

GAHC010200982017



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

Criminal Appeal No.348/2017

Shri Romesh Borah @ Bijupon Appellant

-Versus-

State of Assam & Anr.

..... Respondents

Advocate for the Appellant : Mr. N. Mahajan.

Advocate for the respondent no.1 : Ms. B. Bhuyan, Addl.P.P.

Advocate for the respondent no.2 : Mr. U. Choudhury, Legal Aid Counsel.

Date of hearing : 21.02.2023

Date of Judgment : 28.02.2023

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER(CAV)

(Michael Zothankhuma, J)

Heard Mr. N. Mahajan, learned counsel appearing for the appellant.
Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor appearing

for the State/respondent No.1 and Mr. U. Choudhury, learned Legal Aid Counsel appearing for the respondent no.2.

2. The challenge in this appeal is against the impugned judgment and order dated 05.10.2016 passed by the learned Sessions Judge, Golaghat in Sessions Case No. 76/2015, by which the appellant has been convicted under Section 302 I.P.C. and sentenced to undergo rigorous imprisonment for life with a fine of Rs.5,000/-, in default, simple imprisonment for one month.

3. The prosecution case is that an FIR was lodged on 29.04.2015 by P.W.-2, who is the second wife of the deceased Biren Bora, to the effect that the appellant, who is the son of the deceased with his first wife PW-8, had killed the deceased around 8 p.m. on 28.04.2015. In pursuance to the FIR, Borpathar Police Station Case No. 43/2015 under Section 302 I.P.C. was registered and confessional statement of the appellant was taken under Section 164 Cr.P.C. As the I/O found a prima facie case under Section 302 I.P.C. against the appellant, he filed the charge-sheet.

4. Charge under Section 302 I.P.C. was framed against the appellant on 02.07.2015, to which the appellant pleaded guilty. The same not having been accepted by the learned Trial court, ten prosecution witnesses and two defence witnesses were examined by the learned Trial Court. Examination of appellant was done under Section 313 Cr.P.C. and thereafter, the appellant was convicted and sentenced in terms of the impugned judgment and order dated 05.10.2016 passed in Sessions Case

No. 76/2015.

5. The learned counsel for the appellant submits at the outset, that there is no denial with the fact that the cause of death of the deceased was due to action of the appellant in hacking the deceased (his father) with an axe and the injuries sustained therein, which is recorded in the evidence given by Dr. Rajiv Kr. Prasad (P.W.-1).

6. The learned counsel for the appellant submits that as his father (deceased) had abused the appellant and scolded his mother by using filthy words, besides alleging that the appellant was having an illicit affair with his mother, i.e. P.W.-8, an argument ensued between them. Thereafter, as the deceased had punched the appellant and made an attempt to assault him with a fence post, the appellant had struck him with an axe.

7. The learned counsel for the appellant submits that there was no pre-meditation involved in the action of the appellant and the same occurred due to grave and sudden provocation. There was no intention to kill the deceased and it was only due to the argument that had erupted between the appellant and the deceased, that the deceased was struck by the appellant with an axe. He submits that the evidence of P.W.-5 shows that a quarrel had taken place between the appellant and the deceased. The learned counsel for the appellant thus prays that as the incident comes within the ambit of exception 1 or 4 of Section 300 I.P.C., the appellant should have been sentenced under Part II of Section 304 I.P.C. In support

of his submissions, the learned counsel for the appellant has relied upon the judgments of this Court in- (i) *Depon Saikia vs State of Assam* reported in (2013) 2 Gau LR 241 (ii) *Manju Lakra vs State of Assam* reported in (2013) 6 Gau LR 222 (iii) *Ranjit Tanti vs State of Assam & Anr.* reported in 2018 SCC OnLine Gau 585.

8. Ms. B. Bhuyan, the Additional Public Prosecutor, on the other hand submits that there is no infirmity with the impugned judgment and order, as the appellant in his confessional statement under Section 164 Cr.P.C. clearly admitted the fact that the deceased had died at the hands of the appellant. Further, the appellant's extra judicial confession, which is reflected in the evidence of P.W.-5 and P.W.-8 clearly shows that the appellant is guilty of the offence under Section 302 I.P.C. She further submits that P.W.-2, who is the second and present wife of the deceased, was an eye witness to the crime. She also submits that the present case does not come within the exceptions carved out under Section 300 I.P.C., as the appellant had the motive and intention to kill the deceased, keeping in view the weapon used and the fact that he had struck vital parts of the body of the appellant, i.e. the neck and belly, more than two times. She also submits that as relations between the appellant and P.W.-8 (first wife of deceased) on the one hand and the deceased on the other hand were not good, there was an enmity on the part of the appellant to cause harm to the deceased. In support of her submission that the appellant intended to kill the deceased, regard being had to the weapon used and that the vital parts of the body had been chosen for the assault, she has relied upon the decision of the Apex Court in case of ***Singapagu Anjaiah vs***

State of Andhra Pradesh, reported in ***(2010) 9 SCC 799***.

9. The learned Additional Public Prosecutor submits in the alternative, that if this Court finds that the appellant's case comes within the ambit of the exceptions carved out under Section 300 I.P.C., the intention and knowledge to kill being present in the action of the appellant, the appellant would have to be convicted and sentenced under the Part-I of Section 304 I.P.C.

10. Mr. U. Choudhury, learned legal aid counsel for the informant/respondent No. 2 submits that a perusal of the confessional statement of the appellant under Section 164 Cr.P.C. and his evidence as DW-I shows the changing stands of the appellant. The evidence given by the appellant vis-a-vis the statements made by him under Section 164 Cr.P.C. are contradictory. The fact that the appellant has also changed his stand with regard to his confessional statement made under Section 164 Cr.P.C. during his examination under Section 313 Cr.P.C., also goes to show that the exceptions to Section 300 I.P.C. cannot be attracted/considered, as he is an unreliable witness. He also submits that for the appellant to take the benefit of the exceptions of Section 300 I.P.C., the appellant would have to show that the alleged quarrel between the appellant and the deceased was started by the deceased. However, the evidence recorded by the learned trial court does not give any indication as to who had started the alleged quarrel between the appellant and the deceased. He also submits that the action of the appellant in killing his father was done by taking undue advantage and acting in a cruel manner. He

accordingly submits that as the appellant had killed his own father and as there is a constant change in the appellant's statement vis-à-vis his evidence, statement under Section 164 Cr.P.C. and examination under Section 313 Cr.P.C., the Exceptions under Section 300 I.P.C. are not attracted to this case.

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

12. The evidence of P.W.-1, i.e. the Doctor, shows that in the opinion of P.W.-1, the cause of death was due to shock and haemorrhage, as a result of cut injury in the neck of the deceased. The injuries recorded in the Post Mortem Report shows that there are two deep cuts in the neck and one deep cut in the chest, which was caused by a heavy sharp cutting weapon. The extract of the injury sustained by the deceased in the Post Mortem Report, which is reflected in the evidence of PW-1, is reproduced below as follows:-

“External Appearance :

A dead body of a male person about 55 years of age, short black hairs, fair complexion, average built, both mouth and eyes closed. Rigor mortis present.

Injuries :-

(i) One deep cut injury with well define margin on the right side of the neck of dimension- 10 Cm. X 5Cm. X 5Cm. with partial cut of survical bone No.5.

(ii) One bone deep cut injury in front of neck with well defined margin of dimension – 3Cm. X 3Cm. X 5Cm. with partial cut of upper part of sternum.

(iii) One bone deep cut injury in front of chest in left side below the

clavicular bone of dimension- 3Cm. X 3Cm. X 5Cm. with full thickness cut of 2nd and 3rd ribs in left side.

Cranum and Spinal Cord :

Scalp, skull and vertebrae are healthy.

Membrane healthy.

Brain and spinal healthy.

Thorax :

Walls, ribs and cartilages :- cut injury of the upper part of the chest just below the front of neck with partial cut injury of upper part of sternum.

Cut injury of left side of chest with full thickness cut injury of 2nd and 3rd ribs.

Pleurae is ruptured.

Larynx and Trachea :- partial thickness cut injury of larynx and trachea in its upper part.

Lungs are congested

Peritoneum is healthy.

Heart is healthy.

Vessels are healthy.

Abdomen :- Walls healthy; peritoneum healthy; mouth and pharynx healthy.

Stomach is healthy and contains undigested food.

Small intestine is healthy and contains semi-digested food.

Large intestine is healthy and contains some faecal matter.

Liver, spleen, kidney and bladder are healthy.

Organs of external genitalia is healthy.

Muscles, bones and joint :- injury as described in 'external appearance'.

Diseases and deformities are nil.

Fracture as described in 'External appearance'.

Dislocation nil.

OPINION :

The cause of death is due to shock and haemorrhage as a result of cut injury of the neck sustained by the deceased. Post mortem duration is less than 36 hours. According to him, all the injuries were caused by heavy sharp cutting weapon."

13. The evidence of P.W.-2, who is the second surviving wife of the deceased Biren Borah, is to the effect that while her husband was returning home after herding cattle, at around 7.30 p.m. and had reached the gateway to his house, the appellant had hacked him thrice on his neck and once on his belly. The appellant then brought the deceased to the courtyard and laid him there. She also states that she did not know why the appellant had hacked the deceased. P.W.-2 then went to the house of PW-5, the VDP Secretary and informed him about the incident. In her cross-examination, she states that appellant was given a share of the landed property, but not the full share he was entitled to.

14. The evidence of P.W.-3, who is the nephew of the deceased Biren Borah, is that while he was in his house he heard a commotion at the gateway of the deceased Biren Borah's house. When he came out from his house, he found the dead body of Biren Borah lying on the gate. Further, as it was a dark night, he did not go there. At this stage, P.W.-3 was declared a hostile witness by the public prosecutor. In his cross-examination, P.W.-3 denies the making of any statement by him to the police, which is to the effect that the VDP Secretary had stated that the appellant had killed his father with an axe.

15. P.W.-4, who is the brother of the deceased Biren Borah, states in his evidence that he was told by P.W.-8 (first wife of the deceased) that a quarrel had taken place between the appellant and the deceased. He was made a seizure witness with regard to the axe that had been used in the crime. P.W.-4 also states in his evidence that P.W.-2 had stated that a quarrel had taken place between the appellant and the deceased over the issue of pulling a cow and that the appellant, who was armed with an axe had hacked the deceased. P.W.-4 also states that there had been regular quarrels between the appellant and the deceased.

16. The evidence of P.W.-5, who is the VDP Secretary of the village, is to the effect that P.W.-2 had approached him and informed him that a fight had started between the appellant and the deceased. Since she could not stop the fight, she had come to inform him of the same. When he went to the place of occurrence, he saw the appellant splashing water on the road with a bucket and on being asked, the appellant told him that he had a fight with his father. When the appellant was asked by P.W.-5 as to where his father was, he told PW-5 that he had pulled the deceased into the courtyard and left him there. In his cross-examination, P.W.-5 states that P.W.-2 had told him about the quarrel that took place between the father and the son.

17. P.W.-6 is the elder brother of the deceased Biren Borah, who states in his evidence that he came to know from P.W.-4 that the appellant had a quarrel with Biren Borah and that the appellant had killed him with an axe.

In his cross-examination P.W.-6 states that P.W.-2 and the deceased Biren Borah were married 12 years ago and that he had driven out his first wife i.e. P.W.-8 from his house. Thereafter, another house was constructed by them for P.W.-8. He also states in his cross-examination that the deceased used to torture the appellant and his mother. Land for cultivation was also not given to them. Further the deceased had alleged that the appellant had illicit relation with his mother, i.e. P.W.-8.

18. The evidence of P.W.-7 is to the effect that he was informed by the VDP Secretary, i.e. P.W.-5, that the deceased had been killed by his son, appellant. He stood as a seizure witness with regard to the seized axe. In his cross-examination, he states that the deceased used to torture the appellant and first wife, PW-8. He also states that he does not know why the second son of the deceased with PW-8 had committed suicide.

19. The evidence of P.W.-8, who is the first wife of the deceased Biren Borah, is to the effect that the appellant, who was her son, told her that as the deceased had rushed upon him with an intention to assault him, the appellant had assaulted the deceased with an axe to save himself. In her cross-examination, P.W.-8 states that the deceased used to torture them and that he made a false allegation that she was having an illicit relationship with her son, the appellant. In her cross-examination P.W.-8 also states that on the date of the incident, the deceased assaulted her when the appellant was not at home. When the appellant came home, P.W.-8 informed him that the deceased had assaulted her, due to which the appellant went to his father to ask him why he had assaulted P.W.-8.

Thereafter, the deceased assaulted the appellant and told him that he was having an illicit affair with P.W.-8. As the appellant could not bear it and as his father had rushed at the appellant, the appellant killed his father to save himself.

20. P.W.-9 is the Sub-divisional Judicial Magistrate, Dhansiri, Sarupathar, who states that he had recorded the confessional statement of the appellant under Section 164 Cr.P.C., after giving him 24 hours time for reflection. After all the procedures were followed and the appellant was informed that he was not bound to make a confession, which could be used against him and that he could be convicted on the basis of the same, the appellant made his confessional statement voluntarily. The confessional statement of the appellant was exhibited as Ext-5 and the signature of the appellant was also identified.

The confessional statement made by the appellant under Section 164 Cr.P.C. is reproduced herein below-

Earlier, my father served in the Indian Army and after his retirement in 1997, he returned home. My younger brother, mother and I lived in our house. After consuming liquor, my father used to beat my younger brother, mother and me. My father drove my younger brother and mother out of the house some 7 years ago from today and for that reason, my younger brother went to my maternal uncle's house and committed suicide there. Without bringing my mother back to the house, my father married another woman and brought her home about 6 years ago. Later as my mother lodged a case against my father, the latter gave 1 bigha land to the former near his house to construct a house thereon. My mother and I constructed a house on that plot of land and lived there. My father did not give any share of his pension amount to my mother. My father did not give us any cultivable land. Later I went to Hyderabad to work there. I returned home

from Hyderabad to enjoy Rangali Bihu. One day, I approached my father seeking landed property from him, but he did not give me any landed property. On Tuesday last, my father came after consuming liquor and hurled abuses at me. He also told me that he would not give me any landed property. Then I asked my father not to abuse me and I also told him that I would go to Hyderabad again. My father did not accept me as his son and he scolded my mother using very filthy words. My father asked me why I had not married yet. He also told me that I had illicit affair with my mother. Then, as it enraged me, I went near my father. Then my father punched me and made attempt to assault me with a fence post. Fearing that my father would assault me, I went inside the house. While entering the house, I found an axe on the door and in a fit of anger, I struck my father on his head with that axe. Then my father fell down. When I went towards the road, my father attempted to assault me with stone(s). Then I dealt an axe blow to my father again. Thereafter, I left that place. Later, I came to know that my father had died. Thereafter, I appeared at Barpathar Police Station. I have to say this much only.

21. P.W.-10, who is the I/O of the case, gave his evidence to the effect that after completing the investigation, charge-sheet was submitted against the appellant under Section 302 I.P.C.

22. The evidence of the appellant, as D.W.-1, is to the effect that he met his father, the deceased in the morning when his father was going to the market. He told his father that he would not be going to Hyderabad again for work and instead asked for a share of the ancestral land that he was entitled to. The deceased refused the request of the appellant. The appellant thereafter went to attend a feast held in a school. When he returned home in the house of PW-8 in the evening of 28.04.2015, he found broken household articles and furniture lying scattered. When he asked his mother who had done the said act, she remained silent.

However, a minor girl of the family told him that the deceased had assaulted his mother (P.W.-8). He then ran to his father to ask him about it, to which his father told him that you have never demanded any article or land till date and now your mother has instigated you. The deceased also told him that his mother was an evil woman and asked him why he hadn't got married yet. The deceased also said to the appellant "Have you kept your mother as your wife". The appellant then hurled a chair, in reaction to which his father punched him in the face. Thereafter, a fight ensued and his father beat him with a fence post. Thereafter, the appellant went home and no sooner had he reached his gateway, his father threw stones. The appellant hid himself behind a fence and then his father, armed with an axe, rushed at him with an intention to kill him. Thereafter, they were engaged in a tussle due to which his father released his grip on the axe. The appellant thereafter threw away the axe. His father thereafter became unconscious and fell on the road. He sprinkled water on the deceased and took inside. Thereafter, he left for his own house. In his cross-examination, DW-I denied the suggestion that the evidence given by him in his examination-in-chief was false.

23. The evidence of D.W.-2 is to the effect that on the day of the incident, the deceased had assaulted the appellant's mother after entering the house of P.W.-8. Thereafter, the appellant asked his father as to why he had assaulted his mother. An altercation ensued due to which the father died. In his cross-examination D.W.-2 states that he did not witness the incident.

24. The appellant in his answer given to Question No.16 under Section 313 Cr.P.C. has admitted the fact that he had given his Confessional Statement before the SDJM, Dhansiri, Sarupathar under Section 164 Cr.P.C., wherein he confessed to having killed his father by means of an axe. However, the appellant in his answer given to Question No.18 in his examination under Section 313 Cr.P.C. has stated that he never made any Confessional Statement.

The extract of the examination of the appellant under Section 313 Cr.P.C. pertaining to question Nos. 16 and 18 are reproduced below-

Question No.16:- P.W.9 Nur Jamal Haque testified that on 29.04.2015, while he was posted as Sub-Divisional Judicial Magistrate, Dhansiri, Sarupathar, on that day, you were produced before him by the I.O. for recording your confessional statement u/s 164 Cr.P.C., and then he sent you to the judicial custody for 24 hours by giving you a period of reflection and thereafter, he recorded your confessional statement, Ext-5 on 30.04.2015 and you confessed before him having killed your father by means of an axe.

Have you got anything to say in this regard?

Answer:- Yes.

Question No.18:- P.W.10 also testified that on 29.04.2015, you surrendered at Police Station and then he recorded your confessional statement and also forwarded you to the Court for recording your confessional statement and then the Court has recorded your confessional statement.

Have you got anything to say in this regard?

Answer :- It is a fact that I surrendered at the P.S. but I never made my confession.

25. In his evidence the appellant had stated that his father was armed with an axe with an intention to kill the appellant. However, the appellant in his confessional statement under Section 164 Cr.P.C., has stated that on entering his house, he found an axe and in a fit of anger he hit his father with the axe. The changing stands of the appellant shows that his evidence is not reliable. However, as the gravity of the crime committed by him would be dawning upon the appellant, it is plausible that he would be trying to improve his chances in the Court for getting a favourable decision and thereby making some changes in his statements. In any event, as held by the Apex Court in the case of ***Gurmail Singh and Another vs. State of Uttar Pradesh and Another***, reported in ***(2022) 10 SCC 684***, that in order to make culpable homicide 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.

26. The above being said, the question to be decided is whether there was any premeditation on the part of the appellant to kill his father. The fact that they had having been driven out from the father's house along with his mother and younger brother many years ago is not in dispute. The fact that the appellant and the deceased could meet amicably whenever the appellant came home implies that there could not have been any premeditation on the part of the appellant to kill his father. The only question remaining is with regard to whether there was any intention on the part of the appellant to kill the

deceased at the time of occurrence of the incident. The evidence recorded by the learned Trial Court shows that the deceased used to torture the appellant and PW-8, his first wife. Further, the evidence suggests that there was a lingering problem between the appellant and the deceased, with regard to cultivable land not being given to the appellant by his father. Besides the above fact, the evidence of PW-5 shows that PW-2 had approached PW-5, as she could not stop the fight between the appellant and the deceased. Though PW-2 has not stated anything in her evidence with regard to the fight between the appellant and the deceased, PW-5 has however stated the same had been told to him by PW-2. Though the evidence suggests that there was a underlying problem between the appellant and the deceased, there was no real enmity between the father and son over cultivable land not being given to the appellant. However, due to various reasons, as can be culled from the evidence of PW-8 and the confessional statement of the appellant, a quarrel ensued on the said date which escalated into a fight, wherein it can be presumed that the appellant lost the power of self-control during to the fight and thereafter hit his father with the axe.

27. [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'.

28. 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 of 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. Exception 4 of Section 300 IPC provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat without the offender 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.

29. In the case of ***Ajmal vs. State of Kerala***, reported in ***(2022) 9 SCC 766***, the Apex Court has referred to another decision of the Apex Court in the case of ***Pulicherla Nagaraju vs. State of A.P.***, reported in ***(2006) 11 SCC 444***, where it has been held that the considerations that should weigh with Courts, in discerning whether an act is punishable as murder, or culpable

homicide not amounting to murder, is determining the intention to cause death, which can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The Apex Court has held that the above list of circumstances is, not exhaustive and there may be several other special circumstances, with reference to individual cases, which may throw light on the question of intention.

30. In the present case what can be seen is that the weapon was picked up by the appellant. From the Post Mortem Examination it is seen that the blow was aimed at the vital parts of the body. Not only has the appellant given two deep cuts in the neck of the deceased, but one bone deep cut injury was also given in front of the chest. The weapon used was an axe. The Post Mortem Report shows that the injuries were deep, which implies that considerable force must have been applied while hitting the deceased. It shows that there was a quarrel between the parties and that the appellant's act was done in the heat of the moment.

31. The evidence given by PW-2 does not speak of there being any quarrel between the appellant and the deceased. However, the evidence of PW-5, who is an independent witness, is to the effect that a fight had started between the appellant and the deceased, as told to him by PW-2. The evidence of PW-6 is that he came to know from PW-4 that a quarrel had taken place between the deceased and the appellant. On considering all the above issues, it appears that a quarrel had ensued between the deceased and the appellant. However, the question to be decided is whether the use of axe by the appellant on the deceased coupled with the fact that the injuries were caused in the vital parts of the body would imply that there was an intention to cause the death of the deceased by the appellant.

32. In the case of ***Muthu vs. State***, reported in **(2009) 17 SCC 433** : AIR 2008 SC 1, it has been held that when in the heat of the moment or in a fit of anger a person does an act without premeditation, that person must also be punished, but his punishment should be lesser than that of premeditated offences. The Supreme Court has observed that it is for this reason that Exceptions 1 and 5 have been inserted in Section 300 of the Penal Code, 1860. Exception 4 to Section 300 of the Penal Code, 1860 clearly provides 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.

33. In the case of ***Depon Saikia vs. State of Assam***, reported in **(2013) 2 GLR 241**, the Division Bench of this Court had considered the act of an

uneducated village simpleton belonging to a scheduled caste community, who had choked his father and inflicted several dao blows on his back which resulted in the death of his father. The accused in the said case had given an explanation under Section 313 Cr.P.C. that being blinded by rage against his father, for the mistreatment of his mother, he was not able to tolerate the constant harassment of his mother by his father. Out of anger the accused choked his father and inflicted several blows on his back. The Division Bench held that considering his rustic background, hailing from a scheduled caste community, it would be reasonable to hold that the accused was gravely provoked by the aggressive acts of his father towards his mother which was a continuing act repeated time and again. The Division Bench thus held that as there was no pre-plan and premeditation to kill his father and as there was no motive or intention to kill his father, the Division Bench held that the act of the accused was culpable homicide not amounting to murder, under the purview of Exception 4 to Section 300 IPC. As such, the conviction was converted under Part-II of Section 304 IPC and he was sentenced accordingly.

34. In the case of ***Manju Lakra vs. State of Assam***, reported in ***(2013) 6 GLR 222***, the Division Bench of this Court held that the killing of the husband by the wife fell within the ambit of Section 304(Part-II) IPC, as her action came within the First Exception to Section 300 IPC. This Court in the above case held that unprovoked acts of domestic violence, day in a day out, had been building up inside the accused and that the volcano of resentment erupted on the fateful evening, when her husband came home in a drunken state and started beating her up. Thus the accused wife lost her power of self control and reacted by snatching away the lathi from the hand of her husband and started to beat him

up, without realizing that he was likely to die.

35. On considering the above facts, we are of the view that the appellant's case comes under Exception 4 of Section 300 IPC, as the appellant's action was without premeditation, in the heat of passion, upon a sudden quarrel. However, the appellant by taking an axe from his home and in inflicting three deadly blows to the vital parts of his father's body can be said to have the intention to kill his father. The conflicting stands taken by the appellant in his evidence, statement under Section 164 Cr.P.C. and his answers to Question Nos.16 & 18 under Section 313 Cr.P.C. goes to show that the appellant is not a reliable witness/person. The Apex Court in the case of ***Pulicherla Nagaraju (supra)***, has held that the intention of the accused has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of injuries caused, etc. In the present case, the appellant had used an axe and had chosen the neck and chest of his father for inflicting deep blows by the axe. The effect of the above factors leads us to believe that the appellant intended to cause death of the deceased. As Exception 4 to Section 300 IPC is attracted to the facts of the case, the appeal is partly allowed. The conviction under Section 302 IPC is converted to Section 304 Part-I IPC. The appellant is convicted under Section 304 Part-I and sentenced to undergo R.I. for a period of 10 (ten) years and fine imposed by the learned Trial Court will remain the same. The conviction under Section 302 IPC is accordingly set aside. The period already undergone by the appellant shall be set off from the period of imprisonment imposed on him.

36. The appeal stands disposed off accordingly. Send back the LCR.

37. In appreciation of the assistance provided by the learned Legal Aid Counsel, his fee, as per applicable rates, should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant