

HIGH COURT OF TRIPURA
AGARTALA
Crl. A. (J) 5/2022

1. Sri Amit Deb @ Bapan Deb

son of late Sailen Deb, resident of South Barjala, P.S. New Capital Complex
District- West Tripura

2. Sri Ajit Sarkar

son of late Manindra Chandra Sarkar, resident of South Barjala, P.S. New Capital Complex, District- West Tripura

3. Sri Litan @ Mona Nag

son of Sri Biswanath Nag, resident of South Barjala, P.S. New Capital Complex, District- West Tripura

4. Sri Pankaj Sutradhar

son of late Biswambar Sutradhar, resident of South Barjala, P.S. New Capital Complex, District- West Tripura

5. Sri Rajen Deb @ Raju

son of late Sailen Deb, resident of South Barjala, P.S. New Capital Complex, District- West Tripura

6. Sri Ujjal Deb

son of Sri Ratish Deb, resident of South Barjala, P.S. New Capital Complex, District- West Tripura

7. Sri Uttam Sarkar

son of late Parimal Sarkar, resident of Barjala, Kalyanpur Para, P.S. New Capital Complex, District- West Tripura

----Appellants

Versus

The State of Tripura

----Respondent

For Appellant(s)	:	Mr. PK Biswas, Sr. Advocate Mr. S. Lodh, Advocate Mr. P. Majumder, Advocate
For Respondent(s)	:	Mr. S. Ghosh, Addl. PP
Date of hearing	:	02.08.2023
Date of delivery of judgment & Order	:	09 .08.2023
Whether fit for reporting	:	Yes / No

HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER

(Amarnath Goud, J)

Heard Mr. PK Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the appellants no. 2 and 7 as well as Mr. S. Lodh, learned counsel appearing for the respondents no. 1, 3, 4, 5 and 6. Also heard Mr. S. Ghosh, learned Additional PP appearing on behalf of the respondent-State.

2. This appeal arises out of the judgment and order of conviction and sentence passed in connection with case No. S.T.(Type-1) 54 of 2013 by the learned Additional Sessions Judge, Court No. 2, West Tripura, Agartala, whereby and whereunder the learned Additional Sessions Judge convicted the appellants for commission of offences punishable under Sections 447, 149 read with Section 323, Section 149 read with Section 302 of the IPC, and sentenced them to suffer R.I. for one month for committing offences punishable under Section 447 IPC, and they were further sentenced to suffer R.I. for six months for committing offences punishable under Section 149 read with Section 323 IPC and they were also sentenced to suffer R.I. for life for committing offences punishable under Section 149 read with section 302 IPC with default stipulations.

3. Bereft of unnecessary details, fact of the case, brought on record, is that, on 28.11.2008 accused Sujit Malakar when was walking on ripen paddy field of the informant, the father of the informant raised objection for which accused Sujit Malakar assaulted the father of the informant causing injuries. Thereafter, on that day at about 6:00 p.m., Sujit Malakar alongwith others being armed with sharp weapons entered into the house of the informant and damaged doors and windows of the house and had assaulted the informant, Lal Mohan Sarkar, Saraswati Sarkar and Dilip Sarkar causing bleeding injuries. Immediately after the occurrence all the injured persons were taken to GBP hospital, but injured Nirubala Sarkar succumbed to her injuries on that night.

4. The complainant, Ajit Das (PW-1) lodged a written complaint with the Officer-in-Charge of West Agartala PS against Sujit Malakar, Raju Deb, Mona Nag, Uttam Sarkar, Amit Deb, Ujjal Das and others, and the said complaint was registered as West Agartala PS case no. 203 of 2008 under Sections 148, 149, 447, 326 of the IPC. Subsequently, section 302 IPC was added vide order dated

29.11.2008. The matter was investigated by the investigating officer. During investigation, I.O. has also visited the place of occurrence, prepared handsketch map of the PO with separate index and also examined the available witnesses. The IO had also seized some articles by preparing seizure list, collected injury report and the post mortem report alongwith forensic report and thereafter submitted charge-sheet against 11 accused persons, namely, Sujit Malakar, Uttam Sarkar, Rajen Deb @ Raju, Amit Deb @ Bapan, Litan nag @ Mona, Ujjal Deb, Dipankar Roy @ Mantu, Pankaj Sutradhar, Hanipu Rahaman @ Sohel, Gopal Pal and Ajit Sarkar under Sections 148, 149, 447, 323, 324, 302, 427, 120B of the IPC against accused persons. Out of the 11 accused persons, Sujit Malakar and Gopal Pal were shown as absconder and accused Dipankar Roy and Hanipu Rehman being juvenile in conflict with law were produced before the JJB. On receipt of charge sheet, learned CJM took cognizance of the offences and subsequently the case was committed to the court of learned Additional Sessions Judge, Court no. 3, West Tripura, Agartala. At the commencement of trial, the learned Additional Sessions Judge had framed charge against the present accused persons i.e. the appellants herein, under Sections 148,149,323,324,447,427,302,120B of the IPC against the accused-persons to which they pleaded not guilty and claimed to be tried.

5. During trial, the prosecution to establish the charges had adduced 16 witnesses and exhibited some documents. After closure of recording evidences, the accused-persons were examined under Section 313 Cr.P.C. wherein they denied all the allegations leveled against them by the prosecution witnesses and denied to adduce any evidence on their behalf. After hearing arguments and on examining the evidences and materials on record, the learned Additional Sessions Judge had acquitted all the accused persons from the charge framed against under Sections 148 and 427 of the IPC, but convicted them under

sections 447, 149 read with section 323 IPC and 149 read with section 302 IPC and sentenced them as aforesaid. Being aggrieved, the present appeal is preferred by the appellant.

6. Mr. Biswas, learned senior counsel appearing for the appellants no. 2 and 7 has submitted that none of the prosecution witness has uttered about the presence of the appellants no. 2 and 7 in the alleged place of occurrence. Mr. Biswas, learned senior counsel also argued that PW-1, the complainant in his deposition has stated that he did not see appellant no. 2, Ajit Sarkar with the other accused persons at the time of commission of the offence. Learned senior counsel also argued that PW-1 in his cross examination has stated that except accused Sujit Malakar, no other accused persons had assaulted his mother. PW-1 even did not utter a single word against appellant no. 7, Uttam Sarkar. Learned senior counsel also pointed out that PW-2 also in his deposition did not state anything adverse against appellants no. 2 and 7. Learned senior counsel also has tried to assist this court throwing light to the deposition of PW-3, PW-4, PW-6, PW-7, PW-8 and PW-9, wherein they have not stated anything against appellants no. 2 and 7. Learned senior counsel has further argued that none of the prosecution witnesses are trustworthy and their evidence has no evidentiary value, hence, learned senior counsel has urged this court to set the appellants, particularly, appellants no. 2 and 7 at liberty. In fine, learned senior counsel has argued that without properly appreciating the evidences on record, the learned trial court had convicted the appellants, particularly, appellants no. 2 & 7.

7. On the other hand, learned counsel appearing for the accused-appellants no. 1, 3, 4, 5 and 6 has argued that there are lots of contradictions between the depositions of the prosecution witnesses. Mr. Lodh, learned counsel has argued that according to PW-2 and 7, he are the eye witness to the alleged incident,

wherein PW-2 has stated that he has witnessed the entire incident from a nearby jungle, but Mr. Lodh has pointed out that in the hands sketch map along with index prepared by the I.O. there is no mention of any jungle. Further, PW-7 in her entire deposition had named Sujit Malakar as the miscreants and she did not depose anything against any of the appellants herein. Mr. Lodh, learned counsel has also argued that PW-1, the complainant, in his complaint did not mention the name of appellants no. 4 and 6. PW-1 has also in his deposition has deposed that except Sujit Malakar, none of the accused-appellants had assaulted his mother with rod. Learned counsel also has argued that as per PW-2 he was informed by two persons regarding assault of his father by a knife, but he could not name the persons who had informed him regarding such assault and those persons were not brought on record as prosecution witness. Learned counsel also has deposed that PW-7 is the eye witness to the alleged incident and this witness during her deposition has stated that Sujit Malakar had assaulted her mother with an iron rod as a result of which her mother sustained bleeding injuries. PW-7 during her deposition before the Juvenile Justice Board did not mention the name of any other accused except Sujit Malakar. Mr. Lodh, learned counsel has further argued that the statements made by PW-3 before the learned trial court was first-time statements which in other word be termed as improved statements, and to that, Mr. Lodh has placed reliance upon *Sajal Sarkar vs. State of Tripura*, reported in **2020 Cri.LJ 4704**. Mr. Lodh, learned counsel has further argued that PW-6, except the name of Sujit Malakar, did not utter a single word against the other accused person. Further, Mr. Lodh has argued that PW-7, claiming to be an eye witness to the alleged incident also stated nothing against the other accused-appellants except that of Sujit Malakar to have committed the alleged crime. Lastly, Mr. Lodh, drawing the discrepancy between the deposition of PW-2 regarding witnessing the incident from a

jungle to the absence of any jungle shown in the handsketch map alongwith index prepared by the I.O., has placed reliance on **Regulation 273 of Police Regulation of Bengal**, has urged this court to set the accused appellants at liberty since nothing could have been established against them.

8. On the other hand, learned Additional PP appearing for the respondent-State has urged to maintain the findings of the learned trial court since there is no infirmity or illegality in the findings of the learned trial court.

9. We have considered the submissions for learned counsel appearing for the parties. We have perused the evidences and materials on record and the judgment passed by the learned Sessions Judge.

10. In the instant case, according to the prosecution, the injured persons are, Lal Mohan Sarkar (PW-13), Manoranjan Sarkar (PW-8), Smt. Nirubala Sarkar (dead), Ajit Sarkar (PW-1, complainant), Saraswati Sarkar (PW-5), and, Dilip Sarkar (now examined as prosecution witness). According to the prosecution, Indrajit Sarkar (PW-2) and Ruma Sarkar (PW-7) are the eye witnesses. So, this court feels it necessary to analyze the depositions of these prosecution witnesses.

PW-1, Ajit Sarkar is the complainant of this instant case. In his deposition only stated that Sujit Malakar had assaulted his father Lal Mohan Sarkar on 28.11.2008 at about 2/2.30 pm when he was going to their paddy land and thereafter when his father raised alarm he and his brother (PW-2) went to the paddy field and took their father to hospital. He also deposed that on the same day at about 7/7.30 pm Sujit Malakar alongwith other miscreants came to their house and assaulted his wife, mother, father and his neighbour and other accused persons struck his mother by lathi and rod on the back side of her head. He further deposed that the accused persons tried to assault him, his brother and his sister but they somehow managed to

escape. He further alleged that in the night, his mother succumbed to her injuries at GBP hospital and thereafter, he lodged the FIR. PW-1, also deposed that he did not see accused Ajit Sarkar in their house.

In cross examination, PW-1, stated that he did not mention the name of Ajit Sarkar in the FIR. PW-1 also stated that during his deposition before Juvenile Justice Board, he did not utter a single word against any of the accused persons except Sujit Malakar. PW-1 also stated that in the FIR he did not mentioned the name of accused Ujjal Deb and Pankaj Sutradhar. In his cross examination, PW-1, stated that except Sujit Malakar, none of the accused persons had assaulted his mother.

PW-2, Indrajit Sarkar, deposed in the same tune to that of PW-1. He has further stated that he and his brother saved themselves by taking shelter inside a nearby jungle and from the jungle he saw the accused persons to assault his family members. PW-2, in his deposition stated that he saw accused Amit Deb and Raju Deb to hold hands of his mother and accused Sujit Malakar to give a blow on his head. He also deposed that he saw Raju Deb and Amit Deb and others to damage their dwelling huts. PW-2 also deposed that the accused persons tried to assault his younger sister but she save herself by entering into their dwelling hut. He further deposed that the accused persons had assaulted his sister-in-law, PW-5,

In cross-examination, PW-2 deposed that he has stated to the I.O. that his father himself returned home from the place of occurrence with a view to go to hospital for treatment.

PW-3, Saraswati Sarkar (Das) in her deposition deposed in the same tune to that of the PW-1 and PW-2. She has further stated that she was being assaulted by the miscreants and the miscreants also assaulted

Manoranjan Sarkar. She had also deposed that she did not tell anything against accused Ajit Sarkar.

In her cross-examination, PW-3 stated that she did not tell to the I.O. during her examination under section 161 CrPC that after the incident her husband and younger brother in law rushed to the spot and arranged for shifting her injured to hospital. She also in her cross examination stated that she did not tell the I.O. during her examination under Section 161 CrPC that accused Amit Deb and Raju Deb hold the hands of her mother in law and accused Sujit Malakar gave blow on the head of her mother in law, and the said deposition was confirmed by the IO wherein the IO has admitted that the said statement is absent in her examination under Section 161 CrPC. Further, when this witness was confronted with her statement recorded under Section 161 CrPC that she lost her sense after being assaulted by the miscreants, such statement is found absent. Further, PW-3 in her cross examination has stated that she did not tell the I.O that she could have identified Amit Deb, Raju Deb, Mona Nag and Uttam Sarkar at the time of occurrence. This witness also deposed that she did not tell anything before the JJB during her deposition that accused Raju Deb and Amit Deb caught hold of the hand of her mother in law. She also affirmed that she do not know accused Ujjal Deb, Pankaj Sutradhar and other accused persons by name.

PW-5, Saraswati Sarkar, who according to PWs 1, 2, 3 and 6 was assaulted by the miscreants, had deposed nothing relevant to the instant case and nothing could be revealed from her cross examination.

Nothing materials could have been elucidated from the deposition of PW-6. PW-6 in her cross examination only stated that she could not identify the miscreants due to insufficient light at the place of occurrence. When this

witness was confronted to her previous statement under Section 161 CrPC that she saw accused Sujit Malakar to give a blow on the head of her maternal aunt and also saw the other miscreants to assault PW5, PW-8 and PW-13, such statements were found to be absent.

PW-7, claiming herself as eye witness to the alleged incident witnessing the entire incident from her dwelling hut, deposed in the same tune to that of PW-1 and PW-2, but she did not utter a single word against the present accused appellants except Sujit Malakar.

During her cross-examination, PW-7, told that during her deposition before JJB, she only named Sujit Malakar who killed her mother. When this witness was confronted to her previous statement recorded under Section 161 CrPC that she told the IO that the miscreants had threatened her to kill and that they damaged the windows of the room, was found to be absent.

Nothing materials could have been elucidated from the deposition and cross examination of PW-8, who claimed to be one of the injured persons of the alleged incident.

PW- 9 and PW-11 are hearsay witnesses.

PW-10, is the Medical Officer who had conducted post mortem examination over the dead body of the deceased, who deposed that the injury was antemortem in nature and was due to impact of hard and blunt object.

PW-12, is the Senior Scientific Officer of SFSL, Tripura who had conducted the biological examination.

PW-13, is the victim of the alleged incident and father of PW-1, 2 and 7 and nothing material could have been elucidated from his deposition.

PW-14 is the Medical Officer who had examined PW-5.

PW-15, is a seizure witness.

PW-16, is the IO who after investigation has submitted the charge sheet.

11. On appreciation of the evidences of PW-1, PW-2, PW-3, PW-5, PW-7 and PW-13, the involvement of the present accused appellants is not well established. PW-2 and PW-7, though claimed to be eye-witnesses of the alleged incident, but their deposition had contradicted to their statements recorded under Section 161 CrPC. Further, PW-1, being the complainant did not state anything against any of the appellants except Sujit Malakar. He stated that only Sujit Malakar had assaulted his mother. Similarly, the other witnesses also did not name the present accused-appellants to be involved in the alleged offence except Sujit Malakar. PW-2, an eye witness to the alleged incident in his deposition deposed that he saw Raju Deb and Amit Deb and hold the hands of his mother and Sujit Malakar to hit a blow on her head, but, another eye witness i.e. PW-7 did not depose anything regarding Amit Deb and Raju Deb. PW-7 only stated that Sujit Malakar had entered into their house and assaulted her family members. Further, prior to their deposition, PW-1, PW-2, PW-3 and PW-7, have deposed before the Juvenile Justice Board relating to the instant case wherein they did not depose anything regarding involvement of any of the accused-appellants in the instant case except accused Sujit Malakar. Thus, there appears to be contradictory statements of the prosecution witnesses, particularly, statements of PW-1, PW-2, PW-3, PW-5 and PW-7, which is sufficient to destroy the credibility of the prosecution case.

12. Further, in the said complaint, PW-1 has stated about the involvement of the accused persons, in particular, but during his cross examination, PW-1 except one Sujit Malakar, did not mention involvement of any other accused persons. Similarly, the other witnesses also did not utter regarding involvement of any accused appellants, except Sujit Malakar. The overt act against each

accused person is not mentioned but, the same is improved in the evidence of PW-2, PW-3, and their evidences have been discarded by the evidence of another eye witness i.e. PW-7, who in her evidence did not utter a single word against any particular accused appellant except Sujit Malakar. Further, PW-1 and PW-2 when were confronted with their earlier statement recorded under Section 161 CrPC that both of them rushed to the spot and saw their father lying on the ground with bleeding injuries and subsequently they took their father to their home, was found to be absent in their statement recorded under Section 161 CrPC. PW-3 in her cross examination when was confronted to her earlier statement recorded under Section 161 CrPC that accused Amit Deb and Raju Deb hold the hands of her mother in law and Sujit Malakar gave a blow on the head of her mother in law, was found to be absent in her previous statement recorded under Section 161 CrPC. Further, when this witness was confronted to her statement recorded under Section 161 CrPC that some of the miscreants struck her from her back side was also found absent in her earlier statement recorded under Section 161 CrPC. PW-3 also in her cross examination adduced that she did not tell the IO that she could identify Amit Deb, Raju Deb, Mona Nag and Uttam Sarkar, but during her deposition she had named and identified the accused persons, and the same implies as first time statement before the learned court. PW-13, was the injured, and according to the complainant (PW-1) PW-13 was assaulted in the paddy field, but PW-13 failed to mention the name of the accused who had assaulted him. Similarly, PW-7 is the eye witness, but, she in her deposition failed to establish any involvement of the accused appellants in the alleged incident. PW-3 when was confronted to her earlier statement recorded under Section 161 CrPC that the miscreants had threatened her and also damaged the windows of the room, was found to be absent.

13. Mr. Lodh, has argued that as per deposition of PW-2, he has witnessed the incident from a jungle, but the I.O. in his hands sketch map alongwith index did not mention anything regarding the jungle. Mr. Lodh, has submitted that a map shall accompany the charge sheet and the same are useful in criminal investigation and prosecution. A scene of crime is the place where a particular crime has been committed or where physical evidence of such crime is found. As per testimony of the complainant/victim, the I.O. shall prepare the hands sketch map alongwith index and will submit with the charge sheet. In the instant case, in the index/hands sketch map there is no indication of any jungle as averred by PW-2. In this regard, it would be preferable to refer **Regulation 273 of Police Regulation of Bengal**, which reads as under:

“Map or plan to accompany charge sheet in certain cases. [12, Act V, 1861.] 273. (a) A map or plan shall always accompany the charge - sheet in cases of murder, dacoity, serious riot, mail robbery, highway robbery, extensive burglary or theft where Rs. 600 or more are stolen. Ordinarily, maps will not be required in cases other than those mentioned above; but the investigation officer may, at his discretion, prepare and send up a map in any other case. The map shall be prepared at as early a stage of the investigation as possible.

(b) The map shall, if possible, be drawn to scale, but this is not essential. If not drawn to scale, the fact shall be noted clearly on the map.

(c) The draughtsman or investigating officer who prepares the map shall bear in mind that it is essential for a correct appreciation of the situation by the court and jury that a clear distinction should be made between (i) facts actually seen by the draughtsman himself and (ii) facts deposed to only by witnesses. Statements made by' the draughtsman as to the first group are always relevant; his statements as to the second are prima facie inadmissible and cannot be used as primary evidence to go to the jury.

It is necessary to maintain a suit able distinction in the map between these two sets of facts. This distinction shall be effected as follows :-

(i) The objects actually seen by the person preparing the map including such permanent features as buildings,. trees, roads, paths and tangible points connected with the case, such as blood stains, foot-prints, cloth and corpse, etc., actually seen by him shall be indicated by letters of the alphabet, A, B, C, D, etc., explanations of these letters being given preferably in the margin of the map, but if this cannot be conveniently done, the explanations shall be furnished on a separate sheet of paper attached to the map.

(ii) Particulars derived from witnesses, e.g., the place where witness X is said to have stood, where the accused is said to have been standing when seen by X, where the blow was struck, etc., shall be indicated on the map by the numbers 1, 2, 3, 4, etc, The explanations of these numbers, however, shall on no account be given on the face of the map or on the separate sheet of paper referred to above, but on another sheet of paper distinct from either the map or the list of explanations of the actual facts indicated by letters.

(d) The number if the case and the name of the accused shall be given at the top of the map and the signature of the person who prepared it at the foot . Use should always be made of cadastral and other maps, where they are available and are of sufficiently large scale.

(e) The draughtsman or the investigating officer who prepared the map shall be produced a s a witness at the trial.”

14. On the peculiar facts and in the circumstances of the case it can be safely concluded that the appellants did not share common object of one of the

members of the alleged unlawful assembly to cause death of Nirubala Sarkar. The appellants cannot be reasonably attributed with knowledge that there was likelihood of commission of murder. Further as already stated above, all the witnesses have given contradictory versions as to who gave the fatal blow to deceased Nirubala Sarkar, and who had caught hold of the hands of the deceased, and the same amounts to material contradictions. It is reiterated that the testimony of PW-1 is inconsistent with the testimonies of PW-2, PW-3, PW-6 and PW-7. Under the circumstances, this Court is of the opinion that the conviction of the appellants recorded by the learned trial court under Sections for causing death of deceased Nirubala Sarkar by the present appellants is not well-founded and is liable to be set aside.

15. Keeping in view the aforesaid principle, this Court would hold that in the present case, there are material discrepancies in the testimonies of the witnesses and the same is fatal to the case of the prosecution. The prosecution has thus failed to prove the guilt of the accused-appellants beyond reasonable doubt. In the present case, owing to the substantial and material contradictions in the testimonies of the prosecution witnesses, the evidence of the prosecution is considered wholly unreliable. Additionally, the prosecution has examined only related witnesses and not a single independent witness who can support the prosecution case. Therefore, in the facts and circumstances of the case, the evidence does not prove the alleged offences of murder against the accused-appellants. In our view, the Trial Court has failed to take into consideration, the vital discrepancies and inconsistencies in the evidence of the prosecution witnesses, and therefore, the trial Court was not justified in recording the judgment and order of conviction under section 302 IPC.

16. However, from the record it is evident that prior to the alleged incident, the prime accused, Sujit Malakar was assaulted by the PW-1 and PW-2 in the

agricultural land relating to a land dispute between them, and out of rage, said Sujit Malakar had committed the said offence. The mother of the complainant was hit by Sujit Malakar by a rod, as alleged, but that rod was only 2 ft. in length and not a sharp cutting weapon. In the instant case, the alleged crime was caused out of rage. The question then is what offence has been committed by the person who caused the injury on the head and what offence has been committed by the other two appellants, i.e. Amit Deb and Raju Deb, who allegedly have caught hold of the hand of the deceased. It is contended by learned counsel for the appellants that the person who caused the injury on the head could not be held guilty of murder under Section 302, I. P. C., but must be held guilty of culpable homicide not amounting to murder under Section 304, IPC, and that the other two accused, having regard to the common intention of them all, which was merely to beat the deceased, could not be held guilty either of murder or of culpable homicide not amounting to murder but only of causing simple injuries. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. It is, therefore, necessary first to examine the sections themselves.

“Section 299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1- When culpable homicide is not murder- Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly —That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2: Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3: Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation: It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5: Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

17. Here, the intention of the appellants for causing an injury 'likely to cause death' and its consequence was not foreseen. The alleged incident had taken place out of rage between two parties. It is not necessary that the appellants should have the knowledge that the injury they intend to cause will be sufficient in the ordinary course of nature to cause death. In the present case the injury sustained by the deceased was sufficient in the ordinary course of nature to cause her death. The presumption is that the intention to cause the injury was by giving a blow on the head of the deceased. The motive was to take revenge on the family members of the complainant for having assaulted the prime accused, Sujit Malakar, prior to the alleged incident, but the motive was not strong enough for causing death of the deceased. Even if the accused did not have the intention of causing death, they certainly had the intention of beating the deceased. In the absence of any definite evidence that the intention of giving the blow was confined to cause simple hurt or grievous hurt or an injury

likely to cause death, the presumption of intention drawn from the nature of the injury actually caused remains unshaken. It must, therefore, be held that the person who actually caused the injury on the head was guilty of murder as defined in Clause (3) of Section 300, which says that *if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*. In the instant case there is nothing to show that the intention of hitting the victim was merely confined to causing simple hurt or grievous hurt or an injury likely to cause her death. It is true that Sujit Malakar inflicted simple injuries on the head of the deceased by a 2 ft. long iron rod. The intention of the other two persons i.e. Amit Deb and Raju Deb, cannot be ruled out because under Section 34 when a criminal act is done with the common intention of all, everyone is responsible for the entire act.

18. From the entire deposition and the materials on record, it is clear that there was an unlawful assembly in the courtyard of the complainant leading to some chaos, but involvement of the present appellants for the commission of offence under Section 302 IPC, creates serious doubt to this court. Consequently, the offence against the present appellants under Section 302 has also been converted to section 299 and 300 IPC. Basing on the entirety of the facts and circumstances regarding holding of hands of the victim by the appellants, Amit Deb and Raju Deb, cannot be ruled out, so they are also found to be guilty for the offences punishable under Section 120(B) read with Section 299 and 300 IPC.

19. If, however, we conclude that the common intention was to give simple hurt or grievous hurt or an injury likely to cause death, then the mere fact that one of them has actually caused an injury sufficient in the ordinary course of nature to cause death would be immaterial and the persons who actually did not

cause the fatal injury would not be guilty of murder but would be guilty of causing simple hurt or grievous hurt or of culpable homicide not amounting to murder. The reason is that the person who caused the fatal injury, caused it either accidentally without intention of causing such injury, or, exceeded the common intention of causing an injury of that nature. If he caused the injury without the intention of causing the injury sufficient in the ordinary course of nature to cause death, he would not be guilty of murder under Section 300, and if he could not be held guilty of murder, his associates too could not be held guilty of murder. In the instant case, there is no concrete evidence which could establish the intention of the appellants to cause the death of the victim, Nirabala Sarkar. Therefore, we hold that the acts of provocation on the basis of which the appellants caused the death of the deceased was both sudden and grave and that there was loss of self-control. Thus, it could safely be said that the said act of the appellants amount to culpable homicide not amounting to murder, and accordingly, applying the provocation exception, we would convert the conviction of the appellants from Section 302 to Part I of Section 304 of the IPC. This court is inclined to convert the offence under Section 302 IPC to Section 299 and 300 IPC. The punishment for the offence of culpable homicide not amounting to murder is prescribed in Section 304 Part I of the IPC which reads as follows:

"304. Punishment for culpable homicide not amounting to murder. Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

20. From the entirety of the materials and evidences on record, this court finds that the appellants, namely, Amit Deb and Raju Deb as guilty in participating in the crime alongwith prime accused Sujit Malakar by holding

the hands of deceased Nirabala Sarkar, for which they are also liable to be convicted for the offence of culpable homicide not amounting to murder as prescribed under Section 304 Part I of the IPC. However, with regard to the sentence, we are inclined to modify the sentence of imprisonment suffered by the appellants, Amit Deb and Raju Deb, to the period already undergone. As we have said earlier that the appellants Ajit Sarkar and Uttam Sarkar deserve clear acquittal from the charges leveled against them, and the appellants, namely, Litan @ Mona Nag, Pankaj Sutradhar and Ujjal Deb, are also entitled to be acquitted since the charges leveled against them have not been proved beyond reasonable doubt. Accordingly, all the appellants in the instant appeal, except Sujit Malakar, the prime accused, are directed to be released forthwith, if not required to be detained for any other case.

Consequently, the appeal filed by the appellants-accused is partly allowed and the impugned judgment dated 19.01.2022 passed by the learned Additional Sessions Judge, Court no. 2, West Tripura, Agartala, Court is hereby quashed and set aside.

Since the prime accused, Sujit Malakar, is found to be an absconder till date, the police of the concerned police station is directed to initiate every possible steps for causing his arrest at the earliest.

Send down the LCRs.

Pending application(s), if any, also stands disposed.

JUDGE

JUDGE