

Mani Kumar Thapa Vs. State of Sikkim

Mani Kumar Thapa Vs. State of Sikkim

SooperKanoon Citation : sooperkanoon.com/497067

Court : Sikkim

Decided On : Apr-10-2001

Reported in : 2002CriLJ876

Judge : Ripusudan Dayal, C.J. and; Anup Deb, J.

Acts : Indian Penal Code (IPC) - Sections 34, 100(4), 107, 201, 302 and 364;
[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 161, 313 and 342

Appeal No. : Crl. A. No. 1 of 2000

Appellant : Mani Kumar Thapa

Respondent : State of Sikkim

Advocate for Def. : S.P. Wangdi, Public Prosecutor,; J.B. Pradhan, Govt. Adv.
and;

Advocate for Pet/Ap. : Anmole Prasad and; T.B. Thapa, Advs.

Disposition : Appeal dismissed

Judgement :

Anup Deb, J.

1. This appeal filed by Mani Kumar Thapa, is directed against the judgment of the learned Special Judge, Human Rights, South and West District, Sikkim, in Criminal

(Human Rights) Case No. 6 of 1996 passed on 21st December 1999, holding, accused Holland Christopher Chhetri, who was a Deputy Superintendent of Police and Sub Divisional Police Officer of West Sikkim, since deceased, and Mani Kumar Thapa, who was a Sub-Inspector of Police, Special Branch, Sikkim Police (hereinafter referred to as the appellant), guilty of the offence punishable under Sections 364/302/201 of Indian Penal Code (in short IPC) read with Section 34 of IPC for committing the abduction and murder of one Dharma Dutta Sharma. During trial of the case, Rolland Christopher Chhetri expired on 9th October 1995 and the case against him abated and, therefore, no order of conviction and sentence was passed against him. The appellant was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- (Rupees five thousand) only and in default of payment of fine to undergo further rigorous imprisonment for six months under Section 364 of IPC, to undergo imprisonment for life and to pay a fine of Rs. 10,000/- (Rupees ten thousand) only and in default to pay fine to undergo further imprisonment for one year under Section 302 of IPC and to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5,000/- (Rupees five thousand) only and in default to pay the fine to undergo further rigorous imprisonment for six months under Section 201 of IPC. The learned Special Judge held that all these substantive sentences of imprisonment shall run concurrently and the period spent in jail by the accused, as under-trial prisoner shall be set off against the term of imprisonment imposed on him, and fine, if realised, be paid to the children, if any, of the deceased Dharma Dutta Sharma.

2. The prosecution case as made out in the charge sheet (Ext. P. 20) was that the Officer Incharge, Naya Bazar Police Station, West Sikkim, came to learn from reliable source, that on 12th February 1988 at about 16-05 hrs, one Dharma Dutta Sharma of Timberbong Busty was found abducted by the accused Rolland Christopher Chhetri, accused No. 1 (in short accused Rolland) and the appellant, and on the way to Naya Bazar. Dharma Dutta Sharma was murdered at Zoom Busty and after murdering him the dead body was disposed of on the other side of the river under Bijanbari Police Station, Darjeeling District, West Bengal. The aforesaid Officer Incharge, Sub-Inspector Lawang Dhondup Bhutia, P.W. 47 registered a suo motu FIR Exhibit P-18 on 20th February 1988 under Section

364/302/201/34, IPC, against accused Rolland and the appellant vide Naya Bazar Police Station case No. 6(2)88. Initially, investigation of the case was taken up by P.W. 47, who examined a few witnesses and recorded their statements under Section 161 of Code of Criminal Procedure 1898 (in short Cr. P.C.). Subsequently, a team of Police Officers comprising of Shri R.K. Pradhan, S.P., CID, PW. 43, Shri Luktook Gyatso, Dy S.P., CID, P.W. 48, Shri K.B. Gurung, Inspector, CID P.W. 45, Shri Mingma Bhutia, Inspector, Sadar P.S. Gangtok, P.W. 44, S.I. Nedup Bhutia of Crime Branch P.W. 46 was constituted, under orders of the Director General of Police, Government of Sikkim and investigation was taken up by the team of officers and during investigation they examined all the remaining witnesses and it transpired that Dharma Dutta Sharma of Timberbong Busty had left for the office of the Sub-Divisional Magistrate, Soreng on 12th February 1988 at about 11.00 a.m. to submit Panchayat election nomination form and since then he did never come back. One Madav Prasad Dahal, P.W. 4 of Timberbong Busty put his signature on the nomination form as witness on the request of Dharma Dutta Sharma at Bhamsey Danra and Dharma Dutta Sharma accompanied by P.W. 4 came to the office of the Sub-Divisional Magistrate, Soreng for filing nomination paper. When P.W. 4 and Dharma Dutta Sharma reached the office of the Sub-Divisional Magistrate, the District Collector, West District, who was the Returning Officer, was not there. However, the District Collector came to the office at about 3.00 p.m. and when Dharma Dutta Sharma wanted to file his nomination paper, the District Collector declined to accept the same on the ground that it was presented beyond scheduled time. Then Dharma Dutta Sharma and P.W. 4 returned back in a jeep bearing No. SKM 865. On the same day, i.e. on 12th February, 1988, at about 15-45hrs while K.K. Pradhan, constable in the Special Branch, Sikkim Police P.W. 5 was returning from Sub-Divisional Magistrate's office, Soreng, he met accused Rolland and the appellant at Soreng Bazar. Accused Rolland enquired from P.W. 5 as to whether he had seen Dharma Dutta Sharma anywhere. The accused Rolland also asked P.W. 5 whether he knew the house of Dharma Dutta Sharma and he replied in the affirmative. P.W. 5 accompanied accused Rolland and appellant in the Gypsy SKM 999, official vehicle attached to the accused Rolland, in order to identify the house of Dharma Dutta Sharma came towards Timberbong Busty to show the house of deceased

Dharma Dutta Sharma. On the way to Timberbong, on reaching the office of the State Bank of Sikkim, Soreng Branch, Soreng, P.W. 5, accused Rolland and the appellant met Yamu Kumar Gurung alias Maggi, P.W. 11 and R.B. Gurung, P.W. 12, both employees of the State Bank of Sikkim. Accused Rolland who was driving the vehicle Gypsy SKM 999, the official vehicle attached to him, stopped the vehicle and the appellant enquired from these P.W. 11 and P.W. 12 as to whether they had seen the victim Dharma Dutta Sharma anywhere. Both of them pleaded their ignorance. P.W. 12 returned home, as it was about to rain. P.W. 11 took lift in the said vehicle SKM 999 and came with them up to Timberbong. The accused Rolland asked P.W. 5 as to whether he knew the house of Chhatraman Subba, P.W. 3 and he pointed out the house of P.W. 3. In the meantime, the driver of jeep SKM 865 (taxi) Pratap Lama, P.W. 13 reached the spot and the accused Rolland stopped the jeep SKM 865 and asked P.W. 13 whether he had seen Dharma Dutta Sharma anywhere. P.W. 13 replied that Dharma Dutta Sharma had come from Soreng in his jeep upto Tiberbong on the same day and then went towards his house. Accused Rolland directed P.W. 5 to accompany P.W. 3 and to bring the victim Dharma Dutta Sharma from his house and they met Dharma Dutta Sharma on the way in the house of Kedar Nath Sharma, P.W. 37. They saw victim Dharma Dutta Sharma talking with three other persons namely K.P. Sharma, P.W. 6, P.L. Sharma, P.W. 9 and Rudra Prasad Sharma, P.W. 8 in the varandha of P.W. 37. Dharma Dutta Sharma was called by P.W. 3, on the ground that he was wanted by accused Rolland who was the Deputy Superintendent of Police. The victim accompanied by P.W. 3 and P.W. 5 reached the place where accused Rolland and the appellant were standing with the Gypsy SKM 999. Accused Rolland directed the victim to get into the gypsy for interrogation. The victim obliged accused Rolland by carrying out his orders. P.W. 3 was present when accused and the appellant took the victim Dharma Dutta Sharma in the vehicle SKM 999. P.W. 5 and victim Dharma Dutta Sharma sat on the back seat. P.W. 5, the victim, accused Rolland and appellant came to Soreng and at Soreng Bazar, accused Rolland asked P.W. 5 where he should drop P.W. 5. P.W. 5 got down in the Soreng Bazar. The accused. Rolland and the appellant with the victim Dharma Dutta Sharma in the Gypsy SKM 999 proceeded to the checkpoint at Ramam. Constable Nak Tshering Lepcha, P.W. 15, was on duty at Rarnam checkpoint.

Accused Rolland and the appellant crossed the checkpoint and proceeded towards Singhla side in the Darjeeling District, West Bengal. After sometime the accused Rolland and the appellant drove back the vehicle through the checkpoint. While proceeding further the accused Rolland instructed Head Constable Budhiman Tamang, P.W. 22 at Ramam checkpoint not to allow entry to Naya Bazar to any injured person if he was coming from West Bengal side across the bridge for medical treatment. On 13th February 1988, Damber Singh Subba, a CPIM leader of Singhla, Darjeeling, on getting information that a dead body was lying below the road at Kerabari near forest quarters proceeded to see the dead body who found the dead body to be of a male person lying below the road near the forest quarters. Along with his party men, the said Damber Singh Subba proceeded to Ramam checkpoint. P.W. 15 informed him about the visit of accused Rolland and appellant on the night of 12th February 1988 to the checkpoint and that from there they proceeded towards West Bengal side and returned. On the request of Damber Singh Subba, P.W. 22 informed the accused Rolland that he was required to meet Damber Singh Subba. The accused Rolland and P.W. 22 arrived at Ramam checkpoint and after some altercation agreed to go to Kerabari and to see the dead body. The accused Rolland and P.W. 22 accompanied by Damber Singh Subba proceeded to the place where the dead body was lying and they saw the dead body. One Kamal Prasad Shah, P.W. 36 of Naya Bazar also reached the spot at that time. On 12th February 1988 one Man Bahadur Mukhia had seen a Gypsy vehicle being washed by one gentleman below the Gamon Bridge at Naya Bazar. On the following day when the accused Rolland was called by said Damber Singh Subba at Ramam checkpoint, the said Man Bahadur Mukhia recognized the accused Rolland to be the same person who was washing one Gypsy vehicle below Gamon bridge at Naya Bazar on 12th February 1988. Meanwhile a group of people gheroad the accused Rolland as they suspected him to be the cause of the said death. Damber Singh Subba along with his followers rescued the accused Rolland from the mob and took him inside the house of one Kazi Lohagan of Kerabari. The accused Rolland gave a written statement to Damber Singh Subba giving his own version of the existence of the dead body at the place. The said written statement was handed over to the Investigating Officer of this case. On 13th February 1988 at about 14-30 hours the accused Rolland returned from

Kerabari to Naya Bazar. On 16th February 1988 at about 7.00 a.m. the accused Rolland visited Sub-Inspector S.K. Baniya, P.W. 10 at Jorethang and asked him to accompany him to Forest Bungalow at Naya Bazar. Both the accused Rolland and P.W. 10 were at Dak Bungalow at 9.00 a.m. Damber Singh Subba, a leader of CPM met the accused Rolland and they held consultations inside the bathroom for sometime. P.W. 10 asked the accused Rolland about the dead body. Accused Rolland informed him that the dead body was that of the deceased Dharma Dutta Sharma. The appellant accompanied the accused Rolland on 12th February 1988 and was found with the accused Rolland till they returned to Ramam checkpoint after crossing the checkpoint at Ramam. The appellant was a Sub-Inspector of Special Branch in-Charge of the area. The appellant accompanied the accused Rolland and assisted the accused Rolland in abducting the deceased and also in the murder of the deceased. On 13th February 1988 the appellant met P.W. 5 and told him as to what had happened after P.W. 5 got down from the Gypsy on 12th February 1988 at Soreng. On 14th February 1988 the appellant met P.W. 36 and took him to the other side of the Ramam bridge and when P.W. 36 narrated the incident of gheraoing the accused Rolland to appellant and the appellant told P.W. 36 that he along with accused Rolland chased one smuggler from Nepal on 12th February 1988 and that while escaping he died and on the same night they removed the dead body on the other side of the bridge in West Bengal. At the side of dead body during the course of search one hawai chappal (Exhibit P-11), one tobacco container (Exhibit P-11) and one identity card (Exhibit P-11) were found and seized. The chappal was identified by one Purna Bahadur Chetti, P.W. 2 to be the one, which was worn by the victim at the time he left his house. The tobacco container was identified by Mrs. Mandhodara Sharma, P.W. 1, wife of the victim to be that of the victim. The identity card contained the name of the victim. Also the West Bengal Police during the course of their investigation recovered a letter Exhibit P-1, which was identified to be true by G. Targain, P.W. 20, Assistant Engineer, Power Department, Jorethang, South Sikkim. The General Diary of Ramam Checkpost dated 12th February 1988 Exhibit P-9(c) mentioning about the crossing of the checkpoint by the accused Rolland and the appellant in Gypsy SKM 999 was found to be obliterated and when deciphered by the expert it read as 'Singhla Taraf Gayo' (went towards Singla). The entry in the General Diary was

made in the handwriting of P.W. 22. Therefore, his handwriting was sent for comparison with the handwriting appearing in the General Diary dated 12th February 1988. According to the opinion of the handwriting expert, Exhibit P-7(a), the two handwritings tallied with each other. The undertaking letter Exhibit P-12 given by the accused Rolland to Damber Singh Subba on 13th February 1988 at Kerabari was sent to Government Examiner of Questioned Documents at Calcutta for comparison with the specimen handwriting of accused Rolland. The expert opinion Exhibit P-7 was that the two handwritings tallied with each other. The hair strands seized from Gypsy SKM 999 was identified to be of human origin on expert examination. Thus as per the Investigating Officer both the accused Rolland and the appellant had abducted the deceased Dharma Dutta Sharma and murdered him and screened the evidence available in proof of murder and as such both the accused persons were charged under Sections 364/302/301/34 of IPC.

3. On the basis of the facts disclosed in the charge-sheet and the statements recorded and other materials collected during the investigation, the Ld. Sessions Judge, Sikkim at Gangtok after hearing arguments of the Id. Counsel for the parties on charge and having found materials to proceed against the accused Rolland and the appellant, framed charges under Sections 302/364/201, IPC read with Section 34, IPC against them on the 15th September 1988.

4. The accused Rolland and the appellant pleaded not guilty to all charges framed against them and claimed trial. The plea of the accused Rolland and the appellant was one of denial. However, as already stated, during that, accused Rolland died on 9th October 1995 as per death certificate issued by S.T.N.M. Hospital, Gangtok and Chief Registrar of Births and Deaths and case against him stood abated vide order dated 13th December 1995.

5. Ld. Sessions Judge, Sikkim at Gangtok recorded evidence of 21 witnesses during 1988 and 16 witnesses during 1989 and 2 witnesses during 1992. The case file was transferred from the file of Sessions Judge, South and West to the Court of Special Judge, Human Rights (in short trial Court) on 22nd March 1995. Ld. trial Court recorded evidence of 3 witnesses during 1995, 2 witnesses during 1996, 2 witnesses during 1997 and 2 witnesses during 1998. Accused Rolland and the

appellant were released on bail vide order dated 17th February 1989 passed in Crl. Misc. Case No. 1 of 1989.

6. During investigation statements of 46 witnesses were recorded under Section 161, Cr. P.C. Statements of Chatraman Limboo, P.W. 3 and constable K.K. Pradhan, P.W. 5 were recorded under Section 164, Cr. P.C. by the Addl. District Magistrate, Gangtok, being Exhibit P-15 and P-16 respectively. Test identification parade in respect of certain articles P-14 was also held by the aforesaid Magistrate Damber Bahadur Subba alias D.S. Subba of Karmatar, West Bengal, Man Bahadur, Mukhia, Kerabari, West Bengal, Shiva Kumar Rai of Gook, Darjeeling, Kaziman Lohagar of North Tukbar Tea Estate, Darjeeling though examined during investigation and their statements were recorded under Section 161, Cr. P.C. could not be produced before the trial Court for recording their evidence. Summonses were issued several times upon the prosecution witnesses Damber Bdr. Subba alias D.S. Subba, Man Bahadur Mukhia, Shiva Kumar Rai and Kaziman Lohagar. Prosecution made attempts for production of these four witnesses from Darjeeling District, West Bengal from the beginning and the Id. P.P. made prayer on 27th January 1989 for issuance of summons upon all the witnesses of West Bengal to be served through Singhla O.P. Order was passed by the trial Court on 12th September 1990 for examination of Damber Bahadur Subba alias D.S. Subba, Shiva Kumar Rai, Man Bahadur Mukhia and Kaziman Lohagar on 7th and 8th November 1990, but these witnesses did not turn up. Warrants of arrest were issued against these four prosecution witnesses vide order dated 2nd March 1991 through Superintendent of Police, Darjeeling, West Bengal but no intimation was received by the trial Court from Superintendent of Police, Darjeeling and it is observed vide order dated 17th May 1991 that the police authorities at Darjeeling decided not to co-operate and inspite of efforts made by the prosecution, these witnesses could not be produced and examined. During trial 41 witnesses were examined out of 46 prosecution witnesses whose statements were recorded under Sections 161, Cr. P.C. and 164, Cr. P.C. Seven witnesses were examined who were seizure list witnesses, headwriting expert, the Magistrate who held T.I. Parade of articles and recorded statements of P.W. 3 and P.W. 5 under Section 164, Cr. P.C. Prosecution submitted that P.W. Agni Lama is not a material witness and, therefore, did not examine the said witness.

7. Mr. Anmole Prasad, Advocate appearing with Mr. T.B. Thapa, Advocate on behalf of the appellant submitted that there is no evidence of abduction or intention to commit an offence under Section 364, IPC. According to Mr. Prasad, the evidence of Kishore Kumar Pradhan, P.W. 5, a Constable in the Intelligence Branch, Sikkim Police cannot be believed because in his statement under Section 164, Cr. P.C. P.W. 5 stated that he met the appellant at Soreng Bazar and after sometime he also met accused Rolland, whereas in the statements made before the trial Judge, P.W. 5 stated that he had met both the accused Rolland and the appellant at Soreng Bazar. Mr. Prasad submitted that there is no evidence that the appellant participated in the commission of offence except that he was also present. In other words, there were no overt acts committed by the appellant in order to bring him within the mischief of Section 34, IPC. Letters Exhibits P-2 and P-3 which were written by P.W. 5 to P.W. 31 K.K. Pradhan, who was holding the post of Havildar Constable and posted at Jorethang, South Sikkim in the Special Branch, Sikkim Police at the relevant time and P.W. 5 Kishore Kumar Pradhan was posted in Soreng in the Special Branch under P.W. 31 are at best self exculpatory. Mr. Prasad submitted that such documents cannot be relied upon. It is further the case of the appellant that by writing such letters Exhibit P-2 and Exhibit P-3, P.W.5 wanted to feed fat the grudge he bore against the appellant as the appellant had been very strict with him regarding discipline, day to day works and TA/DA bills. Mr. Prasad submitted that it was accused Rolland who had been making enquiries from various witnesses regarding whereabouts of deceased Dharma Dutta Sharma and the appellant had no role to play. Mr. Prasad submitted that P.W. 5 could not be believed because he deposed that he had visited the office of the Sub-Divisional Magistrate, Soreng to collect the lists of candidates for the panchayat election. Mr. Prasad submitted that it would appear from the statement of P.W. 19, T.T. Sherpa, Assistant Returning Officer of the Panchayat election and P.W. 28, T.P. Ghimiray, District Collector-cum-District Magistrate, West Sikkim at the relevant time, that no such lists of candidates were prepared and in fact, P.W. 19 in cross-examination stated that on 12th February 1988 they did not prepare any list of names of candidates who had filed the nomination forms. Mr. Prasad argued that the deceased Dharma Dutta Sharma had two criminal cases pending against him in the Court of District Magistrate, West

Sikkim, which was revealed from the statement of P.W. 28 and the deceased Dharma Dutta Sharma was not attending the Court in those cases and P.W. 5 had been deputed to execute the warrant of arrest against the deceased, and, therefore, P.W. 5 had been on the look out for the deceased Dharma Dutta Sharma. Mr. Prasad submitted that there is contradiction in the statement of P.W. 36 Kamal Prasad Shah and P.W. 22 Head Constable Buddhiman Tamang inasmuch as P.W. 22 stated that on 13th February 1988 at about 11.45 a.m. 4 to 5 persons from Darjeeling side came to the check-post and enquired as to whom vehicle No. SKM 999 belonged and on being informed that it belonged to the accused Rolland, they told P.W. 22 that one dead body was found at the point where the vehicle had turned and as such they wanted P.W. 22 to accompany them to see the dead body. P.W. 22 then went to Naya Bazar Police Station, which is about half a kilometer from the check-post to inform the O.C., Naya Bazar Police Station. Not finding the O.C., Naya Bazar Police Station, P.W. 22 went to the Forest Rest House to meet the accused Rolland to inform him about the matter. Accused Rolland then came to the checkpoint with P.W. 22 where some discussions took place with the aforesaid 4 to 5 persons from Darjeeling side and thereafter they went over to the Darjeeling side. Therefore, P.W. 22 and the accused Rolland could not have reached across the river at Kerabari Singla side at 11.45 a.m., but much later. In other words, at 11.45 a.m. the accused Rolland was at Forest Rest House whereas as per the statement of P.W. 36 Kamal Prasad Shah at 11-11.30 a.m. when he was returning and on reaching of Singla he had seen that some CPM boys had surrounded the accused Rolland. Mr. Prasad submitted that accused Rolland could not have been present at the two places at the same time. Mr. Prasad submitted that in the statement of P.W. 36 another contradiction appears inasmuch as in his examination-in-chief he stated that on his way back from Singla he had asked the appellant whether anything was wrong because the accused Rolland was seen at Kerabari on 13th February 1988 and on 14th February 1988 and the appellant had also gone towards the Singla side to meet so many people. To this, as per P.W. 36, the appellant replied that on 12th February, 1988 they had arrested one smuggler from Darjeeling and were bringing him to Naya Bazar but on reaching Gorlay Bhir the smuggler jumped out and tried to run away and in the process the smuggler met with death and that they got

nervous and as such they had thrown the dead body on the other side of the river. Mr. Prasad submitted that in the cross-examination, P.W. 36 stated that there was no conversation between him and the appellant on the way when they were going to Naya Bazar Dak Bunglow on 14th February 1988. Mr. Prasad stated that P.W. 36 in his statement did not mention that P.W. 22 was also present at Singla. Mr. Anmol Prasad submitted that at the checkpost on 13th February 1988 no such entry had been made in the G.D. at Ramam check-post, meaning thereby, the story of the prosecution that people from Kerabari side had come cannot be accepted as true and in view of the contradiction as aforesaid, statements of P.Ws. 22 and 36 did not inspire confidence and as such need to be discarded. Reading identification of the appellant in the night of 12th February 1988, Mr. Anmol Prasad argued that it was dark and there was no light in the check-post and the back portion of the vehicle was covered, In such situation, the statement of P.W. 15 Constable Nak Tshering Lepscha that he saw the appellant in the back seat of the vehicle cannot be believed. None of the other witnesses namely, P.W. 25, Constable Loday Butla and P.W. 26, Yawan Kumar Chhetri of the Armed Force, Sikkim Police identified the appellant. P.W. 22 Head Constable Buddhiman Tamang had not seen the appellant but was informed by the P.W. 15 that the appellant had gone with the accused Rolland to the West Bengal side. Mr. Prasad submitted that there is a contradiction as to the place in which the other person in the vehicle was seated. According to the version of P.W. 15, the appellant, was found seated in the back seat. The other P.Ws., namely P.W. 25 and P.W. 26, stated that the other person was seated on the side seat. Mr. Prasad submitted that the entry made in the G.D. with regard to the crossing of the accused Rolland in his vehicle No. SKM 999 which has been partially struck off is made and manufactured. Mr. Prasad argued that the Ld. trial Court totally discarded the evidence of P.W. 39 Rajeev Bhattacharjee, who in his statement stated that a dead body was lying on the Sikkim side contrary to the other witnesses. This witness has neither been declared hostile nor cross-examined by the prosecution. Mr. Prasad then submitted that this is a case where admittedly no dead body was found. According to him, the prosecution failed to bring the best evidence, namely of Damber Singh Subba, CPM Leader of Singla, Kazi Lohagan in whose house exhibit P-12 was said to have been executed and of Kaloo driver who was the

driver of the vehicle of P.W. 36, Mr. Prasad submitted that seizure of incriminating articles belonging to the accused Rolland and the appellant has not been proved. No independent witnesses were examined. The tobacco container Exhibit 1 which was seized by P.W. 45 K.B. Gurung was not witnessed by any independent witness and the signature of P.W. 35 Rudra Prasad Dahal was also not obtained even when it was P.W. 35 who was said to have given the tobacco container Exhibit P-1 to the deceased Dharma Dutta Sharma and had also accompanied the police officer to Kerabari where the said article was recovered. The P.W. 35 was also not asked to identify in the TI parade of the articles seized, which was conducted by P.W. 41 T.P. Dorjee. It has been urged by Mr. Prasad that from the circumstances of the case no common intention to commit the offence of murder of the victim Dharma Dutta Sharma can be Inferred. It Is further urged by Mr. Prasad that mere standing and being silent at the time when the offence is being committed does not indicate common intention to commit the offence. Mr. Prasad urged that the principles governing cases purely based on circumstantial evidence have also been applied to cases based on Section 34, IPC i.e. common intention to commit an offence. In other words, all incriminating facts constituting common intention must be established and those proved incriminating facts must form a chain to establish a hypothesis that there was a common intention on the part of the accused person to commit such offence.

8. Mr. Prasad submitted that certain conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established and in this context Mr. Prasad relied upon the decision in the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in AIR 1984 SC 1622 : 1984 Cri LJ 1738 which inter alia held :

The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established.

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

9. Mr. Anmol Prasad relying upon the decision of the case, Sayed Ahmed v. State of Maharashtra reported in 1995 Cr LJ 3585, argued that the principles governing cases purely based on circumstantial evidence have also been applied to cases based on Section 34, IPC i.e. common intention to commit an offence. In other words all incriminating facts constituting common intention must be established and those proved incriminating facts must form a chain to establish a hypothesis that there was a common intention on the part of the accused persons to commit such offence.

10. Mr. Prasad then relied upon the decision in the case of G. Gabriel v. State of Kerala reported in 1983 Cri LJ 94, wherein it has been held.

There is an additional burden on the prosecution to establish, in cases which rest on circumstantial evidence, that the circumstantial evidence is inconsistent with the innocence of the accused besides its being consistent with his guilt. True it is, in a murder case, the evidence that the deceased was last found in the company of the accused is an important link in the chain of circumstances pointing to the guilt of the accused, but it could not be deemed to be conclusive, unless it is further established that during the interval between the time when they were last seen together and the time at which the victim died every circumstance was inconsistent with the innocence of the accused.

11. Mr. Prasad submitted that in the present case motive for crime has not been proved, neither evidence as to last seen nor evidence of recovery of dead body. Therefore, circumstantial evidence fell short of required standard on all material particulars and in this context Mr. Prasad relied upon the decision in *Sardar Hussain v. State of Uttar Pradesh* reported in AIR 1988 SC 1766 : 1988 Cri LJ 1807 where conviction of the accused was set aside.

12. Mr. Prasad also relied upon the decision in the case of *Sharad Birdhichand Sarda v. State of Maharashtra* (supra) to the effect that it is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence and the following passage is quoted for convenience --

150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this where various links in a chain are in themselves complete, then a false plea or alibi defence may be called into aid only to lend assurance to the Court....

13. Mr. Prasad relied upon the decision in the case of *Shankarlal Gyarsilal Dixit v. State of Maharashtra* reported in AIR 1981 SC 765 : 1981 Cri LJ 325 and submitted that while appreciating the evidence, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea by defence can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilty of the accused.

14. Mr. Prasad also placed reliance on the decision in the cases of *Bhagwan Singh v. The State of Punjab* reported in AIR 1952 SC 214 : 1952 Cri LJ 1131 *Prem Thakur v. State of Punjab* reported in AIR 1983 SC 61 : 1983 Cri LJ 155 and *Ram Avtar v. The State (Delhi Administration)* reported in AIR 1985 SC 1692 : 1985 Cri LJ 1865. It is not necessary to discuss those decisions in view of the position already considered by the Court.

15. Mr. Prasad submitted that seizure of incriminating articles belonging to the accused Rolland and the appellant has not been proved as no independent

witnesses were examined. The tobacco container Exhibit 1 which was seized by P.W. 45 K.B. Gurung was not witnessed by any independent witness and the signature of P.W. 35 Rudra Prasad Dahal was also not obtained even when it was P.W. 35 who has said to have given the tobacco container Exhibit P-1 to the deceased Dharma Dutta Sharma and had also accompanied the police officer to Kerabari where the said article was recovered P.W. 35 was also not asked to identify in the TI parade of the articles seized, which was conducted by P.W. 41, T.P. Dorjee.

16. In this context Mr. Prasad relied upon the decision in the case of Chander Pal v. The State reported in 1999 Cr LJ 135. In this case, the Delhi High Court inter alia held :

Non-joining independent witnesses to recoveries from places though such witnesses were available, would be nothing short of violation of Sub-section (4) of Section 100 of the Code and such recoveries cannot have any semblance of connecting the accused with the crime and proving the guilt.

17. In the case of Padam Singh v. State of U.P. reported in AIR 2000 SC 361 : 2000 Cri LJ 489, it has been held (at pages 493-494 of Cri LJ) :

7. We also find ample force in the argument of Mr. Bachawat that the fact that there had been firing at the place of occurrence, has not been established by the prosecution witnesses. The reading of the evidence of the Investigating Officer P.W. 5 gives an interesting picture when he states that blood stained soil and control soil had been taken from the place of occurrence and sealed separately but no witness to the seizure has been examined. According to him, on the way to Saragpur, though a dead body was found and Panchayatnama of the dead body was prepared, but no panch had been examined. He further candidly admitted that the pellet marks which were found on the wall, were not shown in the site plan. In his cross-examination, he categorically stated that 'I had not conducted any investigation as to who killed Munshi Singh, Lekh Raj and the unknown person.' He also further admitted that he did not sign on the labels of the bundles, which were sealed. In the teeth of the aforesaid materials, brought out in the cross-examination of the Investigating Officer and in view of the fact that we have

already held the interested witnesses to be unreliable and that the prosecution has offered no explanation, as to how three people belonging to the accused party died, it is difficult for us to sustain the conviction of the appellant. We, accordingly, set aside the impugned conviction and sentence of the appellant and acquit him of the charges levelled against him. He may be set at liberty forthwith, unless, required in any other case.

18. In support of the appellant's case, Mr. Prasad placed reliance in the case *Bhalinder Singh v. State of Punjab* reported in (1994) 1 SCC 726 on the point that circumstances not put to the accused in his statement recorded under Section 313, Cr. P.C. cannot be used against him. Subsequently, Mr. Prasad gave up this point.

19. It was further urged by Mr. Prasad that from the circumstances of the case no common intention to commit the offence of murder of the victim Dharma Dutta Sharma can be inferred. Regarding applicability and scope and nature of evidence of prior concert, Mr. Prasad placed reliance upon the case *Paridurang v. State of Hyderabad* reported in AIR 1955 SC 216 : 1955 Cri LJ 572 it has been held :

(32) Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all:-- '*Mahbub Shah v. Emperor*' AIR 1945 PC 118 at pp. 120 & 120(B). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others, and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case AIR 1925 PC 1 at pp. 5 & 6 (A) and AIR 1945 PC 118 (B). As their Lordships say in the latter case, 'the partition which divides their

bonds is often very thin : nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.'

(33) The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him & join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g. the intention to rescue another and, if necessary, to kill those who oppose.

20. Mr. Prasad also placed reliance upon decision in the case of Ramashish Yadav v. State of Bihar reported in AIR 1999 SC 3830 : 2000 Cri LJ 12, wherein the Supreme Court held (at page 15 of Cri LJ) :

The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it pre-supposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arrangement or premeditated concert. This being the requirement of law for applicability of Section 34, IPC. from the mere fact that accused-Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeswar, whereafter Samundar Yadav and Sheo Layak Yadav came with gandas in their hands and gave blows by means of gandas, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar Yadav and Sheo Layak Yadava. Consequently, accused Rama Pravesh Yadav and Ramanand Yadav cannot be held guilty of the charge under Section 302/34, IPC but accused Samunder Yadav and Sheo Layak Yadav did commit the offence under Section 302/34, having assaulted deceased

Tapeshwar on his head by means of gandasa on account of which Tapeshwar died....

21. Mr. Prasad submitted that mere standing and being silent at the time when the offence is being committed does not indicate common intention to commit the offence and he placed reliance upon the decision in the case of *Sumitra Banik v. State of West Bengal* reported in 1999 Cr LJ 4057 : AIR 1999 SC 2594, wherein the Supreme Court has held (at pages 4058-4059 of Cri LJ) :

We cannot accept the submission because mere presence of these persons near the place of the incident cannot lead to an inference that they shared the common intention with the other two accused as they were also residing in that house. They had not entered the room of Debjani at 4 O'Clock when the beating took place or thereafter. They had remained standing outside that room. As something was happening in the room of Debjani, it was quite natural for the other family members to go near that place and see what had happened. Merely, because they did not try to prevent the other two accused from beating Debjani no inference of sharing the intention of beating her to death can be inferred in view of their relationship with them and their indifferent attitude towards Debjani. The only positive act alleged against Sumitra is that she had told Jagdish and Shanti to go away from that place. On the basis of this circumstance it would not be reasonable to jump to the conclusion that she also intended that Debjani be killed on that day. It was a family quarrel and it is quite natural that Sumitra did not like the domestic servants to witness the same.

22. Mr. Prasad lastly argued that the principles governing cases purely based on circumstantial evidence have also been applied to cases based on Section 34, IPC i.e. common intention to commit an offence. In other words, all incriminating facts constituting common intentions must be established and those proved incriminating facts must form a chain to establish a hypothesis that there was a common intention on the part of the accused persons to commit such offence. In this regard, Mr. Prasad placed reliance in the case of *Sayed Ahmed v. State of Maharashtra* reported in 1995 Cri LJ 3585, wherein it has been held :

Laymen invariably and men of law often, treat the expression in furtherance of common intention of all as synonymous with the expression similar intention. However, common intention and similar intention are too different concepts in law. Before an inference of common intention can be reached in a given case, the incriminating facts from which such an inference is to be drawn should be held to be firmly established, they should only and wholly warrant the inference that more than one accused person acted in furtherance of common intention, of all; they must be wholly incompatible with the contrary inference, and incapable of being explained on any other reasonable hypothesis.

23. Mr. Prasad submitted that in view of the infirmities in the prosecution case, the appellant is liable to be acquitted and the judgment and conviction and order of sentence passed by the Ld. trial Court has to be set aside.

24. Mr. Wangdi, Id. Public Prosecutor appearing for the State-respondent supported the judgment of conviction and order of sentence passed by the trial Court and advanced his arguments elaborately in support thereof. Arguments of Mr. Wangdi are accepted by us and it is considered not necessary to incorporate the arguments advanced by Mr. Wangdi in details, separately. 25. There are eye-witnesses to say that the accused Rolland and the appellant was searching for the deceased Dharma Dutta Sharma and the deceased was last seen with the accused Rolland and the appellant and the deceased was taken in the official vehicle of accused Rolland along with him and the appellant. Both the accused Rolland and the appellant, who are police officers, are alleged to abduct the deceased Dharma Dutta Sharma from Timberbong and murdered him on the way to Naya Bazar and after the commission of offence of the murder, the dead body of the Dharma Dutta Sharma was thrown on the other side of the river at Kerabari on the West Bengal side by crossing the Ramam Bridge, where there is a check-post manned by Sikkim Police. But there is no direct evidence to prove that the accused Rolland and the appellant murdered Dharma Dutta Sharma and threw his body on the other side of the river on West Bengal side. The learned Special Judge, Human Rights on the basis of the circumstances has found the appellant guilty and convicted him as aforesaid. The circumstances are as follows:--

1. There was panchayat election going at the material time and that 12th February 1988 was fixed as last date for filing of nomination papers.
2. Dharma Dutta Sharma had gone to Soreng to submit his nomination paper as a candidate.
3. Dharma Dutta Sharma obtained nomination paper.
4. Dharma Dutta Sharma returned back to Timberbong on 12th February 1988.
5. On 12th February 1988 the accused Rolland and the appellant were searching for the victim Dharma Dutta Sharma.
6. On 12th February 1988 deceased Dharma Dutta Sharma had left Timberbong in Gypsy No. SKM 999 towards Soreng with the accused Rolland and the appellant.
7. The deceased Dharma Dutta Sharma was last seen in the company of the accused Rolland and the appellant and they abducted the deceased Dharma Dutta Sharma.
8. The appellant Mani Kumar Thapa was with the accused Rolland all along with from Soreng to Timberbong. The appellant opened the door and made the deceased to sit in the back seat and that the deceased left with both the accused Rolland and the appellant on the evening of 12th February 1988 from Timberbong in the direction of Soreng.
9. Both the accused Rolland and the appellant were together while returning from Singhla side of West Bengal.
10. The accused Rolland and the appellant murdered the deceased Dharma Dutta Sharma and concealed the evidence of the murder.
26. In the present case, charge has been framed against accused Rolland and the appellant for commission of offence of abduction under Section 364, IPC, for commission of murder of Dharma Dutta Sharma under Section 302, IPC, concealment of evidence by disposing of the body of the victim by the accused Rolland and the appellant under Section 201, IPC. Charge has been framed

against accused Rolland and the appellant for the aforesaid offences with common intention to commit such offence under Section 34, IPC. As regards the first substantive part of the charge i.e. abduction under Section 364, IPC, there is direct evidence. However, with regard to murder under Section 302, IPC, there is no direct evidence and it is to be seen as to whether circumstantial evidence proves the charge or not. There was panchayat election at the material time. Mrs. Mandhodara Sharma, wife of the victim, P.W. 1, stated that on 13th December 1987 she and her husband had gone to Nepal to the place of their in-laws and came back on 9th February 1988. On 9th February 1988 they stayed at Jorethang and on 10th February 1988 they proceeded to Timberbong. On 10th February 1988 they attended death rites and ceremony of the uncle of the deceased Dharma Dutta Sharma, who had expired about 7 or 8 days back. P.W. 1 further stated that on 11th February 1988 her husband, deceased Dharma Dutta Sharma had sent Giryia Singh Karki to Soreng to collect nomination form for the panchayat election, but Giryia Singh Karki did not bring any form on that day and asked her husband to go and collect the form himself. On 12th February 1988 at about 11-00 a.m. deceased Dharma Dutta Sharma left for S.D.M. office, Soreng to file panchayat election form and since then he never came back. Purna Bahadur Chhetri, P.W. 2, a cultivator-tenant (Kutiyadar) of deceased Dharma Dutta Sharma residing in the house of the deceased at Timberbong stated that he had last seen the deceased Dharma Dutta Sharma about 7 or 8 months ago and the date was 12th and it was Monday and on that day, the deceased Dharma Dutta Sharma left the house for filing of form in connection with panchayat election. Madav Prasad Dahal, P.W. 4, a resident of Timberbong stated that on 12th February 1988 at about 2.00 p.m. when P.W. 4 was working in his field, one Dilliram Sharma came to him and said that he was wanted by the deceased Dharma Dutta Sharma. Dilliram Sharma told him that the deceased Dharma Dutta Sharma was waiting for him at 'Bhamsey Danra'. Dilliram Sharma told P.W. 4 that he was required to be witness in the panchayat election nomination form, by the deceased Dharma Dutta Sharma. P.W. 4 immediately went to Bhamsey Danra and he found the deceased Dharma Dutta Sharma was waiting for him alone. Dharma Dutta Sharma was carrying a form for filing nomination in the panchayat election. P.W. 4 then put his signature on the said form as a witness at the instance of the deceased Dharma

Dutta Sharma. P.W. 4 came along with the deceased to the office of the Sub-Divisional Magistrate at Soreng for filing the same. Kishore Kumar Pradhan, a Constable in the Intelligence Branch, Sikkim Police, P.W. 5, posted at Soreng stated that the last date for filing of nomination paper for panchayat election was 12th February 1988. T.T. Sherpa, P.W. 19, was appointed as the Assistant Returning Officer of the panchayat election stated that he was appointed as Assistant Returning Officer of the panchayat election held in February 1988. On 12th February 1988, P.W. 19 had gone to Soreng, West Sikkim for accepting the nomination papers of the candidates. On 12th February 1988 by 3.00 p.m. nearly 45 candidates filed their nomination papers at Soreng. P.W. 19 further stated that at 3-05 p.m. Dharma Dutta Sharma, the deceased came to the office and wanted to file his nomination papers. Since it was already beyond the time prescribed by the rules they did not accept the nomination paper from the deceased Sharma Dutta Sharma. T.P. Ghimerey, District Collector-cum-District Magistrate, West District, Gyalshing, P.W. 28, stated that last date for filing nomination paper for the panchayat election was fixed on 12th February 1988. In pursuance of Sikkim Panchayat Election Rules of 1982, he had fixed the time for filing of nomination papers to be from 11-00 a.m. to 3-00 p.m. of 12th February 1988. P.W. 28 further stated that he accompanied by P.W. 19 had gone to Soreng to receive the nomination papers and the venue for filing and receiving the nomination papers was fixed in the office of the Sub-Divisional Magistrate, Soreng, P.W. 28 stated that on 12th February 1988 he left to receive the Chief Minister who was to visit that area. The Chief Minister first went to the Soreng Panchayat Ghar where he had some tea and refreshment. After that the Chief Minister went to the Soreng Community Hall where he met some villagers who had come to receive the Chief Minister and also addressed them about the forthcoming panchayat election. After sometime, P.W. 28 took leave of the Chief Minister and went to the office of the Sub-Divisional Magistrate and when he reached the office of the Sub-Divisional Magistrate it was about 2.30 p.m. and 2-3 nomination papers were filed. More than five minutes past 3-00 p.m. one person along with his friend came to the office and he had signed the papers as Dharma Dutta Sharma and he wanted to file his nomination paper at that time, but P.W. 28 refused to accept his nomination paper on the ground that the time for filing the nomination papers was already over. P.W.

13 Pratap Lama, owner as well as driver of taxi jeep SKN 865 stated that on 12th February 1988 at about 3-30 p.m. as he was going to Dodak carrying some ration in his jeep he met the deceased Dharma Dutta Sharma returning home near Soreng. The deceased Dharma Dutta Sharma requested him for a lift and went in his vehicle upto Timberbong. From Timberbong P.W. 13 went to Dodak to reach the ration. After unloading the ration, P.W. 13 returned back to Soreng and when he reached the place where the deceased Dharma Dutta Sharma had gone down from his vehicle earlier, P.W. 13, found one Gypsy parked at the same place and there were three persons in the said Gypsy. P.W. 13 knew one of them who was P.W. 5 and two of them were inside the vehicle including P.W. 5 and one was standing outside the vehicle. The person standing outside the Gypsy asked P.W. 13 which way was to Dharma Dutta's house. P.W. 13 had shown them the way, which was uphill from the roadside, and then he left that place to Soreng with his vehicle. P.W. 4 stated that when P.W. 28 refused to accept the nomination papers, P.W. 4 and the deceased Dharma Dutta Sharma came back to Timberbong and on reaching below the Soreng Bazar, P.W. 4 and the deceased Dharma Dutta Sharma came cross one jeep SKM 865 which was going to Dodo. P.W. 4 and the deceased Dharma Dutta Sharma boarded the jeep and came towards Timberbong and on reaching above the house of Chabilal Dahal, P.W. 4 and the deceased Dharma Dutta Sharma got down from the vehicle and up to the house of Bholanath, they came together. On reaching the house of Bholanath, the deceased Dharma Dutta Sharma stayed back there as he was invited in some puja ceremony there. P.W. 4 returned to his house and he had not met Dharma Dutta Sharma after that day. K.P. Sharma, P.W. 6, a resident of Timberbong stated that Bholanath Sharma is his uncle and on 12th February 1988 there was some puja in the house of Bholanath Sharma. The house of Bholanath Sharma and the house of P.W. 6 are close to each other and P.W. 6 was attending the puja ceremony in the house of Bholanath almost the whole day. P.W. 6 further stated that at about 3.00 p.m. or so P.W. 6 had been in the house of his father Kedarnath Sharma for about 5 minutes or so when he went there he saw the deceased Dharma Dutta Sharma, P.L. Sharma, Arun Sharma, his younger brother and some children. Arun Kumar Sharma, P.W. 7, who is the brother of P.W. 6 K.P. Sharma, stated that Bholanath Sharma is his uncle and K.N. Sharma is his

brother. There was a puja in the house of their uncle Bholanath Sharma. He went to the house of Bholanath Sharma to attend the puja and between 3 and 4 p.m. P.W. 7 came back to his house. The distance between their house and the house of Bholanath Sharma is about 100 to 200 feet. He stated that he used to live with his father Kedarnath Sharma. When P.W. 7 came back to his house, he saw the deceased Dharma Dutta Sharma, Rudra Prasad Chalisay alias Sharma sitting outside their house. Chhatraman Subba, P.W. 3 and P.W. 5 also came there. P.W. 7 further stated that the deceased Dharma Dutta Sharma was the President of Timberbong block during the relevant period. P.W. 3 called the deceased Dharma Dutta Sharma and they were seen talking for some time. After that they left the place and P.W. 5 followed them. P.W. 7 further stated that after 12th February 1988 he had not seen or met the deceased Dharma Dutta Sharma. P.W. 8 Rudra Prasad Sharma alias Chalisey stated that he is a resident of Timberbong and on 12th February 1988 there was a puja in the house of Bholanath Sharma who is his elder brother. At about 3.00 p.m. P.W. 8 went to the house of another brother Kedarnath Sharma and Kedarnath Sharma was not present in his house on 12th February 1988. While he was there in the house of Kedarnath Sharma the deceased Dharma Dutta Sharma came first followed by K.P. Sharma, P.L. Sharma and Arun Sharma. After sometime, P.W. 3 and P.W. 5 came there. P.W. 3 took the deceased Dharma Dutta Sharma 2-3 steps away from the group by saying that he had some talk with Dharma Dutta Sharma. After a little while Dharma Dutta Sharma told them to wait for him and that he would come after sometime and saying this the deceased Dharma Dutta Sharma, P.W. 3 and P.W. 5 left the place and after that day P.W. 8 had not seen Dharma Dutta Sharma. P.W. 9 stated that he is a resident of Timberbong and he is working as Headmaster of Secondary School Okhrey. He said that Bholanath Sharma is his uncle and there was a puja in the house of Bholanath Sharma on 12th February 1988 and he had gone to attend the puja. He said that he lived with his father Kedarnath Sharma and when he reached his house he saw Dharma Dutta Sharma and Rudra Prasad Sharma alias Chalisey sitting and conversing in their courtyard. He also joined them with their conversation. P.W. 8 stated that after sometime P.W. 3 and P.W. 5 came there. P.W. 3 took away Dharma Dutta Sharma, the deceased, for sometime and then P.W. 3, Dharma Dutta Sharma followed by P.W. 5 left the place. P.W. 9

further stated that on the same day at about 5-30 or 6.00 p.m. 'Bhamsey Jetha' came and told him that Dharma Dutta Sharma left in the vehicle of Dy S.P. Saheb, the assured Rolland. P.W. 13 Pratap Lama, driver of SKN 865 stated that on 12th February 1988 he found one Gypsy parked at the same place where the deceased Dharma Dutta Sharma earlier had got down. There were 3 persons in the vehicle and he knew one of them who was P.W. 5 K.K. Pradhan. Two of them were inside the vehicle including P.W. 5 K.K. Pradhan and one was standing outside the vehicle and the person who was standing outside the vehicle asked him which way was to Dharma Dutta's house and he had shown the direction of the house of Dharma Dutta Sharma. P.W. 3 Chhatraman Subba categorically stated that on 12th February 1988 at. about 4.00 p.m. accused Rolland came to their village at Timberbong in a Gypsy along with the appellant. Accused Rolland asked him to bring Dharma Dutta Sharma. P.W. 5 was also found in the same vehicle. P.W. 3 and P.W. 5, then, went to the house of Dharma Dutta Sharma in search of him and Dharma Dutta Sharma was found in the house of Kedarnath Sharma along with P.L. Sharma and Rudra Prasad Chalisey. P.W. 3 informed Dharma Dutta Sharma that Dharma Dutta Sharma was wanted by the accused Rolland. P.W. 5 stated in his deposition that while P.W. 5 was returning from Soreng S.D.M.'s office with the list of those candidates who had filed nomination papers earlier for taking them to Gangtok Head Office he met accused Rolland and the appellant at Soreng Bazar. Accused Rolland asked P.W. 5 whether he had seen Dharma Dutta anywhere. Accused Rolland also asked P.W. 5 as to whether he knew the house of Dharma Dutta Sharma to which he replied in the affirmative and P.W. 5 was asked to go with the accused Rolland to identify the house of Dharma Dutta Sharma. Since the accused Rolland is a senior police officer, P.W. 5 could not disoblige the accused Rolland. P.W. 5, accused Rolland and the appellant came towards Timberbong in search of the deceased Dharma Dutta Sharma. On the way they met R.B. Gurung and Maggi both employees of the State Bank of Sikkim, Soreng Branch. Accused Rolland was driving the Maruti Gypsy, stopped the vehicle and the appellant enquired from R.B. Gurung and Maggi whether they had seen Dharma Dutta Sharma anywhere. P.W. 5 stated in his evidence that the accused Rolland asked the deceased Dharma Dutta Sharma to get into the Maruti Gypsy and the appellant opened the front door of the vehicle. P.W. 5 and the deceased Dharma

Dutta Sharma sat in the back seat. The accused Rolland was in the driving seat and the appellant was in the front seat. P.W. 3 went back to his house. P.W. 5 and three others came to Soreng and at Soreng Bazar accused Rolland asked P.W. 5 where he should drop him and P.W. 5 stated that he would get down in the Soreng Bazar and accordingly P.W. 5 got down there P.W. 5 further stated that when he got down from the vehicle the accused Rolland called him and told him quietly that he was kidnapping Dharma Dutta Sharma and P.W. 5 had sent a chit/letter, Exhibit P. 2, to his Superior Officer, Head Constable K.K. Pradhan, P.W. 31 informing him that the accused Rolland had taken away Dharma Dutta Sharma. P.W. 3 stated in his evidence that the accused Rolland asked Dharma Dutta Sharma to get into his vehicle and stated that Dharma Dutta Sharma was required to come with accused Rolland in connection with some Public Health Department matter. Accused Rolland was in the driving seat, the appellant was in front seat, P.W. 5 and Dharma Dutta Sharma in the back seat. P.W. 3 further stated that the deceased Dharma Dutta Sharma enquired from inside the vehicle of accused Rolland as to how far he was to go. The accused Rolland informed that he need not go very far and the distance is not much and he would drop Dharma Dutta Sharma at a short distance. The deceased Dharma Dutta Sharma asked P.W. 3 that he should inform Pushpalal Sharma and his wife P.W. 1 Mandhodara Sharma that he was taken away by the accused Rolland.

27. Statements of P.W. 6 K.P. Sharma, P.W. 7 Arun Kumar Sharma, P.W. 8 Rudra Prasad Sharma and P.W. 9 Kedarnath Sharma corroborate the statements of P.W. 3 Chhatraman Subba and P.W. 5 Kishore Kumar Pradhan that at Timberbong they were asked to look for and call the deceased Dharma Dutta Sharma from his house. The factum of search of the deceased person by the accused Rolland and the appellant on 12th February 1988 and despite searching and severe cross-examination made, nothing could be brought out to dis-credit their evidence. Therefore, such facts being not assailed or demolished by the defence remained to be proved. The material statements of the witnesses as aforesaid, that the accused Rolland and the appellant had taken the deceased Dharma Dutta Sharma with them in Gypsy No. SKM 999 despite cross-examination are also trust-worthy, as nothing could be brought out to dis-credit the evidence of P.W. 3 Chhatraman Subba and P.W. 5 Kishore Kumar Pradhan. P.W.

14 Phipraj Subba corroborated P.W. 3 Chatraman Subba that P.W. 3 had asked P.W. 14 to inform P.W. 9 Kedarnath Sharma that Dharma Dutta Sharma had been taken by the accused Rolland and the appellant.

28. On analysis of the evidence aforesaid, it is clear that there was panchayat election going on at the material time that is on 12th February 1988. The deceased Dharma Dutta Sharma had gone to Soreng to submit his nomination paper as a candidate, that the deceased Dharma Dutta Sharma returned back to Timberbong on 12th February 1988, that on 12th February 1988 the accused Rolland and the appellant M.K. Thapa were looking for the deceased Dharma Dutta Sharma and that on 12th February 1988 the deceased Dharma Dutta Sharma had left Timberbong in Gypsy No. SKM 999 towards Soreng with the accused Rolland and the appellant. Therefore, the charge of abduction of the deceased Dharma Dutta Sharma by the accused Rolland and the appellant has been proved.

29. The next crucial question is whether the prosecution has been able to prove that the appellant was involved in the crimes of murder and concealment of evidence. It is well settled that in a case resting on circumstantial evidence, all the circumstances brought out by the prosecution must inevitably point to the guilt of the accused and there should be no circumstance which may reasonably be considered consistent with the innocence of the accused. In such case, the Court has to bear in mind the cumulative effect of all the circumstances as an integrated whole and any missing link in the chain is fatal to the prosecution. In the case of Dharm Das Wadhvani v. The State of Uttar Pradesh reported in AIR 1975 SC 241, it has been held :

Every evidentiary circumstance is a probative link, strong or weak, and must be made out with certainty. Link after link forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taken separately may just suggest but when hooked on to the next and on again any manacle the accused inescapably. Only then can a concatenation of incriminating facts suffice to convict a man. Short of that is insufficient.

In the case of Tulshiram v. State of Maharashtra reported in 1984 Cr LJ 209, it has been held :.The law on circumstantial evidence is clear and we need not restate it.

Suffice it to say that all the circumstances established must unerringly point to the guilt of the accused and that they must be consistent and consistent with the guilt and inconsistent with the innocence of the accused. What is important is the cumulative effect of all the circumstances. It cannot be said that since no motive is established, the chain is broken and the prosecution must fail.

30. In the case of *Yeshwant v. State of Maharashtra* reported in AIR 1973 SC 337 : 1972 Cri LJ 1254, the Supreme Court observed :.that the evidence of the two eyewitnesses, who were in a better position to see and describe the occurrence than the victim Zingu, is natural, credible, and unshaken, and is also fully corroborated by other good evidence in the case, we do not think that the mere fact that the prosecution had not given evidence either to corroborate Zingu's assertions that he and Sukal had gone out fishing during the night or to make out a good enough motive for murder would justify the rejection of the evidence of the three eye-witnesses. It was suggested by the prosecution that the defeat of Harlal at the Panchayat elections must be rankling in the mind of his brother Yeshwant. But, there is no evidence to show what Sukal and Zingu had to do with that or why the other accused should join hands with Yeshwant. The defence suggestion in the cross-examination of witnesses, that the occurrence took place elsewhere is belied by the finding of the body of Sukal a few paces from the lamp post, but another suggestion that Sukal was a bully, who went about with Zingu, collecting money, may conceivably give a clue to the possible motives of the accused. The discovery of the true motive for a crime is not imperative in every case.

31. In the case of *the State of U.P. v. Hari Prasad* reported in AIR 1974 SC 1740 : 1974 Cri LJ 1274, it has been held (at page 1276 of Cri) :.This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of that, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive....

32. In the case of Podda Narayan v. State of Andhra Pradesh reported in AIR 1975 SC 1252 : 1975 Cri LJ 1062, it has been held :

Where independent testimony is available to prove the murder charge against the accused, the question of motive becomes more or less academic.

33. In the case of State of Gujarat v. Anirudhsing reported in (1997) 6 SCC 514 : 1997 Cri LJ 3397 it has been observed (at pages 3409-3410 of Cri LJ) :

46. It is then contended by Shri Sushil Kumar that Accused 1 had no motive and the prosecution has failed to prove it. We find no force in the contention. The motive gets locked in the mind of the makers and it is difficult to fathom it. The evidence of Acharya, PA to the deceased, who too turned hostile to the prosecution speaks of motive. Equally, others have spoken but their evidence is not on record. If motive is proved that would supply a chain of links but absence thereof is not a ground to reject the prosecution case. So we reject the contention of the learned counsel in that behalf too.

34. In the case of Nachittar Singh v. The State of Punjab reported in AIR 1975 SC 118 : 1975 Cri LJ 66 it has been held (at page 68 of Cri LJ) :

9... the failure of the prosecution to establish the motive for the crime does not mean that the entire prosecution case has to be thrown over-board. It only casts a duty on the Court to scrutinize the other evidence, particularly of the eye-witnesses, with greater care. The High Court was fully conscious of the need for such caution, and rightly observed : The absence of proof of motive has this effect only that the other evidence bearing on the guilt of the accused has to be very carefully examined....

35. In the case of Atley v. State of Uttar Pradesh reported in AIR 1955 SC 807 : 1955 Cri LJ 1653) it has been observed :

(6)... it was said that the evidence led on behalf of the prosecution did not clearly establish the motive for the crime. It was said that it was true that the deceased was the discarded wife of the appellant who had taken a second wife but that there was no clear evidence of any serious quarrels between the husband and the wife.

That is true; and where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. If the prosecution had proved by clear evidence that the appellant had reasons of his own for getting his first wife out of the way, that would have lent additional assurance to the circumstantial evidence pointing to his guilt. But the fact that the prosecution has failed to lead such evidence has this effect only, that the other evidence bearing on the guilt of the accused has to be very closely examined.

36. Supreme Court in the case of Narayan Nathu Naik v. The State of Maharashtra reported in AIR 1971 SC 1656, has observed (at page 1657) :.We need not consider the question of motive in this case if we are satisfied that the evidence that Narayan Nathu Naik was the assailant of Rattan, is acceptable....

37. In the case of State of Haryana v. Sher Singh reported in AIR 1981 SC 1021 : 1981 Cri LJ 714 the Supreme Court held (at page 716 of Cri LJ):

The prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others...

38. In the case of Bahal Singh v. State of Haryana reported in AIR 1976 SC 2032 (1976 Cri LJ 1568) the Supreme Court held :

8... even if the genesis or the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only on that account, if otherwise it was reliable.

39. In the case of Tulshiram v. State of Maharashtra reported in 1984 Cri LJ 209, it has been observed :. True, it is that motive in such a case plays an important part but, the law is not that in the absence of proof of motive, other circumstances, howsoever clear and clinching, can under no circumstances bring home the guilt to the appellant-accused. After all, motive is something which is locked up in the heart of the culprit and sometimes it would not be possible to have any trace of

it....

40. In the case of Joseph v. State of Kerala reported in (2000) 5 SCC 197, it has been observed :

10. As far as the homicidal fact is concerned, there is only circumstantial evidence. It is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinised to see that the incriminating circumstances are such as to lead only to hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavour in this case should be to find out whether the crime was committed by the appellant and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the appellant. The formidable incriminating circumstances against the appellant, as far as we could, see, are that the deceased was taken away from the Convent by the appellant under a false pretext and she was last seen alive only in his company and that it is on the information furnished by the appellant in the course of investigation that the jewels of the deceased, which were sold to P.W. 11 by the appellant, were seized under Ex. P. 5 duly attested by P.W. 12 and that P.Ws. 5 and 6 were categorical in their evidence that those jewels were worn by the deceased at the time when she left the Convent with the appellant.

41. The charge of murder and concealment of evidence of murder are solely based on circumstantial evidence. From the evidence already discussed, it is clear that accused Rolland and the appellant were looking for the deceased Dharma Dutta Sharma and that on 12th February 1988, the deceased Dharma Dutta Sharma had left Timberbong in a Gypsy SKM 999 towards Soreng along with the accused Rolland and the appellant. P.W. 3 in his evidence stated that the deceased Dharma Dutta Sharma got into the Maruti Gypsy SKM 999 belonging to the accused Rolland and the victim was told that he need not go very far and the distance was not much and the deceased would drop at a very short distance.

P.W. 3 Chhatraman Subba stated that the deceased Dharma Dutta Sharma told P.W. 3 from the vehicle that P.W. 3 should inform Pushpalal Sharma and his wife Mandhodara Sharma, P.W. 1 that he was taken away by the accused Rolland. P.W. 5 Kishore Kumar Pradhan in his evidence stated that on 12th February 1988 P.W. 3 Chhatraman Subba called the deceased Dharma Dutta Sharma and the deceased, P.W. 3 and P.W. 5 came to the place where accused Rolland was waiting for them. P.W. 5 also stated that the accused Rolland asked the deceased to get into the vehicle and the appellant opened the front door of the vehicle. P.W. 5 got down from the vehicle and accused No. 1 Rolland called him and told him quietly that he was kidnapping Dharma Dutta Sharma. After dropping the P.W. 5, the vehicle went towards Chakung. On 13th February 1988 while forwarding the list of the persons who had filed nomination on 12th February 1988 for onward transmission to Gangtok, P.W. 5 had sent a chit/letter, Exhibit P-2, to his superior official Head Constable K.K. Pradhan P.W. 31. P.W. 5 also wrote a letter. Exhibit P-3 to P.W. 31 on 17th February 1988. English translations of Exhibit P-2 and P-3 as submitted by the parties are reproduced below :--

'TRANSLATION OF EXT P-2

K.K. Pradhan

Soreng.

Dear Brother,

K.K. good morning.

subject : On 12-2-88, evening, SDPO Roland Saheb, myself and Mani (OC, S.B. Gyalsing) went to look for Dharma Datta Sharma in Timberbong and on finding him Roland Saheb put Mr. Sharma in the vehicle and took him with him to Naya Bazar and Roland Saheb told me that Mr. Sharma has now been kidnapped but on the way to Timberbong I did not realise that Roland Saheb would do such a thing to Sharma and I am in a dilemma and I did not think it proper to communicate this message in the D.C.R. and after consideration, on this basis, will communicate and send to Gangtok by telephone or D.C.R. I did not approve of

all these things and I thought what Roland Saheb did, he did correctly. Please send a copy of Dethang and of the nomination at the earliest.

Sd/- illegible

TRANSLATION OF EXT P-3

Secret K.K. PradhanSorengD/- 17-2-88Dear Bro.,

K.K. good morning.

subject : You have received the letter I sent the other day (dt. 13-2-88) (concerning Roland Saheb) and keep this letter carefully without losing it or tearing it up because I have learnt and understood everything and that letter will later support and save me. This is my request to you in the capacity of a younger brother.

Because of Roland Saheb's compulsion I may have implicated myself too.

This moch. Sd/- illegible17-2-88.

P.W. 5 stated that on 13th February 1988 at about 5-30 p.m. the appellant M.K. Thapa came to his official quarter at Soreng and P.W. 5 asked the appellant as to where they took Dharma Dutta Sharma, the deceased on the previous day i.e. on 12th February 1988. In reply, the appellant stated that when at Zoom, accused Rolland went out to urinate, the appellant had helped the deceased to run away from the vehicle. P.W. 5 said that he told the appellant that they should not have left Dharma Dutta on the way. It is further stated by P.W. 5 that on 16th February 1988 at about 4-30 p.m. the appellant came to his quarter at Soreng and told him that 'auta-kam-khatam bhayo' (one work is finished) P.W. 5 stated that he asked the appellant what did the appellant mean by that and the appellant then told him that on 12th February 1988 while they were taking the deceased Dharma Dutta Sharma in their vehicle and when they reached Zoom, accused Rolland went out of his vehicle to urinate and in his absence the appellant helped the deceased Dharma Dutta Sharma to escape from the vehicle, but when the accused Rolland saw the deceased Dharma Dutta Sharma running away, the accused Rolland called out the name of Dharma Dutta 'Dharmey, Dharmey' and the deceased then

got. nervous and he continued to run away, with the result he fell from a cliff of Zoom and sustained injuries on his temple. P.W. 5 stated that the appellant further told him that the appellant and the accused Rolland were taking injured Dharma Dutta Sharma in the vehicle to Jorething for medical treatment, but on the way Dharma Dutta Sharma expired and on the same night the accused Rolland and the appellant took the dead body to Singhla, on the other side of the river, which falls within West Bengal and threw away the dead body there. P.W. 5 said that the appellant further added that on 13th February 1988 the accused Rolland and the appellant had gone to the other side of the river and with the help of O.C. Bijanbari (West Bengal) and some C.P.M. men they had disposed of the dead body. P.W. 5 further stated that the appellant also informed P.W. 5 that the accused Rolland and the appellant paid Rs. 10,000/- to the C.P.M. men, Rs. 8,000/- to the O.C. Bijanbari and Rs. 1,000/- plus 2 cases of rum to the labourers who had disposed of the dead body. P.W. 5 stated in his evidence that accused Rolland had asked the appellant that this should not be disclosed to anyone and that the appellant also should not worry about the whole affairs.

42. On the analysis of the evidence, it is crystal clear that the victim Dharma Dutta Sharma was last seen the company of the accused Rolland and the appellant. The material fact that the appellant was with the accused Rolland all along from Soreng to Timberbong, that he opened the door and made the deceased to sit in the back seat and that the deceased left with both the accused Rolland and the appellant on the evening of 12th February 1988 from Timberbong in the direction of Soreng could not be assailed or demolished by the defence at all.

43. In the case of Phalay Motya Valvi v. State of Maharashtra reported in AIR 1979 SC 1949 : 1979 Cri LJ 1310 it has been observed (at page 1312 of Cri LJ) :

9... Ordinarily, when a person is accused of committing murder of another, the fact that the accused and the deceased were last seen alive in company of each other and the failure of the accused to satisfactorily account for the disappearance of the deceased is considered a circumstance of an incriminating character. According to Bhikjya, P.W. 8, the appellant and deceased Parshi Motya came to his house around midnight time and asked for two bottles of liquor. But further according to

Bhikjya, at about that time accused No. 2, Bhamta also joined them. According to Bhikjya all the three, i.e. deceased, appellant and Bhamta left his house together. Undoubtedly thereafter deceased was not seen alive by anyone but two persons were in company of the deceased, viz., appellant and Bhamta when they left the house of Bhikja. Now, Bhamta was the co-accused. This very circumstance has not been found to be of some importance against Bhamta. To some extent the circumstance ceases to be of an incriminating character because not only the appellant should account for the disappearance of the deceased but simultaneously on evidence of Bhikjya, original accused No. 2, Bhamta would also be required to explain the same circumstance...

44. The accused Rolland and the appellant crossed Ramam bridge bordering the District of Darjeeling, West Bengal State late in the evening of 12th February 1988 between 6.00 p.m. and 7.00 p.m. and returned back within 5 to 10 minutes later. Constable Nak Tshering Lepcha, P.W. 15 in his evidence stated that, on 12th February 1988 P.W. 15 was on check-post duty from 6.00 p.m. to 10.00 p.m. at Ramam Bridge. At about 6.20 p.m. on 12th February 1988 the accused Rolland and the appellant came to the check post, in Maruti Gypsy SKM 999. P.W. 15 stated that he also found the appellant was sitting inside the vehicle. The accused Rolland asked P.W. 15 to open the gate and said that he would return immediately. The P.W. 15 was under the impression that the accused Rolland would turn his vehicle behind the gate but the accused Rolland instead of turning the vehicle proceeded towards the other side of the river, Singhla side and after about five minutes the vehicle came back from Singhla side. P.W. 15 stated that while the accused Rolland returned from Singhla side P.W. 15 was near the bridge. P.W. 15 further stated that the back portion of the vehicle was covered at the time and he did not notice anything as it was dark. Head Constable Budhiman Tamang, P.W. 22 stated that on 12th February 1988 at about 6.30 p.m. P.W. 22 had gone to check-post for usual inspection and P.W. 15 Constable Nak Tshering Lepcha was on duty in the check-post at the relevant time P.W. 15 Nak Tshering Lepcha reported to him that the accused Rolland and the appellant had gone towards West Bengal side in the official vehicle SKM 999 a short while ago, after crossing the bridge. When any Government vehicle crosses the checkpoint and goes towards the West Ben-,gal side they make entries in the Register. Exhibit IX

is a General Diary maintained at the checkpoint and Exhibit IX (a) is the entries made by the P.W. 22. When P.W. 22 was making entries in the General Diary, the accused Rolland and the appellant returned from Singhla, West Bengal side. P.W. 22 stated that on 13th February 1988 both the accused Rolland and the appellant again came to the checkpoint at about 10.00 a.m. in the same vehicle SKM 999.

45. On the analysis of the evidence, it is clear that both the accused Rolland and the appellant were together when they returned from Singhla. The statement of P.W. 22 that the accused Rolland and the appellant returned from West Bengal side of the river towards Sikkim side could not be assailed and demolished by the defence in the cross-examination. Despite searching and severe cross-examination made, nothing could be brought out to dis-credit the evidence of the P.W. 22.

46. In the case of Joseph v. State of Kerala reported in (2000) 5 SCC 197 the following observations have been made :

9.... They had nothing against the accused and no reason to speak falsely to implicate the appellant, and despite searching and severe cross-examination made, nothing could be brought out to dis-credit their evidence. P.W. 9, the brother of the accused, and P.W. 26, the member of the Panchayat, also confirmed that P.Ws. 5 and 6 had identified the appellant as the person who had taken away Gracy on 16-9-1994 when they went to enquire about the deceased, accompanied by the accused also. The learned Judges of the High Court also were got convinced with the conclusions of the trial Court in this connection and accepted the same to be correct on the basis of the evidence of P.Ws. 5 and 6, and P.Ws. 9 and 26. We see no infirmity whatsoever either in the manner of appreciation of their evidence or the reasons assigned in support of the same and, therefore, this finding of fact appears to be Well justified on the materials on record. The same does not also call for interference in this appeal.

13. Taking advantage of the discrepancies pointed out by the Sessions Judge, the learned counsel for the appellant also tried to contend that the evidence of P.Ws. 11 to 14 is not trustworthy. It is not that every discrepancy or contradiction that matters much in the matter of assessing the reliability and credibility of a witness

or the truthfulness of his version. Unless the discrepancies and contradictions are so material and substantial and that too are in respect of vitally relevant aspects of the facts deposed, the witnesses cannot be straightaway condemned and their evidence discarded in its entirety. On going through the entire evidence of P.Ws. 11 to 14, we are unable to come to the conclusion that they are not speaking the truth or that they cannot inspire confidence in the mind of any reasonable person or authority to adjudge disputed questions of fact, so as to eschew entirely their evidence from considerations, whatsoever.

47. Decision in the case of State of U.P. v. Bhagwan reported in (1997) 11 SCC 19 : AIR 1997 SC 3292 it has been held (at page 3294 of AIR) :

4... it is true that the testimony of an eye-witness having minor discrepancies has to be given weightage unless the discrepancies are such which demolish the basic case of the prosecution. Similarly, the testimony of an eye-witness who is partisan by itself is also not a ground for discarding the evidence as testimony of such partisan witness necessarily is not false evidence, but such testimony requires thorough and careful scrutiny....

48. In cross-examination, Budhiman Tamang; P.W. 22 deposed that it is true that on 12th February 1988 Constable Nak Tshering did not name the appellant S.I.M.K. Thapa to be with the accused Rolland when the accused Rolland crossed the bridge and went towards West Bengal side. This pertains to the time when accused Rolland crossed towards West Bengal and not while returning from there when the appellant was with the accused Rolland as is evident from the statements of P.W. 22. From the statement of P.W. 22 that when he was making entries in the General Diary the accused Rolland and the appellant returned from Singhla (West Bengal side) and the accused Rolland enquired from P.W. 22 as to what the situation was like and since the accused Rolland and the appellant returned immediately P.W. 22 had to strike off the words 'towards Singla' from the General Diary. This statement of P.W. 22 in examination-in-chief has to be accepted as correct.

49. P.W. 25 Constable Lodey Bhutia of Sikkim Armed Police (S.A.P.) deposed that the Constable N.T. Lepcha of Sikkim Police was on gate duty and he identified the

accused Rolland and the appellant in the dock. P.W. 25 stated that he knows accused Rolland, S.D.P.O. but he did not know the other accused person. On 12th February 1988 at about 6.30 p.m. one Gypsy vehicle approached the gate from Naya Bazar side and he could identify the accused Rolland who was in the wheel and there was also another person on the side seat but he could not identify him. Accused Rolland asked Constable N.T. Lepcha, P.W. 15 to open the gate. P.W. 15 opened the gate as ordered and accused Rolland then told the Constable N.T. Lepcha, P.W. 15 not to close the gate as he would be returning soon after going a little ahead from there and came back after about 5 to 10 minutes. Yawan Kumar Chhetri, P.W. 26, who was in the armed force of the Sikkim Police and was the Section Commander in charge of Guard duty at the Ramam Bridge stated that he knew the accused Rolland but he did not know the other person. On 12th February 1988 at about 6-30 or 7.00 p.m. as he was resting in his tent some constable came to him and said that one vehicle was coming from Naya Bazar side towards the bridge. P.W. 26 stated that he thought that some of their superior officers were coming for checking and he immediately got up and came out of his tent. When he came out from the tent, he saw accused Rolland near the gate and asked the Constable on duty N.T. Lepcha, P.W. 15 to open the gate. Accused Rolland took his vehicle towards Singla (West Bengal side) and after about 5-10 minutes the accused Rolland again returned from Singla. He then shouted on top of his voice that they should be vigilant and do their duty properly. After saying so accused Rolland went towards Naya Bazar. P.W. 26 further stated that he saw the accused Rolland from a distance of about 4-5 yards and the accused Rolland was driving the vehicle. P.W. 26 further stated that there was another person on the side seat with hands crossed but he could not identify him. In cross-examination P.W. 26 stated that it is not a fact that the person who was with the accused Rolland was sitting on the backside. From the positive suggestion given by' the defence, it has been admitted that there was a second man in the Gypsy with the accused Rolland and further as revealed from analysis of the statement of P.W. 15 Constable Nak Tshering Lepcha and P.W. 22 Budhiman Tamang the second person was no other than the appellant. P.W. 15 stated that on 12th February 1988 he was on checkpoint duty from 6-00 p.m. to 10.00 p.m. at Ramam Bridge. At about 6-20 p.m. on 12th February 1988 the accused Rolland and the appellant

came to the check post in Maruti Gypsy SKM 999. The vehicle was being driven by the accused Rolland himself and he enquired from P.W. 15 as to what was the situation like. P.W. 15 also found that the appellant was on the back seat of the vehicle. P.W. 22 Budhiman Tamang also found that P.W. 15 on duty in the checkpost at the relevant time. Constable Nak Tshering Lepcha, P.W. 15 told P.W. 22 that the accused Rolland and the appellant had gone towards Singla, West Bengal side in the official vehicle SKM 999 a short while ago. While making entries in the G.D. P.W. 22 saw that the accused Rolland and the appellant returned from Singla West Bengal side and the accused Rolland enquired from him as to what the situation was like. Since the accused Rolland and the appellant returned immediately P.W. 22 had to strike off the words 'towards Singla' from the G.D. It is, therefore, crystal clear from the statements of P.W. 15, Constable Nak Tshering Lepcha and P.W. 22 H/C Budhiman Tamang that the second person with the accused Rolland was none other than SI Mani Kumar Thapa, the appellant. The Maruti Gypsy SKM 999 crossed Ramam Bridge towards Singla late in the evening of 12th February 1988 is also proved by Exhibit P-9, which is the G.D. extract entered by P.W. 22 Budhiman Tamang. That the G.D. entry was made by P.W. 22 has been proved by H.S. Tuteja, P.W. 27, Assistant Government Examiner of Questioned Documents in the Government of India Laboratory at Calcutta whose report is at Exhibit P-6. The accused Rolland and the appellant were seen together at Jorethang between 6.00 p.m. and 7.00 p.m. on 12th February 1988. P.W. 19 S.I.S.K. Baniya in the cross-examination stated that it is true that on 12th February 1988 he and others gave a farewell party in honour of Mania Kumar Mohra at the police station. Shri Baniya stated that the accused Rolland also attended the party. He also stated that the accused Rolland brought one bottle of drink and he had one peg out the said bottle and he further stated that it was about 6-30 p.m. when the accused Rolland came to the party. P.W. 10 further stated that the appellant had also come to the party. Besides the accused Rolland, Constable Kharga Bahadur Gurung and the appellant Mani Kumar Thapa also had one peg each from the bottle brought by the accused Rolland. Statement of Sonam Bhutia, P.W. 24 also proves the fact that the accused Rolland and the appellant were seen together at Jorethang between 6.00 p.m. and 7.00 p.m. on 12th February 1988. P.W. 24 also stated that on 12th February 1988 he had organised one small

farewell tea party for the outgoing Constable Mania Kumar Mohra who was transferred to Reserve Lines at Gangtok. The party was organised in the police station itself. P.W. 24 stated that at about 6.00 or 7.00 p.m. when the party was in progress the accused Rolland and the appellant M.K. Thapa came to the Police Station. Accused Rolland enquired from P.W. 24 as to what was going on and P.W. 24 told that they were having a small farewell party. P.W. 24 stated that then the accused Rolland asked the appellant to bring one bottle of whisky from his vehicle, which the appellant did. P.W. 24 then arranged for two glasses and both the accused Rolland and the appellant started having drinks. P.W. 24 further stated that the accused Rolland and the appellant spent about 20 to 30 minutes with them and after the party was over they all disbursed from that place. The defence did not cross-examine P.W. 24 and could not assail the statement made by him. It is pertinent to note that the distance between Ramam Checkpost and Naya Bazar is about half a kilometer as would be evident from the statements of P.W. 15 and P.W. 22. It takes less than five minutes to cover the distance. P.W. 15 stated that accused Rolland was staying at Naya Bazar Dak Bungalow, which is about half kilometer from the Ramam checkpost and Naya Bazar is adjacent to Jorethang. P.W. 22 stated that Naya Bazar Police Station is at a distance of about half kilometer from Ramam Checkpost. It takes less than 5 minutes to cover the distance. Therefore, the approximate time given by P.W. 15, P.W. 22, P.W. 25 and P.W. 26 when the accused Rolland and the appellant had crossed Ramam Bridge and got back will have to be accepted as correct. On 13th February 1988 at about 10.00 a.m. both the accused Rolland and the appellant again had gone to the checkpost, which will be evident from the statements of Nak Tshering Lepcha, P.W. 15 and Budhiman Tamang, P.W. 22. It is also evident from the statements of P.W. 15, P.W. 22 and P.W. 25 that on 13th February 1988 at about 11.00 a.m. people from Kerabari Singla came to the checkpost and enquired as to whom Maruti Gypsy SKM 999 belonged which had gone towards Singla side the previous night i.e. on 12th February 1988. On being told that it belonged to the accused Rolland, they stated that one dead body was found at the point where the vehicle had turned. It is also evident from the statements of P.W. 15, P.W. 22 and P.W. 25 that on 13th February 1988 the accused Rolland had discussions first at the checkpost with the CPM men, crossed the Ramam bridge over to the West

Bengal side at Singla with P.W. 22 Budhiman Tamang, saw the dead body, went to the house of one Kazi executed an undertaking Exhibit P-12 and returned. English translation of Exhibit P-12 reads as follows :--

Ex.-P12

On 13-2-88 I, S.D.P.O. Roland Chettri, resident of West Sikkim, am executing this document that on the night of 12-2-88 at about 5.00 p.m. while chasing a 'Badmash' near ghorley Bhir of Naya Bazar elakha, Sikkim, he suddenly jumped with the intention to run away and died at that time. The driver at around 7.15 threw it at Kerabari forest area. On 13-2-88 when I was called at Kerabari it was the same person who had fallen and I am taking the person for dispose/enquiry. In the future if there is any Governmental action I shall be fully answerable for the same. Because the entry of vehicle No SKM 999 Maruti has been made at the check post on the same date and same time.

Sd/-

Roland Chettri

SDPO (W)

The fact that the people from Singla side were agitated and that the accused Rolland and Budhiman Tamang, P.W. 22 went over to Singla side at the behest of those people is borne out by the suggestion put to Constable Lodey Bhutia, P.W. 25 on behalf of the accused Rolland and the appellant in cross-examination. P.W. 25 replied that it is true that all the 8/9 persons had come from the other side of the river surrounded Rolland and took him to the other side along with Havildar of the checkpost.

50. The appellant gave false answer to question Nos. 22, 27 and 37 in his statement under Section 342 of Cr. P.C. which are reproduced below :--

Q.22 It is In his evidence that you were in the back seat of the vehicle. What have you to say?

Ans. It is incorrect.

Q.27. It is in his evidence that on the following day i.e. on 13-2-1988 Rolland Kristopher and you again went to the checkpoint at about 10 a.m. in the same vehicle i.e. SKM-999 and after staying there for about one hour you and Rolland Kristopher left. What have to you say?

Ans. I do not know as I was not there. My duty was at Gyalshing and at that time I was at Gyalshing.

Q.37. Do you have anything else to say?

Ans. On 12-2-88 I had gone to Soreng on the order of my S.P. as Hon'ble CM. was visiting Soreng. In the evening as I did not have my vehicle I took lift in the vehicle of accd. No. 1 up to Jorethang from where I went to my own quarters and accd. No. 1 went to Nayabazar Forest Dak Bungalow as he was camping there on duty.

Answer to question No. 22 is proved to be false by the statements of P.Ws. 15, 22, 25, 26 regarding crossing over to West Bengal side by Ramam Bridge. Statements of P.Ws. 10 and 24 prove that both accused Rolland and the appellant attended a farefell party in Jorethang Police Station in the evening of 12th February 1988 between 6 p.m. and 7 p.m. Answer to question No. 27 is an alibi regard to the incident at the Ramam bridge in the morning of 13th February 1988 when both accused Rolland and the appellant had visited the checkpoint. The appellant had also visited the official quarter of Kishore Kumar Pradhan, P.W. 5 in the evening of 13th February 1988 at about 5.30 p.m. as is evident from the statement of P.W/5. Answer to question No. 37 is palpably false on the face of the proven fact that on 12th February 1988 the appellant had gone from Soreng to Timberbong looking for the deceased Dharma Dutta Sharma, and returned from Timberbong with the accused after collecting the said deceased, as proved by the statements of P.W. 3, P.W. 5, P.W. 6, P.W. 7, P.W. 8, P.W. 9, P.W. 11 and P.W. 13.

51. In the case of Joseph v. State of Kerala reported in (2000) 5 SCC 197, it has been held :

5.... The accused when questioned under Section 313 of the Criminal Procedure Code, denied bluntly all the incriminating circumstances brought out against him and reiterated about he being innocent.

14. The incriminating circumstances numerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313, Cr. P.C., the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, Courts have, from the falsity of the defence plea and false answers given to Court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see *State of Maharashtra v. Suresh*). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy....

Following deposition of P.W. 5 Kishore Kumar Pradhan is very relevant :--

On 13-2-1988 at about 5-30 p.m. accused No. 2 M.K. Thapa came to my official quarter at Soreng. There was one another person with him. He was known as Postik Manager. I asked M.K. Thapa as to where did they take Dharma Dutta Sharma the previous day i.e. on 12-2-1988. Accused No. 2 replied that when at Zoom accused No. 1 went out to urinate he had helped Dharma Dutta Sharma to run away from the vehicle. At about 7.00 p.m. accused No. 2 and his companion went from my house saying that they would return to Jorethang.

I had said to the accused No. 2 M.K. Thapa that they should not have left Dharma Dutta on the way.

On 16-2-1988 at about 4-30 p.m. accused No. 2 M.K. Thapa again came to my quarters at Soreng and told me that auta-kam-Khatam Bhayo (one work finished). I asked him what did he mean by that? The accused No. 2 told me that on 12-2-1988 while they were taking Dharma Dutta Sharma in their vehicle and when they reached at Zoom accused No. 1 (Rolland Christopher Chhetri) went out of his vehicle to urinate and in his absence he (accused No. 2 M.K. Thapa) helped Dharma Dutta Sharma escape from the vehicle. But when accused No. 1 saw Dharma Dutta Sharma running away he (accused No. 1 Rolland) called out the name of Dharma Dutta 'Dharmey -- Dharmey'. But Dharma Dutta Sharma got nervous when the accused No. 1 v/as calling out his name and he continued to run away with the result that he fell from a cliff of Zoom and sustained injuries on his temple. The accused No. 2 further said that he and the accused No. 1 brought the injured Dharma Dutta Sharma in the vehicle and was taking to Jorethang for medical treatment. But on the way Dharma Dutta Sharma expired. He also said that on the same night they took the dead body of Dharma Dutta Sharma to Singla, on the other side of the river which falls within West Bengal and threw away the dead body there. He further added that on 13-2-1988 they had gone to the other side of the river (Singla) and with the help of O.C. Bajanbari (West Bengal) and some CPM men they had disposed of the dead body. He also said that they paid Rs. 10,000/- to the CPM men and Rs. 8,000/- to the O.C. Bijanbari and Rs. 1,000/- plus 2 cases of rum to the labourers who had disposed of the dead body. He also said that the accused No. 1 had asked him (accused No. 2) that this should not be disclosed to anyone and that he (accused No. 2) also should not worry about the whole affairs. He further said that they had destroyed the seal of the Panchayat along with some papers found in the possession of Dharma Dutta Sharma and the receipt issued by some dry cleaners was still retained by him (Accused No. 2). The accused No. 2 told me that the coat from the dry cleaners should be taken against the receipt as if Dharma Dutta Sharma himself had taken out the coat from the dry cleaners. The accused No. 2 asked me not to disclose these things to anyone as per the instruction of the accused No. 1.

The deposition of Kamal Prasad Shah, P.W. 36 is also significant :--

On our way back from Shingla I told accused M.K. Thapa that yesterday i.e. the previous day, the accused Roland Sahib was seen at Keyrabari where the situation was quite disturbing and today he (accused No. 2) had gone towards Shingla and met so many people there, etc. I asked him whether anything was wrong. (Subject to Objection by the Defence Counsel). In reply accused No. 2 M.K. Thapa told me that on 12-2-1988 they had arrested one smuggler from Darjeeling and was bringing him to Naya Bazar but on reaching 'Gorlaya Vhir' the smuggler jumped out and tried to run away and in the process he met with his death and that they got nervous and as such they had thrown the dead body on the other side of the river (Objected to by the Defence Counsel).

52. It is, therefore, clear that on 16th February 1988 P.W. 5 Kishore Kumar Pradhan was told by the appellant that while running away after being helped by the appellant at Zoom, the deceased fell causing injury on his temple and died on the way to Jorethang and that his body was disposed of at Singla with the help of the people of that place on payment.

53. Letter of undertaking Exhibit P-12 executed by the accused Rolland also constitutes an incriminating circumstance about the death of Dharma Dutta Sharma having been caused by him. This couples with the fact that the appellant was all along participating with accused Rolland also implicates the appellant.

54. Prosecution has produced some evidence that the dead body of Dharma Dutta Sharma was found but there is no reliable evidence to prove that the dead body was of Dharma Dutta Sharma. Even Kamal Prasad Shah, P.W. 36 who knew the deceased, could not identify the body as that of the deceased Dharma Dutta Sharma. The fact that the prosecution could not find the dead body of the deceased Dharma Dutta Sharma is not fatal.

55. It is a settled principle that factum of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. Like in case where murder has been committed and the body is thrown into a flowing tidal river or stream or burnt out. It is unlikely that the

dead body can be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed, etc. and that would afford a complete immunity to the guilty from being punished and would escape even when the murder is proved. What, therefore, is required for conviction in an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the body may not be traced. For this, we find support from the case of *Savaka Pertumal v. State of Tamil Nadu* reported in AIR 1991 SC 1463.

56. Ld. counsel for the appellant has submitted that at best the prosecution has proved that the murder was committed by the accused Rolland and the appellant was only with him and there is no evidence of the appellant having any common intention with the accused Rolland to cause the death of Sharma, and so the appellant is entitled to acquittal. In this context the following decisions are relied upon :--

57. In the case of *Pandurang v. State of Hyderabad* reported in AIR 1955 SC 216: 1955 Cri LJ 572 it has been held:

(32) Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all -- '*Mahbub Shah v. Emperor*' AIR 1945 PC 118 at pp. 120 & 121 (B). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others, and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill

could be proved in his case. AIR 1925 PC 1 at pp. 5 & 6(A) and AIR 1945 PC 118 (B). As their Lordships say in the latter case, 'the partition which divides their bounds is often very thin : nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

(33) The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him & join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g. the intention to rescue another and, if necessary, to kill those who oppose.

58. In the case of *Tukaram Ganpat Pandare v. State of Maharashtra* reported in AIR 1974 SC 514 : 1974 Cri LJ 469, it has been held (at pages 470-471 of Cri LJ) :

Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal and performed by a plurality of persons.

Criminal sharing, overt or covert, by active presence or by distant direction, of the act is the essence of Section 34. Even assuming that presence at the scene is re-requisite to attract Section 34 and that such propinquity is absent, Section 107, which is different in one sense, still comes into play to rope in the accused.

59. In the case of *Krishnan v. State of Kerala* reported in (1996) 10 SCC 508 : 1996 Cri LJ 4444 the Supreme Court held as under (at page 4449 of Cri LJ) :

15. Question is whether it is obligatory on the part of the prosecution to establish commission of an overt act to press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act has always to be established? I am of the view that

establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when 'a criminal act is done by several persons in furtherance of the common intention of all'. What has to be, therefore, established by the prosecution is that all the persons concerned had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention, *res ipsa loquitur*.

60. In the case of *Gurnam Singh v. State of Punjab* reported in (1998) 7 SCC 722 : 1998 Cri LJ 4024 it has been held (at page 4027 of Cri LJ) :

Death of the deceased took place within a short time after they were kidnapped and that lead to a legitimate inference that the persons who had kidnapped them had killed them. There is no evidence to show that any of the appellants had killed the deceased. Therefore, the designated Court instead of convicting them under Section 302 should have convicted them under Section 302 read with Section 34, IPC.

61. In the case of, *Ramashish Yadav v. State of Bihar* reported in AIR 1999 SC 3830 ; (2000 Cri LJ 12) it has been held (at page 15 of Cri LJ) :

Section 34 lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of Section 34 is the element of participation in action. The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert of meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arrangement or premeditated concert. This being the requirement of law for applicability of Section 34, IPC.

62. Identification of the appellant that he was at the Ramam Bridge on the night of 12th February 1988 was unimpeachable for the following reasons :--

(a) P.W. 15 Constable Nak Tshering Lepcha who was on checkpoint duty at the bridge clearly stated that both the accused Rolland and the appellant had crossed the Ramam Bridge and had gone over the West Bengal side and returned after some time.

(b) Being on the gate of the bridge and the accused Rolland and the appellant being his superiors, P.W. 15 Constable Nak Tshering Lepcha definitely had gone near the Maruti Gypsy and spoken to his officer from just outside the door of the vehicle. Both the accused Rolland and the appellant being his superior officers, it was quite natural for P.W. 15 to have recognized them even if it was dark, Moreover, if the vehicle was driven in the dark the Gypsy must have had its headlights on.

(c) P.W. 22 Head Constable Budhiman Tamang corroborates P.W. 15 Constable Nak Tshering Lepcha inasmuch as both the accused Rolland and the appellant were in the vehicle.

(d) P.W. 25 Constable Loday Bhutia and P.W. 26 Yawan Kumar Chhetri corroborate that with the accused Rolland, there was another person in the vehicle. P.W. 25 was 4-5 yards i.e. 12 to 15 feet away from the vehicle while P.W. 26 was 8-9 yards i.e. 24 to 27 feet away from the vehicle. Although must is being attempted to be made out with regard to the statements of 'back side' and 'side seat', the vital aspect of the prosecution evidence that both the accused Rolland and the appellant were in the Maruti Gypsy vehicle SKM 999 in the night of 12th February 1988 and had crossed Ramam Bridge and returned has been proved.

63. Credibility of P.W. 5 K.K. Pradhan has been throughout consistent and has withstood the test of cross-examination. Being a constable of Intelligence Branch it was his duty to collect the names of those candidates who had filed their nomination for the panchayat election on 12th February 1988. The list he refers is such a list. Therefore, it is irrelevant whether P.W. 19 T.T. Sherpa and P.W. 28 T.P. Ghimiray stated that nobody came to collect the list of persons from them.

Moreover, the witness P.W. 5 clearly stated that he took the statement from V.L.O. M.B. Gurung in his cross-examination. Exhibit P-2 and P-3 state the name of accused Rolland only because he was the superior of the two officers involved.

64. Learned counsel for the appellant has submitted that the prosecution has failed to prove the motive. But absence of motive does not mean rejection of prosecution case. It is not mandatory to prove the motive because motive is something, which is in the mind of the accused person. There is no necessity to prove the motive if Court accepts from the evidence on record that the accused Rolland and the appellant had committed the murder.

65. The prosecution has proved by reliable evidence all the incriminating circumstances against the appellant as stated earlier. It is proved that the accused Rolland and the appellant abducted Dharma Dutta Sharma and disposed of his body at Singla on the other side of the river which falls within West Bengal side. The appellant intentionally aided, by his acts and illegal omissions in the commission of the aforesaid offences. We see no reason to differ with the learned trial Court.

66. In the result, the appeal is dismissed.