

# IN THE GAUHATI HIGH COURT

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

**PRINCIPAL SEAT AT GUWAHATI**

(CRIMINAL APPELLATE JURISDICTION)

**Crl. Appeal No.50 of 2019**

Arup Rabha ... .. Appellant

**-Versus-**

The State of Assam & another ... Respondents

For the appellant : Mr. S. D. Purkayastha, Advocate.

For the respondents : Ms. B. Bhuyan, Addl. P.P., Assam.

**BEFORE**

**HON'BLE MR. JUSTICE SUMAN SHYAM  
HON'BLE MRS. JUSTICE MARLI VANKUNG**

Dates of hearing : 25.10.2021 & 27.10.2021

Date of judgment : 27.10.2021.

**JUDGMENT AND ORDER (Oral)**

***(Suman Shyam, J)***

Heard Mr. S. D. Purkayastha, learned counsel appearing for the appellant. We have also heard Ms. B. Bhuyan, learned Additional Public

Prosecutor, Assam, appearing for the State/respondent No.1. None has appeared for the informant/respondent No.2.

2. The judgment and order dated 03.12.2018 passed by the learned Additional Sessions Judge, Goalpara in Sessions Case No.25/2016 convicting the sole appellant Arup Rabha for committing offences under sections 364(A)/302/201 of the Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment for life for committing the offences under sections 364(A) and 302 of the IPC and to undergo rigorous imprisonment for five years for committing the offence under Section 201 of the IPC and also to pay fine of Rs.,5000/-, in default, to undergo rigorous imprisonment for a further period of one year with all the sentences running concurrently, has been assailed by the sole appellant by filing the present appeal.

3. The prosecution case, in a nutshell, is that on 02.08.2014, an ejahar was lodged before the Officer-in-Charge, Agia Police Station, by Sri Nikhil Chandra Kalita (PW-1) informing that on 30.07.2014, at around 3.00 p.m. someone had called his brother-in-law Sri Jogendra Narayan Kalita (deceased) over phone to Fafanga Part-II Gaon, Barmahara, on the pretext of providing him with rubber. On receiving the phone call, his brother-in-law went out of his house in his motorcycle bearing Registration No.AS-18-A-6670 but thereafter, he went missing. Since his brother-in-law did not return home at night, extensive search was made looking for him but the victim could not be traced out. Later on,

around at 10.00 p.m. in the evening, some miscreants had called up his younger brother viz., Sri Sailen Das in his phone bearing No.97073271842 from the phone of his missing brother-in-law bearing No.8721828988 and said that Jogen Kalita was with them and demanded ransom of Rs.10 lakhs for his release. Thereafter, they switched off the mobile phone. On such ground a prayer was made to initiate necessary action in the matter.

4. On the basis of the ejahar dated 02.08.2014, Agia P.S. Case No.107/2014 was registered under Section 364(A) of the IPC whereafter, investigation had commenced. During the course of investigation dead body of Jogendra Narayan Kalita @ Jogen Kalita was recovered and hence, Sections 302/201 of the IPC were added. Five persons including the appellant herein were arrested by the I.O. and the dead body was sent for post-mortem examination. The I.O. had claimed that the dead body of the victim was dug out in presence of Magistrate on being led by the appellant and another accused viz., Anupam Rabha. Upon completion of investigation the I.O. had submitted charge-sheet against all the five accused persons. Based on the charge-sheet submitted by the I.O., charges under Sections 364(A)/368/302/201/34 of the IPC were framed against the accused persons which was read over and explained to them. However, since the accused persons had pleaded innocence and claimed to be tried, the matter went up for trial.

5. The prosecution case was entirely based on circumstantial evidence. The prosecution has also claimed that based on disclosure made by the appellant the dead body was recovered on being shown by the accused. The accused has denied the charge brought against him. The defence side, however, did not adduce any evidence. Upon analyzing the evidence adduced by the prosecution side, the learned trial court had convicted the appellant Arup Rabha under Sections 364(A)/302/201 of the IPC and sentenced him as aforesaid while acquitting the four other accused persons due to lack of evidence against them.

6. By referring to the impugned judgment and order dated 03.12.2018 passed by the learned Additional Sessions Judge, Goalpara, Mr. Purkayastha has argued that there is no evidence to support the prosecution story that the dead body was recovered on being lead by the accused/appellant. However, even assuming that there was evidence within the meaning of Section 27 of the Evidence Act, even then, the same would, at best, be an additional link in the chain of circumstances. The present being a case based on circumstantial evidence, the prosecution, according to Mr. Purkayastha, has failed to establish the chain of circumstances pointing towards the guilt of the appellant. Mr. Purkayastha submits that there is no evidence against his client so as to sustain the conviction and therefore, the impugned judgment and order dated 03.12.2018 be set aside and the appellant be set at liberty. In

support of his above arguments, Mr. Purkayastha has relied upon the following decisions :-

1. **Anter Singh vs. State of Rajasthan [(2004)10 SCC 657]**
2. **Sk. Yusuf vs. State of West Bengal [(2011)11 SCC 754]**
3. **Mustakeem alias Sirajuddin vs. State of Rajasthan [(2011)11 SCC 724]**

7. Ms. Bhuyan, learned Addl. P.P., Assam, on the other hand, has argued that the evidence on record clearly goes to show that the miscreants had called the victim over phone and later on kidnapped him for ransom. Even after receiving the amount the victim was murdered and thereafter, the dead body was kept hidden inside a forest which was eventually dug out by the police on being shown by the accused persons. Under the circumstances, it cannot be said that there is no evidence against the accused/appellant so as to sustain his conviction. On such ground, Ms. Bhuyan submits that the conviction of the appellant does not call for any interference by this Court.

8. We have bestowed our anxious considerations on the arguments advanced by the learned counsel for both the parties and have also carefully gone through the evidence brought on record. Since the basic plea of the appellant is to the effect that there is no evidence to establish the chain of circumstances pointing towards the guilt of the appellant, it would be

necessary for us to embark upon a brief discussion as regards the evidence led by the prosecution side.

9. As noted above, Sri Nikhil Chandra Kalita (PW-1) is the informant in this case. PW-1 has deposed before the court that the incident had taken place on 30.07.2014. On that day, his brother-in-law Jogendra Narayan Kalita was called by someone over telephone and then he went out but did not return back home for the whole day, his elder sister had informed him that his brother-in-law did not return home and then he went to the house of his younger brother-in-law Sailen Das and learnt that he had received a phone call wherein the person on the other side had told him in broken Assamese voice that his missing brother-in-law was in their custody and demanded the ransom amount of Rs.10 lakhs for his release. On the next day he had lodged the ejahar at the Agia Police Station. Ext-1 was the said ejahar and Ext-1(1) was his signature. This witness has stated that after about three days from the date of filing the F.I.R. the dead body of his brother-in-law was found. However, later on, he had stated that the dead body of his brother-in-law was found at Bornohara Lethenga Pahar after about 7 days from the date of lodging the F.I.R. The police had taken him to that place to identify the dead body which was buried under some stones at the hill. The dead body was dug out in presence of a Magistrate, police and accused Arup Rabha. The dead body was later taken to the police station and the Magistrate had prepared

the inquest report in the hospital. Ext-2 is the inquest report and Ext-2(1) was his signature. During his cross-examination by accused Arup Rabha, the PW-1 has stated that many people went to the jungle to collect firewood.

10. The 2<sup>nd</sup> witness (PW-2) examined by the prosecution is Sailen Das. He is the brother-in-law of PW-1 as well as the victim. PW-2 has also stated that the incident had occurred about 2 ½ years back. On receiving a call over telephone, his brother-in-law (deceased) went out of his home and thereafter, went missing. On the same day, at about 10/10.30 p.m., a call came to his mobile phone and the caller told him that there was no need to worry about the victim who was with them and they wanted Rs.10,00,000/-. The caller had also warned him not to inform the police. Accordingly, he informed his elder sister Kalyani Kalita i.e. the wife of the deceased on the same night. According to PW-2, three days thereafter, the ransom money was given and the appellant had shown the dead body of his brother-in-law Jogendra Narayan Kalita at Lethenga Pahar. The dead body was then taken away for conducting post mortem. During his cross-examination by the defence counsel, PW-2 has stated that accused Arup Rabha had shown the dead body of Jogendra Narayan Kalita. PW-2 has also stated that his cousin brother Nikhil (PW-1) and some other persons had accompanied the police and the accused had lead to the discovery of the dead body of his brother-in-law. This

witness has also denied the suggestion that accused Arup Rabha had not shown them the dead body.

11. PW-3, Kalyani Kalita is the sister of the informant and the wife of the deceased. PW-3 has stated that on 30.07.2014, at about 3.00 p.m. her husband went out after receiving a phone call. Her husband had told her that he was going to Bormohora but he did not return home till about 10.00 p.m. At around 10.00 p.m. her brother-in-law Sailen (PW-2) informed her over phone that her husband has been detained by the accused who were demanding ransom of Rs.10 lakhs for his release. After that her brother Nikhil(PW-1) and uncle Bishnu Ram Kalita launched a search for her husband but he could not be found. About 7/8 days after the incident, the dead body of her husband was found at the Lethenga Pahar. PW-3 has stated that the dead body of her husband was kept between two sacks full of salt and her brother along with Agia police went and recovered the body. The dead body was then taken for post-mortem and thereafter, it was handed over to them. During her cross-examination by accused Chandra Kumar Biswas, PW-3 has stated that she did not know the phone number or as to who had called her brother-in-law Sailen over telephone and demanded ransom.

12. PW-4, Kishore Mohan Kalita is another cousin of the victim Jogendra Kalita and he has deposed that his deceased cousin was a businessman dealing in rubber. About 2 ½ years back, someone had called Jogen Kalita in

order to supply him rubber. On the same night, at about 10.00 p.m., his family member received a telephone call wherefrom, it transpired that the victim was in the custody of some miscreants who were demanding ransom for a sum of Rs.10 lakhs for his release. On that night they had launched a search operation but could not find Jogen Kalita. About 4 days later, the dead body of Jogendra Kalita was found at Bormohora Pahar which was taken by the police. During his cross-examination, PW-4 has stated that he had not seen the dead body but only heard that it was taken by the police.

13. PW-5, Jyoshna Kalita is also related to the victim Jogendra Kalita who was her brother-in-law. PW-5 has also deposed in similar lines by saying that her brother-in-law (deceased) was a businessman dealing in rubber and on the day of occurrence, someone had called him to supply rubber. Since Jogendra Kalita did not return home even in the evening, they had made phone call in his mobile phone but it was found switched off. At about 10.00 p.m. on that day they received a phone call from some unidentified person saying that Jogendra Kalita was in their custody and demanded ransom money of Rs.10 lakhs for his release. The dead body of Jogendra Kalita was found at Lethenga Pahar about 7 days thereafter. The dead body was buried in the hill by spreading salt all over it. During her cross-examination, PW-5 has stated that the police had not recorded her statement but had only called her to see

accused persons. Therefore, she had not stated before the police what she had deposed before the court.

14. PW-6, Sunil Horizon is the sweeper who had dug out the dead body of the victim from the Bormohora Pahar along with another sweeper Pania Basfor on being taken there by the police. PW-6 has stated that he did not know the person who had shown the dead body where it was buried.

15. PW-7, Harish Medhi is an inquest witness. PW-7 has proved his signature Ext-2(2) in the inquest report. Save and except being an inquest witness, this witness did not appear to be aware of any other fact. Likewise, PW-8, Dhruva Jyoti Baruah, another inquest witness, has stated that he had heard that deceased Jogendra Narayan Kalita was kidnapped and later, his dead body was found at Lethengapara Hill. This witness has proved his signature Ext-2(3) in the inquest report.

16. PW-9, Santosh Rabha has deposed that the incident took place about 3 ½ years back. One police personnel from the Agia Police Station by the name of "Ali" had taken him and Khanindra Rabha to the place where the dead body was buried. Accused Arup Rabha had identified the spot where the dead body was buried. Then the body was dug out by the police with the help of sweepers. This witness has also confirmed that the police had taken

accused Arup Rabha along with them and the spot was surrounded by jungles.

17. PW-10, Khanindra Rabha has also stated that he along with Santosh (PW-9) and the police personnel had gone to the hill from where the police had dug out the dead body in front of them. Thereafter, the dead body was taken away by the police. This witness has, however, not mentioned about the presence of accused Arup Rabha or the fact that it was the accused who had shown the place where the dead body was buried.

18. The evidence of PWs-11 and 12 are not of much significance in this case and therefore, we do not deem it necessary to discuss their evidence in any details.

19. PW-13, Mohorsh Kashyap was the Executive Magistrate, Goalpara, who had conducted the inquest over the dead body of Jogendra Narayan Kalita. PW-13 has deposed that the dead body was identified by Nikhil Chandra Kalita. On examination he found that the victim was a medium built person having height of 5 ft. 7 inch approximately. Teeth normal, hair black, eyes closed and he was wearing check white shirt and a black pant. During his enquiry, he found injury marks on the head, on the left chest but no other injury was seen. During his cross-examination PW-13 has admitted that he had not called any independent respectable person of the locality and in his report he

had not given the brief description of the case nor has he taken statement of the witnesses who were present at the time of the inquest.

20. PW-14, Dr. Z. Hussain was the Senior Medical & Health Officer on duty at the Goalpara Civil Hospital on 07.08.2014 when the dead body of Jogendra Narayan Kalita was brought there for conducting post-mortem examination. PW-14 has confirmed that he had conducted post-mortem examination on the dead body which was identified by S.I. Ali Hussain and Constable Dharmendra Rabha. Upon examination of the dead body, PW-14 had found the following injuries :-

*"1) Incised injuries of 3 inch at the submental area i.e. around neck area.*

*2) Fracture of mandible at the mental area.*

*3) Lacerated looking injury of 1 ½ inch at left side of forehead vertically 2 inch above the superior orbital ridge.*

*4) Lacerated looking injury of 1 ½ inch at right forehead 1 ½ inch above the superior orbital ridge.*

*5) Lacerated looking injury of 1 inch at occipital area.*

*There were no other injury found on the dead body."*

21. PW-15, Bhabesh Ch. Biswas was posted at the Agia Police Station on 02.08.2014 when the F.I.R. was lodged by the PW-1. PW-15 has deposed that on the basis of the F.I.R. a police case was registered and the matter was endorsed to him by the then Officer-in-Charge for carrying out investigation.

During the course of investigation, he had visited the place of occurrence and prepared sketch map. He had recorded statements of some witnesses and thereafter, submitted the Case Diary to the Officer-in-Charge of the Police Station as in the meantime, he got transferred out of Agia P.S. During his cross-examination, this witness has confirmed that the incident had occurred on 30.07.2014 and the F.I.R. was lodged on 02.08.2014. The place of occurrence was situated at a distance of about 5 kilometers from the Police Station and that it was the informant who had lead him to the place of occurrence. PW-15 has stated that although he had started investigation, yet, due to his transfer he could not complete the same.

22. PW-16, Ali Hussain is the Sub-Inspector of Police posted at Agia P.S. who had taken over the investigation in the connected police case from the PW-15 and upon completion of investigation had laid the charge-sheet. According to PW-16, during the course of investigation, he had received information from the Officer-in-Charge, Krishnai P.S. informing that two suspected accused persons were found loitering around the Police Station area. On receiving such information, he, along with his staff, went to Krishnai P.S. and apprehended accused Arup Rabha and Anupam Rabha near Paikan. After examining the two arrested accused persons they were forwarded to the Court. PW-16 has deposed that the accused Arup Rabha and Anupam Rabbha had admitted of having killed the victim and thereafter, burying the body in the Bormohora

Hill by saying that they would be able to show the burial place. Accordingly, he took the two apprehended accused persons to the Bormohora Pahar and on being lead and shown by the accused persons, the dead body of the deceased was dug out from the grave in presence of Executive Magistrate and other persons. The Executive Magistrate (PW-13) had conducted inquest, whereafter, the dead body was sent for post-mortem examination. He had collected the inquest report as well as the post-mortem report and arrested three other accused persons on the basis of statements given by accused Arup Rabha and Anupam Rabha. During his cross-examination, PW-16 has stated that the statement of the accused persons were recorded by him and they had admitted their involvement in the incident but their statements were not recorded under Section 164 Cr.P.C. The PW-16 has further stated that during the recovery of the dead body from Bormohora Pahar he had called some villagers but has admitted that he had not mentioned that those persons were respectable people in that locality. The I.O. has further admitted that at the time of recording the statement of the accused persons he did not call any outsiders in the Police Station. The PW-16 has also categorically admitted that during investigation although he came to know that the victim was called by the miscreants, he did not collect the details of the phone numbers and other call details pertaining to the phone number from which the call was made.

23. In the impugned judgment dated 03.12.2018 the learned Additional Sessions Judge has categorically observed that the evidence of the I.O. has not been corroborated by any other witnesses including those who were present at the time of recovery of the dead body and therefore, the presence of the accused Anupam Rabha at the place of occurrence appears to be doubtful. Having held as above, the learned trial court has found the appellant guilty of kidnapping and committing the murder of Jogendra Narayan Kalita while acquitting the other accused persons

24. From an analysis of the aforementioned evidence brought on record it is no doubt clear that on the date of the incident i.e. on 30.07.2014 the deceased had gone out of his house upon receiving a phone call never to return home again alive. After about a week, his dead body was dug out from a forest area in the Bormohora Pahar. The medical evidence as well as the inquest report fully establishes the fact that the victim had died a homicidal death. It has also come out from the evidence of PWs-1, 2 and 3 that some unknown miscreants had demanded ransom money of Rs.10 lakhs for releasing the victim. The core question that would, however, arise for consideration of this Court in the present case is as to whether the prosecution had succeeded in establishing the links in the chain of circumstances so as to prove beyond reasonable doubt that it is none other than the appellant/accused Arup Rabha who had kidnapped and thereafter, killed the victim and concealed

the dead body by burying it in the forest area? In our considered opinion, the answer to the said question has to be in the negative in the facts of the case. The reasons are as follows.

25. As alluded above, save and except claiming that the dead body was recovered from the forest area on being shown by the accused Arup Rabha and another Anupam Rabha, there is not even an iota of evidence to connect the accused person with the incident. In so far as the claim of the prosecution that accused Arup Rabha had led the police leading to discovery of the dead body, we find that there is nothing in the Case Diary to substantiate the aforesaid claim of the I.O. It is no doubt true that the I.O. (PW-16) has deposed before the Court to the effect that the accused Arup Rabha and Anupam Rabha had admitted before him that they had killed the victim and buried the body at Bormohora Pahar and that they will be able to show the burial place, yet, there is no corroborating evidence available on record to establish the said fact. As a matter of fact, the learned trial court has also disbelieved the I.O. on such count, more particularly when it comes to the admission and/or discovery of the dead body on being lead by accused Anupam Rabha. The I.O. (PW-16) has stated that both the accused persons viz., Arup Rabha and Anupam Rabha were taken to the spot where the dead body was buried but none of the other witnesses have stated that appellant Arup Rabha had shown the place where the dead body was buried. The

witnesses have also not supported the version of the I.O. regarding presence of Anupam Rabha on the spot.

26. PW-1 has stated that the appellant was present in the spot. PW-9 Santosh Rabha has also stated that accused Arup Rabha was present at the spot along with him, PW-10 and the police when the deadbody was being dug out with the help of sweeper. However, curiously enough, PW-10 Khanindra Rabha did not mention about the presence of Arup Rabha. That apart, PWs-1 and 9 have not stated that Arup Rabha had shown the place where the dead body was buried. In the absence of any entry made in the Case Diary to such effect, it is doubtful as to whether the dead body was at all recovered on being lead by the accused Arup Rabha as claimed by the police.

27. PW-16 has stated that the accused persons had confessed to the killing of the victim. However, there is also no explanation as to why no attempt was made to record the confessional statement of accused persons under Section 164 Cr.P.C. if they had actually confessed to the killing of the victim.

28. Having held as above, we would hasten to add herein that law is fairly well settled that any information leading to discovery of a fact under Section 27 of the Evidence Act alone would not be sufficient to convict a person of having committed an offence such as murder unless the other links in the

chain of circumstances is properly established by leading cogent evidence. By a long line of authoritative pronouncement, the Hon'ble Supreme Court has held that Section 27 of the Evidence Act is an exception to the provisions of Sections 25 and 26. In the case of **Anter Singh** (*supra*) relied upon by the appellant's counsel, the Apex Court has observed that under Section 27 of the Evidence Act only so much of information that relates to the fact thereby discovered would be admissible in evidence and no further. While laying down the tests for applying Section 27 of the Evidence Act, it has been held that the first condition necessary for bringing the Section into operation would be the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second condition would be that the discovery of such fact must be deposed to and the third is that at the time of receipt of information the accused must be in police custody. Section 27 partially lifts the ban against confessional statements made to the police while in custody on account of the fact that if a fact is actually discovered in consequence of information given by the accused, it would afford some guarantee of truth of that part, and that part only of the information which was the clear, immediate and proximate cause of the discovery.

29. If the accused, while in police custody, had given information leading to the discovery of the dead body, the said fact would undoubtedly be

regarded as evidence within the meaning of Section 27 of the Evidence Act. However, from a careful examination of the materials available on record, we have failed to decipher as to what was the information, if any, given by the accused Arup Rabha or fact disclosed by him to the police based on which, the dead body was recovered. Rather, as noticed above, we find that there are material contradictions and omissions in the testimony of the witnesses pertaining to the presence of accused Arup Rabha in the place wherefrom, the dead body was dug up.

30. In the case of **Pulukuri Kottaya vs. Emperor** reported in **AIR 1947 PC 67** it has been held that information leading to the discovery of fact cannot form the foundation of the prosecution case as it is one link in the chain of proof and the other links must be forged in a manner allowed by the law.

31. While interpreting the scope of Section 27 of the Evidence Act, the Supreme Court has observed in the case of **Mustakeem alias Sirajuddin** (supra) as follows :-

*“25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden*

*lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution."*

32. In the present case, even assuming that the dead body was recovered on the basis of facts disclosed by the appellant while in police custody, even then, that alone would be insufficient to convict the appellant for committing the murder of the victim. The prosecution in this case, has not only failed to establish all other links in the chain of circumstances pointing towards the guilt of the accused, but has also failed to even remotely connect the appellant with the kidnapping or murder of the victim. We are, therefore, of the view that the prosecution has failed to prove the charges brought against the accused. If that be so, the impugned judgment and order dated 03.12.2018, in our opinion, would be unsustainable in the eye of law and hence liable to be set aside.

33. We accordingly set aside the impugned judgment and order dated 03.12.2018 passed by the learned Additional Sessions Judge, Goalpara and set the appellant at liberty.

We are informed that the appellant Arup Rabha is presently in Jail. We, therefore, direct that he be forthwith released unless his custodial detention is deemed to be necessary in connection with any other case.

Send back the LCR.

**JUDGE**

**JUDGE**

*T U Choudhury*