



GAHC010190362020

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

**Case No. : CRL.A(J)/103/2020**

DHIREN TANTI  
SONITPUR, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR  
REP. BY PP, ASSAM.

**Advocate for the Petitioner** : MR. A AHMED, AMICUS CURIAE

**Advocate for the Respondent** : MRS. R D BHUYAN, LEGAL AID COUNSEL

**BEFORE**

**HON'BLE MR. JUSTICE SUMAN SHYAM**  
**HON'BLE MR. JUSTICE ROBIN PHUKAN**

Date of hearing : 03.03.2022 & 04.03.2022.

Date of judgment : **04.03.2022.**

**JUDGMENT & ORDER (Oral)**

**(Suman Shyam, J)**

Heard Mr. A. Ahmed, learned Amicus Curiae appearing for the appellant. We have also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam,



appearing for the State. None has appeared for the informant.

2. This appeal is directed against the judgment and order dated 11.02.2020 passed by the learned Sessions Judge, Sonitpur, Tezpur in connection with Special POCSO Case No.67/2017 convicting the sole appellant under Section 302/201 of the Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for further six months, for the offence under Section 302 of the IPC. The appellant was also sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.5000/- with default stipulation for committing the offence under section 201 of the IPC. Both the sentences were to run concurrently.

3. This is yet another unfortunate case where an 11 years old girl child was found dead under mysterious circumstances with her body partially buried under the soil. The prosecution case, as unfolded from the materials available on record, is to the effect that on 01.11.2017 at around 2.30 p.m. the victim had gone to the "bagan" (garden) at Block No.3 of Malijan Tea Estate along with the accused Dhiren Tanti looking for firewood. Subsequently, the victim was raped and murdered and her body was dragged and buried in a drain of the garden by the accused. On 01.11.2017, at about 7.10 p.m., the Officer-in-Charge of Salonibar Policei Outpost, coming under Tezpur Police Station, had received an information over phone from the Welfare Officer of Malijan Tea Estate informing him that one minor girl has been murdered and her body concealed under the ground. Accordingly, Salonibari Outpost G.D. Entry No.11 dated 01.11.2017 was made and the police went to the



place of occurrence, arrested the accused person, conducted videography of recovery of the dead body allegedly, on being led by the accused. On 02.11.2017 an F.I.R. was lodged by the PW-3 i.e. the uncle of the victim based on which, Salonibari O.P. G.D. Entry No.29 dated 02.11.2017 was made and the same was forwarded to the Tezpur Police Station for registering a proper case. Based on the F.I.R. dated 02.11.2017, Tezpur P.S. Case No.2253/2017 was registered under Sections 302/201 of the IPC r/w Section 4 of the POCSO Act and the matter was taken up for investigation. S.I. Aminul Islam i.e. the PW-8 was entrusted with the task of carrying out investigation in the case. The PW-8 had conducted investigation but before he could submit charge-sheet he was transferred, as a result of which, the charge-sheet in this case had to be submitted by the PW-11. Based on the charge-sheet, charges were framed against the accused/appellant under Sections 302/201 of the IPC read with Section 8 of the POCSO Act, 2012 and the same was read over and explained to him. However, since the accused had pleaded not guilty the matter went up for trial.

4. In order to bring home the charges, the prosecution side had examined as many as 11 witnesses out of which PWs-7, 8, 9, 10 and 11 were the official witnesses. Upon recording of evidence of the prosecution side the statement of the accused person was recorded under Section 313 of the Cr.P.C. wherein he had denied all the incriminating circumstances put to him. The accused, however, did not adduce any evidence in his defence. Upon conclusion of trial and on evaluation of the materials on record the learned trial court had found that the charges brought against the accused under Sections 302/201 of the IPC were fully established on the basis of circumstantial evidence brought on record. The accused was, however, acquitted in



respect of the charge brought under Section 8 of the POCSO Act due to want of sufficient evidence. The conviction of the appellant/accused in this case is based on the "last seen together" circumstances which, according to the learned Sessions Judge, completed the chain of circumstances so as to conclusively prove the charges brought against the accused person under Sections 302/201 of the IPC.

5. Assailing the impugned judgment dated 11.02.2020, Mr. A. Ahmed, learned Amicus Curiae, has argued that the evidence brought on record by the prosecution side neither establishes the "last seen together" circumstance nor does it prove the charge brought against the accused under Sections 302/201 of the IPC. The learned Amicus Curiae submits that even assuming that the accused was last seen together with the victim, even then, the same alone cannot be the basis to convict the accused for committing murder. Mr. Ahmed has further argued that the prosecution has failed to establish the time of death. No evidence could be produced by the prosecution to connect the accused with the occurrence. Moreover, the statement of the witnesses relied upon by the prosecution side are full of contradictions and their statements were also recorded by the I.O. after much delay. Contending that there is no information provided by the accused leading to the discovery of the dead body, as claimed by the prosecution side, the learned Amicus Curiae has argued that the accused/appellant in this case has been convicted merely on suspicion without there being any cogent evidence available on record so as to prove the charge brought against him. It is also the submission of Mr. Ahmed that the prosecution witnesses, who did not support the prosecution case and were not declared hostile witnesses, their testimony would be binding on the prosecution. From

the testimony of PW-1, it would be established beyond doubt that the charge brought against the accused/appellant could not be proved on the basis of evidence available on record. In support of his aforesaid arguments Mr. Ahmed has relied upon the following decisions :-

**1. (2005) 12 SCC 438 [Jaswant Gir vs. State of Punjab]**

Paragraph 5

**2. 2020 (1) GLT 725 [Sharifa Khatun & Ors. Vs. The State of Assam and Ors]**

Paragraphs 20 and 32

**3. (2014) 4 SCC 715 [Kanhaiya Lal vs. State of Rajasthan]**

Paragraphs 11, 12 & 14.

6. Responding to the above argument, Ms. B. Bhuyan, learned Addl. P.P., Assam, has argued that PWs-1, 5 and 6 have categorically deposed that they have seen the accused with the victim around the time of the occurrence and their evidence has remained unimpeached. PW-1 has also deposed that on the date of the incident, at around 2.30 p.m. while she was plucking tea leaves in the garden, she had seen the accused dragging the victim taking her inside the garden. According to the PW-1, the incident took place at Block No.3 of Malijan Tea Estate which is the place where the dead body of the victim was found out. Ms. Bhuyan has further submitted that it has come out from the evidence brought on record that the accused person had also initially joined the other people in the search for the victim but soon after the body was found the accused fled from the scene and later on he was apprehended



by the public and handed over to the police. The evidence brought on record to the above effect, according to the learned Addl. P.P., establishes the chain of circumstances so as to conclusively prove the charge brought against the accused under Section 302/201 of the IPC. As such, submits Ms. Bhuyan, the impugned judgment and order does not call for any interference, particularly keeping in mind, the heinous nature of the offence.

7. We have bestowed our anxious consideration on the submissions made at the bar and have also carefully gone through the materials on record.

8. As noticed above, the learned Sessions Judge had acquitted the accused/appellant of the charge framed under Section 8 of the POCSO Act, 2012 due to want of evidence. The conviction of the appellant as regards the charges brought under Sections 302/201 of the IPC appears to be entirely based on the "last seen together" circumstances which is apparent from the findings and conclusions recorded by the learned Sessions Judge in paragraphs 48 to 51 of the impugned judgment which are reproduced herein below for ready reference :-

*"48. In the present case the totality of the evidence and the circumstance pressed on record undoubtedly finger towards the accused as author of the crime and the injuries of abdomen sustained by the little girl indicates that the accused intentionally caused the death of the deceased perhaps not succeeding in going to do some illegal acts.*

*49. In the light of the discussions made above, it reveal that there are series of incriminating evidence which are consistent with the guilt of the accused*



and inconsistent with his innocence. The complete chain of incriminating circumstance and last seen together the deceased with the accused led to forming a reasonable link of certainty that the murder of the deceased being committed by none but the accused and as such I am of the considered view that charge u/s 302 IPC against the accused stands proved. Accordingly, he is convicted for offence punishable u/s 302 IPC.

50. In this case it is in the evidence of PWs that body of the deceased girl was found covered with soil in a drain and only from a toe in the midst of the soil, her body was found. This reveals that the body was buried for causing of disappearance of evidence with intend to screening himself from punishment and a such the accused Dhiren Tanti is also found guilty punishable u/s 201 IPC and convicted accordingly.

51. However there is no evidence that the deceased was sexually assaulted or raped. Though the PM report suggestive of presence of abrasion over her breast but only from this it cannot be safely held that with sexual intend she was caused injury. Therefore, he cannot be held guilty for offence u/s 8 of POCSO Act. Accordingly he is acquitted from charge of section 8 of POCSO Act."

9. Since the thrust of the argument advanced by the learned Amicus Curiae is to the effect that the conviction of the appellant under Section 302/201 of the IPC is wholly on the basis of "last seen together" circumstance without there being any other evidence to connect the accused with the occurrence, we deem it



appropriate to briefly examine the evidence adduced on record by the prosecution witnesses.

10. PW-1, Smti Pinki Karmakar is the aunt of the victim. She has deposed that at the time of the incident the victim was about 11 years old. The incident took place about a year back at around 2.30 p.m. At that time she was plucking tea leaves in the garden. She saw the accused dragging the victim inside the garden. According to the PW-1, the incident took place in the Block No.3 of Malijan Tea Estate under Sonabeel Division. In the evening she had seen the mother of the victim searching for her and then she told her that the victim was seen with the accused who was taking her forcefully inside the garden. Then the mother of the victim went into the garden to enquire about her daughter and found one chappal and one 'lathi' (stick) used for collecting firewood. Thereafter, the mother of the victim recovered the dead body in a drain of the garden. While the victim's mother was searching for her daughter she was accompanied by other villagers viz., Castanti Surin and Anil Ghatowar. The dead body was found covered with earth and the legs were uncovered and hence, those came out. They raised alarm and on hearing the hullah local people went to the place of occurrence. Next day police recovered the dead body. During her cross-examination PW-1 has stated that at the time of the incident her husband was at home and she had asked the accused Dhiren Tanti to sell their saucepan (deksi). According to PW-1, the victim was wearing a yellow colour pant and a white sporting T-shirt while she was being taken away by the accused. She has further stated that the accused came to their house at about 3.00 p.m. and at that time she was also present at home. Thereafter, the accused went to "Kherbari" to sell



the saucepan and stayed there. This witness had denied the suggestion that the local people on suspicion had apprehended the accused and thereafter handed him over to the police. She has, however, admitted that she had not seen the incident but has seen the accused forcefully taking the victim (deceased) inside the garden.

11. PW-2, Dr. Mridurupam Gogoi was the Senior Medical & Health Officer on duty at the Kanaklata Civil Hospital, Tezpur on 02.11.2017 when the dead body of the victim was brought there for post-mortem examination. PW-2 had conducted the post-mortem examination. This witness has proved the post-mortem report Ext-1. According to the evidence adduced by PW-2, the following injuries were found on the dead body of the victim :-

*“Three lacerated injuries present over left cheek, two present at the label of left eye, size 2 cm x 2cm x 3cm and one present below it, size – 3 cm x 2cm x 2cm. Left eye ball is absent. Neck is tied with a cloth. Knot present at the left side. One abrasion mark present on right breast, size -1cm x 1cm 1 cm. No injury marks over genital area. Vaginal swab is sent to FSL examination.”*

PW-2 has also opined that death had occurred due to haemorrhagic shock due to abdominal blunt trauma. During his cross-examination, PW-2 has admitted that he had not mentioned the time since death, in the post-mortem report nor did he mention about the presence of rigor mortis. Hence, he could not say when the deceased had died. The doctor had, however, maintained that the deceased had died due to abdominal injuries.

12. PW-3, Sankar Ghatowar is the informant in this case. He is also the uncle of the



victim. PW-3 has deposed to the effect that the incident occurred on 01.11.2017 and on that day, at around 2.00 p.m., his niece (victim) along with the accused went to the 'bagan' (garden) for collecting firewood. At around 7.00 p.m. he had heard that his niece did not return home. The mother of the victim, along with other villagers, went out in search for her and found the dead body of the victim in a drain of the garden covered with soil. Noticing marks of someone being dragged, they had followed the track and soon found that the toes of the victim were sticking out from the earth covering the drain and found the dead body. PW-3 has further deposed that he had lodged F.I.R. Ext-2 and Ext-2(1) was his signature. This witness has further confirmed that he had seen injury over the head of the deceased and there was 'gamosa' tied in the neck of the deceased. The police had conducted inquest over the dead body in his presence and Ext-3 was the inquest report. During his cross-examination, PW-3 has stated that except the recovery of the dead body he knew nothing about the incident and he had reached the place of occurrence after the recovery of the dead body. PW-3 has also stated that he had not seen as to when and how the deceased had gone to the garden. PW-3 has further stated that the police had recorded his statement after the F.I.R. was lodged. In the F.I.R. he had not mentioned as to from whom he had heard about the incident. On the day of the incident many persons were working in the garden from 7.00 a.m. to 12 noon and after a break of two hours again from 2.00 p.m. to 4.00 p.m.

13. PW-4, Smti Dipmala Topno is the mother of the victim. She has deposed that the deceased was her daughter aged about 11 years. The incident occurred one and a half years back. On that day she had gone to work and her husband was at



home due to illness. Her deceased daughter went to the garden along with the accused so as to collect firewood. In the evening when she returned home, not finding her daughter home, when she had enquired from her husband about her, he had replied that the victim went with Dhiren Tanti to the garden. Since her daughter had not returned home she went in search of her but could not find her. Then she called her neighbours and some of the people came and joined in the search of her daughter. They had found one chappal of her daughter and noticed marks of dragging towards the drain. They followed the drag mark, proceeded towards the drain and found the dead body of the victim which was covered with earth with one toe coming out. Seeing the dead body she had raised alarm and then the accused fled away. Next morning the police along with the villagers had dug up the earth and brought out the dead body of her daughter. She had seen cut marks over the cheek, near the eye and both the eye balls had come out. There was a "gamosa" (towel) tied in her neck. During her cross-examination, PW-4 had denied that her brother-in-law (PW-3) had lodged the ejarah against the accused out of jealousy since the accused was a permanent labour but her brother-in-law was not. This witness has also denied that she had deposed as tutored by the informant but she has clarified that she had not seen the incident.

14. Smti Dasen Nayak was a resident of the neighbourhood and she had heard hullah and came to know that the accused had committed rape on the victim and killed her and thereafter buried the dead body in a drain of the garden. This witness was examined as PW-5. In her cross-examination, PW-5 had maintained that when she went to the garden to bring her cattle, except accused Dhiren and the



deceased none was there. On the next day of the incident the police recorded her statement and after 5 days she was brought before the Magistrate for recording her statement. She, along with Dipamala (PW-4), Sankar (PW-3), Kundan (PW-6) and Pinki (PW-1) had come to the court of the Magistrate for recording their statements.

15. PW-6, Sri Kundan Karmakar was playing carom on the day of the incident at about 2.00 p.m. when he saw accused along with the victim proceeding towards the garden. In the evening he came to know that the victim did not return. In the evening the dead body of the victim was recovered from a drain of the bagan. He had gone there to see the dead body and found that the same was covered with earth in a drain. He had also noticed injury in the head of the deceased. This witness has confirmed that his statement was recorded before the Magistrate. During his cross-examination, this witness could not be shaken. PW-6 had, however, stated that his statement was recorded before the Magistrate after about a month.

16. PW-7, Sri Sankar Chandra Rabha was the Scientific Officer who had conducted forensic test in respect of the vaginal smear of the victim and found that the samples were negative for the test of spermatozoa. The cross-examination of this witness was declined.

17. PW-8, S.I. Aminul Islam was the Investigating Officer (I.O.) who had conducted investigation in connection with Tezpur P.S. Case No.2253/2017. PW-8 has deposed that on receipt of information about the incident over telephone he had made a G.D. entry and then accompanied by ASI Bijoy Kumar Domai and other staff, proceeded to the place of occurrence. On reaching the place of occurrence he



was informed that the accused is taking shelter at a nearby village i.e. Kherbari. Accordingly, he had arrested the accused. Next morning around 7.00 a.m., accompanied by the Circle Officer of Chariduar Revenue Circle as well as the accused, they had proceeded to the place of occurrence, conducted inquest on the dead body. Before the inquest was held the accused had taken them to the place where the dead body was dumped. PW-8 has also deposed that the incident was videographed and he had also prepared a sketch map of the place of occurrence which shows that the accused had led him to the place where the body was buried. During his cross-examination, PW-8 has admitted that there is no mention of the Compact Disc (CD) containing the videography in the charge-sheet nor has the same been exhibited before the court. The PW-8 had also confirmed that the statement of the accused regarding information leading to recovery of the dead body had not been recorded by him. This witness has, however, denied the suggestion made by the defence side that the accused did not lead the police party and the Magistrate to the discovery of the dead body. Having denied as above, the I.O. has admitted that there is no mention about the discovery of the dead body on being lead by the accused in the Case Diary nor has the Case Diary been paginated by him. PW-8 has further stated that in this case he had not seized any article.

18. Although PW-8 had conducted the investigation and completed the same but the charge-sheet was ultimately submitted by PW-11 i.e. S.I. Labanya Bezbaruah since PW-8 was transferred in the meantime. PW-11 has confirmed that Ext-6 is the charge-sheet submitted by him and Ext-6(1) was his signature.



19. PW-9, Dr. S. K. Borah was working as the Circle Officer, Charduar on 02.11.2017 and he has deposed that inquest over the dead body was conducted by him. Ext-3 is the inquest report and Ext-3(2) was his signature. According to PW-9, the dead body was shown to him by PW-3 and he had found that the body was lying on the ground with head injury and blood mark on the left eye. The body was sent to KCH, Tezpur for post-mortem examination. According to PW-9, a wooden lathi was found near the dead body and it was suspected to be a murder case as per public opinion. During cross-examination, PW-9 has confirmed that the inquest report was prepared by him.

20. PW-10, Ms. Juhi Gogoi was the Judicial Magistrate 1<sup>st</sup> Class posted at Sonitpur, Tezpur, who had recorded the statement of witnesses Pinki Karmakar, Kundan Karmakar, Dipmala Topno and Dasen Nayak i.e. PWs- 1, 6, 4 and 5 respectively, under section 164 of the Cr.P.C. PW-10 has stated that the witnesses were escorted and identified by AHG Bina Bora. PW-10 has proved Exts-8, 9, 10 and 11 which were the statements of the aforesaid witnesses recorded under Section 164 Cr.P.C. as per her order dated 06.11.2017 (Ext-12).

21. On a careful reading of the evidence of PW-1 we find that she had claimed to have seen the accused dragging the victim and taking her inside the garden which is apparent from her deposition. However, from a reading of the statement of PW-1 recorded under Section 164 Cr.P.C. (Ext-8) we find that no such statement was made by her before the Magistrate. This witness has also not made such a statement to the police which was recorded on the next date of the incident. It also deserves mention



herein that if the PW-1 being the aunt of the victim had actually seen the accused dragging the victim and taking her inside the garden then we did not find any explanation as to why she had not raised any alarm or made any attempt to stop him and instead returned back home only to give this information to the mother of the victim in the evening. Not only that the PW-1 had asked the accused to run an errand for her at 3.00 p.m. on that day by asking him to sell her saucepan. For the aforesaid reason, we find that the testimony of PW-1 is full of contradiction and appears to be wholly untrustworthy. It is, perhaps, for the aforesaid reason that the learned Sessions Judge had also chosen not to rely upon the evidence of PW-1 so as to convict the accused.

22. As noted above, it has come out from the evidence of PWs-5 and 6 that the accused was last seen in company of the victim on the date of occurrence. The assertion made by these two witnesses to the above effect has also not been specifically challenged by the defence side during their cross-examination. However, it will be significant to note herein that there is variance in the version of these witnesses as regards the time and circumstances under which the accused was last seen with the victim. According to PW-5, the victim was last seen together with the accused at about 3.30 p.m. She has also stated that there was none other than the deceased and the accused at the "bagan" when she had seen them. However, in the following sentence this witness has stated that there were labourers plucking tea leaves and she had seen the accused and the deceased from a distance of 10 to 15 meters. She had also seen the accused with a lathi in his hand. According to PW-6, he had seen the victim accompany the accused at about 2.00 p.m. What, therefore,



transpires from the evidence of PWs-1, 5 and 6 is that the accused was seen in the company of the victim at 2.00 p.m. and again at 2.30 p.m. on the day of the occurrence but at 3.00 p.m. on the same day, he had come to the house of PW-1. Again at 3.30 p.m. the accused was seen in the garden in the company of the victim. If the version of PW-1 is to be believed, then at that time the accused had gone to the Kherbari village in his attempt to sell the saucepan. From the testimony of the prosecution witnesses, as noted herein above, it would also clearly transpire that the victim though seen in the company of the accused, was alive until 3.30 p.m. What happened thereafter is, however, not discernible.

23. In the above context, it would be significant to mention herein that as per the evidence of the mother of the victim i.e. PW-4, she was plucking tea leaves in the garden in Line No.4 between 7.00 a.m. to 4.00 p.m. along with 400/500 other labourers. As per PW-3, there were about 100 labourers working in Line No.3 between 2.00 p.m. to 4.00 p.m. What is surprising is the fact that none of the other labourers had seen the victim drag or use any force or for that matter display any unnatural behavior towards the victim. Therefore, while it may be correct to argue that there is evidence on record to show that on the date of the occurrence the victim was seen in the company of the accused between 2.00 p.m. to 3.30 p.m. there is nothing on record to connect the accused with the offence. The aforesaid aspect of the matter assumes great significance on account of the fact that the place of occurrence is a part of the tea garden where hundreds of other labourers were engaged in plucking tea leaves on the date of the occurrence and therefore, the place was accessible to all.





24. In the case of **Leela Ram vs. State of Haryana** reported in **(1999) 9 SCC 525** the Hon'ble Supreme Court has held that the circumstance of "last seen together" is a weak kind of evidence.

25. In the case of **Kanhaiya Lal vs. State of Rajasthan** reported in **(2014) 4 SCC 715** the Apex Court has held that the circumstance of last seen together does not, by itself, lead to the inference that the accused had committed the crime. There must be something more establishing the connectivity between the accused and the crime. Similar view has been expressed in the case of **Ashok vs. State of Maharashtra** reported in **(2015) 4 SCC 939** whereby the Apex Court has observed that in a case of "last seen together" the prosecution would be relieved from proving the exact happenings of the incident as it is the accused who would have special knowledge of the incident. However, the burden of proving the charge by adducing sufficient evidence pointing towards the guilt of the accused would always be on the prosecution. It has further been held that "last seen together" itself is not a conclusive proof but along with other circumstances surrounding the incident, the same may lead to presumption of guilt, more so if the accused person fails to offer reasonable explanation discharging the burden under Section 106 of the Evidence Act.

26. What follows from the aforesaid decisions of the Hon'ble Supreme Court is that it would be wholly unsafe to base the conviction of the accused only on the circumstance of "last seen together" and the prosecution must adduce evidence to prove the other links in the chain of circumstances so as to prove the guilt of the accused. It is only when such burden is discharged by the prosecution that the failure



on the part of the accused to offer reasonable explanation based on the circumstances of "last seen together" that it would amount to an additional link in the chain of circumstances which would go against the accused.

27. In the above context, it deserves mention herein that the prosecution story proceeded on the basis that the accused/appellant had committed rape on the victim by taking her to a secluded place and thereafter, killed her and buried the body so as to destroy evidence. However, as mentioned above, the accused has been acquitted in respect of the charge framed under Section 8 of the POCSO Act. The State has not preferred any appeal against the judgment of acquittal. If that be so, there can hardly be any doubt about the fact that in this case there is no evidence to establish the motive on the part of the accused to commit the murder of the victim. This would naturally impel us to assume that failure to establish the motive has further weakened the prosecution case.

28. During his deposition the PW-8 has made a tacit attempt to project that the dead body of the victim was recovered on the basis of information received from the accused and on being led by him. However, we have already noted herein above that there is no such statement of the accused leading to discovery of the dead body. As a matter of fact, the PW-4 has stated in her deposition that when she went out in search of her daughter accompanied by some villagers, she found the dead body covered in earth in a drain inside the garden. According to the testimony of PW-4, the dead body was found out in the evening hours of 01.11.2017 and we find from the evidence of PW-8 that the accused was arrested on 02.11.2017 at about



5.00 p.m. Under the circumstances, there cannot be any question of information received from the accused leading to discovery which could be proved by the prosecution within the meaning of Section 27 of the Evidence Act, 1872 so as to implicate the accused.

29. Coming to the last limb of submission of the learned Addl. P.P. pertaining to the accused having fled from the place of occurrence immediately after the discovery of the dead body as one of the adverse circumstance which could be taken note of by the court so as to convict the accused, here also we find the aforesaid submission to be wholly unacceptable. If the accused was really guilty then we fail to understand as to why he should have accompanied the search team and wait till the body was recovered so as to flee the place. If the accused did have any real intention to flee the scene, he could have either refused to accompany the search team or fled even before the body was recovered. It has come out from the evidence of PW-1 herself that the accused had gone to Kherbari village to sell a saucepan to Asmat Ali. The PW-8 has also stated that after visiting the place of occurrence he came to know that the accused was taking shelter in Kherbari village and went there and apprehended the accused. Therefore, it is established from the evidence of the prosecution witnesses themselves that the accused had gone to Kherbari village so as to sell the saucepan of the PW-1 in the afternoon of the date of occurrence and this, in our opinion, would amount to explanation as to the whereabouts of the accused at the time of occurrence.

30. It has come out from the evidence on record that the stick used by the victim



to collect firewood was found near the place of recovery of the dead body. But that stick was neither seized by the I.O. nor was it sent to the FSL. The stick was not even shown to the doctor conducting the post-mortem examination so as to make an assessment as to whether the injury in the body of the victim could be possibly caused by it. There is no other evidence collected by the I.O. to connect the accused with the commission of the offence.

31. On a cumulative assessment of the evidence brought on record by the prosecution side we find that the prosecution can at best be said to have established the "last seen together" circumstance but no further. But that alone, in our view, would not be sufficient to convict the appellant under Sections 302/201 of the IPC for committing the murder of the victim. The tea garden being an open field, the involvement of any other person in committing the offence cannot be ruled out in this case. Ms. Bhuyan, learned Addl. P.P., has relied upon the recent decision of the Apex Court in the case of **Arvind Singh vs. State of Maharashtra** reported in **2020 SCC Online SC 400** to contend that if the accused fails to offer reasonable explanation in case of last seen together circumstances then in that event conviction of the accused would be justified. However, after perusal of the said decision we find that the decision was rendered by taking note of the facts and circumstances of that case. **Arvind Singh** (supra) does not in any manner relieve the prosecution of its burden to prove the charge brought against the accused beyond reasonable doubt by leading evidence. In the facts of the case the evidence suggesting that the accused was seen in the company of the deceased on the date of occurrence, in our opinion, can at best raise grave suspicion about his involvement but the same



obviously cannot take the place of proof. There is serious doubt about the involvement of the accused and benefit of such doubt must go in favour of the accused.

32. For the aforesaid reason, the impugned judgment dated 11.02.2020 is held to be unsustainable in law. The same is accordingly set aside.

We are informed that since his arrest on 01.11.2017 the accused is in jail. We, therefore, direct that the accused/appellant be forthwith released from jail if his custodial detention is not required in connection with any other case.

The appeal stands allowed.

Before parting with the record, we extend our appreciation to the services rendered by Mr. A. Ahmed, learned Amicus Curiae and recommend that the Registry may make arrangement for payment of necessary remuneration to the learned Amicus Curiae as per the existing norms.

Send back the LCR.

**JUDGE**

**JUDGE**

*T U Choudhury*

**Comparing Assistant**