

GAHC010035042017



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

Case No.: Crl.App./317/2017

Mr. Mukul Deka

...Appellant/Accused

-Versus-

1. The State of Assam
2. Smti Guna Bala Deka
Wife of Late Kushal Deka
Resident of Tamul Chupa
Police Station- Sarthebari
District: Barpeta (Assam)
Pin: 781307

...Respondents

Advocates:

For the Appellant : N.N.B. Choudhury

For the Respondent : S. Jahan, Additional Public Prosecutor,
Assam

BEFORE
HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR
HON'BLE MR. JUSTICE KARDAK ETE

Date of Hearing : 02.06.2023
Date of Judgment : 28.07.2023

JUDGMENT & ORDER (CAV)

(*Kardak Ete, J*)

Heard Mr. N.N.B. Choudhury, learned counsel representing the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor appearing for the State of Assam. Ms. Hira Baruah Barman was appointed as legal aid counsel for the respondent No. 2 *vide* order dated 02.09.2021. However, the learned legal aid counsel is absent.

2. This Criminal Appeal has been preferred by the appellant against the judgment and order dated 07.06.2017 passed by the Court of Sessions Judge, Barpeta, Assam in Sessions Case No. 296/2012, whereby the convicts, Shri Mukul Deka and Shri Dipankar Deka have been convicted under Section 341/302/34 IPC, 1860 and sentenced to undergo Life Imprisonment and to pay a fine of ₹ 10,000/- (Rupees Ten Thousand) each, in default to undergo Rigorous Imprisonment for another 6 (six) months each for the offence under Section 302/34, IPC and to undergo Simple Imprisonment for 1 (one) month each for the offence under Section 341/34 IPC.

3. Be it noted that conviction and sentence of Mr. Dipankar Deka was set aside by the Coordinate Bench of this Court *vide* Judgment and

Order dated 06.02.2020 on the ground that the appellant/convict, Mr. Dipankar Deka was juvenile on the date of commission of the offence and the matter has been remanded to the Juvenile Justice Board to proceed in accordance with law.

4. The case of the prosecution, in brief, is that on 27.07.2008 at about 8:50 PM, while Kushal Deka was returning from Sarthebari market, near Fire Brigade Office suddenly the informant, Smt. Guna Bala Deka heard a sound "*Mok namaribi, mok namaribi*". Hearing the shouting she rushed to the place of occurrence and saw the two accused, Mukul Deka and Dipankar Deka stabbed Kushal Deka on his neck by a sharp cutting weapon restraining him on the road. Seeing her, both the accused persons fled away from the place of occurrence and Kushal Deka died on the spot. Accordingly, wife of the deceased, Smt. Guna Bala Deka lodged an FIR at Sarthebari Police Station on 28.07.2008. An FIR was registered being Sartherbari PS Case No. 111/2008 under Section 341/302/34 IPC, 1860. On completion of the investigation, the police submitted a Charge-sheet against Shri Mukul Deka and Shri Dipankar Deka under Section 341/302/34 IPC on 08.07.2015.

5. The Judicial magistrate First Class, Barpeta committed the case to the Court of Sessions. Charges were framed against the accused persons under Section 341/302/34 IPC. The convicts/accused persons pleaded not guilty and claimed for trial.

6. During the course of trial, the prosecution has examined in all 9 (nine) witnesses including the Investigating Officer. The convicts/accused persons were examined under Section 313 of CrPC. The defence plea is total denial and the accused persons declined to adduce evidence.

7. The Court of Sessions Judge, Barpeta after examination of the deposition and materials available on record, convicted the accused persons/convicts *vide* judgment and order dated 07.06.2017 under Section 314/302/34 IPC, 1860 and sentenced them to undergo Life Imprisonment and to pay a fine of ₹ 10,000/- (Rupees Ten Thousand) each in default to undergo Rigorous Imprisonment for another 6 (six) months each for the offence under Section 302/34, IPC and to undergo Simple Imprisonment for 1 (one) month each for the offence under Section 341/34 IPC.

8. Mr. N.N.B. Choudhury, learned counsel appearing on behalf of the appellant submits that the whole case is based on circumstantial evidence and the chain of circumstances of the instant case could not be proved by the prosecution. There are several contradictions of the evidence of the witnesses as well as the G.D. Entry which can be considered as FIR in the instant case. The person who informed the police of Sarthebari Police Station on the basis of which G.D. Entry No. 651 dated 27.07.2008 was made was not examined by the Trial Court, which is fatal to the prosecution case because it is on the basis of the G.D. Entry that the Preliminary Enquiry and the statement of witness under Section 161 CrPC was recorded. He submits that although the Investigating Officer has stated that on the basis of G.D. Entry the statements of witnesses were recorded, but the statement is not available in the Case Diary which is fatal to the prosecution case. Moreover, *Ejhar* was lodged by PW-1, Smt. Guna Bala Deka on the next day, but there is no explanation on the part of the informant, why there is a delay in lodging the FIR, which creates serious doubt on improvement of the story in the FIR.

9. The learned counsel, Mr. N.N.B. Choudhury submits that PW-1, Smt. Guna

Bala Deka has mainly deposed against the appellant that on 27.07.2008 at about 8:50 PM, while her husband was returning home from Sarthebari Market, before reaching their rented house both the accused persons committed murder of her husband by stabbing with knife. At that time she was standing in front of the house and she heard her husband scream "*Mok namaribi, mok namaribi*". Upon hearing her husband's scream, she came running and on reaching the spot she saw both the accused persons fleeing from the scene on a bicycle. She noticed the knives in the hands of the two accused persons.

10. Mr. N.N.B. Choudhury, learned counsel further submits that in her cross-examination, Smt. Guna Bala Deka stated that it was dark in the night when she reached the place of occurrence and about 40 to 50 persons came to the place of occurrence. The employee of the fire station, members of the neighbour's family residing as tenants also came to the place of occurrence. The employee of the Fire Station informed the police about the incident and within half an hour, police from Sarthebari Police Station arrived there, but none of the witnesses either from Fire Brigade Office or the people of the neighbourhood locality were examined in the instant case. He submits that the PW-1, has stated that her rented house is 12 feet away from the place of occurrence, and on the other hand in the examination-in-chief, she categorically stated that after hearing the scream of her husband, she ran towards the spot which is contradictory in nature because it is not necessary to run to reach the spot if it is only 12 feet away from the place of occurrence, despite the evidence on sketch map that the incident took place in front of the Fire Brigade Office and the distance between the Fire Brigade Office is about 300 meters away from the place of occurrence of the alleged incident in the dark night. The learned

counsel submits that there is a probability that PW-1 could not identify the accused persons in dark night at about 8:50 PM in the Village road. The PW-1, in her cross-examination had categorically stated that she informed the police verbally at first but there is no G.D. Entry to that effect. Moreover, the G.D. Entry No. 651 dated 27.07.2008, does not mention the name of the appellant and for that reason, the investigating authority withheld the said G.D. Entry, which is fatal to the prosecution case. Moreover, in her cross-examination, she categorically stated that there is no enmity between her husband and the accused persons which shows that there is no motive for the appellants to murder the deceased person.

11. The learned counsel for the appellant, Mr. N.N.B. Choudhury further submits that the PW-9, in his cross-examination categorically stated that PW-1, Smt. Guna Bala Deka did not tell him that on the day of occurrence they had been in their rented house, that a little distance ahead of their rented house, the two accused persons had caused her husband injury with knife. That on the day of occurrence, she had been asked to prepare rice, and on being told so, she had been waiting at the gateway and going in a run, she saw the two accused persons, armed with knives, flee from there by means of a bicycle. The learned counsel submits that if this Court takes out this part from the evidence of Smt. Guna Bala Deka then there is absolutely no evidence against the appellants to show that they were involved in the commission of the murder of the deceased. The learned counsel further submits that during the course of hearing, the learned Additional Public Prosecutor tried to project the case on the basis of the 161 CrPC statement recorded by the Investigating Officer of the instant case. This cannot be considered for two reasons. Firstly, as per the PW-9

statement, Section 161 CrPC was recorded on the basis of the G.D. Entry on that particular day, whereas the statement under Section 161 CrPC relied by the learned Additional Public Prosecutor was from the Case Diary which were recorded either on 28.07.2008 or 27.07.2008 meaning thereby the first statement which were recorded by the Police was withheld by the Investigating Officer which is fatal to the prosecution case. He further submits that the law of the land as per the Apex Court judgment as well as CrPC, the Case Diary cannot be looked upon for convicting the accused person. Moreover, under Section 172(2) of CrPC, it is categorically stated that Case Diary cannot be used as evidence in any case but to aid in such enquiry or trial. That in the instant case at the appellate stage, the Hon'ble Court has to look upon only legal evidence which has been recorded before the Court and not the Case Diary because enquiry and trial part are completed as soon as the trial is complete. In addition, as per the judgment of the Apex Court, the Case Diary can be referred only for contradicting the accused person.

12. The learned counsel submits that the PW-2 in his statement has stated that although police seized two knives, he did not know from where the police have seized the same. Although PW-2 is a seizure witness (Exhibit-2) but he categorically stated that he did not know the content of the Seizure List. He also falsely stated that he saw cut injury on the neck of the deceased and he did not state before the police.

13. The learned counsel for the appellant, Mr. N.N.B. Choudhury submits that PW-3 is a hearsay witness who stated that the appellant/accused Mukul Deka confessed before them (public) that he had killed Kushal Deka by stabbing him with a knife. The statements were made before the police officer and when both

the accused persons were in police lock-up. He submits that as per the law of the land the statement made in the presence of a police officer in a police station has no evidentiary value in the eye of law.

14. The learned counsel for the appellant, Mr. N.N.B. Choudhury submits that PW-4 is also a hearsay witness so his evidentiary value is not at all admissible in the eye of law.

15. He further submits that PW-5, the brother of the deceased person is also a hearsay witness. PW-5 stated that PW-1, Smt. Guna Bala Dekka narrated before him that Dipankar Dekka caught and held the hand of the deceased and Mukul Dekka sawed him on the neck with a knife. As Kushal Dekka shouted, his wife, Guna Bala Dekka came out and then the accused person fled the scene on a bicycle.

16. The learned counsel for the appellant, Mr. N.N.B. Choudhury further submits that the appellant states that PW-1, in her evidence never stated the aforesaid story and moreover, PW-5 is a hearsay witness so his evidentiary value is not at all admissible in the eye of law. As per statement of PW-5, the incident took place at 8:50 PM, so there is a major contradiction in respect of timing of the alleged incident as per prosecution story which is doubtful. PW-5 in his cross-examination stated that they were lying in ambush near a Pan shop. That on seeing him, the accused persons hid themselves by covering their faces and at that time, leaving his work place, Kushal Dekka asked him to accompany him to leave the place. The statement was not made before the Investigating Officer by PW-5, so there is no evidentiary value in the eye of law.

17. The learned counsel for the appellant, Mr. N.N.B. Choudhury submits that PW-9, the Investigating Officer in the instant case in his cross-examination categorically stated that PW-5, Anil Deka did not tell him that when Kushal Deka had reached near the house, accused Dipankar had held him by the hands and Mukul Deka sawed Kushal Deka's neck. That when Kushal screamed, Guna Bala Deka came and the accused person left the place by means of a bicycle, that many persons had gathered at the place of occurrence and that on being asked, Guna Bala Deka narrated the incident that he had seen Ripan Deka, Arun Tamuli and other persons at the place of occurrence, that he had carried the dead body in a push-cart and when the police had arrested the accused persons, they confessed to have committed the offence.

18. The learned counsel further submits that PW-6, Alakesh Barman categorically stated that although he is a seizure witness, he did not see the police recovering those knives from the back side of his house and neither did his family members. The police called him to the police station and informed him about the recovery of two knives and requested to put their signature. He stated that when they put signature in the Seizure list (Exhibit-2), it was blank and the police did not show him any knives at that time. PW-6 stated that the police tutored him to make the statement (Exhibit-5) before the Magistrate. That out of fear he made the statement (Exhibit-5) before the Magistrate as tutored by the police. The learned counsel therefore submits that from the evidence of PW-6 it is clear that in respect of recovery of knives there is a serious doubt and there are serious lapses in the prosecution story and the Investigating Officer tried to project a story of their own by tutoring a witness of the instant case which is highly *mala fide* and a perfunctory investigation in any case because the law of the land is that the accused is presumed to be innocent

until and unless he is convicted by any court of law.

19. The learned counsel for the appellant, Mr. N.N.B. Choudhury further submits that PW-8, Medical Officer has stated that he conducted the post mortem at 11:50 AM and the approximate time of death was 6 to 10 hours and if the time of death was to be calculated from the aforesaid evidence of the Medical Officer, the deceased died at 1:50 AM, that is midnight. As per PW-1 the deceased died around 8:50 PM. As per PW-5, the deceased died at 7:00 PM, so there is a serious contradiction in respect of the time of death of the deceased person which creates serious doubt in the prosecution case.

20. The learned counsel for the appellant submits that the document sketch map shows that the rented house of the complainant and the Fire Brigade Office is about 300 meters away and as per evidence of the prosecution witness, the body of the deceased was found near the Fire Brigade Office and PW-1 categorically stated that she ran and reached the place of occurrence. From all the circumstances mentioned above, the statement made by PW-1 that her house is 12 feet away from the place of occurrence is not believable. On the other hand there is probability that the rented house of the complainant and the place of occurrence is 300 meters away and it is not possible to identify a person in the dark of the night, although in the judgement there is a discussion that PW-1 came out from the house with a "*chaki*" but the "*chaki*" was not produced before the court which is fatal to the prosecution case.

21. The learned counsel for the appellant submits that PW-9 has categorically stated that the FIR was filed on the next day but there is no explanation why there was a delay of one day in filing the FIR. He further submits that the most important evidence of PW-1 is that she categorically deposed that after leaving, she screamed and ran to the place of occurrence as per sketch map, which is

300 meters away which nullifies that the place of occurrence is 12 feet away from the rented house of the complainant. Moreover the distance of 12 feet between the rented house of the deceased and the place of occurrence was not put to in 313 CrPC statement, which is why the learned Trial Court Judge could not consider this part in his judgment.

22. Mr. N.N.B. Choudhury, learned counsel for the appellant submits that there are many findings of the learned Trial Court where under Section 313 CrPC examination, the learned Trial Court could not put any question. The law of the land is that whatever is not put to under Section 313 CrPC examination cannot be considered for conviction.

23. The learned counsel for the appellant submits that PW-9 in his cross-examination categorically stated that he did not send the two daggers to FSL to examine if there were any thumb impression on them and he did not see the article in the Court. PW-9 stated that the preliminary investigation was done on the basis of G.D. Entry. He drew a sketch map on the basis of G.D. Entry. He recorded the statement of witness on the basis of G.D. Entry which could not be found in the Case Diary, which creates serious doubt on the prosecution story because the G.D. Entry No. 651 dated 27.07.2008 and the initial statement under Section 161 CrPC were withheld by the police which creates serious doubt that the police has withheld the document Case Diary to convict the accused person.

24. Mr. N.N.B. Choudhury, learned counsel for the appellant submits that, therefore, in the facts and circumstances of the case, the accused person is liable to be acquitted in this case. He submits that one of the most important aspect of this case is that the Public Prosecutor tries to project the case from Section 161 CrPC statement of the Case Diary, which is absolutely barred as per

Section 172 (2) CrPC. The learned counsel relied on the following judgments to show that Case Diary cannot be relied on for convicting the accused person and submits that-

a) in the case of **Nazrul Haque Choudhury Versus State of Assam**, reported in 2004 (3) GLT 453 wherein this Hon'ble Court held that Case Diary cannot be basis of conviction and the court cannot take aid of the Case Diary.

b) in the case of **Virender Singh Versus State of Haryana**, reported in (2017) 11 SCC 126 the Hon'ble Apex Court held that in the absence of any evidence, 161 CrPC cannot be used for convicting the accused person.

25. In addition, the learned counsel for the appellant, Mr. N.N.B.
Choudhury further relied on the following judgments:

a) **Indra Dalal –Vs- State of Haryana**, reported in (2015) 11 SCC 31

b) **T.T. Anthony Kumar –Vs- State of Kerala and Others**, reported in (2001) 6 SCC 181

c) **Reema Hazarika –Vs- State of Assam**, reported in AIR 2018 SC 5361

d) **State of Rajasthan -Vs- Rajendra Singh**, reported in (2009) 11 SCC 106

e) **Vijay Kumar –Vs- State of Rajasthan**, reported in (2014) 3 SCC 412

f) **Kipa Sero –Vs- State of Arunachal Pradesh**, reported in 2005 (4) GLT 86

g) **Harjinder Singh Alias Bhola –Vs- State of Punjab**, reported in (2004) 11 SCC 253

h) **Ravi Kumar –Vs- State of Punjab**, reported in (2005) SCC 315

i) **Birendra Gour –Vs- State of Assam**, reported in 2010 (2) GLT 697

j) **Rajiv Phukan and Another –Vs- State of Punjab**, reported in 2009 (2) GLT 414

k) **Swammy Shraddadananda –Vs- State of Karnataka**, reported in (2007) 12 SCC 288

l) **State of Uttar Pradesh –Vs- Wasif Haider and Others**, reported in (2019) 2 SCC 303

m) **State of Madhya Pradesh –Vs- Ghudan**, reported in (2003) 12 SCC 485

n) **Bircha Kurmi –Vs- State of Assam**, reported in 2013 (4) GLT 1017

o) **Dabu Munda –Vs- State of Tripura**, reported in 1991 (1) GLR 293

p) **R. Shaji –Vs- State of Kerala**, reported in (2013) 14 SCC 266

Mr. N.N.B. Choudhury, learned counsel for the appellant submits that in view of the facts and circumstances submitted above and law of the land laid down by the Hon'ble Apex Court, the judgement and order of conviction dated 07.06.2017 and sentence may be set aside and quashed and the appellant be set at liberty.

26. On the other hand Ms. S. Jahan, learned Additional Public Prosecutor for the State of Assam submits that prosecution story in the instant case is that the appellant Sri Mukul Deka along with another, who was declared a juvenile, hacked the deceased on his neck and fled away from the place of occurrence, thereby killing the deceased on the spot. The instant case rests on circumstantial evidence, which is in the form of a chain of circumstances.

27. She submits that the deceased, Shri Kushal Deka used to work as a brass metal worker in the house of the appellant and both the families were at visiting terms with each other. Ms. S. Jahan, learned Additional Public Prosecutor submits that PW-5 stated that in the afternoon of the day of occurrence, there was a quarrel between the deceased and the appellant over money related issue. She submits that there is every possibility of a quarrel over monetary issue since the deceased worked as a mason in the house of the appellant. Therefore, the statement made by PW-5 in his cross-examination that he did not state that there was a quarrel between the appellant and the deceased could not be an omission in the facts and circumstances of the case.

28. She submits that the wife of the deceased/PW1 had deposed that at around 8:30 PM she heard her husband scream and on going there in a run,

saw the appellant fleeing from the place of occurrence. Although there appears to be a contradiction with regard to the said statement but for the interest of justice, when her statement recorded by the police under Section 161 CrPC was checked, it revealed that she in fact had stated before police that she saw the appellant fleeing away from the place of occurrence.

29. Ms. S. Jahan, the learned Additional Public Prosecutor submits that both the statement of PW-1 as well as the sketch map reveals that the place of occurrence is very near to the house of the deceased and it cannot therefore, be disbelieved that PW-1 heard her husband shouting, ran and saw the appellant fleeing from there. PW-1 had specifically stated that the distance between her house and the place of occurrence is 12 feet.

30. The learned Additional Public Prosecutor further submits that further corroboration comes from the contents of the *Ejahaar* which PW-1 had lodged on the next day at 6:00 AM wherein she stated that she saw both the appellant and the juvenile fleeing away from the place of occurrence. She submits that on seeing the body, PW-1 and 4 saw cut injuries on the neck of the body.

31. The learned Additional Public Prosecutor, Ms. S. Jahan submits that the doctor who conducted the autopsy on the body of the deceased, examined as PW-8 found multiple injuries on the neck of the victim along with fracture of 4th and 6th cervical vertebrae. The death is therefore, homicidal. This corroborates with the statement of PWs- 1 and 4. She submits that PWs -1 and 2 stated that two numbers of knives were recovered. Further, PW-6 had categorically stated that the police recovered the knives from the back side of the house. This statement is further corroborated by PW-6's statement recorded under Section 164 CrPC, wherein he stated that at around 9:15 PM, on the day of occurrence, the appellant along with the juvenile-accused came to the house and told him to

keep the knives and that he handed over the same to the police on 29.07.2008.

32. The learned Additional Public Prosecutor, Ms. S. Jahan submits that on behalf of the appellant it has been argued that one important circumstance that the house of PW-1 was only 12 feet away from the place of occurrence, from where she heard her husband screaming was not put to the appellant while questioning him under Section 313 CrPC. In this context, it is submitted that while framing and putting Question No. 1, it was specifically asked to the appellant, that he, near the home of the deceased killed the victim. By not putting that 12 feet distance will not by any stretch prejudice the appellant since the requirement under law is that all incriminating circumstances must be put and even if some are not put, in the absence of any prejudice caused to the appellant, the same will not be fatal.

33. Ms. S. Jahan, learned Additional Prosecutor submits that it was also argued by the learned counsel for the appellant that in the instant case, there was a General Diary Entry and the same has to be considered as the First Information and not the *Ejhar* that was lodged by PW-1 on 28.07.2008 at 6:00 AM. It is submitted herein that it is no *res-integra* that any telephonic information given, only to get the police to the place of occurrence, cannot be treated as the FIR. She submits that the said law can clearly be culled out from a bare reading of Section 154 CrPC which provides that information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same has to be also given to him, free of cost. In the instant case, it is clear from a bare reading of the G.D. Entry (which was without any required particulars) that it was only to get the police to the place of occurrence. It is also evident that the police did only some preliminary investigation as stated by the Investigating Officer himself in his examination.

Further it is seen from the Case Diary, (which can be seen for the interest of justice) that barring preparation of the sketch map, all other steps viz., examination of witness, inquest, sending the body for Post-Mortem Examination etc., were all conducted after the registration of the *Ejahaar* lodged by PW-1.

34. The learned Additional Public Prosecutor further submits that the further argument by the learned counsel for the appellant that the G.D. Entry was not exhibited will not be relevant in the instant case, however, if the G.D. Entry was considered as relevant, the case can only be remanded back for exhibiting the same.

35. In support of her submission, Ms. S. Jahan, the learned Additional Public Prosecutor has placed reliance on the following judgments:

- i) **Narsingh –Vs- State of Haryana**, reported in (2015) 1 SCC 496
- ii) **Yanab Sheikh –Vs- State of West Bengal**, reported in (2013) 6 SCC 428
- iii) **Bircha Kurmi –Vs- State of Assam**, reported in 2013 (4) GLT 1017

36. We deem it appropriate to appreciate and consider the judgments relied on by the learned counsel for the parties.

In the case of **Indra Dalal Versus State of Haryana** reported in (2015) 11 SCC 31, the Hon'ble Supreme Court held which is reproduced herein below:

“16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

17. The word 'confession' has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined

to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible."

In the present case, though the accused has made a confession while in police custody, the conviction has not been based on the said confession. Therefore, the aforesaid judgement may not have any application.

In the case of **T.T. Anthony Versus State of Kerala and Others** reported in (2001) 6 SCC 181, the Hon'ble Supreme Court held which is reproduced herein below:

"17. Sub-section (1) of Section 154 of Cr.P.C. contains four mandates to an officer in-charge of a police station. The first enjoins that every information relating to commission of a cognizable offence if given orally shall be reduced to writing and the second directs that it be read over to the informant; the third requires that every such information whether given in writing or reduced to writing shall be signed by the informant and the fourth is that the substance of such information shall be entered in the station house diary. It will be apt to note here a further directive contained in sub-section (1) of Section 157 of Cr.P.C. which provides that immediately on receipt of the information the officer in charge of the Police Station shall send a report of every cognizable offence to a Magistrate empowered to take cognizance of the offence and then proceed to investigate or depute his subordinate officer to investigate the facts and circumstances of the case. Sub-section (2) entitles the informant to receive a copy of the information, as recorded under sub-section (1), free of cost. Sub-section (3) says that in the event of an officer in charge of a police station refusing to record the information as postulated under sub-section (1), a person aggrieved thereby may send the substance of such information in writing and by post to the Superintendent of Police concerned who is given an option either to investigate the case himself or direct the investigation to be made by a police officer subordinate to him, in the manner provided by Cr.P.C., if he is satisfied that the information discloses the commission of a cognizable offence. The police officer to whom investigation is entrusted by the Superintendent of Police has all the powers of an officer in charge of the police station in relation to that offence.

18. An information given under sub-section (1) of Section 154 of Cr.P.C. is commonly known as First Information Report (FIR) though this term is not used in the Code. It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation

which ends up with the formation of opinion under Section 169 or 170 of CrPC, as the case may be, and forwarding of a police report under Section 173 of CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 of CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of CrPC. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 I.P.C. and the investigating agency learns during the investigation or receives a fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H - the real offender-who can be arraigned in the report under Section 173(2) or 173(8) of CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the concerned Magistrate even earlier that investigation is being directed against the person suspected to be the accused.

19. The scheme of the CrPC is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of CrPC on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of CrPC, as the case may be, and forward his report to the concerned Magistrate under Section 173(2) of CrPC. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about

a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C.”

The aforesaid case relates to the filing of second FIR, which is admittedly not maintainable in certain circumstances, however, though the learned counsel for the appellant attempted to argue that the *Ejaha* amounts to second FIR, there is no question of second FIR in the present case, therefore, the reliance of the above judgment is misplaced.

In the case of **Reena Hazarika Versus State of Assam** reported in AIR 2018 SC 5361, the Hon’ble Supreme Court held which is reproduced herein below:

“12. The post-mortem report makes it evident that the chop wounds could not have been caused by the small knife alleged to have been recovered. Fracture of the temporal bone with the knife was an impossibility. PW-6 in the deposition ruled out that the injury could be caused by a fall. The post mortem did not find any alcohol in the body of the deceased. The witness also opined that injury no. 4 could have been caused while the deceased may have attempted to save himself from assault. The multiple injuries could certainly not have been caused by one person and tells an entirely different story by itself that the assailants may have been more than one. The chop injuries were possible by a moderate and heavy weapon like a dao. In our opinion also, if the deceased was of average built, it is difficult to accept, according to normal prudence and human behaviour and capacity, that the appellant being a woman, could have made such severe and repeated assault on the deceased, who was her husband, with a small knife, without any resistance and suffered no injury herself.

13. PW7 claimed to have found a knife with the smell of Dettol. Even if the knife had been wiped to erase traces of blood the wooden handle could have revealed much if it had been sent to the FSL. The witness again offers no explanation why he did not do so. No bottle of Dettol has been recovered. There is absolutely no evidence that the deceased would often assault the appellant and the minor child in a drunken condition. The fact that PW7 did not notice tears in the eyes of the appellant, deemed as unnatural conduct by the courts below, cannot be sufficient to draw an adverse inference of guilt against the appellant. The appellant being in a helpless situation may have been stunned into a shock of disbelief by the death of her husband. It is not uncommon human behaviour that on the death of a near relative, or upon witnessing a murderous assault, a person goes into complete silence and stupor showing no reaction or sensibility. We also find it difficult to believe and rely upon the evidence of CW1 primarily because of her minority. If the deceased had been assaulted by the appellant

in the room at night, it would certainly have led to noise and shouts and the witness could not have possibly slept throughout without waking up.

14. PW1 deposed that he informed the police the next morning at about 8:00 a.m. But PW7 has deposed that information was given at the police station by PW1 at about 12:00 p.m. on 11.05.2013 and the General Diary entry no. 452 made in the police station at 12.20 p.m., and the F.I.R. registered at 7:45 p.m. These are suspicious circumstances which leaves enough time for planning after thinking for the manner in which allegations were to be made for deflecting that the occurrence took place in a manner other than what may have happened actually.

16. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem, It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even it is not be considered as a piece of substantive evidence, not being on oath under Section 313(2) Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313 (1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313 (1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different mater. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

*17. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in *Hate Singh Bhagat Singh vs. State of Madhya Bharat*, AIR 1953 Sc 468 observing as follows:*

'26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to the assess, the evidence in an appeal here, but because there has been in this case a departure from the rule that when a accused person but for the word a reasonable defence which is likely to be true, ... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true friend pitted against AV and vacillating case is bound to

raise a reasonable doubts of which the accused must get the benefit....' A similar view is expressed in M. Abbas vs. State of Kerala, (2001) 10 SCC 103 as follows: '10.... On the other hand, the explanation given by the appellant both during the cross examination of prosecution witnesses and in his own statement recorded under Section 313 CrPC is quite plausible. Where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities....'"

The above case has been decided on the facts of that case wherein the complete non consideration was found to have caused prejudice to the appellant.

In the case of **State of Rajasthan Versus Rajendra Singh** reported in (2009) 11 SCC 106 the Hon'ble Supreme Court has held which is reproduced herein below:

"7. It was submitted by the learned counsel for the State that as many as six witnesses were found injured and that would establish their presence at the place of the incident. In our opinion this contention is of no help to the appellant because their evidence has not been discarded on the ground that they were not present. Their evidence was discarded because they were found not telling the truth before the court. It was also submitted by the learned counsel that the evidence of PWs 1 to 4 stood corroborated by two independent witnesses, namely Ramjilal and Jeevan Singh. P.W.8 Ramjilal had stated that he had gone to the spot on hearing sound of a gun shot and tried to snatch away the gun from the respondent. But he was contradicted by his police Statement wherein he had not stated anything regarding snatching of the gun. this omission on such a vital point has to be regarded as a contradiction and it creates a serious doubt about the truthfulness of his version. P.W. 9 Jeevan Singh had stated that he had also rushed to the spot on hearing the sound of a gun shot. He further stated that he had made an attempt to save Harveer and in doing so he had received an injury. He had not so stated before the police. This also shows that this witness had made a material improvement before the Court in order to make his evidence acceptable."

In the case of **Vijay Kumar Versus State of Rajasthan** reported in (2014) 3SCC 412 the Hon'ble Supreme Court has held which is reproduced herein below:

"14. This witness PW 10 Jaswant Singh was admittedly examined by Investigation Officer during investigation and in that statement he has not stated the facts which he now for the first time stated before the Trial Court. This raises a serious doubt as to the veracity of the said facts [See Khalil Khan vs. State of M.F. (2003) 11 SCC 19]. In other words this witness has made material improvement while deposing in the Court and such evidence cannot be safe to rely upon. Thus the evidence adduced by the prosecution to prove the circumstances 2 and 3 does not pass the test of credibility and is liable for rejection."

In the present case, PW-1 has made a statement before the Investigating Officer and consistently deposed before the Court which may have passed the test of credibility. Therefore, aforesaid case would not have automatic application.

In the case of **Kipa Sero Versus State of Arunachal Pradesh** 2005 (4) 86, the Hon'ble High Court has held which is reproduced herein below:

“32. According to the accused-appellant and the DWs, scuffle took place between the accused-appellant and the police personnel and in the process not only the two police personnel received injuries but the wife of the accused-appellant also received injuries. While the prosecution case is that such injuries were inflicted by the accused-appellant with a knife according to the DW's version such injuries were sustained by the two police personnel from sharp bamboo sticks. Such a stand on the part of the DWs coupled with the fact that none of the seized articles including the most important article, i.e., the knife or dao, with which the accused-appellant inflicted injured were not produced and proved before the trial Court, gives rise to strong suspicion to the prosecution case.

40. In the instant case also apart from the fact that the seized articles were not produced, most importantly the weapon allegedly used by the accused-appellant, it is also not the case of the prosecution that there were blood stains. All these factors have rendered the prosecution case highly improbable. As observed above, no amount of suspicion, howsoever, strong it may be can lead to any conviction. In the instant case also there might be suspicion about the conduct of the accused-appellant, but at the same time having regard to the fact that there is inherent contradictions in the prosecution case coupled with the fatal discrepancy of non-production of the seized articles, more importantly, the dao or knife allegedly used by the accused-appellant has made the prosecution case weak. In such circumstance, it cannot be said that the offence allegedly committed by the accused-appellant has been proved beyond reasonable doubt.”

In the case of **Harjinder Singh alias Bhola Versus State of Punjab** reported in (2004) 11 SCC 253 the Hon'ble High Court has held which is reproduced herein below:

“11. Another important factor is that Chowkidar Nahar Singh and P.W.3's servant Pritam Singh who gathered on the spot allegedly after the incident and were put on guard of the dead body were not examined. Though one of them was cited as witness, he was given up by the public prosecutor as being unnecessary. The evidence of the persons who gathered immediately after the occurrence on hearing the alleged cries of P.Ws.3 & 4 would have been valuable piece of evidence to serve as corroboration of the account given by the direct witnesses, especially when the presence of the alleged eye

witnesses at the spot was too much of a coincidence. No reason is forthcoming for not examining them. This is another serious lapse which casts a doubt on the prosecution case."

In the present case, 9 witnesses were examined by the prosecution; However, some seizure witness and necessary witness were not examined and cited. In the case above, the necessary witness and the cited witness were given up by the Public Prosecutor being unnecessary. In that context, the Hon'ble Supreme Court found it to be serious lapse which cast a doubt on the prosecution case.

In the case of **Ravi Kumar Versus State of Punjab** reported in (2005) 9 SCC 315 the Hon'ble Supreme Court has held which is reproduced herein below:

"15. The First Information Report is a report giving information of the commission of a cognizable crime which may be made by the complainant or by any other person knowing about the commission of such an offence. It is intended to set the criminal law in motion. Any information relating to the commission of a cognizable offence is required to be reduced to writing by the officer-in-charge of the Police Station which has to be signed by the person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. The registration of the FIR empowers the officer-in-charge of the Police Station to commence investigation with respect to the crime reported to him. A copy of the FIR is required to be sent forthwith to the Magistrate empowered to take cognizance of such offence. After recording the FIR, the officer-in-charge of the Police Station is obliged to proceed in person or depute one of his subordinate officers not below such rank as the State Government may, by general or special order, prescribe in that behalf to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. It has been held time and again that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') or to contradict him under Section 145 of that Act. It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses. It is not the requirement of law that the minutest details be recorded in the FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind. The object of insisting upon lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed."

There is no dispute to the above proposition of law that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Evidence Act, 1872 or to contradict him under Section 145 of the Evidence Act, 1872.

In the case of **Rajiv Phukan and Another Versus State of Assam** reported in 2009 (2) GLT 414 the Hon'ble High Court has held which is reproduced herein below:

"56. Because of what have been discussed and pointed out above, we conclude that a 'disclosure statement', to be admissible under Section 27 of the Evidence Act, is not statutorily required to be reduced into writing, though prudence demands that such an information should be reduced into writing in order to enable the Court to know exactly as to what the accused is allegedly to have stated and the extent to which the information given by him is admissible. The reference shall stand answered accordingly."

In the case in hand, there is no disclosure statement though the knives were said to have been recovered which is total lapse on the part of investigation.

In the case of **Swamy Shraddadanand Versus State of Karnataka** reported in (2007) 12 SCC 288 the Hon'ble Supreme Court has held which is reproduced herein below:

"42. The learned counsel appearing on behalf of the appellant, in our opinion, was not correct to contend that only because the investigating team having regard to the purported confession made by the appellant had already known that a dead body had been buried in the house, Section 27 of the Evidence Act would not be attracted. In his statements before the investigating office, he made a confession; but what was admissible in evidence is only that part which would come within the purview of Section 27 of the Evidence Act and not the rest. The court while analysing the evidence and appreciating the same cannot take note of confession made before the police."

In the case of **Birendra Gour Versus State of Assam** reported in 2010 (2) GLT 697 the Hon'ble High Court has held which is reproduced hereinbelow:

"12. The evidence of PW-1 and PW-3 when read together makes it apparent that according to the prosecution, the FIR had been lodged by PW-2 after being informed of the incident and also of the assault by PW-1. If the evidence of PW-1 is accepted on its face value, we failed to understand as to why the FIR did not, in clear terms, disclose the name of the accused-appellant to be the assailant, on the other hand, a bare

reading on said document would reveal that it was sought to be represented therein that the deceased had been attacked by some miscreants and that the anticipation of the involvement of the accused-appellant, according to the informant was as he was found to be accompanying the deceased at the relevant point of time. Moreover, the informant also feigned ignorance of the contents of the said document, Though the investigating officer proved the FIR as Ext. 4, the signature of the author had remained unproved. On the above considerations, we find it difficult to place the reliance on this document to represent the earliest and correct version of the prosecution case."

In the case of **State of Uttar Pradesh –Vs- Wasif Haider and Others** reported in (2019) 2 SCC 303 the Hon'ble Supreme Court has held which is reproduced hereinbelow:

"24. In the present case, the cumulative effect of the aforesaid investigative lapses has fortified the presumption of innocence in favor of the accused respondents. In such cases, the benefit of doubt arising out of a faulty investigation accrues in favor of the accused.

25. Although we acknowledge the gravity of the offence alleged against the accused/respondents and the unfortunate fact of a senior official losing his life in furtherance of his duty we cannot overlook the fact that the lapses in the investigation have disabled the prosecution to prove the culpability of the accused. The accused cannot be expected to relinquish his innocence at the hands of an inefficacious prosecution, which is ridden with investigative deficiencies. The benefit of doubt arising out of such inefficient investigation, must be bestowed upon the accused."

In the case of **State of Madhya Pradesh Versus Ghudan** reported in (2003) 12 SCC 485 the Hon'ble Supreme Court has held which is reproduced herein below:

"7. From the evidence of PW-26, it is seen that he states that he noticed a person of medium height with curly hair having somewhat darkish complexion coming out of the house of the MLA who after threatening him shot the deceased three times. According to him, there was a tube light near the place of incident, hence, he could identify the accused. The High Court in its judgment has observed that the factum of the existence of a tube light at the place of incident is doubtful because the sketch of the place of the incident as prepared by the prosecution did not indicate any such light. It is only for the first time while giving evidence before the court, PW-26 pointed out a place in the sketch where according to him the tube light was placed. The trial court accepted it and came to the conclusion that there was sufficient light at the place of incident. The High Court, per contra, observed that if really there was a tube light at the place of the incident, the investigation officer would not have failed to mark the existence of that tube light in the sketch. The omission to do so creates doubt as to the possibility of there being sufficient light for identification. We are in agreement with this finding of the High Court. If really there was a tube light by which PW-26 identified the

respondent then investigating agency would certainly have shown the existence of a tube light and its placement in the sketch because it was a very important fact mainly because the identification of the accused is a vital factor to be proved by the prosecution. The benefit of the omission to point out the existence of such light in the sketch, in our opinion, should go to the accused. That apart, we find some serious discrepancies in the manner in which the PW-26 identified the respondent in the parade. As noticed above, this witness has specifically stated certain salient physical features of the respondent which assisted him in identifying the accused respondent. But if we peruse his evidence given in the court in regard to test identification parade, we notice that none of those features which assisted in identifying the accused really existed at the time of the test identification parade. PW-26 in the course of his examination stated thus:

"The Tehsildar called five-six prisoners from inside. All those who were brought were wrapped in blankets and all of them were young. I do not remember their looks as all were wrapped in blankets. Their hairs were not visible. I did not notice this even, how many of them had moles on their noses, I cannot tell how many of them were dark and how many were fair. I cannot tell how many of them were of medium stature and how many were short statured. I did not tell the Tehsildar. About the mark of my identification, I did not tell the Tehsildar, that the person whom I have come to identify possesses curly hair and is dark coloured."

In the case of **R. Shaji Versus State of Kerala** reported in (2013) 14 SCC 266 the Hon'ble Supreme Court has held which is reproduced hereinbelow:

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case."

In the case of **Narsingh Versus State of Haryana** reported in (2015) 1 SCC 496 the Hon'ble Supreme Court has held which is reproduced hereinbelow:

"20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to

the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused."

In the case of **Yanab Sheikh Versus State of West Bengal** reported in (2013) 6 SCC 428 the Hon'ble Supreme Court has held which is reproduced herein below:

"8. In the case of Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1, a Bench of this Court took the view that cryptic telephone messages could not be treated as FIRs as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of Section 154 of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him, free of cost. Similar view was also expressed by a Bench of this Court in the case of State of Andhra Pradesh v. V.V. Panduranga Rao (2009) 15 SCC 211, where the Court observed as under: -

"10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message, which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of Sections 154 and 162 of the Code of Criminal Procedure, 1973 (in short "the Code"). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR."

9. Thus, the purpose of telephone call by PW6, when admittedly he gave no details, leading to the recording of Entry, Ex.7, would not constitute the First Information Report as contemplated under Section 154 of the Code. The reliance placed by the learned counsel appearing for the appellant upon the provisions of Section 162 of the Code, is thus, not well-founded. Even in the case of Ravishwar Manjhi & Ors. v. State of Jharkhand, (2008) 16 SCC 561, another Bench of this Court took the view that "...we are not oblivious to the fact that a mere information received by a police officer without any details as regards the identity of the accused or the nature of the injuries caused to the victim, name of the culprits, may not be treated as FIR, but had the same been produced, the nature of the information received by the police officer would have been clear...."

10. On this principle of law, we have no hesitation in stating that the second FIR about the same occurrence between the same persons and with similarity of scope of investigation, cannot be registered and by applying the test of similarity, it may then be hit by the proviso to Section 162 of the Code."

In the case of **Bircha Kurmi Versus State of Assam** reported in 2013 (4) GLT 1017 this Court has held which is reproduced herein below:

“19. In the circumstances indicated above, it was incumbent, on the part of the learned trial Court, to examine Md. Abdul Hannan, Officer-in-Charge, Digboi Police Station, and also bring on record as to whether any General Diary Entry had been made, on the basis of the information, so received, by the Officer-in-Charge, Digboi Police Station from PW11, headman of the village concerned, inasmuch as the oral information, so received by police, had been acted upon and the contents of Ext.1 would, in law, be nothing, but a statement made, in writing, by PW11 to the police during investigation.

20. Situated thus, it is clear that Ext.1 could not have been treated as the First Information Report. There was, thus, serious lapse, on the part of the prosecution as well as the learned trial Judge, in not examining Apurba Saikia, who had, according to the headman, Krishna Mahato (PW11), and also the Officer-in-Charge, Digboi Police Station, namely, Md. Abdul Hannan, and also bring on record the General Diary Entry, if any, which might have been made, at Digboi Police Station before the police personnel had moved out of the said Police Station to visit the place of occurrence and investigate the offence, in which had been reported to them, Non-examination of Apurba Saikia and Abdul Hannan as witnesses and the omission to bring on record the General Diary Entry if any, which might have been made before the Police personnel had moved out of the said Police Station, are serious lapses, on the part of the prosecution and the learned trial Judge and for these omissions, cause of justice cannot be allowed to suffer.”

37. To appreciate the matter at hand we deem it appropriate to refer the evidence/deposition of the PWs.

38. PW-1, Smti. Guna Bala Deka, wife of the deceased, Kushal Deka deposed that she knew the accused person. She stated that the incident took place on 27.07.2008 around 8:30 p.m., while her husband was returning home from Sarthebari market. Both the accused persons killed her husband, a little away from their rented house, by stabbing him with knife. At that time she was standing in front of the house and she heard her husband's scream "*Mok namaribi, Mok namaribi*" (don't kill me/assault me, don't kill me/assault me). Hearing her husband's scream, she came running and on reaching the spot, she saw both the accused persons fleeing the scene on a bicycle. She noticed knives on the hands of the accused persons. She saw three cut injuries caused with knife on the neck of her husband and the neck was almost severed. Her

husband was not in a position to speak. She saw the cut injuries caused with dagger, all around the neck of her husband. Before leaving for the market her husband had asked her to cook rice as he was going to the market to fetch some vegetables. So she was waiting for her husband in the gateway. On the following morning she lodged an *Ejhar* with Sarthebari Police Station in connection with the incident. Exhibit- 1 is the *Ejhar* and Exhibit- 1 (1) is her signature. Police seized the two knives used in the occurrence from the two accused persons. While reaching the place of occurrence when she raised a hue and cry other people gathered there.

In her cross-examination, PW-1 had stated that they were residing in a rented house. The name of their landlord was Nipen Choudhury and his wife's name was Bhanu Choudhury. A person of Bodo community was residing in a separate house near their rented house. She doesn't know his name. The said person was residing with his family. The place of occurrence was some 12 feet away from their rented house. The Fire Station was situated near their rented house and there was no other residence there. The employees of Fire Station and the members of the Bodo family residing near them had heard her husband's scream. The night on which the incident took place was a dark one.

No one was present at the place of occurrence when she reached there. After her arrival at the place of occurrence some 40/50 persons turned up. She doesn't know if the *Gaonbura* came to the place of occurrence. The employees of the Fire Station and the members of the aforementioned family, residing as tenant near their rented house, arrived at the place of occurrence. The employees of the Fire Station informed the Police Station of the incident and after about half an hour, police from Sarthebari Police Station arrived there. Half an hour after the incident, her husband's dead body was taken to Sarthebari

P.S. At first she informed police verbally and on the following day she lodged a written *Ejahaar* at the Police Station. On the following morning police seized the said two knives. Police informed her about the said two knives. Neither was her signature obtained nor was she shown the said two knives. At the time of occurrence her husband was wearing a pair of trousers and shirt. Her husband's wearing apparel was stained with blood coming out of his injuries and Police seized that wearing apparel. There was blood at the place where her husband was lying and after arrival of Police, water was poured at that place. At that time Police personnel were present there. Her husband never told her that he had enmity with the accused persons. Before her husband's death, as he used to work as a brass metal worker in the house of accused, Mukul Dekha, they had visiting terms with them. Sarthebari P.S. is about 1/2 Kms away from their rented house. It took about 10 minutes to reach the police station from their rented house on foot and that the road was in a good condition. She did not write the *Ejahaar*. It was written in the presence of the Police. She doesn't know the name of the petition writer who wrote the *Ejahaar*. It was written as per her version. At the time of occurrence her three sons were at home. At that time her eldest son, Dhanjit was aged about 14 years, second son, Sanjoy was aged about 11 years and her youngest son, Simon Dekha was aged about 8 years. Hearing her husband's scream she rushed to the place of occurrence alone. Later on her sons went to the place of occurrence when she raised hue and cry after noticing the incident at the place of occurrence she stated before the police that hearing her scream, other tenants residing near their rented house and the employees of the Fire Station had arrived at the place of occurrence. She was not produced in the court for recording of her statement. She had denied the suggestions that she did not state before the police that at the time of occurrence they had been

staying in a rented house, that she did not state before the police that on the day of occurrence the accused persons had stabbed her husband with a knife, at a distance from their rented house, that she did not state before the police that on the day of occurrence she had been asked to cook rice and that (he) would have it after coming back and that for that reason she had been waiting in front of her rented house. She further denied the suggestion that she did not state before the police that her husband had shouted, "*Namaribi, Namaribi*" (Don't assault/kill me) and that hearing her husband's scream she had rushed there and reaching the spot, she had seen both the accused persons fleeing the scene on bicycle and she had noticed knives in their hands, that she did not state before the police that she had seen three cut injuries around the neck of her husband, that no knife was recovered from the possession of the two accused persons; that the accused persons did not kill her husband by stabbing him on the neck with knives at some distance from their rented house; that the accused persons were not involved with the incident and that she lodged the instant case against the two accused persons on false ground.

39. PW-2, Sri Ripun Deka, deposed that he knew the accused persons and the complainant. He knew the deceased, Kushal Deka. The incident took place on a day about five (5) years back. Around 7:00/7:30 PM on the day of the incident he heard that Kushal Deka had been killed and his dead body had been left. On the following day when he came to the Police Station he saw the two accused persons being tied and kept there. He also saw the dead body of Kushal Deka there. He noticed cut injury on the neck of the deceased. He did not ask the informant, Guna Bala Deka anything about the occurrence. Police seized two knives at the place of occurrence. Exhibit- 2 is the said seizure list and Exhibit- 2(1) is his signature. His statement was recorded in the Court. Exhibit- 3 is his

statement and Exhibit- 3(1) and Exhibit- 3(2) are his signatures. In his cross examination he stated that he does not know the content of Exhibit- 2, the seizure list. He had not seen the seized knives in the court. He knows wherefrom the police seized those knives. It is not a fact that he had falsely deposed that Police did not recover the knives at Namkhola. He had falsely stated that he saw cut injury on the neck of the deceased and he did not state it before the police. Police took him to court on their own vehicle to get his statement recorded. Police called him to the police station at 10:00 a.m. and they produced him in the court at about 2:00 p.m. It is not a fact that he made his statement on being tortured by the police.

40. PW-3, Sri Arun Tamuli, deposed that he knew the complainant. He knew the deceased Kushal Deka. He knew the two accused persons. The incident took place on a day about five (5) years ago. Around 8:00 PM on the day of the incident he heard that the two accused persons had assaulted Kushal Deka. He does not know as to why they assaulted him. On the following day he went to the Police Station along with public. The accused persons had been taken to the Police Station on the previous day. After their arrival at the Police Station, police took out the accused persons from the lock-up and asked them to say as to how they had killed Kushal Deka. The accused, Mukul Deka confessed before them (the public) that he had killed Kushal Deka by stabbing him with a knife fitted with a white handle. Thereafter they returned home. He did not see Kushal Deka's body. He does not know about the injury present on Kushal Deka's body. Police obtained his signature on the seizure list. Police seized the two knives. He was produced in the court for recording of his statement under section 164 CrPC. Exhibit- 4 is the statement and Exhibit- 4(1) and Exhibit- 4(2) are his signatures. Exhibit- 2 is the seizure list and Exhibit- 2(2) is his signature.

In his cross-examination, PW-3 stated that he did not see who assaulted and killed Kushal Deka. On the following day of the day of incident he went to the Police Station along with public. More than 100 (hundred) persons of the village had gone to the Police Station with him. Police took out the two accused persons from lock-up of the Police Station in their presence. They had been kept in the Police Station since the previous day. The two accused persons told before them all these things after they had been taken out of the lock-up. It is not a fact that he did not state that accused Mukul had not killed Kushal by stabbing him with a knife fitted to a white handle. He did not state these things before the Magistrate too. Police took him in their own vehicle to produce him before the Magistrate. He was told that they had taken him for getting his statement recorded. Police did not obtain his signature in separate sheet of paper. He only put his signature before the Magistrate. He does not remember where he put his signature in Exhibit- 2, the seizure list. He has not seen the seized knives in the court that day. It is not a fact that he has falsely deposed that accused Mukul Deka had told them that he had killed Kushal Deka.

41. PW-4, Sri. Chandra Kanta Roy, deposed that he knows the two accused persons and the complainant. He knew deceased Kushal Deka. Kushal Deka died in the year 2008, about six (6) years ago. He heard that someone had killed Kushal Deka. He heard from public that accused Mukul Deka had killed Kushal Deka. When he went to see the dead body he noticed cut mark on the neck of the deceased. He did not see the incident. He did not meet police at the place of occurrence. Police did not question him. In his cross, PW-4 deposed that he does not know how Kushal Deka died. He did not know how Kushal Deka sustained injury on his neck. He knew nothing about the incident.

42. PW-5, Sri Anil Deka, deposed that he knew the two accused persons and

the complainant. Deceased Kushal Deka was his younger brother. The incident took place around 6:00/7:00 PM one day some 5/6 years ago. In the afternoon on the day of occurrence, deceased Kushal Deka had a quarrel with accused persons over some money related matter. Then the accused persons threatened Kushal that they would cut and assault/kill him. In the evening on that day the accused persons were lying in ambush near a Pan shop. Seeing him the accused persons hid themselves by covering their heads and faces. At that time of leaving his work place, Kushal Deka asked him to accompany him, but he told that he would leave the place after some time. After about 10 minutes, when Kushal arrived in front of his house accused, Dipankar caught hold of his hands and accused Mukul Deka sawed him on the neck with a knife. As Kushal shouted, his wife, Guna Bala Deka came out and then the accused persons fled the scene on their bicycle. When Guna Bala raised alarm, a lot of people turned up there. Arriving at the place of occurrence when he asked Guna Bala about the incident, she narrated to him about the same. Kushal Deka sustained cut injury on his neck and he died on the spot. He saw Ripun Deka, Arun Tamuli and many other persons at the place of occurrence. He took Kushal to the Police Station on a handcart. Guna Bala lodged an *Ejaha*. Police arrested the accused persons and held inquest on the dead body. Exhibit- 5 is the inquest and Exhibit- 5(1) is his signature. On being interrogated by the Police, the accused persons confessed that they had committed the offence.

In his cross-examination, PW-5 stated that Kushal and he used to live separately. At the time of occurrence, Kushal was residing as a tenant in the house of Nripen. At that time Nripen Choudhury was alive. At the time of the incident one person of Boro community along with the members of his family was residing in the house of Nripen Choudhury. At the time of occurrence,

Kushal Deka was unemployed. He came across (Kushal) in front of the Namghar at Tamuli Chuba around 6:15 PM on the day of occurrence. There was a grocery shop near the Namghar. At that time the shop was open. The incident took place about 20 minutes after that he had come across Kushal. One boy, whose name is unknown to him, informed him about what had happened to Kushal. Then he went to the house of Kushal and found him beside a bamboo grove near the house along the road. He found Kushal Deka dead. About 200/300 people gathered there. He reached the place of occurrence after people had gathered there after about 20 minutes i.e. around 7:00 PM. The dead body was lying under the bamboo grove till then. Police questioned Guna Bala Deka. He was questioned in the Police Station. He alone carried the dead body to the Police Station. He put his signature on Exhibit- 5 in the police station. The inquest was held at the Police Station on the following day. At the time of holding of the inquest, Gagan Deka was present there along with other people. At the time of occurrence Kushal was wearing a pair of red and white coloured trousers and a half sleeved vest. Kushal's vest was stained with a little blood. Blood also fell on the road. Police did not seize the pair of trousers and the vest. Police did not collect Kushal's blood from the road. He knows the persons who run the pan shop near which the accused persons were lying in ambush. But he does not know his name. At that time the shop was open. At that time some other youths were present near the shop. He stated before the police that he had seen the owner of the Pan shop and other youths there. Police recorded his statement only on the date of the occurrence. Thereafter, he did not make any statement before Police. Exhibit- 5 was a written paper while he put his signature therein. The content of Exhibit- 5 was not read out to him. At the time of preparation of Exhibit- 5, Guna Bala was not present at the police station. He

did not state before the police that the incident had taken place around 6:30 PM one day about six (6) years ago and in the afternoon on that day, Kushal had a quarrel with the accused persons and in course of the quarrel the accused persons had threatened Kushal that they would cut and assault/kill him. He also did not state before the police that on the date of occurrence accused persons were lying in ambush near a *Pan* shop; that seeing him the accused persons hid themselves by covering their heads and faces and that at the time of leaving his work place, when Kushal Deka had asked me to accompany him, he had told him to leave the place. He had denied the suggestion that he did not state before the police that while Kushal had arrived in front of his house accused Dipankar had caught hold of his hands and accused Mukul Deka has sawed him on the neck with a knife, that he did not state before the police that when Kushal had shouted, his wife Guna Bala Deka had come out and then the accused persons had fled the scene on their bicycles. A lot of people turned up there; and that on being asked Gunabala told them about the incident. He denied the suggestions that Guna Bala did not tell him that accused persons had killed Kushal.

43. PW-6, Sri Alakesh Barman, deposed that he knows the two accused persons. One day about 6/7 years ago he saw police taking accused Mukul Deka to their house. Two knives were recovered from the back side of their house. Police obtained his signature in Exhibit- 2, in the Seizure List saying about the recovery of knives. Exhibit- 2(3) is his signature therein. On the following day, his statement was recorded in the court. Exhibit- 5 is his statement and Exhibit- 5(1) and Exhibit- 5(2) are his signatures. Police questioned him about the incident. In his cross-examination, PW-6 deposed that no boundary wall was around his homestead; it was an open one. There was a village road on the

back side of their house. Any person coming through that road can enter their house through the back side of the house. He was not present while Police visited their house. On his arrival at home he came to know about Police visiting their house. He did not see Police recovering two knives from the back side of his house. The members of his family also did not see the recovery of any knife. Police called him to the Police Station. On being asked by Police, he put his signature on some paper. In the Police Station he came to know from Police about the recovery of two knives. At the time of putting his signature, the Exhibit- 2 was blank. Police obtained his signature saying that he would have to depose as witness. At the time of putting his signature Police did not show him any knife. At that time of putting his signature he did not find any people of their village there. At that time he did not see Ripun Deka, Arun Tamuli or Manikanta Patowary there. He had not seen the two knives in the court that day. Except the recovery of two knives, he got no other information from Police. Police took him to the court on a vehicle for getting his statement (Exhibit- 5) recorded. Police tutored him how to make his statement. Out of fear he made the statement (Exhibit- 5) before the Magistrate as tutored by the Police. Except for that he knows nothing about the incident.

44. PW-7, Sri Manikanta Patowary, deposed that he knows the two accused persons. He did not know (deceased) Kushal Deka. The incident took place one day about 6/7 days ago. On the day of the incident he went to deliver goods. Later on his wife informed that Police had first gone to the house of the accused and then to their house. On being called, he went to the Police Station. Police also visited the house of Alakesh. Exhibit- 2(4) is his signature in Exhibit- 2, the seizure list. In his cross-examination, PW-7 had stated that the Police told him that as they had visited the house of his neighbour Alakesh. He had to put his

signature on some paper. He does not know what was written in the paper on which he put his signature. The content of the same was not read out to him. He did not see any person of their village while Police obtained his signature. Police did not show him any article at the time of putting his signature. On the day of deposition he had not seen any article in the court. Police did not question him.

45. PW-8, Dr. Ajit Kr. Sarma, deposed that on 28.07.2008 he was working at Barpeta Civil hospital and on that day he performed post-mortem examination of Kushal Deka, s/o Suren Deka, aged almost 38 years on police requisition and identified by constable Hirendra Bharali and found average build make body. Body was pale in appearance. There was blood clot on neck. *Rigor mortis* was present. Multiple cut throat injuries exposing was present on right side of neck. Vessel of both sides of neck has been cut having also exposed. There was fracture of 4th to 6th cervical vertebrae. Approximate time of death was 6 to 10 hours.

In his opinion, PW-8 deposed that the death was due to shock and haemorrhage as a result of injury sustained. Exhibit- 6 is his report and Exhibit- 6(1) is his signature. In his cross-examination, PW-8 stated that he had conducted post mortem at almost 11:50 AM. Without inquest report post mortem is not conducted. In Exhibit- 6, he had not mentioned about no inquest report on requisition and its copy.

46. PW-9, Sri Subudh Ch. Haloi, deposed that on 27.07.2008, when he was working at Sarthebari police station, the Officer-in-Charge of the P.S. received an *Ejaha*r and entrusted him with the charge of the investigation. Upon visiting the place of occurrence, he recorded the statements of the witnesses and drew sketch map of the place of occurrence. He held inquest on the body of Kushal

Deka. He sent the dead body (to hospital) for post mortem examination. He arrested the accused.

He seized the articles namely the shirt found to be worn by the deceased and dagger, plastic bag, sandal, shirt and one bicycle. Exhibit- 7 is the sketch map of the place of occurrence and Exhibit- 7(1) is his signature. He seized one brown shirt stained with blood, one black bicycle, Hawaiian sandal and plastic bag through Exhibit- 8, Exhibit- 8(1) is his signature. He seized the dagger through Exhibit- 2, the seizure list, Exhibit- 2(4) is his signature. Exhibit- 5 is the Inquest Report and Exhibit- 5(2) is his signature therein. After collecting the post mortem, he submitted Exhibit- 9, which is the Charge-sheet against the accused, and Exhibit- 9(1) is his signature.

In his cross-examination, PW-9 stated that he visited the place of occurrence at about 9:15 PM, 27.07.2008 and Entry No. being 651 was made in G.D. As per the said GD Entry the place of occurrence is a PWD road in front of the Fire Station. He did not note down the distance of the PWD road in the case diary. He did not write in the GDE as to in which direction of the PWD road, the place of occurrence is. Preliminary investigation was done on the basis of the said GDE. He drew the Exhibit- 7 on the basis of the said GDE. He recorded the statements of the witnesses on the basis of the said GDE. He held inquest at 8:00 am on 28.07.2008.

The *Ejhar* was lodged one day after the incident i.e. on 28.07.2008. He was not told the reason as to why the lodging of the *Ejhar* got delayed. The Police Station is about one furlong away from the place of occurrence and it takes about 10 minutes to cover that distance. He prepared Exhibit- 7 on 27.07.2008. The case was registered on 28.07.2008. Though he prepared Exhibit- 7 on 27.07.2008, he mentioned that he prepared it on 28.07.2008 after the lodging of

the *Ejahaar*. There is no mention of GDE in Exhibit- 7. In Exhibit- 7, he showed the place of occurrence to be a PWD road of Sarthebari. In Exhibit- 7 he did not show the exact place in the PWD road where the incident had taken place. The house of the deceased and the Fire Station are near the place of occurrence. But he did not record statements of employees of the Fire Station. He had not seen the seized articles in the court on the date deposition. He did not get the Exhibit- 8 shown by any Magistrate. It is not a fact that he prepared the Exhibit- 8 on his own and submitted the same.

He did not make enquiry as to who the seized shirt belonged to and he did not get the blood stains on it examined to ascertain as to whose blood stains those were. He did not make enquiry as to who had recovered the bicycle, bag and sandal. He did not record the statements of the seizure witnesses (of Exhibit- 8) namely Krishna Deka and Gagan Deka and he did not mention the reason of the same as well.

On 29.07.2008 he seized the article and prepared the seizure list i.e. Exhibit- 2 and he made the seizure list 'seen' at the court on 30.07.2008. But he did not mention the reason why he got the seizure list seen in the court one day later. It is mentioned in Exhibit- 2 that no blood stain was seen on the two seized daggers. He did not mention that the two daggers had been washed with water. He did not send the two daggers to FSL to examine if there were thumb impression on them. He did not see the seized articles in the court on that day. He did not receive any order to prepare Exhibit- 5 on his own. An inquest has to be held by Executive Magistrate. He held inquest on 28.07.2008. He did not mention the reason why he had held inquest one day later. He did not get statements of the other witnesses under Section 164 CrPC on 30.07.2008. He did not mention the reason why the same was done one day later.

The Entry No. 660 in the GD of Sarthebari P.S. was not made in connection with this case. He had not submitted copy of the GDE No. 651 dated 27.07.2008 in this case.

Witness Guna Bala Dekka wrote in the *Ejahaar* that after hearing her husband's scream, she had seen in the light of an open lamp that the accused had killed her husband. But he did not seize that open lamp. None from the Fire Station informed him anything regarding the incident.

Witness Guna Bala Dekka did not tell him that on the day of occurrence they had been in their rented house; that a little distance ahead of their rented house, the two accused persons had caused her husband injury with knife; that on the day of occurrence she had been asked to prepare rice; that on being told so, she had been waiting at the gateway and that going in a run, she had seen the two accused persons, armed with knives, flee from there by means of bicycle.

Witness Anil Dekka did not tell him that when Kushal had reached near the house, accused Dipankar had held him by the hands and Mukul sawed Kushal's neck; that when Kushal had screamed, Guna Bala came and the accused persons left the place by means of bicycle; that many persons had gathered at the place of occurrence; that on being asked, Guna Bala narrated the incident; that he had seen Ripun Dekka, Arun Tamuli and other persons at the place of occurrence; that he had carried the dead body in a push-cart and that when police had arrested the accused persons, they had confessed to have committed the offence.

47. Altogether, 9 (nine) prosecution witnesses were examined by the prosecution. There is no eyewitness. However, PW-1, wife of the deceased had deposed that at around 8:30 PM, while her husband was returning home from Sarthebari market, both the accused persons killed her husband, a little away

from their rented house, by stabbing him with knife. At that time she was standing in front of the house and she heard her husband's scream "don't kill me/assault me, don't kill me/assault me". Hearing her husband's scream, she came running to her husband and reaching the spot, she saw both the accused persons fleeing the scene on a bicycle. Though she deposed that both the accused persons killed her deceased husband by stabbing him with knife, she had stated that on reaching the spot she saw them fleeing from the scene on a bicycle.

48. The case has been investigated on the basis of G.D. No. 651/2008 dated 27.07.2008 which has not been exhibited by the prosecution. The Inquest Report has been prepared on 28.07.2008. It transpired that the Investigation Officer has failed to get blood stain examined, which was found at the place of occurrence by the FSL and the seized material evidences/weapons were also not sent to the FSL, and those articles were also not produced before the Trial Court.

49. On the scrutiny of the deposition of PW-1 it transpires that PW-1 had deposed that the incident took place on 27.07.2008. At Around 8:30 PM, while her husband was returning home from Sarthebari market, both the accused persons killed her husband, a little away from their rented house, by stabbing him with knife. At that time she was standing in front of the house and she heard her husband's scream "don't kill me/assault me, don't kill me/assault me". Hearing her husband's scream, she came running to her husband and reaching the spot, she saw both the accused persons fleeing the scene on a bicycle. She noticed knives on the hands of the accused persons. She saw three cut injuries, caused with knife, on the neck of her husband and the neck was almost severed. Her husband was not in a position to speak. She saw the cut injuries,

caused with dagger, all around the neck of her husband. Before leaving for the market her husband had asked her to cook rice as he was going to the market to fetch some vegetables. So she was waiting for her husband on the gateway. On the following morning she lodged an *Ejhar* with Sarthebari Police Station in connection with the incident. Police seized the daggers (two knives) used in the occurrence from the two accused persons. While reaching the place of occurrence when she raised a hue and cry other people gathered there. PW-1 further deposed that they were residing in a rented house. The place of occurrence was some 12 feet away from their rented house. The Fire Station was situated near their rented house and there was no other residence there. The employees of Fire Station and the members of the Bodo family residing near them had heard her husband's scream. The night on which the incident took place was a dark one. No one was present at the place of occurrence when she reached there. After her arrival at the place of occurrence some 40/50 persons gathered. The employees of the Fire Station and the members of the aforementioned family, residing as tenant near their rented house, arrived at the place of occurrence. The employees of the Fire Station informed the Police Station of the incident and after about half an hour police from Sarthebari P.S. arrived there. Half an hour after the incident, her husband's dead body was taken to Sarthebari Police Station. At first she informed police verbally and on the following day she lodged a written *Ejhar* at the Police Station. On the following morning police seized the said two knives. Police informed her about the said two daggers. Neither was her signature obtained nor was she shown the said two knives. At the time of occurrence her husband was wearing a pair of trousers and shirt. Her husband's wearing apparel was stained with blood coming out of his injuries and Police seized that wearing apparel. There was

blood at the place where her husband was lying and after arrival of Police, water was poured at that place. At that time Police personnel were present there. Her husband never told her that he had enmity with the accused persons. Before her husband's death, as he used to work as a brass metal worker in the house of accused, Mukul Deka, they had visiting terms with them. Sarthebari Police Station is about ½ Kms away from their rented house. She had stated that she arrived at the place of occurrence after hearing the sound of her husband/deceased and she stated that at the time it was dark. She had further stated that when she reached the place of occurrence, she saw the accused persons on a bicycle with the knife. The night on which incident took place was dark one. PW-1 has in her cross also stated that before the death of her husband he used to work as a brass metal worker in the house of the accused/appellant Mukul Deka. Therefore, as per her deposition it is seen that PW1 had rushed to the place of occurrence after hearing the scream of her deceased husband and saw accused persons fleeing from the scene on bicycle and she noticed knives on the hands of the accused persons. She saw three cut injuries, caused with knife, on the neck of her husband and the neck was almost severed. Her husband was not in a position to speak. She saw the cut injuries, caused with dagger, all around the neck of her husband and as such her testimony is difficult to discard on threshold without appreciation of other evidence for corroboration.

50. On the scrutiny of the deposition of the prosecution witnesses 2, 3, 4, 5, 6 and 7, we find that all the above witnesses appear to be hearsay witnesses. The testimony of the PW-5 would have corroborated with the evidence of PW-1, had it not been narrated by PW1. More so, the evidence of PW5 appears to be by way of improvements as he mentioned of quarrel between the appellant and

deceased, which is hard to believe.

51. PW-8, Dr. Ajit Kr. Sarma, deposed that on 28.07.2008 he was working at Barpeta Civil Hospital and on that day he performed Post-Mortem Examination of the deceased Kushal Deka, aged almost 38 years on police requisition and identified by constable Hirendra Bharali and found average build male body. Body was pale in appearance. There was blood clot on neck. *Rigor mortis* was present. Multiple cut throat injuries exposing was present on right side of neck. Vessel of both sides of neck had been cut having exposed. There was fracture of 4th to 6th cervical vertebrae. Approximate time of death was 6 to 10 hours.

In his opinion, PW-8 deposed that the death was due to shock and haemorrhage as a result of injury sustained. Post mortem was conducted at almost 11:50 AM. Therefore, there would not be any doubt that the accused died on 27.07.2008 at 8:30 PM and according to the evidence of the Medical Officer, on examination of the dead body of the deceased, he died due to shock and haemorrhage as a result of injury sustained. Therefore, admittedly death is homicidal.

52. On the scrutiny of the deposition/testimony of PW-9, the Investigating Officer, it transpires that the Investigating Officer has failed to get the blood stains examined, which were found at the place of occurrence and on the person of the deceased by FSL and also not sent the seized weapons to FSL for examination to verify the fingerprint. The prosecution witnesses have stated that instead of collecting the blood from the place of occurrence the Police had poured water on the said blood. The Investigating Officer has failed to produce the seized articles before the Court. Therefore, it appears that the whole investigation has been conducted by the Police in a perfunctory manner which is full of defects. It is also noticed that 3 (three) witnesses were examined,

namely, Shri Ripun Deka, Shri Arun Tamuli and Shri Alakesh Barman. The 3 (three) PWs being PWs- 2, 3 and 6 statements were recorded under Section 164 CrPC but they appear to have retracted from their statement before the Court. The deposition of PW6 in his cross-examination had negated the seizure of the knives/daggers.

53. The learned Trial Court has recorded that PW-1 in her statement recorded under 161 CrPC had stated that on 27.07.2008 at around 8:50 PM, while her husband was returning from the market near the office of the Fire Brigade, on hearing the sound she ran to the place of occurrence with a "*Chaki*" and saw the two accused, Mukul Deka and Dipankar Deka stabbing her husband on the neck by sharp cutting weapon. The PW-1 in her evidence before the Court had not deposed that she saw the two accused, Mukul Deka and Dipankar Deka stabbing her husband on the neck by sharp cutting weapon and she came out from the house with a "*Chaki*". The statement under 161 CrPC can be used for contradiction but cannot be relied for conviction.

54. We are in agreement with the learned Trial Court that on his findings, admittedly, there are several defects in the investigation of the case. He had concluded that the Investigation Officer did not seize the "*Chaki*" by which the informant could identify the attacker by knife which was allegedly seized by him on the leading of the accused persons. The Investigation Officer has also not sent the blood which was found at the place of occurrence to the FSL. The witnesses who were shown as witnesses of the seizure list has also not been supported the version of the Investigation Officer. Yet there is no dispute that the accused died on 27.07.2008 at 8:30 PM and according to the evidence of the Medical Officer, on examination of the dead body of the deceased, he died due to shock and haemorrhage as a result of injury sustained.

55. The learned Trial Court had also concluded that the informant is the wife of the deceased and in her examination-in-chief has stated that at the time of occurrence she was standing in front of her house. At that relevant time, she heard the shouting of her husband then she rushed to her husband and saw both the accused persons flee on their bicycle armed with knife. She saw the injury on the neck of her husband and the neck was hanging. She was waiting for her husband in front of her house as her husband had gone to the market to bring vegetables asking her to prepare dinner. The defence, according to the learned Trial Court has failed to rebut the statement of the informant/PW-1. The learned Trial Court has also concluded that PW-1 in her statement recorded under 161 CrPC has also clearly stated that on 27.07.2008, at around 8:50 PM, while her husband was returning from the market, near the office of the Fire Brigade at a distance from their rented house she heard the shouting of her husband. Then she ran to the place of occurrence with a "*Chaki*" and saw the accused persons stabbing her husband on his neck by sharp cutting weapon and on seeing her, the accused persons fled away. According to the learned Trial Court, there is no contradiction in between the statement of the informant recorded under 161 CrPC and her deposition before the Court. Therefore, there is nothing on record to show as to how the evidence of PW-1, who is the wife of the deceased, is to be disbelieved. Though PW-1, who is the wife of the deceased as she was an eyewitness, decision can be given on the basis of her evidences and accordingly, on the basis of evidence of PW-1 and the injuries which were found on the person of the deceased, caused by the accused persons in furtherance of the commission of the offence and those injuries were caused by restraining him on the road, the learned Trial Court has convicted the appellant/accused persons, which we are unable to accept for want of some

corroboration and for investigative lapses.

56. In the present case, admittedly there is no eyewitness to the occurrence. Again, coming to the deposition by the PW-1, wherein she stated that the incident took place on 27.07.2008. Around 8:30 p.m., while her husband was returning home from Sarthebari market, both the accused persons killed her husband, a little away from their rented house, by stabbing him with knife. At that time she was standing in front of the house and she heard her husband's scream "don't kill me/assault me, don't kill me/assault me". Hearing her husband's scream, she came running to her husband and reaching the spot, she saw both the accused persons fleeing the scene on bicycle. She noticed knives on the hands of the accused persons. She saw three cut injuries, caused with knife, on the neck of her husband and the neck was almost severed. Her husband was not in a position to speak. She saw the cut injuries, caused with dagger, all around the neck of her husband. Before leaving for the market her husband had asked her to cook rice as he was going to the market to fetch some vegetables. So she was waiting for her husband. Such testimony of hers is not corroborated by any evidence. She had deposed that distance was 12 feet but sketch map shows the distance as 300 meters, which is contradictory and not proved.

57. On examination of evidence of PW-1 it is seen that the occurrence had happened at night around 8:30 PM, and that the "*Chaki*" which the PW-1 has used as per statement under Section 161 CrPC, was not seized by police, in our view the same cannot be relied upon. It is also noticed that no enmity could be established by PW1, that itself may not be a ground to disbelieve the testimony of PW-1. If we may say so, when the ocular witness clearly gave her statement before the Police and consistently before the Court, it is hard to discard the said

testimony. However, such evidence must find support/ corroboration from other tangible evidence which is not the case in the present one.

58. The Hon'ble Supreme Court held that the Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized under Section 134, which by laying down that no particular number of witnesses shall in any case be required for the proof of any fact as enshrined in the world recognized maxim that "evidence has to be weighed and not counted". It is seldom that crime has been committed in the presence of only one witness leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished (*Vide Vadivelu Thevar Versus State of Madras* reported in AIR 1957 SC 614).

59. In the present case, the prosecution having examined in all 9 (nine) witnesses, there was no insisting of multiplying the number of witnesses and definitely no adverse inference could be drawn against the PW-1 as being only the sole witness as such. If the incident had taken place as suggested by the prosecution, if it happened in a different manner, there was no impediment in the way the accused/appellant to examine any different witnesses but they did not choose to do so. However, we find that some necessary witness like, employees of the Fire Station were not cited as witnesses by the prosecution side and the cited witnesses have negated the prosecution case and the prosecution has not re-examined those witnesses thereby miserably failed to establish the guilt of the appellant.

60. The contention of the learned counsel for the appellant that there was a

delay in lodging the FIR, even if it is accepted that there is a delay, the delay in such an FIR by itself cannot be a ground to doubt the prosecution case. The FIR was lodged on the next day, *i.e.* 28.07.2008 by PW-1, the wife of the deceased. It has been held by the Hon'ble Supreme Court that human nature is different. The kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all promptitude in giving report to the Police. At times being grief-stricken because of calamity it might not occur to them that they should give a report. After all, it is natural in these circumstances for them to take some time to go to the police station for giving the report. Unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case. In the instant case, PW-1, who is the wife of the deceased filed the FIR clearly stating the occurrence and consistently deposed before the Court in her examination-in-chief therefore, we are of the view that just because the FIR was lodged on the next day of the occurrence there is a delay and without there being any indications of fabrication, the contention raised by the appellant on the ground of delay of filing the FIR is unacceptable.

61. Upon examination of the materials, we notice that investigation appears to be done in a callous manner by the Investigating Officer as the material evidence were also not collected and collected material evidence were not sent for FSL examination and the seized articles were not produced before the Court. However, as held by the Hon'ble Supreme Court, and relied on by the learned Trial Court that in the cases of defective investigation, the Court has to be circumspect in validating the evidence but it would not be right in acquitting an

accused person solely on account of the defect as it would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Therefore, the evidence of the prosecution witnesses needs to be considered so as to see whether those evidences are reasonable and cogent. From the testimony/evidence of the PWs as noted above, we find that the testimony/evidence of PW1, though, may be believable but is not corroborated by other evidence and as such conviction based solely on the evidence of PW1, in our opinion, is not sustainable.

62. As observed by the Hon'ble Supreme Court in **Wasif Haider** (Supra) the cumulative effect of the investigative lapses has fortified the presumption of innocence in favour of the appellant and the benefit of doubt arising out of a faulty investigation accrues in favour of the appellant. In the present case also, although we acknowledge the gravity of offence alleged against the appellant and the unfortunate fact of losing the life of husband of the PW-1, we cannot overlook the fact that the lapses in the investigation have disabled the prosecution to prove the culpability of the appellant. The accused cannot be expected to relinquish his innocence at the hands of an inefficacious prosecution, which is ridden with investigative deficiencies. The benefit of doubt arising out of such inefficient investigation must be bestowed upon the appellant.

63. The accused-appellant stabbed the deceased with a knife according to the PW1. None of the seized articles including the knives or daggers, with which the appellant inflicted injury were produced and proved before the trial Court, gives rise to strong suspicion to the prosecution case. The fact that the seized articles were not sent to FSL and produced before the Court, importantly the knives allegedly used by the appellant, it is also not the case of the prosecution that

there were blood stains. All these factors have rendered the prosecution case highly improbable. The fatal discrepancy of non-production of the seized articles, more importantly, the knife allegedly used by the appellant has made the prosecution case weak. In such circumstance, it cannot be said that the offence allegedly committed by the appellant has been proved beyond reasonable doubt.

64. On the careful scrutiny of the testimony of PW-1, we have noticed that she had stated that she has seen the entire incident that took place in front of her eyes, whereby her deceased husband, was assaulted by the appellant and Shri Dipankar Deka, thereby deceased had succumbed to injuries inflicted by the accused on the spot. However, same is not corroborated by any evidence to establish the charge against the appellant.

65. From a careful reading of the questions put to the appellant while he was being examined under Section 313 of CrPC, we are of the view that attention of the appellant was drawn to the incriminating material so as to enable him to explain it, but was not explained except of simple denial. Even if any omission had occurred, it does not *ipso facto* vitiate the trial as no material prejudice has been established by the appellant. Therefore, we are unable to accept the arguments of the learned counsel for the appellant in this regard. However, we noticed that no specific question was put to the accused regarding the distance of 12 feet as stated by PW-1 and 300 meters as per sketch map, between the place of occurrence and the house of the PW-1.

66. In the case of **Anil Phukan Versus State of Assam**, reported in (1993) 3 SCC 282, the Hon'ble Supreme Court has held that conviction can be based on the testimony of single eyewitness and there is no rule of law or evidence which says to the contrary provided the sole eyewitness passes the test of reliability.

So long as the single eyewitness is a wholly reliable witness, the courts have no difficulty in basing conviction on his/her testimony alone. However, where the single eyewitness is not found to be wholly reliable witness, in the sense that there are some circumstances which may show that he/she could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars before recording conviction. It is only when the courts find that single eyewitness is a wholly unreliable witness that his/her testimony is discarded in total and no amount of corroboration can cure that defect. In the present case, in our view, the PW-1, who is the wife of deceased, her testimony is not supported by any evidence and there is independent corroboration to her testimony.

67. The Hon'ble Supreme Court in **Namdeo Versus State of Maharashtra** reported in (2007) 14SCC 150 held that it is clear that a close relative cannot be characterised as interested witness. He/she is a natural witness. His/her evidence, however, must be scrutinized carefully. If on such scrutiny, his/her evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the sole testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his/her evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. In the instant case, we find that the testimony of the PW-1, is not wholly reliable and trustworthy due to lack of corroboration of any evidence. No motive had been established by the prosecution. There is nothing on record to show that there was any animosity between the appellant and the deceased.

68. On careful examination and scrutiny of the testimony of Prosecution Witnesses, we are of the view that the evidences of these witnesses pertaining

to the assault by knives, seizures and the eyewitness at the occurrence by PW-1 which resulted in the death of deceased are not proved beyond reasonable doubt. The prosecution has not been, in our view, able to bring home its accusation beyond shadow of doubt. Therefore, the conviction of the appellant by the Trial Court could not have been based on testimony of PW-1 which is not corroborated by other evidences. Therefore, we have no hesitation in holding that the evidences laid by the prosecution do not establish the charge brought against the appellant beyond shadow of doubt and as such the learned Trial Court could not have convicted and sentenced the appellant based on sole testimony of PW1.

69. From an analysis of the evidence on record in its entirety and the law laid down by the Hon'ble Supreme Court as referred to herein above, we are of the view that the prosecution has failed to establish the guilt of the accused appellant beyond shadow of doubt. As such, giving the benefit of doubt, the conviction of the appellant Shri Mukul Deka is hereby set aside and quashed. Consequently, the judgement dated 07.06.2017 passed by the Sessions Judge, Barpeta, Assam stands set aside and quashed. The appellant Shri Mukul Deka is hereby acquitted from the charges brought against him and accordingly we direct that the appellant Shri Mukul Deka be released from jail forthwith.

70. In the result, the present criminal appeal 317 of 2017 stands allowed. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant