

GAHC010055432022



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

Crl.A(J) 41/2022

Stephen Dhan

.....Appellant

Versus

The State of Assam

.....Respondent

Crl.A(J) 42/2022

Kishore Dhan

.....Appellant

Versus

The State of Assam

.....Respondent

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. B Talukdar, Amicus Curiae/Senior
Counsel appearing in Crl. A. (J)

No.41/2022.

For the appellant : Ms. M Barman, Amicus Curiae
appearing in CrI. A. (J) No.42/2022.

For the respondent : Ms. B Bhuyan,
Additional Public Prosecutor, Assam.

Date of hearing : 23.02.2023

Date of judgment : 28.02.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. B J. Talukdar, learned senior counsel and Amicus Curiae in Criminal Appeal (J) 41/2022 and Ms. M. Barman in Criminal Appeal (J) No. 42/2022. Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam appears for the State. The above two appeals are being disposed of by a common judgment, as the challenge made in the 2 [two] cases is to the same impugned Judgment and Order dated 17.02.2022 passed in Sessions Case No. 399/2013.

2. The two appeals have been filed against the impugned Judgment and Order dated 17.02.2022 passed by the learned Sessions Judge, Dibrugarh in Sessions Case No. 399/2013, by which the appellants have been convicted under Section 302/34 IPC and sentenced to undergo Rigorous Imprisonment for life with a fine of Rs.3,000/- each, in default Simple Imprisonment for 1 [one] month.

3. The facts of the case, in brief, is that PW No. 3 submitted an FIR on 04.09.2013 at Chabua Police Station stating that on 03.09.2013, at around 3.10 PM, the appellants had assaulted Nasib Munda with a *lathi* (bamboo stick),

which resulted in the death of Nasik Munda.

4. Subsequent to the FIR, Chabua P.S. Case No. 165/2013 under Sections 302/34 IPC was registered against the appellants. After the investigation concluded, charge sheet was submitted against the appellants, as a *prima-facie* case under Sections 302/34 IPC had been found against the appellants.

5. The Learned Trial Court framed charges under Sections 302/34 IPC against the appellants, to which they pleaded not guilty and claimed trial.

6. During the trial proceedings in the Learned Trial Court, 14 [fourteen] prosecution witnesses were examined. Thereafter, examination of the appellants under Section 313 CrPC was undertaken. Subsequent to the above, the Learned Trial Court came to a finding that the appellants had been found guilty of the offence under Sections 302/34 IPC and vide the impugned Judgment and Order dated 07.02.2022, convicted the appellants under Sections 302/34 IPC and sentenced them as stated in the earlier paragraphs.

7. The learned Amicus Curiaes in both the appeals submit that though the evidence of PW No. 2 clearly shows that the deceased was assaulted by the appellants, there is nothing to show that the deceased had died due to the assault. They also submit that PW No. 1 and PW No. 4 had been declared hostile witnesses by the prosecution. However, a reading of the statement made by the PW No. 4 to the Police under Section 161 CrPC, read with paragraphs 44 and 45 of the impugned Judgment and Order, would go to show that the action

of the appellants in assaulting the deceased, was not only due to grave and sudden provocation on the part of the deceased, in trying to have sexual relations with the wife of the appellant (Stephen Dhan), but also due to the accused trying to assault the appellant Stephen Dhan with an axe, which provoked the appellants to retaliate.

8. The learned Amicus Curiaes also submit that there was no intention on the part of the appellants to kill the deceased. They submit that as the case comes within the Exceptions provided under Section 300 IPC, the impugned judgment and order and sentence should be set aside and the appellants should be sentenced under Part-II of Section 304 IPC.

9. Ms. B. Bhuyan, learned Additional Public Prosecutor submits that it appears that the Exceptions Nos. 1 and 2 under Section 300 IPC can be applied to the case of the appellants, in view of the Learned Trial Court having taken judicial notice of the Inspection Memo, which formed a part of the case diary, where the bite mark of the deceased on the left forearm of the appellant Stephen Dhan was recorded and which is in consonance with the statement given by the PW No. 4 to the Police under Section 161 CrPC that a fight stated.

10. The learned Additional Public Prosecutor submits that the answer given by the appellant Kishore Dhan to the Question No. 5 under Section 313 CrPC where is Stephen Dhan's examination under Section 313 Cr.PC also corroborates the statement made by PW No. 4 under Section 161 CrPC. Hence, the evidence given by PW No. 4 that the deceased tried to have sexual relations with the wife

of the appellant Stephen Dhan and which was told to Stephen Dhan by his wife when he entered his own home, wherein the deceased was present, seems to be true. Thus, the fact of grave and sudden provocation appears to be quite plausible in the facts and circumstances of the case.

11. We have heard the learned counsels for the parties.

12. On a perusal of the evidence adduced by 14 witnesses, we find that there is 1 eyewitness, i.e. PW-2 to the crime.

13. PW-2 in her evidence states that the incident occurred around 3:00 PM while she was in her house. When the appellants starting assaulting the deceased with a piece of firewood (fola khor) on a road near her house, she along with PW-1 went and tried to stop the assault on the deceased. However, they left the place as the appellants had chased them. On going back to the place of occurrence, they found that the deceased had died by then. Thereafter, local persons were informed about the incident.

In her cross-examination, PW-2 has stated that she did not see the firewood in Court, that was used for assaulting the deceased. She has also stated that prior to the alleged incident, relations between the appellants and the deceased was very good and they used to joke amongst themselves. Further, the appellants used to call the deceased '*Dada*' (elder brother).

14. PW-1, on the other hand, states that the informant and the deceased were both her brother-in-laws and that on the date of occurrence at about 3:30 PM, she saw the dead body of the deceased. At this stage, PW-1 was declared a

hostile witness.

In her cross-examination by the prosecution, PW-1 has stated that she did not give any statement to the police. The statement which PW-1 denies giving to the Police under Section 161 Cr.P.C. has been exhibited by the I.O. (PW-14) as Exbt.6 is as follows :

“Nasib Munda is my younger brother-in-law. In the evening, Kishur Dhan and Istifa Dhan assaulted Nasib with a stick. Momi and I was in our house. I as well as Momi went to the place of occurrence and asked them not to assault Nasib. Both of them chased us from the place of occurrence. After assaulting Nasib, they left the place. Then, I went nearby Nasib, but he was already expired on the road. Thereafter, we went to our house”

15. The evidence of PW-3, who is the younger brother of the deceased is to the effect that he saw the dead body of his brother lying on the road and that he came to know from PW-1 and PW-2 that the appellants had assaulted the deceased and killed him.

In his cross-examination, PW-3 states that he did not see the incident. In his cross-examination, he also states that when he arrived at the place of occurrence, there were no other persons present from their line of houses, except for PW-1 and PW-2.

16. The evidence of PW-4, who is the wife of the appellant Stiphen Dhan and sister-in-law of appellant Kishore Dhan, is to the effect that at about 3:00 PM, the deceased asked her to serve him food. PW-4 thereafter served food to the deceased, after which the deceased asked her to have sexual intercourse with him. She replied that she could not have sexual intercourse with him as she was his daughter-in-law. The deceased then left the house of PW-4 and went

towards his own house. PW-4 then states that she heard that the deceased had died on the same day. She also states that she went to the Police Station and Police asked her whether she had been raped. At this stage, the prosecution declared PW-4 hostile and during cross-examination by the prosecution, PW-4 states that she did not give the following statement to the Police:-

“It is not a fact that I gave statement before police that - 'Today, on 03-09-13, at about 3:00, I was in my house. My sister-in-law Astami Dhan was also with me. Then, Nasib Munda came to our house and caught hold of my body and he laid a gunny bag on the floor and tried to lay me down on the said bag. When I tried to fled, he caught my wearing blouj and then, my sister-in-law Astami tried to save me. Thereafter, the deceased Nasib tried to commit bad work with her and caught hold of her. While my sister-in-law Astami tried to fled, Nasib went out towards his house and after a while, he again came to our house by wearing a gamusa/towel. At that time, my husband Stiphen came to our house and I informed him about the behavior of Nasib. While my husband confronted Nasib, a quarrel took place between them. While Stiphen was ready for going his work, Nasib came and tried to assault him with an axe. By crossing the bridge/Haku made of one single bamboo, Nasib assaulted my husband. Then Nasib bite on the hand of Stiphen. Then, Stiphen assaulted Nasib with a bamboo stick. The said stock was a dry bamboo stick. Nasib sustained injury on his head. Then Nasib fell down into the water and Kishor and Stiphen killed him by drowning him into the water again and again.”

PW-4 in her cross-examination also states that she did not tell the Police that her husband had killed the deceased and that she did not tell her husband that the deceased wanted to have sexual intercourse with her. She also states that she did not know as to when and how the deceased had died. The statement which PW-4 denied making to the police has been exhibited by the I.O.(PW-14) in his evidence as Exbt.7. Interestingly Astami Dhan, who is PW-9 has stated in her evidence as follows:-

“I know both the accused persons. I knew the deceased Nasib Munda. The alleged incident took place about one year back. On the day of occurrence, my father-in-law was

taken to the hospital and I was in the house. After some time, I heard halla towards the road and later on, I heard that the deceased died. I do not know as to how the deceased died. Police visited our house and recorded my statement."

The cross-examination of PW-9 was declined.

17. PW-5, PW-6, PW-8 and PW-9 in their evidence have stated that they did not know how the deceased died.

18. PW-7, who is the Doctor, has stated that in his opinion the death was due to coma, as a result of head injury sustained. The extract of the evidence given by PW-7, with regard to the post-mortem examination of the deceased done by him, is reproduced below as follows:-

"External Appearance: One average built male dead body wearing a T-shirt and underwear. Body smeared with sand and mud particles. Eyes closed and mouth closed. Rigor mortise passed off. Post-mortem staining faintly present on the back.

Injuries:-

- 1. Abrasion of 3 x 2 cm over right forehead, 3 cm from the mid line, 2 cm above the eye brow;*
- 2. Multiple abrasion present over the frontal lateral side of the neck of size varying from 1x 1 cm to 1.5 cm to 1 cm. cresenteric shaped nail mark;*
- 3. Abrasion of 4 cm x 3 cm over right elbow;*
- 4. Multiple abrasion over the dorsal aspect and web of the left hand of varying sizes in an area of 6 cm x 2 cm sizes from .5 to .5 to 1 cm x 1 cm;*
- 5. Boggy swelling over the left parietal area 6 cm x 3 cm;*
- 6. Boggy swelling over the right parietal area 8 cm x 6 cm in size with split laceration of 5 cm.*

On examination of cranium and spinal canal: Scalp: (1) contusion of 6 cm X

5 Cm over left parietal temporal region; (2) contusion over the right parietal region of 6 cm x 6 cm.

Skull: linear fracture of 4 cm over the left tempo parietal region vertically placed and right side tempo parietal region linear fracture vertically placed 6 cm in size. Vertebrae healthy. Membrane and brain are congested, extra dural haemorrhage of 4 cm x 3 cm x 1 cm over left side present and over the right side of 3 x 1 x .5 cm with defused subdural haemorrhage. Spinal cord not dissected.

On examination of the thorax: Walls, ribs and cartilages as healthy. Pleurae, larynx and trachea, both the lungs are congested. Trachea contains sand particles. Lungs are congested, voluminous. on dissection blood mixed with fluid Comes out.

On examination of the abdomen: All the organs are congested. Kidney is congested. Stomach is healthy and empty. Small intestine healthy and filed with digestive food material. Large intestine healthy, filled with gases and fecal materials.

OPINION: *Death was due to coma, as, a result of head injury sustained as described. All the injuries were ante mortem and caused by blunt force impact and homicidal in nature. Approximate time since death 18-24 hours.*

Injury No.5 & 6 are individually and collectively sufficient to cause death of the deceased in the ordinary course of nature.

Ext. 1 is the Post-mortem Report wherein Ext. 1(1) is my signature. I placed my Report before the Head of the Department, who concurred with my findings. Ext. 1(2) is the signature of Dr. HK Mahanta, Professor & Head of the Department, Forensic Medicine, Assam Medical College, Dibrugarh and I know his signature.

Following documents were placed before me at the time of post-mortem examination-

Ext. 2 is the Dead Body Challan wherein Ext. 2(1) is my signature.

Ext. 3 is the Inquest Report wherein Ext. 3(1) to Ext. 3(3) are my signatures.

XXXX

Declined."

19. PW-10 in his evidence has stated that he did not have any personal knowledge about the cause of death of his brother. However, his wife, PW-2 had told him that there was an altercation between the deceased and the appellants. Further, the appellants had assaulted the deceased, as a result of

which he died.

20. PW-11, PW-12 and PW-13, who are the brothers of the informant and the deceased, state that they have no personal knowledge about the incident.

21. PW-14, who is the Investigating Officer of the case, states that after the earlier Investigating Officer expired, he became the Investigating Officer. He submits that there was no seizure of any bamboo stick in connection with the case and that he had submitted the charge-sheet on the basis of the investigation made by the earlier Investigating Officer.

22. The examination of the appellant Shri Kishore Dhan under Section 313 Cr.PC shows that his answers are only to the effect that "the allegations are false" or "I don't know". It is only in respect to Question No.5 that the appellant Kishore Dhan has said that the allegation against Nasib Munda, the deceased is correct. The Question No.5 and its answer, as recorded by the learned Trial Court under Section 313 Cr.P.C, is reproduced below as follows:-

***“Question No.5:-** PW-4 Smt. Sabida Dhan (wife of Stephan Dhan) has given evidence that on the day of the occurrence, at about 3:00 pm, Nasib Munda asked her to serve food and she served him with food whereafter he asked her if she would allow him to rape her. Then she replied that she is his daughter-in-law by relation and how he would have sexual intercourse with her. Asking the same, Nasib went out of her house and left towards his house. On the same day, she heard that Nasib died. Thereafter, she went to the police station and police asked her whether rape was committed with her or not. What do you have to say?*

***Answer:-** The allegation against Nasib Munda is correct.”*

23. The examination of the appellant, Stephen Dhan under Section 313 Cr.PC shows that his answers are to the effect that the allegations made against him are false. In respect to question No. 5, the appellant, Kishore Dhan has said

that he was in the Tata factory and doing his work. The question No. 5 and its answer as recorded by the learned Trial Court under Section 313 Cr.PC in respect of the appellant, Stephen Dhan is reproduced below as follows:-

“Question No. 5:- Pw-4 Smt. Sabida Dhan (your wife) has given evidence that on the day of the occurrence, at about 3:00 pm, Nasib Munda asked her to serve food and she served him with food whereafter he asked her if she would allow him to rape her. Then she replied that she is his daughter-in-law by relation and how we would have sexual intercourse with her. Asking the same, Nasib went out of her house and left towards his house. On the same day, she heard that Nasib died. Thereafter, she went to the police station and police asked her whether rape was committed with her or not. What do you have to say?

Answer:- This is not true. I was in the Tata Factory and doing my work there.”

24. The answer given by the appellant to question No. 5 shows the contradictory stands taken by the appellants with respect to the allegations of assault made against them, which resulted in the subsequent death of the deceased.

25. The evidence recorded by the learned Trial Court shows that there was one eye witness, i.e. PW-2, who saw the appellants assaulting the deceased. Though PW-1 was with PW-2 at the relevant point of time, as per the testimony of PW-2, PW-1 has denied seeing the assault on the deceased and she has been declared a hostile witness. However, the evidence of PW-3 is to the effect that he came to know from PW-1 and PW-2 that the appellants had assaulted the deceased and killed him.

26. In the case of **Ajai @ Ajju & Others -Vs- State of U.P.**, reported in

2023 LiveLaw (SC) 110, the Apex Court has held that it is the quality and not quantity of the witness that matters. It also held that the Court can rely on the evidence of a solitary eye witness while convicting an accused. As there is nothing to doubt the credibility of PW-2 as a witness, we find that the appellants caused the death of the deceased by assaulting him with firewood.

27. The evidence of PW-4, who is the wife of the appellant Stephen Dhan, is to the effect that the deceased had asked her to have sexual intercourse with him to which she had replied in the negative. Thereafter, the deceased had left her house and gone towards his house. There is nothing in the cross-examination of PW-4 to show that there could be any motive or reason on the part of the appellants to kill the deceased, inasmuch as, PW-4 has stated that she did not tell her husband that the deceased wanted to have sexual intercourse with her. As such, if PW-4 did not tell her husband anything about the incident, there was no occasion for the appellants to cause any harm to the deceased. The above being said, statements made to the Police under Section 161 Cr.P.C are not admissible as evidence. However, the statement allegedly made by PW-4 to the Police under Section 161 Cr.P.C with which PW-4 was confronted with during cross-examination, has been marked as Exhibit-7, during recording of the evidence of the Investigating Officer, i.e., PW-14. The statement of PW-4, which has been brought on record as Exhibit-7, can be used for the purpose of corroboration only, as it is not substantive evidence. The evidence of PW-4, prior to her being declared hostile witness, is that after the death of the deceased, she went to the police station and police asked PW-4 whether she had been raped. The above facts seem to be corroborated by Exhibit-7, where the deceased had apparently requested PW-4 to have sexual intercourse. Though PW-4 in her evidence states that she did not tell her

husband, appellant Stephan Dhan, with regard to the above incident, the sequence of events suggest otherwise. However, as PW-4 has not given any evidence regarding an attempt to rape against the deceased, as was apparently given in her statement under Section 161 Cr.PC, the same cannot be considered as evidence by this Court.

28. In the case of ***Rajendra & Anr. vs. State of Uttar Pradesh***, reported in ***(2009) 13 SCC 480***, the Apex Court has held that the evidence of a hostile evidence may not be totally rejected, and subject to close scrutiny, a portion thereto which is in consonance with the case of the prosecution or defence may be accepted.

29. The evidence of the parties shows that the appellants and the deceased were known to each other. There is nothing in the evidence to show that there was any motive or premeditation on the part of the appellants to kill the deceased. The only plausible reason for the altercation and assault on the deceased by the appellants appears to be due to the sexual overture made by the deceased towards PW-4 and which has also been stated in the evidence of PW-4 and in her statement made to the police, which has been exhibited by the I.O (PW-14). Even if the statement of the PW-4 to the police is not taken into consideration, there is nothing to show that there was any premeditation or motive to kill the deceased.

30. On a perusal of the impugned judgment passed by the learned Trial Court, we find that the learned Trial Court had taken judicial notice of the Inspection Memo in respect of the appellant Stephan Dhan, wherein it has recorded in the impugned judgment that there was "bite mark injury 2 cm., on

the front side of the left forearm". Though the learned Trial Court has held that the said Inspection Memo had corroborated the statement (version) given by PW-4 to the Police, that the deceased had bitten the arm of Stephan Dhan, we are of the view that the said statement is inadmissible as evidence, as PW-4 has denied giving such statement to the police. As PW-4 was never confronted with the Inspection Memo, which forms a part of the Case Diary, the taking of judicial notice of the said Inspection Memo by the learned Trial Court is not in consonance with Part-II Chapter-III of the Indian Evidence Act, 1872. Further, the said Inspection Memo was never exhibited before the learned Trial Court.

31. The record shows that the weapon used for assaulting the deceased was not seized by the Police. However, an assault was made on the deceased by the appellants, as has been clearly stated by PW-2. The fact that fire wood had been used is also clear, as PW-2 has stated that fire wood (phola khori) had been used.

32. The Doctor's evidence also shows that there were multiple abrasions on the head, i.e., over the forehead. There were also multiple abrasions in the neck, right elbow, left hand, etc. The Doctor's evidence and post-mortem report clearly shows that the deceased suffered multiple injuries especially in the scalp and skull region.

33. [Section 299](#), describes 'culpable homicide' as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. From a reading of this provision, emphasis is on the expression 'intention' or upon 'knowledge'. [Section 300](#), however, deals with

"murder" although there is no clear definition of "murder" in [Section 300](#) of the Code. As has been repeatedly held by the Apex Court, "culpable homicide" is the genus and "murder" is its species and all "murders" are "culpable homicides", but all "culpable homicides" are not "murders".

34. Section 302 IPC provides the punishment for a person who commits murder, i.e. if the culpable homicide has been done with the intention of causing death or causing such bodily injury as to the offender knows is likely to cause death or sufficient to cause death or is likely to cause death.

However, Exception 1 to Section 300 IPC provides instances where culpable homicide is not murder, if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. Also, Exception 4 to Section 300 IPC states that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. In the case of ***Gurmail Singh and Another vs. State of Uttar Pradesh and Another***, reported in ***(2022) 10 SCC 684***, the Apex Court has held that in order to make culpable homicide as murder, the act by which death is caused should fall not only under any one or more of clauses Firstly to Fourthly under Section 300 IPC but they should also not fall under any of the five Exceptions to Section 300 IPC.

35. Section 304 IPC provides for punishment for culpable homicide, not amounting to murder. Section 304 is reproduced hereinbelow:

“Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for

a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

36. For conviction under Section 304 Part-I IPC, the prosecution has to prove that the death was caused with the intention of causing death on the part of the offender. However, with regard to Section 304 Part-II IPC, prosecution has to prove that the death of the person was done with a knowledge that his act would like to cause death, but without any intention to cause death or to cause such body injury as is likely to cause death. The same has been enumerated by the Apex Court in the case of **Alister Anthony Pareira v. State of Maharashtra**, reported in **(2012) 2 SCC 648**.

37. In the present case, the only eye witness to the assault is PW-2. On considering the fact that there was no previous enmity between the appellants and the deceased who knew each other, we are of the view that there was no premeditation to kill the deceased on the part of the appellants. However, due to a sudden fight that had ensued between the appellants and the deceased, the appellants appear to have hit the deceased with the firewood in the heat of passion, thereby resulting in the death of the deceased. PW-10 in his evidence has stated that his wife PW-2 told him that there was an altercation between the deceased and the appellants, due to which the appellants assaulted the deceased, who died. Though the weapon, i.e. the firewood has not been seized or produced before the learned Trial Court, we are of the view that intention to kill was there, keeping in mind the fact that there was head injury and other

injuries sustained by the deceased, caused by a blunt object. As such, on considering the evidence adduced, we are of the view that Exception 4 to Section 300 IPC would be attracted in this case and that the appellants should be convicted under Part-I of Section 304 IPC.

38. In the result, appeal is partly allowed. The conviction under Section 302 IPC is converted to Section 304 Part I and both the accused/appellants are sentenced to rigorous imprisonment for 10 (ten) years each and fine imposed by the learned Trial Court will remain the same. The conviction under Section 302 IPC is set aside. The period already undergone by the appellants shall be set off from the period of imprisonment imposed on them.

39. Send back the LCR

40. In appreciation of the assistance provided by the learned Amicus Curiaes, the appropriate fees shall be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant