali Akbar.

3. In Criminal Appeal No.7/2008, Kartik Chakraborty, Javed Ali and Ali Akbar are the three appellants whereas Ajay Chakraborty is the sole appellant in Criminal Appeal No.8/2008.

4. Smt. Gita Das , PW2, lodged one first information on 10.10.1999 before the

Officer-in-Charge, Dangtola Police Outpost under Dhaligaon Police Station stating that on 09.10.1999, her brother-in-law Ajay Chakraborty left his wife, i.e., her sister Anita Chakraborty at her residence saying that he would go to Cooch Bihar to bring gold jewelry. As he did not return back that night, informant along with her sister and minor daughter went to sleep on the same bed around 9.30/10 pm after having their meal. Her husband Shri Prabir Das went to the house of Ajay Chakraborty to guard the same. Around midnight, one miscreant entered into her house by digging a hole and opened the door. Informant woke up after hearing noise and in view of the light filtering into the room from outside. On waking up, she saw a person inside the room. She woke up her sister by raising hue and cry. About that time, another person had entered into the room and focused a torchlight at them. The person who had entered through the door dealt repeated blows with sharp dagger like weapon on Anita Chakraborty from outside the mosquito net. Then he dragged her out and on to the floor whereafter he again inflicted deadly blows with the weapon killing Anita on the spot. Thereafter, both the persons left the room and went away. Before leaving, they threatened the informant in Bengali language not to make noise but they did not cause any injury to her. Both the assailants had their faces covered with clothes for which informant could not identify them.

5. On the basis of the first information, G.D. Entry was made whereafter it was forwarded to the Officer-in-Charge, Dhaligaon Police Station where it was registered as Dhaligaon Police Station Case No.57/1999 under Sections 460/302 IPC.

6. On completion of investigation, police submitted charge-sheet against the four appellants who were arrayed as accused. Thereafter, charges were framed against the accused under Sections 120B, 460 and 302/34 IPC. Appellants pleaded not guilty and claimed to be tried. It may be mentioned that one of the accused persons, namely, Kalidas Mahanta @ Kuddus Ali had evaded investigation and was accordingly declared as absconder. The case was '*filed*' against him.

7. In the course of the trial, prosecution examined as many as 27 witnesses and exhibited a number of documents. Witnesses were cross-examined by the defence. After closure of evidence of the prosecution witnesses, statements of the accused persons were

recorded under Section 313 Cr.PC. The accused persons also tendered evidence as defence witnesses. After hearing the matter, learned Additional Sessions Judge (FTC), Bongaigaon vide judgment and order dated 13.11.2017 convicted all the accused as above.

8. Hence, the two appeals.

9. During the pendency of the appeals, certain developments had taken place and on a question of law, the two appeals were referred to a larger Bench. We will deal with that aspect of the matter at a later stage of the judgment. But for the moment, it would be apposite to advert to the evidence tendered by the witnesses.

10. PW24 is the Dr. Prashanta Kumar Das who was serving as Senior Medical and Health Officer, Goalpara Civil Hospital at the relevant point of time. On 11.10.1999, he had performed post-mortem examination on the dead body of Anita on police requisition. He found the following injuries on the person of Anita:-

“1. Penetrating injury over left scapula, 2 in numbers, 2”x1” and 2”x1”. Both 2” deep.

2. Cut injury over left forearm, 2 in numbers, 2”x1” and 2”x1”.

3. Penetrating injury over right breast, 2 in numbers, 1”x1” deep.

4. Penetrating injury over left wrist, 2 in numbers, 2”x2” and 1”x1”.

5. Penetrating injury over left forearm near elbow, 1”x1”.

6. Stab injury over right forearm, 1”x1”x1” and 2”x1”x1”.

7. Stab injury over right knee, 1”x1”.

10.1. On examination of thorax, the following injuries were noticed:-

“1. Stab injury over left side of the chest, 2”x1”.

2. Penetrating injury over left scapula 2”x1”x2.”.

3. Fracture of the 7th, 8th and 9th ribs on the left side of the chest. Others normal”.

10.2. After examination of abdomen, PW24 recorded the following injuries:-

“1. Penetrating injury over left flank, 2”x1” deep inside peritoneum. Intestine are seen coming out.

2. Cut injury over left side of the abdomen, 8”x 2 ½”. Intestine seen coming out.

3. Penetrating injury over front of upper abdomen, 3 in numbers on the left side, 2”x1”x each and 2”x2”x1” on right side. 4 in numbers.

4. Penetrating injury over the lower abdomen, 3 in numbers, 2”x1”x1” each.

10.3. After examination of the small intestine, PW24 found two numbers of penetrating injuries over the jejunum. Small intestine was seen coming out from the left side of the wound. PW24 opined that cause of death was due to shock and hemorrhage because of the injuries sustained by the deceased which were *ante mortem* in nature. He proved the postmortem report as Ext.9.

10.4. In his cross-examination, he admitted that in the postmortem report, he had not mentioned the length of injuries found on the body of the deceased. He also did not mention the nature and size of the weapons used in causing the injuries.

11. Cross-examination of PW24 does not affect his testimony in any major way. From the evidence of PW24, it is evident that deceased suffered multiple injuries on her person. The injuries were so severe and penetrating that small intestine was seen coming out from below the stomach. From the number of injuries inflicted on the body of the deceased, it is evident that she was assaulted so severely to ensure that there was no possibility of her surviving the brutal attack. Therefore, from the evidence of the doctor, it is quite clear that death of Anita was homicidal in nature but the question is who had caused the injuries on the person of the deceased? Who had murdered Anita? Was it a pre-planned murder? What could be the motive to kill a young married woman in her early twenties?

12. To search for the answers to the above questions, let us briefly refer to and analyse the evidence of the relevant witnesses.

13. PW2 Smt. Gita Das is the informant. She stated that deceased Anita was her younger sister. Accused Ajay Chakraborty was the husband of Anita. On 09.10.1999,

accused Ajay Chakraborty went to Cooch Bihar keeping Anita in her house. On the night of 09.10.1999, she along with her sister Anita and her daughter were sleeping in her house on the same bed. Her husband Prabir Das was sleeping in the house of Ajay Chakraborty to guard the same. House of Ajay Chakraborty was situated at a little distance away from her house. Around midnight, she woke up on hearing the sound of the door of her house opening and saw light inside the house. She found a man present inside the house. She and her sister started screaming. Then a torchlight was focused at her face. She saw another man inside the house. They threatened them to keep quiet. Faces of the two persons inside the room were covered with clothes. The two persons assaulted Anita on the bed and dragged her to the floor. They departed after repeatedly assaulting Anita. PW2 went out of the house through the door taking her daughter along and took shelter in the residence of her aunt which was near their house. Her aunt Manju Rani Vaidya, cousin Manoranjan Vaidya and a few other persons came to the house. PW2 returned a bit later. She saw her sister Anita lying dead on the floor of the house in a pool of blood. She also saw a hole on the southern side of her house. She stated that at about 10 am of the following day, i.e., on 10.10.2008, she wrote the *ejahar*, Ext.2.

13.1. After conducting postmortem examination body was handed over whereafter the body was cremated.

13.2. On 27.10.1999, police called her to the Police Station where she saw the four accused appellants along with Kalidas. She saw a Magistrate interrogating the accused persons in the Police Station. She could gather that accused Kartik had asked accused Javed to engage a person to kill Anita. Javed engaged Kalidas @ Kuddus Ali to commit the murder. Accused Ajay confessed that he had sealed the deal with Kalidas @ Kuddus Ali for an amount of Rs.8000. The murder was carried out pursuant to such conspiracy. Ali Akbar had confessed before the Magistrate that they had murdered Anita. Ali Akbar and Kalidas had also promised the Magistrate that they would handover the *khukri* and dagger.

13.3. In her cross-examination, she admitted that she saw the accused persons inside Dangtola Police Outpost being handcuffed. The Magistrate was sitting inside the Police

Station in a chair. Magistrate told her, her father and her husband that he would interrogate the accused persons and asked them to listen. He interrogated the accused persons while they were handcuffed and were inside the lockup. She, her husband and her father were outside the Police Outpost when the Magistrate recorded statements of the accused persons. She further stated that she could not identify the assailants inside her house. She had also not seen what weapon was used by the two persons while assaulting Anita. They had assaulted Anita from above the mosquito net which was torn.

14. Shri Prabir Das, husband of the informant, deposed as PW3. He stated that Ajay Chakraborty and his sister-in-law Anita used to reside in a rented house near his residence. Both of them had married in a temple about two years prior to the incident. Ajay did not have good terms with his father-in-law but used to visit PW3. He was serving in the Railways Whenever Ajay used to go outside, he kept Anita in the house of PW3 to be with her sister, PW2. On such occasions, PW3 used to guard the house of Ajay Chakraborty.

14.1. On 09.10.1999, he had liquor with accused Kartik whereafter he went to sleep. At about 12.30 am somebody called him from outside saying that there was a robbery in his house; PW3 guessed the person to be Kartik.

14.2. When he rushed to his house, he found Anita lying dead on the floor; along with the neighbours, he found Kartik in his house. He also noticed a hole being dug in his house through which a man could enter. But he noticed that no valuables were taken away from the house; even the ornaments worn by Anita were found intact on her body.

14.3 Accused Ajay came in the morning. Police prepared the inquest report Ext.1 and seized one bloodstained mosquito net, one blood stained quilt, 2 blood stained pillow covers and one blood stained bed sheet from his house as per seizure list Ext.3.

14.4. According to PW3, there was gradual deterioration in the relationship between Ajay and Anita. Kartik was the cousin of Ajay. After Ajay had eloped with Anita, some youths of the neighbourhood had assaulted Kartik. Though Ajay demanded Rs.2000 from his father-in-law for the treatment of Kartik father-in-law did not oblige.

14.5. In his cross-examination he stated that Kartik had consumed liquor with him in the

evening and after he had left, PW3 had fallen asleep. Later on, Kartik called him from outside the house of Ajay where he was sleeping saying that dacoits had entered his house. When he went to his house, he found about 50/100 persons in his house including about 7/8 police personnel.

15. PW5 Shri Ranjit Mandal was the elder brother of deceased Anita. He stated that accused Kartik was the cousin of accused Ajay Chakraborty. A video film was made relating to the murder wherein accused persons narrated how they had murdered Anita. Accused Ajay stated that an amount of Rs. 8000 was paid to accused Ali Akbar and Kalidas to murder Anita. At the time of the incident, accused Ajay had gone to Cooch Behar.

16. Father of the deceased Kalipada Mandal deposed as PW7. He stated that in August, 1997, accused Ajay had eloped with his daughter Anita and thereafter married her. After marriage, he took a house on rent at Daulaguri, New Bongaigaon from where he shifted to a rented house at Nilibari, Bongaigaon. Ajay and Anita used to visit the house of his elder daughter Gita PW2 intermittently but did not visit him.

16.1. PW7 Kalipada Mandal was a Railway employee and in the morning of 10.10.1999 he had come back from Delhi when he came to know from his wife that his daughter Anita was murdered. He had rushed to Gita's house where he saw the dead body of his daughter Anita lying on the floor of the bedroom. He saw cut injuries caused by sharp weapons in several parts of Anita's dead body.

16.2. In his cross-examination, he stated that his son Ranjit had a scuffle with Kartik because of which Kartik had to be taken to hospital. Accused Ajay had demanded Rs.2000 from him as expenses for the treatment of Kartik but PW7 declined to pay any money.

17. Both PW12 Pranab Sarkar and PW13 Pradip Kumar Das had stated that they had seen a Magistrate in the Dangtol Police outpost recording statements of the accused persons. The accused persons had confessed before the Magistrate as to how they had committed the offence. The Magistrate and police took the accused to the place of occurrence.

18. PW16 Manoranjan Basumatary was a seizure witness. He stated that police had asked him to be a witness in the case. Police had also told him that the murder weapon was kept hidden in a jungle nearby his house. Thereafter the police officer recovered a '*khukri*', a long dagger, one underwear and a monkey cap from the jungle as pointed out by accused Kalidas whereafter those were seized vide seizure list Ext.5 where he put his signature. He stated that he had not seen accused Kalidas in the Court.

19. Shri Bapi Dey deposed as PW20. He stated that while he was in his shop, a police man came and took him to the pond near his house. There he saw two police officers with accused Akbar and Kalidas on the bank of the pond. One of the police officers showed him one '*khukri*', one cap and one vest kept on the bank of the pond which were seized. PW20 was told that the materials were recovered from the pond and the police officer asked him to put his signature in the seizure list whereafter he put his signature.

19.1. In his cross-examination PW20 stated that he did not see who had brought the seized materials from the pond.

20. PW21 Bidhan Mandal stated that when he had gone to the police station he had heard accused Ali Akbar and Kalidas confessing before the Sub-Inspector that they would produce some materials in connection with the murder. The Sub-Inspector took accused Ali Akbar and Kalidas with him to the nearby pond from where Ali Akbar produced a vest, one monkey cap and a '*khukri*'. Accused Ali Akbar took the police to his house where he produced one torch and a sari which were seized. Later on, accused Kalidas produced one '*khukri*' and a dagger from the jungle of Nilibari which were also seized.

20.1. In his cross-examination, he stated that the Sub-Inspector had taken accused Ali Akbar and Kalidas to the pond while being tied. Accused Ali Akbar got into the pond while being tied and produced one '*khukri*', one vest and a monkey cap from the pond which were seized. The police officer also recovered one torch and a sari from the house of accused Ali Akbar and those were seized.

21. Miftabuddin Ahmed deposed as PW25. He stated that at the relevant point of time, he was serving as Extra-Assistant Commissioner-cum-Executive Magistrate at

Bongaigaon. Additional District Magistrate Shri TM Sharma had deputed him to go with the police to recreate the crime scene in connection with Dhaligaon PS Case No.57/1999. He stated that he had gone to the place of occurrence along with police personnel. He interrogated the two accused persons Ali Akbar and Kalidas after going to Gita Das's house. They had narrated to him the entire story as to how they had committed the murder. He got their statements recorded (videographed) through a cameraman vide material Exhibit 6. At that time the two accused persons were in police custody under arrest. The seized weapons were in the hands of the two accused persons. He had gone to the police station as a neutral person and not as an Investigating Officer. When he had gone to the place of occurrence police personnel were with him along with the two accused persons. The accused persons had confessed before him and the police personnel that they had hatched a conspiracy in the shop of Kartik Chakraborty to murder Anita. As per the conspiracy Ajay had gone to Cooch Behar on the date of the incident keeping his wife Anita in the house of her sister Gita PW2. In the night accused Ali Akbar and Kalidas had entered into the house of Gita Das and murdered Anita as was planned earlier. The next day husband Ajay Chakraborty came back from Cooch Behar pretending to be unaware of the incident. Accused Ajay had paid Rs.8000 to Ali Akbar and Kalidas.

21.1. In his cross-examination, PW25 stated that police did not record his statement and that he was deposing in the court for the first time from his memory.

21.2. On further cross-examination he stated that material Exhibit 6 was a video cassette in which accused persons recreated the scene of crime. Accused Kalidas confessed his guilt and narrated how the murder was committed and that they were engaged as hired killers by accused Ajay who made the payment through accused Kartik Chakraborty. He further stated that he had submitted a report to the Addl. Deputy Commissioner.

22. PW27 was Shri Jatindra Nath Saikia who was the Investigating Officer of the case. On 10.10.1999, at about 1.15 am, he got a telephonic information from an unknown person that a dacoity was going on at village Nilibari but the person who made the telephone call did not disclose his identity. He went to the village immediately and after crossing the Railway line, he came across two persons one of whom being Kartik

Chakraborty. They told him that they were from village Nilibari and were proceeding to the hospital. However, Kartik Chakraborty took him to the place of occurrence. After deputing police force and keeping the dead body at the place of occurrence, he left the place. He returned back in the morning and carried out inquest on the dead body as per Ext.1 inquest report and thereafter made certain seizures. On 10.10.1999, he received FIR from PW2 Gita Das and made GD Entry No.205 whereafter he forwarded the case to the Dhaligaon Police Station.

22.1. He stated that accused Ajay and Kartik were brought to the Police Station and on being interrogated, they confessed that they had engaged Javed Ali, Ali Akbar and Kalidas to murder Anita for Rs.8000. On such confession, Javed Ali, Ali Akbar and Kalidas were arrested.

22.2. Ali Akbar showed the location where he had concealed the 'khukri' which he had used to commit the murder of Anita Chakraborty. The other accused Kalidas @ Kuddus Ali had led him to the paddy field where he had concealed another '*khukri*' and dagger which were used for committing the murder. All the weapons were seized.

22.3. PW27 stated that he had made a prayer before the District Magistrate to depute one Magistrate at the time of investigation. He had also made a prayer for video recording of the entire episode, which was allowed. Executive Magistrate Miftabuddin Ahmed, PW25 was deputed for the said purpose. Ext.6 was the video cassette. Since the accused had confessed their guilt, they were forwarded to the Court of Sub-Divisional Judicial Magistrate (Sadar), Bongaigaon where their confessional statements under Section 164 Cr.PC were recorded. He stated that on completion of investigation and getting sufficient materials against the accused he had submitted charge-sheet against the accused persons and Kalidas.

22.4. In his cross-examination, he stated that the motive of the crime was that there was bitterness between husband and wife though it was a case of love marriage. There was no adjustment with the family members of Ajay for which they had to live separately in a rented house. They had no issues; in fact there was a miscarriage at an earlier point of

time. When accused Ajay discussed with his cousin brother Kartik and sought his advice, Kartik advised him to go for divorce but Ajay did not agree. He was of the view that it was better to kill Anita by engaging hired killer. According to him this was the motive for killing Anita Chakraborty.

22.5. On further cross-examination, he admitted that prior to lodging of FIR on 10.10.2009, telephonic information was received from some unknown person at 1.15 am of the same day whereafter he proceeded to the place of occurrence. It is evident that no GD Entry was made by PW27 on the telephonic information which he received. He further admitted that in the course of the investigation as recorded in the case diary relationship between deceased Anita Chakraborty and accused Ajay Chakraborty was not so strained that accused Ajay Chakraborty would take the decision to kill his wife by engaging hired killers. He also stated that the accused persons had confessed to committing the crime whereafter their confessional statements were recorded under Section 164 Cr.PC.

22.6. PW27 further stated that he had requested the District Magistrate, Bongaigaon to depute one Executive Magistrate for assisting the investigation as it would be better if an Executive Magistrate was present at the time of the accused taking the police party to the place of occurrence and narrating as to how they committed the offence. He also stated that there was video recording of the entire incident by re-enacting the crime scene. The video recording and leading to the discovery was at the time of police custody of the accused persons. He admitted that the witnesses whom he had examined under Section 161 Cr.PC did not disclose that there was strained relationship between deceased Anita chakraborty and her husband accused Ajay Chakraborty prior to the occurrence.

23. Pausing here for a moment, we find from the evidence tendered so far that assistance of an Executive Magistrate was sought for by the police and the Executive Magistrate PW25 was present in the police station when the accused persons were interrogated by the police while they were in police custody. From the evidence of PW25, it has also come on record that he was instrumental in re-enacting the crime scene which was videographed.

24. Section 26 of the Evidence Act says that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. In **State of Assam Vs. Anupam Das, 2007 (3) GLT 697** a Division Bench of this Court held that the expression ‘Magistrate’ appearing in Section 26 of the Evidence Act, 1872 would mean a Judicial Magistrate and not an Executive Magistrate.

25. When the present two appeals were heard on a previous occasion a Division Bench of this Court considered the decision in **Anupam Das** (supra) and observed that there was some confusion in the observations made in **Anupam Das** (supra) and made a reference to a larger Bench to examine and decide the following question of law:-

“Whether the expression ‘Magistrate’ appearing in Section 26 of the Evidence Act would mean Judicial Magistrate or an Executive Magistrate?”

26. The above question was answered by a three Judge Bench of this Court vide the judgment and order dated 26.10.2017 by holding that the view expressed by the Division Bench in **Anupam Das** (supra) lays down the correct legal position. The reference was answered by the larger Bench by holding that the expression ‘Magistrate’ appearing in Section 26 of the Evidence Act would mean only a Judicial Magistrate and not an Executive Magistrate. Before advertng to the discussions made by the larger Bench, it would be apposite to refer to the decision in **Anupam Das** (supra), relevant portion of which is extracted hereunder:-

“20. It can be seen from the language of Section 26 that the only exception to the Rule contained under Section 26 is that any such confession, which is otherwise hit by Section 26, can be proved against the accused if such a confession is made in the immediate presence of a Magistrate. It is not the case of the prosecution that the alleged confession before PW-8 was made in the immediate presence of a Magistrate, therefore, the same is clearly hit by Section 26 and cannot be looked into.

*21. Coming to Ext-17, learned Public Prosecutor argued that it being a confession made in the immediate presence of a Magistrate, the same could be proved against the accused as falling within the exception to the Rule contained under **Section 26 of the Evidence Act**. Admittedly, PW-12, who recorded Ext-17, is an Executive Magistrate, therefore, it becomes necessary to examine whether the*

expression "Magistrate" occurring under **Section 26 of the Evidence Act** takes within its sweep an "Executive Magistrate". "Magistrate" is not a defined expression under the Evidence Act.

22. Section 3 Sub-section (32) of the General Clauses Act, 1897 defines the expression "Magistrate" as follows:

“(32) "Magistrate" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force;”

Therefore, necessarily we need to examine the provisions of the Code of Criminal Procedure.

23. Section 3 of the CrPC provides for rule of construction of references. **Sub-Section (1) of Section 3** stipulates as to how the expression "Magistrate" shall be construed whenever reference is made under the Code, without any qualifying words. Sub-Sections (2) and (3) are not relevant for our purpose. Sub-section (4), which is relevant for the present purpose reads as follows:

“(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-

(a) Which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) Which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.”

The scheme of Sub-section 4 will be examined slightly later in this judgment.

24. **Section 6 of the Cr.PC** contemplates the establishment of various kinds of criminal courts. They are--(i) Courts of Session; (ii) Judicial Magistrate of the first class and, in any metropolitan area, Metropolitan Magistrate; (iii) Judicial Magistrate of the second class; and (iv) Executive Magistrates. Therefore, Section 6 draws a clear distinction between Judicial Magistrates and the Executive Magistrates. The powers of the Judicial Magistrates and the Executive Magistrates are expressly dealt with under various **provisions of the Cr.PC Sections 12 to 19** deal with the various categories of Judicial Magistrates referred to under **Section 6**. **Section 20** deals with the Executive Magistrates. Relevant to the context of this case is Section 20(1) which reads as follows:

“20. Executive Magistrates--(1) In every district and in every metropolitan area the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and

shall appoint one of them to be the District Magistrate.”

25. Section 21 of the Cr.PC empowers the State Government to appoint Special Executive Magistrates; the details of which are not necessary in the present case. **Section 22 of the Cr.PC** deals with the local jurisdiction of the Executive Magistrates. **Section 23 of the Cr.PC** deals with the hierarchy of the Executive Magistrates and the limits and powers of the various Executive Magistrates. Wherever the CrPC confers powers on the Executive Magistrates, the provisions of the Code are specific, for example, under Sections 107, 108, 109 and 110 the legislature expressly employed the expression "Executive Magistrate". We do not propose to make an exhaustive survey of the provisions of the Code for the present purpose. The above provisions are noted only for understanding the scheme of the Code with regard to the powers, functions and limitations of the Judicial and Executive Magistrates.

26. It is in the context of such separation of powers among the two categories of Magistrates Section 3(1) stipulates that in the Code of Criminal Procedure any reference, without any qualifying words, to a Magistrate shall be construed a Judicial Magistrate which term includes a Judicial Magistrate in contra-distinction to an Executive Magistrate. The Parliament was also conscious of the fact that under various enactments made by the Parliament, powers are required to be exercised by the Magistrates without specifying whether such powers are to be exercised by Judicial or Executive Magistrates in a given situation. The Parliament, therefore, thought it fit to make a declaration under **Sub-Section (4) of Section 3** that whenever such a question arises (in the context of any law made by the Parliament other than the Code of Criminal Procedure whether such a reference is to a Judicial Magistrate or the Executive Magistrate) depending upon the nature of the power that is to be exercised such reference is to be construed to be either to a Judicial or an Executive Magistrate. From the scheme of Sub-Section (4) it appears that where the powers are purely administrative in nature such powers are required to be exercised by an Executive Magistrate. Whereas, where the power to be exercised is such that it involves appreciation of evidence or the formulation of a decision which exposes any person to any punishment, penalty or detention etc then such functions are required to be exercised by the Judicial Magistrates.

27. In the light of the above we are of the opinion that the expression "Magistrate" occurring under Section 26 of the Indian Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in police custody is likely to expose the person making the confession to a punishment. This conclusion of ours gains further support from the very scheme of the **provisions of Sections 25 to 27 of the Evidence Act**. **Section 25 of the Evidence Act** makes a declaration in no uncertain terms that a confession made to a police officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of decisions to the

effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to Section 25. While Section 25 prohibits the proof of a confession made to a police officer, Section 26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provision is made in order to prevent the police from extracting confession from the accused while he is under custody and ingeniously circumventing the prohibition of law contained under Section 25 by making it appear that the confession was not in fact made to a police officer but somebody else. The scheme of the provisions of Sections 25 to 27 was examined by the Supreme Court in (1994) 2 SCC 467: **Bheru Singh v. State of Rajasthan** wherein at para 16 the Supreme Court held:

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

28. The Legislature was obviously of the view that any kind of confession by an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of mankind. However, the Legislature recognized an exception to the rule contained under Sec 26, i. e. a confession made by an accused, who is

in the custody of the police, to some person other than a police officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a police officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods. Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of Article 20 Sub Article 3 of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties u/s 164 (2) Cr.PC on the Judicial Magistrate recording statement u/s 164 Cr.PC. It would be strange logic that while a statement recorded by a Judicial Magistrate u/s 164 Cr.PC would be vitiated for non-compliance of the conditions stipulated u/s 164 (2) and (4) of the Cr.PC and cannot, therefore, be used against the maker of the statement, but the Magistrate contemplated u/s 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, is under no obligation to comply with the requirements of Sec 164 (2) and (4) of the Cr.PC, but the confession recorded by such a Magistrate can be proved against the accused for establishing his guilt.

29. From the foregoing discussion we have no alternative but to reach an irresistible conclusion that the expression "Magistrate" occurring in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate."

27. Larger Bench examined the evolution of the Code of Criminal Procedure and its impact on the Evidence Act, 1872. Thereafter the larger Bench held as under:-

“19. Code of Criminal Procedure was first enacted in 1861. Section 148 of the Code of Criminal Procedure, 1861 provided that no confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence.

20. As per Section 149, no confession or admission of guilt made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person. Section 150 provided that when any fact was deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as related distinctly to the fact discovered by it may be received in evidence.

21. This was Code of Criminal Procedure, 1861. At that point of time, concept of separation of powers between judiciary and executive or distinction between Judicial Magistrate and Executive Magistrate was non-existent.

22. The Indian Evidence Act was enacted in 1872. Section 25 of the Indian Evidence Act, 1872 (Evidence Act hereinafter) is virtually the same as Section 148 of the Code of Criminal Procedure, 1861 with slight modification of language. Section 25 of the Evidence Act says that no confession made to a police officer shall be proved as against a person accused of any offence.

23. Likewise, Section 149 of the Code of Criminal Procedure, 1861 finds place in the Evidence Act as Section 26. Heading of this Section is “Confession by accused while in custody of police not to be proved against him”. The text of Section 26 says that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

24. Similarly, Section 150 of the Code of Criminal Procedure, 1861 finds its expression in Section 27 of the Evidence Act, albeit, with certain modification of language. Section 27 of the Evidence Act says that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, who is in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

25. Sections 148, 149 and 150 of the Code of Criminal Procedure, 1861 having been incorporated in the Evidence Act, these provisions do not find place in the subsequent Codes of Criminal Procedure, 1882, 1898 and 1973. These provisions are now available in the Evidence Act as Sections 25, 26 and 27. Be it stated that as noticed above, the Evidence Act was enacted in the year 1872 when the concept of separation of powers between judiciary and executive was virtually non-existent or at the most in a nebulous state. Be that as it may, since Section 26 of the Evidence Act is central to the deliberation, it would be apposite to extract the same in its entirety for ready reference:-

“26. Confession by accused while in custody of police not to be proved against him.- No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.--In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St.

George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.”

26. Section 26 appears in the Evidence Act immediately after Section 25. Section 25 is specific. It says that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 appears to be in continuation of Section 25 with an exception carved out, the exception being that confession made by a person while in the custody of a police officer may be proved against him if it is made in the immediate presence of a Magistrate. Therefore, a conjoint reading of Sections 25 and 26 of the Evidence Act would go to show that no confession made by a person to a police officer while in custody shall be proved against him unless it is made in the immediate presence of a Magistrate. We have already discussed that when this provision was initially provided in the Code of Criminal Procedure, 1861 and thereafter incorporated in the Evidence Act, 1872, the concept of separation of powers between the executive and the judiciary was either non-existent or was in a nebulous state. Therefore, it is quite but natural that the reference in Section 26 of the Evidence Act is only to a Magistrate.

27. Now, we may look at the Code of Criminal Procedure, 1973, which was enacted 23 years after adoption of the Constitution and by which time separation of judicial powers from the executive was achieved in the country barring a few hill states or some other tribal areas. In this context, Section 3 of the Code of Criminal Procedure, 1973 clearly mentions that any reference in the said Code to a Magistrate without any qualifying words would mean a Judicial Magistrate in relation to an area outside a metropolitan area or to a Metropolitan Magistrate in relation to a metropolitan area.

28. Section 164 of the Code of Criminal Procedure, 1973 provides for recording of confession and statement by a Metropolitan Magistrate or Judicial Magistrate, as the case may be, subject to compliance of the conditions mentioned therein. As per proviso to Sub-Section (1) of Section 164, no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time-being in force. Before recording such confessional statement, Judicial Magistrate has to ensure that the person making such statement is completely free of police influence or there is no fear of any duress or coercion in the making of such a confession. Moreover, as per Sub-Section (3), if at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody. Therefore, if we look at the scheme of the Code of Criminal Procedure, 1973, it is evident that it is only when a confession or a statement is made by a person before a Judicial Magistrate or Metropolitan Magistrate, as the case may be, that the same would have evidentiary value. It is in this context that we have to examine whether the expression “Magistrate” appearing in Section 26 of the Evidence Act would mean a Judicial Magistrate or Executive Magistrate.”

28. The larger Bench extensively referred to the decision in **Anupam Das** (supra) and observed that the reference made was really not necessary. The larger Bench concluded by holding as under:-

“30. In the referral order, we find that the later Division Bench observed that there appears to be some confusion in the finding of the previous Division Bench in paragraphs 28 and 29 of **Anupam Das** (supra) by pointing out that in paragraph 28, it was held that Magistrate under

Section 26 need not even be a Judicial Magistrate but in paragraph 29, it was held that Magistrate under Section 26 would only mean a Judicial Magistrate and not an Executive Magistrate.

31. We are afraid; we can accept such reasoning in the referral order. Paragraphs 28 and 29 of **Anupam Das** (supra) have been extracted above. A plain and simple reading of paragraph 28 would go to show that the previous Division Bench had observed that it would be a strange logic if a statement recorded by a Judicial Magistrate under Section 164 Cr.PC would not be admissible in evidence if the conditions stipulated therein are not complied with whereas a statement made before an Executive Magistrate under Section 26 of the Evidence Act where there is no procedural safeguards as provided under Section 164 of the Code of Criminal Procedure, 1973, would be admissible in evidence. Following such analysis, conclusion was reached in paragraph 29 that the expression “Magistrate” appearing in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate. There is no confusion here. The exposition of the legal position in **Anupam Das** (supra) is clear and unequivocal. Therefore, the observation made in the referral order that there appears to be some confusion in paragraphs 28 and 29 of **Anupam Das** (supra), perhaps, was not justified. Reference to the Coroner’s Act, 1871 whereunder Coroners appointed were deemed to be Magistrates within the meaning of Section 26 of the Evidence Act is misplaced for the same reason as alluded to herein above that when the Coroner’s Act was enacted, there was no distinction between Judicial Magistrate and Executive Magistrate.

32. The view taken in **Anupam Das** (supra) was followed by another Division Bench of this Court in **Ratan Singh Vs. State of Assam, 2012 (6) GLJ (NOC) 123**, wherein it was held that in view of the provision prescribed by Section 3 of the Code of Criminal Procedure, 1973, a reference to a Magistrate unless the context otherwise requires, is to be construed as a reference to a Judicial Magistrate. It was further held that making of a confessional statement in the presence of an Extra-Assistant Commissioner cannot be treated as a statement made in the immediate presence of a Magistrate, while in police custody; it would be hit by Sections 25 and 26 of the Evidence Act and therefore, such statement cannot be used as legal evidence against the maker of the statement.

33. This has also been the view of the Madras High Court and it finds its expression in several decisions. In **Palanisamy alias Kunjupaiyan Vs. State, Criminal Appeal No.541/2005**, decided on 22.03.2013, Madras High Court has held that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973. In view of Section 3(3) of the Code of Criminal Procedure, 1973, the term “Magistrate” referred to in Section 26 of the Evidence Act does not refer to Executive Magistrate. Consequently, the expression “Magistrate” as appearing in Section 26 of the Evidence Act would mean only a Judicial Magistrate. Therefore, confession recorded or videographed by police in the presence of Executive Magistrate would be hit by Sections 25 and 26 of the Evidence Act. Again, in the case of **Kalam @ Abdul Kalam Vs. Inspector of Police**, reported in **MANU/TN/07588/2011**, the Madras High Court examined the provisions of Section 26 of the Evidence Act vis-à-vis Section 3(3) of the Code of Criminal Procedure, 1973 and after observing that the Evidence Act was enacted before the commencement of the Code of Criminal Procedure, 1973, held that the term “Magistrate” as referred to in Section 26 of the Evidence Act will mean only a Judicial Magistrate.

34. Therefore, we have no hesitation in our mind in coming to the conclusion that the views expressed by the Division Bench in **Anupam Das** (supra) lays down the correct legal position

and strictly speaking, the reference so made was really not necessary.

35. Beyond this, we would not like to say anything more.

*36. Consequently, we hold that the decision in **Anupam Das** (supra) lays down the correct legal proposition and accordingly, we answer the reference by holding that the expression "Magistrate" appearing in Section 26 of the Evidence Act would mean only a Judicial Magistrate and not an Executive Magistrate."*

29. Therefore, from the above it is evident that the confessions made by the accused persons before the police while in police custody were made in presence of an Executive Magistrate. Therefore such confessions do not have any legal sanctity and cannot have any evidentiary value.

30. Proceeding further with the evidence, we find that the accused persons had made confessional statements which were recorded under Section 164 Cr.PC vide Exhibits 10, 11, 12, 13 and 14. In Ext.10 accused Kartik Chakraborty made the confessional statement. As per the confessional statement his cousin brother Ajay told him that his wife had illicit relationship with other person and therefore she should be murdered. He had asked Kartik to arrange someone to murder her. Though he counseled his cousin brother against such a course of action, on his repeated insistence, he arranged two hired killers Ali Akbar and Kalidas for committing the murder on payment of Rs.8000. Ali Akbar and Kalidas thereafter murdered Anita Chakraborty.

31. Similar confessional statements were recorded of the other accused persons. The confessional statements were recorded by PW26 Shri Manabendra Uzir who was the Sub-Divisional Judicial Magistrate (Sadar) at Bongaigaon. Before recording the confessional statement, PW26 stated that he was satisfied that there was no police in the Court or nearby except constable Santosh Kumar Dev who was not concerned with the investigation of the case or with the arrest or production of the accused.

32. In his evidence, PW26 stated that on 29.10.1999 he was entrusted by the Chief Judicial Magistrate to record the confessional statements of accused Ajay Chakraborty and Kartik Chakraborty who were produced before him for recording their confessional statements at 11 am. For reflection he kept the two accused persons in his office chamber under care of the office peon and recorded their statements at 3 pm. Similarly the other

three accused persons were produced before him on 30.10.1999 at 11 am whereafter they were kept in his official chamber for reflection. PW26 told accused Kartik Chakraborty as well as the other accused persons that he was not a police officer but a Magistrate; that they were not bound to confess their guilt but if they made the confession, it would go against them as evidence; that they were not bound to make any statement which was tutored by any other person. According to PW26, the accused persons confessed on their own and he was satisfied that such action was voluntary. The confessional statements were recorded at 3 pm.

32.1. In his cross-examination he admitted that as was the practice there was a police constable who was deputed to the Court of Sub-Divisional Judicial Magistrate i.e., his Court. He admitted that no specific question was put to the accused persons as to why they desired to confess their guilt. He further admitted that he did not tell the accused persons that they would not be sent to the police custody again if they did not confess their guilt. The accused persons were brought and produced before him by police. He also admitted that after production of the accused persons before him he did not send them to judicial custody for reflection. He further admitted that while he was recording the confessional statement of one accused, the other accused was not in the room but could not say where the other accused was at that point of time.

33. In their examination under Section 313 Cr.PC., the accused persons denied committing any offence and stated that they were falsely implicated. They further stated that they did not confess their guilt voluntarily. Police had tortured them and had threatened to shoot them if they did not confess their guilt. It is because of police torture that they made the confession.

34. Each of the appellants deposed as defence witnesses. They stated that they had made their confessional statements because they were tortured by police personnel. They were warned by the police that if they did not make confessional statement they would be subjected to severe torture. DW1 Ajay Chakraborty stated that after he was released on bail, he had filed one petition dated 06.07.2001 before the Additional District and Sessions Judge (Ad hoc), Bongaigaon stating that the confessional statement given by him was not

voluntary; rather it was made under duress. Even in his cross-examination, he maintained that he had not made his confessional statement voluntarily.

35. Section 164 Cr.PC deals with recording of confessions and statements. Sub-Section (1) says that any Metropolitan Magistrate or Judicial Magistrate, whether he has jurisdiction in the case nor not, may record a confession made to him in the course of an investigation or any time afterwards but before commencement of trial. As per proviso to Sub-Section (1), no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force. As per Sub-Section (2), the Magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him. Further, the Magistrate shall not record any such confession unless upon questioning the person making it he has reason to believe that it is being made voluntarily. Sub-Section (3) is relevant. It says that if at any time before the confession is recorded the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody. Sub-Section (4) provides that the confession shall be recorded in the manner provided in Section 281 and shall be signed by the person making the confession. The Magistrate shall make a memorandum at the foot of such record in the format mentioned therein.

36. From a careful perusal of Exts. 10 to 14 as well as the evidence of PW26, it is evident that the confessional statements were not recorded in a proper manner. A police man was very much present in the Court of PW26 when the confessional statements were recorded. PW26 did not tell the accused persons that even if they do not confess they would not be sent back to the police custody. This is very important. Confessional statements were recorded on 29.10.1999 and 30.10.1999 respectively. The accused persons were in police custody prior to this for about 5 days. That the interrogation of the accused persons in police custody was intense can be easily made out by the fact that PW25 the Executive Magistrate had joined the police in investigating the case and had reenacted the crime scene through the accused persons which was videographed. The fear of the police

investigation clearly loomed large over the accused persons when their confessional statements were recorded by PW26. Such confessional statements were however retracted by the accused persons both in their examination under Section 313 Cr.PC as well as in their deposition as defence witnesses; rather even prior to that before commencement of trial. They had made applications before the Additional District and Sessions Judge (Ad hoc), Bongaigaon after being released on bail that their confessional statements were not voluntary but were made under duress.

37. There is another aspect to this. A confession is made by a person when he suffers from an acute sense of guilt for committing a wrong. There is remorse in him. As a kind of atonement, he therefore comes forward to tell the truth. 'Desire' or intention of all the accused persons who were in police custody to confess at the same time was quite unusual. This aspect should have been probed further by PW26. Further the confessions could have been recorded maintaining adequate spacing in between each of the confessions. During this period the accused could have been sent to judicial custody. In our considered opinion, failure to do so has impeached the credibility of the confessions.

38. That apart, the spin sought to be given in Exhibit 10 confessional statement of accused Kartik Chakraborty that the deceased had illicit relationship with someone else for which Ajay Chakraborty wanted to kill her is not supported by any witness. This again has clouded the voluntariness of the confession.

39. Therefore, on a careful consideration of the above, we are reluctant to place much reliance on such confessions or rather retracted confessions.

40. If the confessions made before the police in presence of PW25 the Executive Magistrate or the confessions made before the Judicial Magistrate PW26 are excluded, there is hardly any evidence to prove that accused Ajay and Kartik Chakraborty had conspired to murder Anita Chakraborty and as a result of such conspiracy and to give effect thereto they had engaged hired killers Ali Akbar and Kalidas to commit the murder of Anita Chakraborty on payment of Rs.8000 who thereafter committed the murder on 10.12.2009 at around midnight. There is no legally admissible evidence to that effect. Even

the *leading to discovery* of the material exhibits would stand vitiated because of the related confession made by the accused persons before the police in front of an Executive Magistrate.

41. No doubt the victim was killed in a most gruesome and dastardly manner. But conviction in a criminal trial has to be on the basis of legally admissible and cogent evidence wherefrom one and only one conclusion can be reached, that is, accused persons had conspired together and murdered the victim.

42. As noticed above there is no such legally admissible evidence on record. Suspicion howsoever grave it may be cannot take the place of hard and unimpeachable evidence which is lacking in the present case. On the basis of suspicion and legally untenable evidence, we are not inclined to uphold the conviction of the accused persons. That being the position, we are unable to find the answers to the questions posed by us in paragraph 11 above from the evidence presented by the prosecution.

43. While we are conscious of the fact that a young woman was brutally killed in the prime of her life with the assailants remaining unpunished, we cannot however be swayed by emotion and give a go-bye to well established principles of evidence to arrive at a definite conclusion in a criminal proceeding.

44. For the aforesaid reasons, we have no other alternative but to allow the appeals by setting aside the impugned judgment and order dated 13.11.2017.

45. Consequently, since the appellants have been acquitted, they are set at liberty. However, their bail bonds shall continue to be in force for six months in terms of Section 437A Cr.PC. In this connection, it may be mentioned that in Criminal Appeal No.359/2017 (*Abdul Malik Vs. State of Assam*) a Division Bench of this Court vide order dated 14.11.2018, has held that Section 437A Cr.PC would be applicable only in a case of acquittal by the trial Court or in a case of acquittal by the appellate Court by setting aside the conviction, its invocation being dependent upon the facts and circumstances of each case. In the given facts of the present case we feel that appellants have to be given the benefit of doubt and consequently their conviction have to be set aside. In such

circumstances invocation of Section 437A Cr.PC would be justified.

46. Appeals are accordingly allowed.

47. Office to send down the LCR forthwith.

JUDGE

JUDGE

Comparing Assistant