

GAHC010110382023



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

Case No. : Crl.A./177/2023

PARAMESWAR RAJOWAR @ PARAMESWAR RAJUWAR
S/O LATE BOLORAM RAJOWAR,
R/O CHAKI MUKH HALUWA GAON,
P.O.- NAZIRA, P.S.- NAZIRA, DIST.- SIVASAGAR, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY ITS P.P.

2:PADMESHWAR RAJOWAR
S/O LATE MOTILAL RAJOWAR
R/O BON BAGICHA
WARD NO. 9
P.S.- DERGAON
DIST.- GOLAGHAT
ASSAM

Advocate for the Petitioner : MS. RUKMINI BARUA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
JUDGMENT

16.11.2023

Heard Ms. Padmini Baruah, learned counsel appearing for the appellant.
Also heard K. Baishya, learned Addl. P.P., Assam, for the State respondent.

2. Judgment and order, dated 12.04.2023, passed by the learned Sessions

Judge, Sivasagar, in Sessions Case No. 01(S-N) of 2019 u/s 302 IPC, is challenged in this appeal by the appellant, namely, Parameswar Rajowar. It is to be noted here that vide impugned judgment and order, dated 12.04.2023, the learned Court below has convicted the appellant – Parameswar Rajowar, under Section 304-II of the IPC, and sentenced him to suffer rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.2,000/-, with default stipulation.

3. The background facts, leading to filing of the present appeal, is adumbrated herein below:-

“On 16.08.2018, one Padmeswar Rajowar, resident of Bon Bagicha, Ward No. 9, Dergaon, Golaghat, lodged one FIR with the Officer-in-Charge of Nazira P.S., to the effect that one Parameswar Rajowar of Chakimukh got married with his niece Anima Rajowar about two years back. Then on the night of 14.11.2018, at around 09.00 pm, Parameswar Rajowar informed him over phone that he administered few blows to Anima Rajowar and asked him to come to his house immediately. Then on 15.11.2018, he came to know that Parameswar Rajowar assaulted Amina Rajowar and injured her seriously, and thereafter, he got her admitted at Assam Medical College Hospital. Then he left for Dibrugarh and found Anima Rajowar admitted at Aditya Nursing Home and her condition is serious.

Upon the said FIR, the Officer-in-Charge of Nazira P.S., registered a case, being Nazira P.S. Case No.236/2018, under Sections 325/307 IPC and endorsed S.I. Sk. Rahimuddin Ahmed to investigate the same. Thereafter, on 17.11.2018, Anima Rajowar suffered demise, during the course of treatment. Accordingly, on the prayer of the I.O. the learned

Sub-Divisional Judicial Magistrate (M), Nazira had added section 302 IPC, approving his prayer. During the course of investigation, the I.O. had visited the place of occurrence, prepared Sketch Map of the place of occurrence and examined the witnesses and got the Inquest and Post Mortem conducted on the dead body of the deceased and collected the reports, and arrested the accused and forwarded him to the court. Then on completion of investigation, the I.O. had laid charge sheet against the accused Parameswar Rajowar, to stand trial in the court under sections 302 IPC.

Thereafter, the case was committed to the Court of learned Sessions Judge, Sivasagar. Then on production of the appellant, the learned Court below, after complying with the provision of Section 207 Cr.P.C. and after hearing learned Advocates of both sides, had framed charge against the appellant under Section 302 IPC and on being read over and explained over, the appellant pleaded not guilty to the same. Thereafter, the learned Court below had examined as many as ten witnesses, including the Medical Officer and the Investigating Officer and thereafter, closing the prosecution evidence, the Court below had examined the appellant under Section 313 Cr. P.C. Thereafter, the appellant had examined two witnesses in his defence. Thereafter, hearing arguments of both sides, the learned court below has convicted the appellant under Section 304-II IPC and sentenced him, as aforesaid."

4. Being highly aggrieved, the appellant preferred this appeal challenging his conviction and sentence and to set aside the same on the following grounds:-

(i) That, the learned Court below had erred in law and facts, in

passing the judgment and order dated 12.04.2023.

- (ii) That, the learned Court below ought not to have convicted the appellant ignoring the serious contradictions and inconsistencies in the depositions and evidence of the prosecution witnesses and as such the impugned judgment and order is liable to be set aside;
- (iii) That, the learned Court below had arrived at the finding that the death of the victim is homicidal in nature without there being any such finding in medical report and rather the medical evidence is suggestive of the injuries being caused by fall and the cause of death, due to assault, cannot be said to have been proved beyond all reasonable doubt;
- (iv) That, the learned Court below had erred in holding that the circumstantial evidence pointed towards the appellant causing grievous injuries to the deceased without there being any evidence to that effect;
- (v) That, the learned trial Court had failed to consider the evidence of P.W.1 who had testified that the appellant and the victim was leading a happy married life and, on such count, no mens rea can be attributed to the appellant;
- (vi) That, the learned Court below had placed reliance upon the evidence of P.W.7 and 8, who were declared hostile, without there being any evidence to corroborate the same;
- (vii) That, the learned Court below had failed to consider that there was glaring inconsistency in the evidence of P.W.8 and P.W.9

and that there is gap in the chain of events to point the guilt of the appellant;

- (viii) That, the deceased was seen in injured conditions at around 8 am to 9 am whereas, as per evidence of D.W.1/appellant and D.W. 2, the appellant left his house at around 6.30 am in search of a labourer to harvest his crops; and in fact the appellant was informed about the state of the deceased over telephone by the P.W.9, which suggest that at the relevant point of time the appellant was not present at his residence when the deceased was found in injured condition;
- (ix) That, the learned court below had erroneously held that the appellant had failed to explain the cause of death of his wife in his examination under section 313 Cr.P.C. and that burden under section 106 Evidence Act is shifted to the appellant and that falsity of defence case is no ground to convict the appellant;
- (x) That, the learned court below had erroneously held that the confession made by the appellant before the police is also a circumstance against the appellant while the confession made before the police is hit by section 25 of the Evidence Act;
- (xi) That, the finding of guilt of the appellant under section 304-II IPC is not based upon any legally admissible piece of evidence and on such count the finding so recorded by the learned court below is based on conjecture and surmise and that the learned court below had failed to consider that the prosecution side had failed to discharge its burden to prove its case beyond all

reasonable doubt;

5. Ms. Padmini Baruah, the learned counsel for the appellant, during hearing, has raised following issues for consideration of this court:-

- (i) That, the prosecution side has failed to establish its case beyond all reasonable doubt, and that as per medical evidence two view are possible on death of the deceased, one being the injuries caused by fall and the other by blunt force and there being no evidence to suggest that the same were caused by the appellant the other view that the injuries were caused by fall will be applicable;
- (ii) That, the burden of proof never shifted to the appellant and it is the bounden duty of the prosecution to prove its case and when it succeeded in discharging its initial burden, only then the burden shift to the appellant;
- (iii) That, last seen together theory is not applicable here in this case as there is no eye witness to the occurrence;
- (iv) That, the evidence of hostile witness is not corroborated by any reliable and convincing evidence and on such count the evidence of hostile witness cannot be relied upon;
- (v) That, extra judicial confession made by the appellant before the police is hit by section 25 of the Evidence Act and as such it cannot be relied upon to held the appellant guilty of the offence under section 304 -II IPC;
- (vi) That, the chain of circumstances here in this case is not complete to establish the guilt of the appellant, and therefore,

it is contended to allow the appeal, by setting aside the impugned judgment and order of conviction dated 12.04.2023.

6. Ms. Baruah, the learned counsel for the appellant also referred the following case laws, in support of his submissions:-

- (i) **Mohd. Zahid vs. State of T.N.** reported in **(1999) 6 SCC 120;**
- (ii) **Pradip Kumar v. State of Chhattisgarh** reported in **(2023) 5 SCC 350;**
- (iii) **Trimukh Maroti Kirkon vs. State of Maharashtra,** reported in **(2006) 10 SCC 681;**
- (iv) **Sabitri Samantaray vs. State of Odisha** reported in **2022 SCC OnLine SC 673;**
- (v) **Nagendra Shah vs. State of Bihar** reported in **(2021) 10 SCC 725;**
- (vi) **Krishna Shankar Mehta vs. State (Central Bureau of Investigation) Criminal Appeal No. 3 (SH) of 2000**
- (vii) **Swapan Bardhan vs. State of Assam,** reported in **2014 (4) GLT 570;**
- (viii) **Sat Paul vs. Delhi Administration** reported in **(1976) 1 SCC 727;**
- (ix) **Sahadevan 7 Another vs. State of Tamil Nadu** reported in **(2012) 6 SCC 403;**
- (x) **Neeraj Dutta vs. State (Government of NCT of Delhi)** reported in **(2023) 4 SCC 731**

(xi) **Tahsildar Singh & Another vs. State of U.P.** reported in **AIR 1959 SC 1012;**

(xii) **Kanhaiya Lal vs. State of Rajasthan** reported in **(2014) 4 SCC 715;**

(xiii) **Suresh & Another vs. State of Haryana** reported in **(2018) 18 SCC 654;**

7. Per contra, Mr. K. Baishya, learned Addl. P.P., appearing for the State respondent, submits that the learned Court below had rightly convicted the appellant under Section 304 -II IPC. Mr. Baishya, referring the evidence of P.W.2 - the Doctor submits that his evidence had ruled out the possibility of injuries sustained by the deceased by fall. Mr. Baishya further submits that this is not a case of suicide, though the appellant had tried to establish the same and that the appellant had also failed to establish the plea of alibi as he had failed to adduce any convincing evidence to that effect and as per law of evidence (section 101 Evidence Act) it is his duty to establish the same. Mr. Baishya further submits that as per the FIR the occurrence took place on 14.11.2018 at about 9 pm but the appellant had tried to misdirect/mislead the court by adducing evidence that it took place in the morning but he could not state the date. Therefore, Mr. Baishya has contended to uphold the conviction and sentence of the appellant. Mr. Baishya has referred following case law in support of his submission:- **Dinesh Kumar vs. State of Haryana;** reported in **(2023) 4 SCR 220.**

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the record of the learned Court below. Also, I have gone through

the case laws referred by learned advocates of both sides.

9. That, as to the date, time and place of occurrence, it appears from the record of learned court below that the same took place in the house of the appellant at Nazira, Chowkimukh, Gar-Ali. The FIR, Exhibit-1 reveals that it took place at around 9 pm on 14.11.2018. But, the evidence of the complainant (P.W.1) reveals that the occurrence took place on 16.11. 2018, on which the appellant reported him over phone that his daughter -Anima was seriously ill and he called him to his house. Whereas, P.W.4 Arun Dushad had testified that on 14.11.2018, he was called by the uncle of Anima to his house and informed him that the appellant had informed him that Anima had committed suicide by hanging. On the other hand, P.W.5 Dhaneswar Turi had testified that Lakhiram had called him to his house and asked him to manage a vehicle to proceed to Dibrugarh as Anima had attempted to commit suicide. The evidence of P.W.7- Prabin Gogoi (hostile witness) reveals that the occurrence took place on 14.11.2018, and at about 11 pm the family members of the appellant came to his house and reported that the appellant had assaulted his wife and injured her seriously, and thereafter, took her to Hospital for treatment. On the other hand, P.W.8- Aghuni Rajowar (hostile witness) reveals that the occurrence took place on 14.11.2018, at about 9 pm. Thus, basically the FIR- Exhibit-1 and the evidence of P.W.4 and 5 goes a long way to establish that the occurrence took place on 14.11.2018, at about 9 pm in the house of the appellant at Nazira, Chowkimukh, Gar-Ali.

10. It is a fact that some contradictions are there in the versions of the P.W.1 in respect of the date. But, the FIR-Exhibit-1, and the evidence of P.W.4 and 5 are clear and cogent enough to establish beyond all reasonable doubt that the occurrence took place on 14.11.2018 at about 9 pm. And it also appears from

the evidence of the I.O., P.W.10 that the victim died at Dibrugarh, during the course of her treatment on 17.11.2018, at about 7-14 am. It is to be noted here the defence side has not disputed the date, time and place of occurrence.

11. It also appears that the occurrence took place on 14.11.2018, the FIR came to be lodged on 16.11.2018. Further it appears that the victim suffered demise on 17.11.2018 at about 7-15 am. There is delay in lodging the FIR. Apparently, no explanation is also forthcoming for the delay. But, it appears that the informant resides at Dergaon of Golaghat district while the occurrence took place at Chowkimukh village of Nazira of Sivasagar district. Moreover, the informant, as it appears from the Exhibit-1 that he came to know that the victim was admitted at Dibrugarh Medical on 15.11.2018, and then he had visited Dibrugarh and found the victim in serious condition, and thereafter, he had lodged the FIR on 16.11.2018. It also could not be lost sight of that the matter was between husband and wife and usually the family members have not readily adopted the legal recourse. Therefore, in the given facts and circumstances, the delay in lodging the FIR cannot be said to have spell inveracity to the prosecution version.

12. Here in this case, the death of Anima Rajowar is not disputed by the appellant side. Now, it is to be seen whether the death of Anima Rajowar was accidental, suicidal or homicidal in nature. In this regard the evidence of P.W.2 – Doctor – Raihan Uddin Ahmed, who had conducted autopsy, is relevant. His evidence reveals that –

On 17.08.2018, at about 03.45 pm, on police requisition, he had conducted autopsy on the dead body of Anima Rajowar and found presence of rigor mortis all over the body.

Injuries:- Contusion of bluish colour around both eyes;

Mark of ligature on neck dissection etc. :- Not detected;

Scalp, skull, vertebrae:-

Scalp:- Contusion of bluish colour of size 4 cm x 3 cm over right parietal area found on reflection;

Skull:- Healthy,

Vertebrae:- Fracture of body cervical (C4) and C4 vertebrae and with contusion of prevertebral muscle along C4 and C5 vertebrae;

Membrane- Congested, Brain:- Congested,

Spinal Cord:- Contusion along C4 and C5 segment,

Thorax:- Walls, ribs and cartilages:- Healthy;

Pleurae, Larynx and Trachea, Lung (Both), Pericardium- Congested;

Heart :- Congested, chambers- empty, Vessels:- Healthy;

Abdomen:-Walls- Healthy;

Peritoneum, Mouth, Pharynx, Oesophagus – Congested;

Stomach and its contents – Congested, contains liquid materials of 60 ml;

Small Intestine and its contents: - Congested, contains fluidy materials and gases;

Large Intestine and its contents- Congested. Contains faecal materials and gases;

Liver, Spleen & Kidney– Congested, empty

Organs of Generation (external & internal) – Healthy; Uterus:- Empty

Muscles, bones and joints :-

Injury:- As described, Dislocation - not detected;

12.1. Upon the aforesaid findings he opined that the death was due to shock resulting from spinal injury over neck region as described. All the injuries, according to him, were ante-mortem and caused by blunt force and the approximate time since death was 6-12 hours. He further opined that from the nature of injuries, the possibility of suicidal death is very rare and he also opined that the injuries sustained might be caused either by falling or hitting by hard substances and the bluish spot found around the eyes might be caused due to assault on the eyes. He also opined that for injuries around the eyes or for injuries on the head blood may accumulate around the eyes. He further opined that the injuries on the head might amount to fracture on C-4 & C-5. It is, however, elicited in cross-examination that the fracture injuries on the neck cannot be sustained by self-hanging and that he had not found any superficial injury on the external part of the body. To a query put by the court, he stated that the fracture in the neck may be caused by forceful twisting of neck of the deceased. Exhibit-2, the Post Mortem Report is also consistent with his version.

13. It is to be mentioned here that the prosecution side has exhibited the Inquest Report as Exhibit-5 through the I.O. P.W.10, though it was conducted by ASI - Phanidhar Gogoi of Barbari Police Outpost of Dibrugarh. A careful perusal of the same indicates that the said ASI had not found injury on the dead body of the deceased.

14. Notwithstanding, the evidence of the P.W.2 is clear and cogent enough to establish that the deceased had sustained following ante-mortem injuries:-

- (i) Contusion of bluish colour around both eyes;
- (ii) Contusion of bluish colour of size 4 cm x 3 cm over right parietal

area found on reflection;

(iii) Fracture of body cervical (C4) and C4 vertebrae and with contusion of pre-vertebral muscle along C4 and C5 vertebrae;

(iv) Contusion along C4 and C5 segment of the Spinal Cord.

These injuries, according to P.W.2, might be caused either by falling or hitting by hard substance and the injuries on the eye might be caused due to assault on the eyes or injuries on the head for which blood may accumulate around the eyes. And the injuries cannot be sustained by self hanging and the fracture of the neck may be caused by forceful twisting of neck of the deceased.

15. Though Ms. Baruah, the learned counsel for the appellant, submits that as per medical evidence two view are possible in respect of death of the deceased, one being the injuries caused by fall and the other being caused by blunt force and that there is no evidence of the same being caused by blunt force and the possibility of the injuries being caused by falling becomes more probable, yet, contusion of bluish colour of size 4 cm x 3 cm over right parietal area and contusion of bluish colour around both eyes, and the evidence of the Doctor that possibilities of fracture in C 4 & C 5 may be caused by forceful twisting of neck coupled with absence of superficial injuries on the external part of the body, clearly ruled out injuries being caused by falling. Moreover, it is not the case of the appellant that the deceased sustained the injuries by fall, rather, as per his evidence as D.W.1, it was a case of suicide, however, as discussed above, the same has been ruled out by medical evidence. This being the position, and the possibility of suicidal hanging being ruled out and in absence of materials to suggest the injuries being caused by accidental falling, the same has to be held as homicidal in nature.

16. Now, it is to be seen who caused the aforementioned injuries on the person of the deceased -Anima Rajowar. It is not in dispute that the deceased was the wife of the appellant. It is also not in dispute that at the relevant time of occurrence the deceased and the appellant were living in the house of the appellant at Nazira, Chowkimukh, Gar-Ali along with their 3 years old son. The appellant, as D.W.had admitted the same in no uncertain terms by stating that- *"My deceased wife was living with me at the time of incident along with our three years old son."* It is also to be noted here that there is no eye witness to the occurrence. The entire prosecution story is based on circumstantial evidence. Now, it is to be seen how far the prosecution side has been able to establish the circumstances to bring home the guilt of the appellant.

17. Before delving a discussion into the evidence of the prosecution witnesses, it would be beneficial to understand what circumstantial evidence is. In the case of **Suresh and Another vs. State of Haryana**, reported in **(2018) 18 SCC 654**, Hon'ble Supreme Court, has dealt with the issue, in para No. 46 as under:-

"46. Circumstantial evidence are those facts, which the court may infer further. There is a stark contrast between direct evidence and circumstantial evidence. In cases of circumstantial evidence, the courts are called upon to make inferences from the available evidences, which may lead to the accused's guilt. In majority of cases, the inference of guilt is usually drawn by establishing the case from its initiation to the point of commission wherein each factual link is ultimately based on evidence of a fact or an inference thereof. Therefore, the courts have to identify the facts in the first place so as to fit the case within the parameters of 'chain link theory' and then see whether the case is made out beyond reasonable doubt. In India

we have for a long time followed the 'chain link theory' since Hanumant Case (supra), which of course needs to be followed herein also.

18. In the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in **(1984) 4 SCC 116**, while dealing with circumstantial evidence, Hon'ble Supreme Court has held that :- the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in the prosecution cannot be cured by a false defense or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are –

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not merely 'may be' established;
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) the circumstances should be of a conclusive nature and tendency;
- (4) they should exclude every possible hypothesis except the one to be proved; and
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the

innocence of the accused and must show that in all human probability the act must have been done by the accused.

19. Having understood the circumstantial evidence and the conditions precedent, required to be fulfilled to record conviction based on circumstantial evidence, now an endeavour will be made to examine how far the prosecution side had succeeded in establishing the circumstantial evidence herein this case.

20. The prosecution side has examined the informant Padmeswar Rajowar as P.W. 1. His evidence reveals that on 16.11.2018, the appellant informed him that Anima was seriously ill and under treatment at Dibrugarh. He then proceeded to Dibrugarh and found Anima under treatment at Assam medical College Hospital (AMCH) Dibrugarh. He found her not in a position to talk and she was shifted to a Nursing Home. When asked, the appellant replied that she consumed poison and after sometime he told that she committed suicide and again he told that she had extra-marital affairs. Then being confused, he lodged the FIR-Exhibit-1 with the Police Station. His evidence also reveals that Anima was leading a happy conjugal life and she had one male child. It is elicited in cross-examination that he is not aware of the contents of the FIR. It is further elicited that he cannot say as to why his daughter died.

21. However, a conjoint reading of the evidence of P.W.1 and the FIR -Exhibit-1 would reveal that the facts narrated in the Exhibit-1, seems to be not consistent with the evidence lead by him. Notably, in the Exhibit-1 it is stated that, on the night of 14.11.2018, at around 09.00 pm, Parameswar Rajowar informed the P.W.1, over phone, that he had administered few blows to Anima Rajowar and asked him to come to his house immediately and then on 15.11.2018, he came to know that Parameswar Rajowar had assaulted Amina Rajowar and injured her seriously and thereafter he got her admitted at Assam

Medical College Hospital and then the informant had left for Dibrugarh and found Anima Rajowar admitted at Aditya Nursing Home and her condition was serious.

22. P.W.3, P.W.4 and P.W.5, all have accompanied P.W.1 to Dibrugarh. The evidence of P.W.3- Shri Fatik Rajowar reveals that having arrived at Dibrugarh along with P.W.1, he found his niece under treatment at AMCH and she was not in a position to talk and she had expired on the Saturday night and he cannot say why Anima died.

23. The evidence of P.W.4 -Shri Arun Dushad reveals that on 14.11.2018, uncle of Anima Rajowar called him to this house and informed him that the appellant had informed him over phone that Anima had committed suicide by hanging and she was taken to Dibrugarh. Then he along with Padmeswar Rajowar, Fatik Rajowar, Rebati Rajowar and several others went to AMCH and found Anima not in a position to talk. Thereafter, she was shifted to Aditya Nursing Home and thereafter they return home keeping one Lakhiram Rajowar with Anima and just after return, Lakhiram informed him at about 3 pm that Anima expired. Then they proceeded to Nazira and Padmeswar Rajowar had lodged the FIR at Nazira P.S. and he had authored the FIR. Cross-examination of this witness reveals that he cannot say how and why Anima died.

24. The evidence of P.W.5 - Shri Dhaneswar Turi reveals that on 14.11.2018, Lakhiram called him to his residence and asked him to manage one vehicle to proceed to Dibrugarh as Anima attempted to commit suicide. Then he had hired one vehicle and along with P.W.1, 3 and 4 proceeded to Dibrugarh. Then he dittoed the same facts like P.W.4. Nothing tangible could be elicited in the cross-examination of this witness.

25. P.W.6 - Shri Shri Anupam Gogoi had not seen the occurrence and he had no knowledge about the incident. His evidence reveals that on the day of occurrence at about 9 am he was returning home from his shop and then he heard hue and cry and one Jiten Rajowar had asked for his bi-cycle for calling a vehicle, and then instead of giving his cycle, he advised the person to call the vehicle over phone. Later on, he came to know that the wife of the appellant dies, but he is not aware of where she died.

26. The prosecution side has examined the Gaonburah of Chowkimukh -Haluwa Gaon -Shri Prabin Gogoi as P.W.7. But, as he had not supported the case of the prosecution, he was declared hostile and the prosecution side had cross-examined him and brought on record the statement given by him before the I.O. and confirmed through him that on 14.11.2018, at around 11.00 pm, as the family members of the accused came to his house, then the accused assaulted his wife inside his home and thereby caused grievous injuries to her, and thereafter, took her to Hospital for treatment. The defence side has not cross-examined this witness.

27. P.W.8 - Smti Aghuni Rajowar testified that the appellant Parameswar Rajowar is her brother-in-law and younger brother of her husband and the deceased Anima was the wife of the appellant and they reside in two different houses, but they have shared common homestead. Her evidence also reveals that on the day of occurrence, at around 9.00 am while she was taking bath, then her husband came and told her that he had called the wife of the appellant, but she did not respond and then her husband asked her to look into the matter, but she did not see anything. Then the prosecution side declared this witness hostile and cross-examined her and brought on record the statement given by her before the I.O. and confirmed the same through the I.O.

- P.W.10, that the accused, very frequently, engaged in quarrel with his wife after consuming liquor and on 14.11.2018, at around 9.00 pm, the appellant caused severe injuries to her by assaulting, and then the appellant with the help of two local persons took the injured to Dibrugarh Medical College and on 17.11.2018, in the morning hours, two local persons informed her over phone that the injured had died. However, in cross-examination by the appellant, she stated that the occurrence took place at around 09.00 am and at that time the appellant was not at his house and he was called by her husband over phone. Now, it is to be seen how far the evidence of P.W.8 is admissible, being declared hostile and cross-examined by the prosecution side.

28. It is to be mentioned here that while dealing with the evidentiary value of hostile witnesses, Hon'ble Supreme Court in the case of **Haradhan Das vs. State of West Bengal**, reported in **(2013) 2 SCC 197**, held as under:-

“It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution is admissible and can be relied upon by the court.”

29. Again in **Bhajju @ Karan v. State of Madhya Pradesh (2012) 4 SCC 327** discussed the law in some elaboration, declared the principle as follows:

“35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the Appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 Code of Criminal Procedure, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a

permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution."

30. Here in this case, having tested the evidence of P.W.8, on the touchstone of the principles laid down in the cases discussed above, we find that her evidence that- *the accused very frequently engaged in quarrel with his wife*

after consuming liquor and on 14.11.2018, at around 9.00 pm by assaulting, the appellant caused severe injuries to her and then the appellant with the help of two local persons took the injured to Dibrugarh Medical College, and on 17.11.2018, in the morning hours, two local persons informed her over phone that the injured had died, can be relied upon, being the same consistent with the facts mentioned in the FIR-Exhibit-1, that he had assaulted the victim on 14.11.2018, at around 9 pm. and the factum of death of the victim in the morning of 17.11.2018, as is evident from the evidence of P.W.-10. Admittedly, P.W.8 is the sister in law of the appellant. And being the sister-in-law of the appellant and having been resided in the same homestead, she got every opportunity to see the incident of quarrel between the appellant and the victim and this fact also lend assurance to the prosecution version.

31. P.W. 9 - is Shri Sushil Rajowar, and he is the neighbour of the appellant. His evidence reveals that about 2/3 years back, while he was in his house, at around 08.00 – 08.30 am, he heard hue and cry outside his house. Then he called his wife Aghuni Rajowar to enquire about the same. Then his wife told him that something has happened to the wife of the appellant and she was taken to Hospital. Then after 2/3 days he heard that the victim died at AMCH, Dibrugarh while undergoing treatment. In cross-examination by the appellant, he stated that he had no knowledge under what circumstances the deceased died.

32. The evidence, so adduced by P.W. 9 is found to be not at all believable. He has not been telling the truth before the court. In spite of being the own brother of the appellant, he had testified that the appellant is his neighbour. In the brotherly instinct of blood, being nearer to truth, he had sacrificed the latter. Unfortunately, the prosecution side had failed to cross-examine this witness.

And the same eschewed consideration of learned trial court also. The evidence of P.W.9 is thus prevaricated and he is a partisan witness and as such he cannot be relied upon.

33. P.W. 10 - Sk. Rahimuddin Ahmed is the investigating Officer, who had investigated the case and submitted charge sheet- Exhibit- 6. His evidence reveals that on 16.11.2018, the Officer-In-Charge, Nazira P.S. endorsed him to investigate Nazira P.S. Case No. 236/2018 u/s 325/307 IPC after receiving the FIR from Padmeswar Rajowar. He then examined witness Padmeswar Rajowar, Phatik Rajowar, Arun Dusad and Dhaneswar Turi in the Police Station and on 17.11.2018, he had visited the place of occurrence and drawn up sketch map- Exhibit-3 and searched the appellant but could not found him and asked the neighbours to ask him to report at the P.S. Then on 17.11.2018 at about 8.00 pm informant Padmeswar Rajowar informed him over phone that the victim suffered demise at AMCH Dibrugarh. Then on 18.11.2018, the appellant had surrendered at the P.S. and he then interrogated him, in which the appellant had admitted having committed the offence and then he arrested him and forwarded him to the court. Thereafter, he made a prayer before the SDJM(M) Nazira to add section 302 IPC and thereafter his prayer was allowed. He then collected Inquest and Post Mortem Report from the AMCH, Dibrugarh, and then on completion of investigation he laid charge sheet against the appellant to stand trial in the court u/s 302 IPC. It is elicited in cross-examination that he had not seized anything from the place of occurrence. He denied that witness Prabin Gogoi and Aghuni Rajowar have not made any statement before him.

34. On the other hand, case of the appellant is that at the relevant time of occurrence he was not present in his house. He had pleaded alibi and to establish the same he had examined himself and another witness, namely,

Babular Rajowar. He testified that on the day of incident at about 6-30 am he along with Babulal Rajowar went in search a daily wage labourer for harvesting his crops. Then at around 08.30 am Sushil Rajowar informed him over phone that his wife had committed suicide by hanging. Then he reached home with Babulal Rajowar and took his wife to Ligiri Pukhuri Hospital in the vehicle of Babulal Rajowar and from there the victim was referred to Civil Hospital, Joysagar and after initial checkup she was referred to AMCH, Dibrugarh and accordingly they have taken her to AMCH, Dibrugarh and after two days she expired. His evidence also reveals that his relation with this wife was good and he does not know why she had committed suicide. It is elicited in his cross-examination at the time of incident his deceased wife was living with him along with his 3 years old son. He denied having reported to his father-in-law that he gave few beats of assault to his wife and he also denied having told his father-in-law that his wife consumed poison and also denied having stated that his wife had extra-marital affairs. He also denied having pickup any quarrel with his wife on the previous night.

35. D.W.-2 Babulal Rajowar also dittoed the same facts like D.W.1-the appellant. However, in cross-examination it is elicited that Sushil Rajowar first saw that Anima Rajowar tried to commit suicide by hanging and other people also came to know about the same from Sushil Rajowar. In further cross-examination he admitted that he came with Parameswar Rajowar to depose in his favour in the court.

36. Thus, it appears that D.W.1 and D.W.2 even could not state the date of incident. Moreover, the evidence of both D.W.1 and D.W. 2 appears to be not at all believable in as much as the prosecution side has examined witness Sushil Rajowar as P.W.9. His evidence has already been discussed in the paragraph No.

24 and 25. His evidence outweighed the evidence of D.W. 1 and 2. What he had testified is that about 2/3 years back while he was in his house, at around 08.00 - 08.30 am, he heard hue and cry outside his house and then he called his wife Aghuni Rajowar to enquire about the same, who after enquiry, told him that something had happened to the wife of the appellant and she was taken to Hospital. Then after 2/3 days he heard that the victim had died at AMCH, Dibrugarh while undergoing treatment. His evidence also reveals that he had no knowledge under what circumstances the victim died.

37. Thus, though the appellant had taken the plea of alibi, yet he had failed to establish the same by adducing any convincing evidence. Be it noted here that the burden to establish the plea of alibi is always upon the person who pleaded it. It is to be noted here that the plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea therefore succeeds only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. (See-**Dudh Nath Pandey vs. The State Of U.P.**, reported in **1981 SCR (2) 771**). The appellant had failed to establish that at the relevant time of occurrence, he was at a far off place, from where it was practically impossible to remain present at the place of occurrence. Rather the evidence lead by him is found to be false and this provides an additional link to the chain of circumstances. (See - (i) **Balwinder Singh vs. State of Punjab** reported in **(1987) 1 SCC 1**. (ii) **Rameshbhai Mohanbhai Koli & Ors. Vs. State of Gujarat** reported in **(2011) 11 SCC 111**. (iii) **Sharad Birdhichand Sarda** (supra).

38. Thus, the circumstantial evidence, as discussed in the case of **Suresh and Another** (supra), which can be said to have been established here in this

case, from the evidence discussed herein above, are as follows :-

- (i) That, the deceased and the appellant were husband and wife;
- (ii) That, they were living in the house of the appellant at Chowkimukh, Nazira at the relevant time of incident, with their three years old child;
- (iii) That, the appellant frequently engaged in quarrel with the deceased, under the influence of liquor;
- (iv) That, on 14.11.2018, at about 9 pm, he had assaulted the victim in his house and caused severe injuries and with the help of two local persons, he took the victim to Dibrugarh Medical College.
- (v) That, after the occurrence the appellant had reported the matter to P.W.1, at about 9 pm, that he had administered few beats of blow to Anima Rajowar and called him immediately;
- (v) That, on the same night i.e. on 14.11.2018, P.W.1 had reported the matter to P.W.4 that Anima had committed suicide;
- (vi) That, on the same night i.e. 14.11.2018, the uncle of Anima reported the matter to P.W.5 that Anima had attempted to commit suicide and that she was taken to Dibrugarh and asked him to manage one vehicle to proceed to Dibrugarh;
- (vii) That, P.W.1, 3, 4 and 5 along with wife of P.W.3 and several others visited Dibrugarh and found Anima at AMCH and she was not in a position to talk.
- (ix) That, at Dibrugarh, the appellant had told P.W.1 that Anima had consumed poison. And after sometime, he told P.W.1 that Anima

had committed suicide and after sometime, she told him that she had extra-marital affairs;

(x) That, on 16.11.2018, P.W.1 had lodged the FIR - Ext.1 at the Nazira P.S.;

(xi) That, thereafter, she was taken to Aditya Nursing Home, Dibrugarh where she succumbed to the injuries on 17.11.2018, and same was reported to the I.O. by P.W.1 on 17.11.2018 at about 8 pm.

(xii) That, the appellant had taken the plea of alibi and the same is found to be false.

39. Thus, applying the ratio, laid down in the case of **Sharad Birdhichand Sarda** (supra), to the circumstances discussed herein above, would reveals that the circumstances discussed herein above, have formed a chain, so complete to establish that the injuries on the deceased were caused by none other than the appellant.

40. Indisputably, the appellant and the deceased were husband and wife and at the relevant point of time they were living in the house of the appellant at Chowkimukh, Nazira along with their 3 years old son. In his evidence as D.W.1, the appellant, in no uncertain term stated that at the relevant time his deceased wife was living with him in his house. Since the appellant has failed to establish the plea of alibi, and since he was very much present in his house, on the relevant date and time of occurrence, it is his duty to explain as to what had happened and how his wife sustained the injuries, so described in the foregoing paragraph. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Trumukh Maroti Kirkon vs. State of Maharashtra**

reported in **(2006) 10 SCC 681**, wherein, at para-No.22, Hon'ble Supreme Court has held that –

“Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

41. The second part of the ratio that –*“or that the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime”*, is squarely applicable in the given facts and circumstances of the case in hand. Notably, in the aforementioned case, Hon'ble Supreme Court had also discussed following cases:-

(i) Nika Ram v. State of Himachal Pradesh, reported in AIR 1972 SC 2077, where it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

(ii) Ganeshlal v. State of Maharashtra, reported in (1992)

3 SCC 106, wherein the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

(iii) State of U.P. v. Dr. Ravindra Prakash Mittal, reported in AIR 1992 SC 2045, it has been held that the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC.

(iv) State of Tamil Nadu v. Rajendran, reported in (1999) 8 SCC 679, the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were

seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

42. The legal proposition, that can be crystallized from the ratio laid down in the cases discussed herein above, is that - if an accused is prosecuted for the murder of his wife, which took place inside his house and the death had occurred in his custody, the accused is under an obligation to give a plausible explanation for the cause of her death, in his statement under Section 313 Cr.P.C. If he fails to explain the circumstances, under which his wife died or the explanation is found to be false, it is a strong circumstance which held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the accused is the author of the commission of murder of his wife.

43. Now, let it be seen what explanation is forthcoming from the appellant. As discussed herein above, the appellant had failed to establish the plea of alibi. But he had failed to establish the same. Another plea he had taken is that his wife had committed suicide. But, the same is ruled out by the medical evidence. Another stand he had taken is that his wife consumed poison. But medical evidence ruled out the same also. He had also told before the P.W.1 that the victim had extra marital affairs, but he failed to lead any evidence to that effect. He had also failed to offer any explanation as to how and under what

circumstances his wife sustained the ante-mortem injuries in his statement under section 313 Cr.P.C. His evidence in defence is also found to be false. Thus, applying the ratio, so laid down in the case of **Trumukh Maroti Kirkon** (supra) and in the cases **Nika Ram** (supra), **Ganeshlal** (supra), **Dr. Ravindra Prakash Mittal** (supra), **Rajendran** (supra), as discussed herein above, to the facts and circumstances herein this case, it can safely be concluded that failing to offer any explanation, let alone a plausible one, is a strong circumstance that indicates that he is responsible for commission of the offence. Though Ms. Baruah, the learned counsel for the appellant has relied upon the ratio laid down in the case of **Trumukh Maroti Kirkon** (supra) to contend that the same advance the case of the appellant, yet, as held herein above, the same advanced the case of the respondent, instead of the case of the appellant.

44. It appears from the record of the learned court below that it had relied upon following incriminating evidences: -

- (i) That deceased Anima Rajowar was the wife of the accused and on the date of incident she was living with the accused;
- (ii) That the accused very frequently engaged in quarrel with his wife (since deceased) after consuming liquor;
- (iii) That the death of the deceased was homicidal in nature;
- (iv) That on 14.11.2018, at around 11 pm, the accused assaulted his wife (since deceased) inside his home and thereby causing grievous injury to her and thereafter took her to Hospital for treatment;
- (v) That the accused gave his extra-judicial confession to Police that he had committed the alleged offence of murder;
- (vi) That the accused in his 313 Cr.P.C. statement failed to

explain the cause of death of his wife.

45. Thereafter, the learned court below had arrived at a conclusion that the prosecution side had succeeded in bringing home the charge under section 304-II IPC against the appellant beyond all reasonable doubt instead of charge under section 302 IPC, and convicted him and sentenced as aforesaid. Though, some of the incriminating evidence, so relied upon by the learned court below, seems to be justified in the given facts and circumstances on the record yet, the incriminating material relied upon by the learned court below at point No. (v), is against the settled position of law. Be it noted here that any confession, made before the Police, is not admissible in evidence as the same is hit by section 25 of the Evidence Act. Ms. Baruah, the learned counsel for the appellant has rightly pointed this out during argument and I record concurrence to the same. However, the other incriminating materials relied upon by the learned court below seems to be justified and based on evidence on the record, except however, the time of occurrence, i.e., 11 pm, which as per evidence of P.W.4, 5 and 8 as per the FIR-Exhibit-1 was 9 pm on 14.11.2018.

46. Now, it is to be seen whether the act of the appellant comes under any of the exception of section 300 IPC. It is to be mentioned here that there are five exceptions to section 300 IPC and these are:-

- (i) Provocation;
- (ii) Private Defence;
- (iii) Exercise of Legal Power;
- (iv) Absence of Pre-Meditation (Sudden Fight);
- (v) Consent;

47. In the case in hand, it is apparent from the facts and circumstances on the

record, especially from the Exhibit-1 and also from the evidence of P.W.8, the applicable exception may be absence of pre-meditation (sudden fight), in which the appellant and the victim frequently engaged into. This exception has, however, six essential ingredients and these are:-

- (i) Without pre-meditation;
- (ii) In a sudden fight;
- (iii) In the heat of passion arising out of sudden quarrel;
- (iv) Without the offenders having taken undue advantages;
- (v) The offender should not act in a cruel or unusual manner;
- (vi) The fight must have been with the person killed;

48. Here in this case, the evidence of P.W.8 clearly indicates that the appellant and the deceased very frequently engaged in quarrel after consuming liquor and on 14.11.2018, at around 9.00 pm by assaulting, the appellant caused severe injuries and then the appellant with the help of two local persons, took the injured to Dibrugarh Medical College. The injuries suffered by the deceased were:-

- (i) Contusion of bluish colour around both eyes;
- (ii) Contusion of bluish colour of size 4 cm x 3 cm over right parietal area found on reflection;
- (iii) Fracture of body cervical C-4 and C-5 vertebrae and with contusion of pre-vertebral muscle along C-4 and C-5 vertebrae;
- (iv) Contusion along C4 and C5 segment of the Spinal Cord.

49. From the nature of injuries and the post crime conduct of the appellant it cannot be said with certainty that the appellant had intended to cause death of his wife. He used to engage in fight with the deceased frequently. Thus, he may

not have intention to cause death of his wife, yet, it can be well inferred that he had the knowledge that if the victim is assaulted over her head, which is a vital part of the body, it might cause her death.

50. Thus, exception No. 4 to section 300 IPC had taken the offence out of the purview of section 300 IPC. And as such, this is clear case of Section 304 -I IPC, though the learned court below had convicted him under section 304-II IPC. Accordingly, the appellant is found to be guilty under section 304-I IPC, instead of section 304-II IPC and convicted accordingly.

51. I have carefully gone through the case laws, referred by Ms. Baruah, the learned counsel for the appellant and I find that the ratios laid down therein proceeds on its own facts, which are quite different from the case in hand, and as such not applicable in all force to the facts herein this case. And therefore, detail discussion of the same is found to be not necessary here in this case. Also, I have gone through the case law, **Dinesh Kumar** (supra) referred by Mr. Baishya, the learned Addl. P.P., wherein the theory of last seen theory and of Section 106 Evidence Act has been discussed. In the given facts and circumstances, of the case in hand, the ratio laid down in the said case has advanced the case of the prosecution to some extent. As the prosecution side has discharged the burden of living the appellant and the victim together, now duty is cast upon the appellant to explain how the victim had sustained the injuries.

52. It also appears that having convicted the appellant, the learned court below has sentenced him to suffer R.I. for 7 years and also to pay a fine of Rs. 2,000/ with default stipulation. Balancing the aggravating as well as mitigating facts circumstances, and in the given factual background, the sentence so handed down by the learned court below, appears to be justified and

reasonable for commission of the offence under section 304 – I IPC. And the same warrants no interference of this court.

53. In the result, I find this appeal devoid of merit and accordingly, the same stands dismissed. Send down the record of the learned court below along with a copy of this judgment and order.

Comparing Assistant

JUDGE