

GAHC010207802019



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

Case No. : Crl.A./400/2019

SRI MONESWAR DAS
S/O- LATE KALIRAM DAS, R/O- VILL.- KULHATI (BORBILCHUPA), P.S.
HAJO, P.O. KULHATI, DIST.- KAMRUP, PIN- 781104, ASSAM.

VERSUS

MRS. NILIMA DAS AND ANR
W/O- SRI MADAN DAS, VILL.- KULHATI (BORBILCHUPA), P.S. HAJO, P.O.
KULHATI, DIST.- KAMRUP, ASSAM, PIN- 781104, ASSAM.

2:THE STATE OF ASSAM
REP. BY THE P.P.
ASSAM

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

For the appellant : Mr. A.C. Sarma, Sr. Advocate.
: Mr. S. Das, Advocate.
For the respondents : Mr. D. Das, A.P.P., Assam.
Date of hearing : 08.08.2023.
Date of judgment : **25.08.2023.**

JUDGMENT AND ORDER
(CAV)

(K.R. Surana, J)

Heard Mr. A.C. Sarma, senior counsel, assisted by Mr. S. Das, learned counsel for the appellant. Also heard Mr. D. Das, learned Addl. P.P. for the State respondent no.2. None appears on call for the informant i.e. respondent no. 1.

2) This appeal filed under Section 374(2) of the Criminal Procedure Code is directed against the judgment and sentence dated 29.06.2019, passed by the learned Sessions Judge, Kamrup, Amingaon in Sessions Case No. 213/2014. By the said judgment, the appellant was convicted for committing offence punishable under Section 302/324 IPC and sentencing him to undergo rigorous imprisonment for life and also to pay a fine of Rs.20,000/- with default stipulation in respect of offence under Section 302 of the Indian Penal Code and to also undergo simple imprisonment for 1 (one) year for committing offence under Section 324 IPC, and directing that both the sentence would run concurrently.

3) On 15.04.2013, the respondent no. 1 lodged an FIR alleging that at about 9:30 AM on that day, when the appellant was erecting a post for concrete house between the boundary of her house and the appellant, her husband Madan Chandra Das told him to erect the post on his own land. It was stated that following that the appellant stabbed her husband with the *jowar* (sharp weapon like pointed spike, used for fishing) with an intention to murder him, as a result her husband had suffered grievous injury on his head. It was stated that seeing her husband stabbed, when her brother-in-law, Basudev Das

came to save him, the accused no. 2 (i.e. wife of the appellant) gave the *jowar* to accused no. 1 and 3 (i.e. appellant and Kalpa Das) and then both the accused no. 1 and 3 caused grievous injury to Basudev Das also. Both the injured were brought to Guwahati Medical College & Hospital (GMCH for short) by an *Mrityunjoy* ambulance, but the doctors declared her brother-in-law, Basudev Das dead.

4) Accordingly, the FIR was registered as Hajo P.S. Case No. 129/2013 under Sections 302/326 IPC. Upon investigation of the case, charge-sheet was submitted by the Investigating Officer (I.O. for short) against the appellant. The said case was tried as G.R. Case No. 157/2013 and charges were framed against the appellant under Section 302/324 IPC, which were read over to the appellant and he denied the charges and claimed to be tried.

5) The prosecution had examined 14 (fourteen) prosecution witnesses (PWs for short), viz., Smt. Nilima Das (PW-1/informant), Madan Chandra Das (PW-2/injured), Subhash Das (PW-3), Jyotish Ch. Das (PW-4), Dhiren Das (PW-5), Dr. R. Chaliha (PW-6), Haren Lahkar (PW-7), Dr. Hitendra Ch. Chakravarty (PW-8), Ratul Das (PW-9), Biren Das (PW-10), Prabin Das (PW-11), Girish Das (PW-12), Khagen Ch. Das (PW-13/I.O.) and Abul Kalam Azad (PW-14/ Second O/C). The following 12 (twelve) documents were exhibited, viz., FIR (Ext.1), Inquest report (Ext.2), Post-mortem report (Ext.3), Seizure list (Ext.4), Injury report (Ext.5), Printed form of FIR (Ext.6), Sketch map (Ext.7), Command certificate (Ext.8), Forwarding of Post mortem report (Ext.9), Dead-body *challan* (Ext.10), Report of handing over the dead body (Ext.11), and Charge-sheet (Ext.12). The weapon of assault was exhibited by PW-1 as M.Ext.1. The appellant did not examine any witness.

6) The learned senior counsel for the appellant had submitted that the Court had relied heavily on the examination-on-chief of the prosecution witness by ignoring the statement made by the PWs in course of their cross-examination. It was also submitted that the evidence that is available on record and other circumstantial evidence appearing in the case did not conclusively prove that the appellant had committed the alleged offence and accordingly, it was submitted that this was a case for acquittal of the appellant.

7) It was submitted that in the FIR lodged by the informant (PW-1), as well as in her statement recorded by the police under section 161 Cr.P.C., the PW-1 had described the weapon of assault as *jowar*, which is used for fishing and contains about 4-5 spikes. However, in her examination-in-chief, the PW-1 had described the weapon of assault as *ephalia*, which is a single spike pointed spear, used for fishing. It was also submitted that the PW-1 did not state in the FIR or in her statement recorded by the police under section 161 Cr.P.C. that there were witnesses to the alleged incident. However, later on, the police recorded the statement of PW nos. 2, 4 and 5, who being the close relatives of the deceased and the informant were interested witnesses and manufactured a story as if they were present at the time of incident and allegedly saw the assault.

8) It was submitted that the learned Court had failed to appreciate that there was a scuffle between the appellant and the PW nos. 2 and the deceased, and in the process, the deceased accidentally got injured. Hence, it was submitted that there was no evidence to show that the appellant had given any blow to the deceased with the alleged weapon of assault with the intention to murder him. Moreover, it was submitted that in the seizure memo, it

was not mentioned that the seized weapon of assault had blood stains on it.

9) It was further submitted that the case of the prosecution was that the appellant was digging earth within his own boundary at the relevant time. However, the learned trial Court had failed to appreciate that the *ephalia* was not used for digging earth, but was a fishing equipment and therefore, the prosecution case was not believable and accordingly, it was submitted that the credibility of the prosecution witnesses was questionable and not believable.

10) Thus, it was submitted that the prosecution had not been able to prove that the appellant had committed any offence and therefore, the impugned judgment and sentence was not sustainable on facts and in law.

11) The learned Addl. PP has submitted that the prosecution had not only proved that the appellant had assaulted and murdered the deceased by inflicting injury from the seized *ephalia* and injured the PW-2, but also proved the motive of the appellant to murder the deceased because he had come forward to save PW-2 when he had objected to digging of earth on their common boundary to erect RCC post of the proposed construction. It was submitted that the eye-witnesses to the assault had established beyond all reasonable doubt that the appellant alone was responsible for attacking the deceased and causing his death. Accordingly, it was submitted that the prosecution had proved the case beyond reasonable doubt.

12) The Court has given thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgment and have minutely re-appreciated the evidence available on record.

13) Out of the PWs examined, PW nos. 1, 2, 4 and 5 were eye witnesses to the commission of offence. The PW nos. 6 and 8 were respective medical officers who had examined the injured and the deceased. The PW nos. 3, 7 and 9 to 12 are hearsay witnesses. PW nos. 13 and 14 were the I.O. and police personnel, who had prepared the inquest report and did other formalities.

14) As per the post mortem report (Ext.3), prepared and proved by PW-6, the deceased was found with following injuries, viz.,

- a. Injury no. 1: Spindle shaped punctured wound over the left upper anterior chest wall measuring 3 x 1 cm, situated 13 cm from midline and 4 cm above the left nipple. Direction is about downwards, left to right, front to back and situated in the 4th inter costal space;*
- b. Injury no. 2: An abrasion over the middle 3rd of the left forearm measuring 2 x 1 cm;*
- c. Injury no. 3: Lacerated injury over the frontal scalp on the left side measuring 3 x 1 cm. situated 7 cm. above left eyebrow and 3 cm. from the midline;*
- d. Thorax: Injury on the wall already described. Left anterior chest wall is contused.
Left pleura is punctured. There is blood in the plural cavity.
Left lung is punctured. Rest of the thoracic organs are pale and healthy.*
- e. Abdomen: Abdominal organs are pale and healthy stomach is healthy and empty.*
- f. Cranium and Spinal canal: Injury to the scalp already described in injury No. 3. Rest of the organs are pale and healthy.*
- g. Opinion:
Death was due to shock and hemorrhage as a result of injuries to the chest as described. The injuries were ante mortem caused by sharp, pointed cutting weapon and homicidal in nature. Time since death 3-6 hours.*

The said PW-6, was the Doctor who had performed the post mortem examination. He was the then Professor and Head of the Department of Forensic Medicine, GMCH, Guwahati. He had proved his signature in the inquest report (Ext-2) and the post mortem report (Ext-3). In his cross-examination, the

PW-6 had stated that he only found one punctured wound which is mentioned in injury report and that no injury was caused by 4-5 spikes at a time.

15) As per the evidence of PW-1, the accused persons did not pay heed to the objection raised on the construction and engaged in quarrel with the PW-1 and her husband, then the appellant asked his wife to bring the single spike pointed spear with bamboo handle, which was brought and handed over to the appellant, with which he had stabbed on the head of her husband. On the hue and cry made by the PW-1, her brother-in-law rushed to the place of occurrence and then the appellant stabbed the single spike pointed spear with wooden handle on the chest of Basudev Das and he immediately fell down. When on raising hue and cry neighbouring people had gathered there, the appellant had thrown the single spike pointed spear with bamboo handle in his courtyard and ran away from the place of occurrence. The PW-1 had exhibited the said single spiked pointed spear with bamboo handle used by appellant to assault the PW-2 and to give fatal injury to Basudev Das, the deceased as M. Ext.1. In her cross-examination, the PW-1 had stated that the appellant and Kalpa Das had dug a big hole measuring one cubit by one cubit in size and she had denied that the deceased had brought the single spike pointed spear with bamboo handle from her house and gave it to her husband and instigated him to stab the appellant. It was denied that when the appellant restricted the husband of the PW-1, during the scuffle, the single spike pointed spear with bamboo handle hit the deceased. The PW-1 had also denied that her husband had suffered injury by falling on the earth at the place of occurrence. She had also denied that the single spike pointed spear with bamboo handle belonged to them. She had also denied that after getting the stab injury by single spike pointed spear with bamboo handle, they had pulled it out from the chest of the

deceased. Thus, it is seen that the statement made by the PW-1 during her examination-in-chief could not be demolished during her cross examination.

16) The PW-2 had given statement in her examination-in-chief similar to that of PW-1. He was also cross-examined on similar lines. However, the evidence-in-chief of the PW-2 could not be demolished during his cross examination. PW-2 had stated that his wife had gone to the backside of their house to clean the area and saw the appellant and Kalpa Das digging earth on their land and informed the PW-2, who went there and requested them to dig earth on their land, to which they did not pay any heed to the objection made by the PW-2. The appellant then asked his wife to bring single spike pointed spear with bamboo handle, which she brought and handed over to the appellant and the appellant stabbed him on his forehead and he received bleeding injury. On seeing blood, his wife made hue and cry and then his younger brother rushed to the place of occurrence and on his arrival, Kalpa Das restrained his brother with a *khanti* (used for digging earth) and the appellant stabbed the single spike pointed spear with bamboo handle in the left side of the chest (heart) of Basudev Das (deceased), who fell down after receiving injury. On hue and cry made by him and his wife, neighbouring people gathered there and the appellant fled away from the place of occurrence. The villagers took him and his brother by 108 ambulance to GMCH, where his brother was declared brought dead. He also identified the single spike pointed spear with bamboo handle as M.Ext.1. During his cross-examination, the PW-2 had stated that at the time of quarrel between him and the appellant, except for his wife, wife of appellant and Kalpa Das none were present. He had denied that at his call, the deceased had brought the single spike pointed spear with bamboo handle from his house and handed over to him to teach the appellant a lesson. It was denied that

while attempting to stab the appellant, the appellant had restricted him and during the scuffle the single spike pointed spear with bamboo handle hit the deceased at his chest. It was denied that the appellant did not give the spear blow to the deceased intentionally to kill him. He denied that the single spike pointed spear with bamboo handle belonged to him. The other suggestions made to the PW-2 were denied by him.

17) As per the examination-in-chief of PW-3, he was an eye witness. The informant is his sister-in-law. On 15.04.2013 at 9.30 AM, when he was going from his new house to his native house on account of *Bihu*, which is at about 1-2 minutes distance by cycle, he heard hue and cry and on reaching home he saw his brother Madan Das in injured condition with bleeding injury on the right side of his head and the appellant was pressing the chest of another brother Basudev, the deceased, with a pointed and piercing weapon locally called *ephalia*. He had stated that the incident had taken place inside their compound and had also stated that at the place of incident, Namita Das and Kalpa Das, the wife and nephew of the appellant were present and that Kalpa Das was armed with a spade like weapon. He had further stated that after hearing hue and cry 3-4 neighbours assembled there and on seeing them the appellant had ran away from the place of occurrence after throwing away the piercing instrument. Thereafter, they had laid down Basudev, who had sustained piercing injury on his left chest, in a bench, provided him with water and called "108" ambulance, taken to GMCH, Guwahati, where the doctors declared him brought dead. In his cross-examination, he had stated that his native house is 1 km from his present house and denied that it took 10 minutes to cover the distance by bicycle. He denied all the suggestions given to him to question the veracity of his statements made during examination-in-chief. He denied that his

injured brother went to assault the appellant with a piercing/pointed weapon (i.e. *ephalia*) and Basudev also went to help Madan Das and then a scuffle took place amongst them and in the melee, Basudev and Madan Das sustained injuries.

18) PW-4 had stated that the informant was his niece. He had visited her niece on 15.04.2013 at around 9.00 AM with some Bihu gifts and at about 9.00 or 9.30 AM he heard a hue and cry behind the house of the informant and on coming out of the house he had reached the back courtyard and saw Madan Das, husband of the informant running towards the house with bleeding injuries in his forehead and blood oozing from his wound. He then noticed that Basudev Das, brother of Madan Das lying on the backside of the house and the accused was pressing a pointed iron weapon against the left chest of Basudev Das. On seeing him, the accused brought out the pointed weapon from the chest of Basudev and started running towards *basti*. He saw Basudev lying down on ground with bleeding injuries. Thereafter, they brought Madan Das and Basudev Das to GMCH, Guwahati by 108 ambulance, where the doctors declared Basudev as brought dead and provided treatment to Madan Das. He proved his signature in inquest report (Ext.2). During his cross examination, he had denied the suggestions given to him and thus, the statement made in examination-in-chief could not be demolished.

19) PW-5 had stated in his examination-in-chief that he is distantly related to the informant and her husband. He had stated that the incident had occurred on 1st *Bohag* i.e. on 15.04.2013 and on the occasion of *Bihu*, he had gone to their house at 8.00 am to give some gifts *Bihuwan*. Then, he had gone to the house of his aunt (elder sister of his father), which is

adjacent to the house of Madan Das and during his stay at his aunt's house, he had heard hue and cry towards the house of the informant and from the road he saw appellant assaulting Madan Das with a sharp weapon when he had protested against erecting a post on the boundary between the land of the appellant and Madan Das and at that time the appellant was accompanied by his wife and nephew Kalpa Das. Thereafter, when Basudev, brother of Madan came to the rescue of Madan, the appellant pressed a pointed weapon against the chest of Basudev and then when they raised an alarm, on seeing them, appellant took out the pointed weapon from the chest of Basudev and started running towards the *basti*, throwing the weapon. Thereafter, they lifted Basudev and when he was laid down, they noticed blood oozing out from the wound on the chest of Basudev.

20) The PW-7 had not seen the incident, but on hearing hue and cry, he had come to the place of occurrence and found Madan Das and Basudev Das lying near the boundary with bleeding injuries and noticed bleeding injuries on the right side of head of Madan Das and chest injury in the left chest of Basudev Das with bleeding. He along with three persons lifted and laid Basudev on a bench, provided him with water and then one Ghanashyam Das called 108 ambulance, which arrived after half an hour and both the injured were taken to GMCH for treatment. Thereafter, at about 11 – 11¹/₂ AM, the wife of Madan Das went to Hajo PS and lodged an FIR. The police had arrived after about half an hour and when police enquired about the weapon of offence, PW-7 brought the *ephalia* (pointed weapon) with bamboo handle which was lying near the place where both the injured were lying and it was stained with blood and handed it to the police, who seized the same in their presence and prepared a seizure list,

which was marked as Ext.4 and he proved his signature thereon. In his cross examination, he had stated that he had not seen the seized weapon in Court that day and also stated that *jowar* and *ephalia* were two different type of instrument used for catching fish and that in *ephalia* there is only one point and in *jowar*, there were many prongs/points.

21) The PW-8 was the Doctor, who had stated in his examination-in-chief that on 15.04.2013, while he was posted as Casualty Officer at GMCH, Madan Das was examined by doctor on duty and that he had a history of physical assault with no history of LOC, vomiting and ENT bleeding. On local examination, he was found well oriented and there was lacerated wound over right side of head 5 cm X 2 cm, clear cut injury on the left side of forehead of size 2 cm X 2 cm, having soft tissue injury following assaults with head injury, which was simple in nature and caused by blunt or sharp weapon. The PW-8 had stated to the effect that he was the Casualty Officer on 15.04.2013 and he furnished the report and that the patient was discharged on the same day after treatment.

22) PW-9 was the witness of seizure of *ephalia* vide Ext.4 and proved his signature thereon. In his cross-examination, he had stated that the police had seized the *ephalia* and the police showed him the same and took his signature and that he did not know who had handed over the *ephalia* to the police and from where the police had recovered the weapon. He also stated that he did not see the weapon in Court.

23) The PW-10 was the sister's husband of the informant and in his cross-examination, he had stated that he did not see the incident and had also stated that in *ephalia* there is only one spike is present and in *jowar*, several

spikes are present. The PW-10 had also stated in his cross-examination that he was a hearsay witness and heard the incident from others. The PW-11 and PW-12 also did not see the incident and their cross-examination was declined.

24) The PW-13 is the I.O. of the case. He had exhibited Ext.1 to Ext.4 and Ext.6 to Ext.12, as well as his signatures on Ext. nos. 1, 3, 6, 7 and Ext.12 and proved the signature of Abul Kalam Azad (i.e. PW-14) in Ext.8, to Ext.10. He had identified the weapon of assault (M.Ext.1) in Court, referred in Ext.4. In his cross-examination, he had stated that in his sketch map, Ext. 7, there is no indication that there were houses of other co-villagers except the house of the informant and the accused. He had denied that since he has not mentioned the names of any villagers in his sketch map, he has not examined any of the villagers during investigation. He had also denied that he had not examined any of the residents of the place of occurrence during his investigation. He had stated that as per sketch map, place of occurrence is mentioned as 'A' is within the house campus of the accused Moneswar Das. He had also stated that the hole which was dug by the accused was on the boundary touching the boundary between the parties and that he had not specifically mentioned in his sketch map wherefrom the weapon of offence was recovered, but had stated that mentioned weapon was recovered from the place of occurrence i.e. as mentioned at A of the sketch map. He had stated that he had recovered the weapon of offence from the place of occurrence and that in the FIR, the weapon of offence was recorded as *jowar* (a multiple spikes weapons), but he had recovered single spike weapon which is called *Ephalia* which was seized in the present case. He had denied that the weapon recovered by him is not the weapon of offence as it has not been mentioned in the FIR. He had stated that in Ext. 4, he has not mentioned that weapon recovered was

stained with blood, and denied that Material Ext. was not used in the alleged offence as it does not contain any blood stain. He had also stated that he had not collected the finger print of the accused during his investigation, but stated that the weapon of offence was not sent for forensic examination to prove the finger print of any person including the accused. It was stated that during investigation and after recovery of weapon, he had not brought the seizure list and Material Ext. to the Court for signature. He had stated that he had not seized any blood stained clothes of the informant, and stated that he had not collected any blood clots from the place of occurrence. He had stated that he could not collect sufficient evidence against accused Kalpa Das and Namita Das and accordingly, charge sheet has not been submitted against them. It was stated that the P.W. 1 had not stated before him that during quarrel accused Moneswar Das asked his wife Namita Das to bring a single spike pointed spear with bamboo handle which she brought and handed over the same to Moneswar Das, and that the P.W. 1 had not stated before him that one Kalpa Das with one iron khanti obstructed Basudev Das on his arrival at the place of occurrence. He had stated that the P.W. 2 had not stated before him that at the time of occurrence Nilima Das and wife of the accused were present at the place of occurrence, and that the P.W. 2 had not stated before him that accused asked his wife to bring the *Ephalia* which his wife brought and handed over the same to him, and that the P.W. 2 had not stated before him that one Basudev Das was not intervening the accused with a *khanti*. He had also stated that the P.W. 3 did not state before him that he saw the accused placing the weapon of offence on the chest of deceased Basudev Das, and that the P.W. 3 had not stated before him that he saw the *khanti* in the hand of Kalpa Das, or that he had witnessed the blood oozing injury on the head of one Madan Das. He

further stated that the P.W. 3 had not stated before him that when he and other three/four villagers arrived at the place of occurrence, accused Moneswar disappeared from the place of occurrence, and that the P.W. 3 had not stated before him that incident took place in their house campus. He had stated that he had not examined P.W. 4 Jyotish Ch. Das and P.W. 5 Dhiren Das and those were examined by another I/O SI A.K. Azad. It was denied that before filing the present FIR there was an ejahar lodged by Moneswar Das which he refused to accept. It was denied that on the date of occurrence, there was a quarrel between Madan, Moneswar and Basudev and in the scuffle, accidentally, the weapon called the weapon for fishing has caused injury on the stomach of the deceased. It was denied that he had not properly investigated the case and wrongly submitted the charge sheet.

25) The PW-14 was not the I.O. of the case, but on death of the victim at GMCH, he was entrusted to prepare inquest report and other formalities and he requisitioned Executive Magistrate from the Deputy Commissioner for conducting inquest, and an Executive Magistrate was deputed, who went to GMCH and prepared inquest report. He had examined the witnesses who were present during inquest and issued a forwarding letter for conducting post-mortem of the dead body and he proved Ext.8 to Ext.10 and his signature thereon. He denied that PW-4 had stated before him that he saw the Madan Das running towards his house with injury on his forehead or that he saw the appellant pressing pointed weapon on the chest of the deceased and on seeing him, the appellant brought out the weapon from the chest of the deceased and ran away. He had admitted that PW-5 did not state before him that on hearing hue and cry he came out of his aunt's house and saw the appellant assaulting Madan and he did not state that after withholding the

weapon from the victim the accused had fled away and ran towards the *basti*.

26) Therefore, the medical opinion of injury is found to be consistent with the ocular evidence of PW-1, PW-2, PW-4 and PW-5 that the deceased had succumbed to injury caused by the single spike pointed spear (M.Ext.1) by which the appellant had stabbed the deceased at his chest.

27) The prosecution has been able to establish that the appellant along with Kalpa Das were digging a pit/hole in the boundary between his land and land of the PW-2. The PW-2 objected to such construction. Thereupon, the appellant asked Namita, his wife to bring the single spike pointed spear with bamboo handle, which was brought and handed over to the appellant, with which he had stabbed on the head of PW-1's husband. On hearing the hue and cry by PW-1, Basudev Das, her brother-in-law rushed to the place of occurrence and then the appellant stabbed the single spike pointed spear with wooden handle on the chest of Basudev Das and he immediately fell down. When on raising hue and cry neighbouring people had gathered there, the appellant had thrown the single spike pointed spear with bamboo handle in his courtyard and ran away from the place of occurrence. Thus, not only the prosecution has been able to establish the chain of events leading to the homicidal death of Basudev Das, the deceased, but the prosecution has also been able to prove the act of the appellant to make preparation of murder by asking his wife to bring the *ephalia*, which was brought and handed over to the appellant, which was used to inflict injury to the PW-2 and caused death of the deceased.

28) Therefore, the Court does not find any ground to interfere with the impugned judgment of convicting the appellant or in respect of the

sentence awarded to him.

29) Therefore, this appeal fails and the same is dismissed.

30) Return back the LCR.

31) Let a free copy of this judgment and order be communicated to the appellant through the Jail Superintendent concerned.

JUDGE

JUDGE

Comparing Assistant