

GAHC010119692017



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

CRIMINAL APPEAL [I] NO. 10/2017

Buburam Deka

.....Appellant

-VERSUS-

The State of Assam

.....Respondent

Advocates :

Appellant	: Mr. N.J. Das, Legal Aid Counsel
Respondent	: Mr. K.K. Das Additional Public Prosecutor, Assam.

Date of Hearing, Judgment & Order : 06.06.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

This criminal appeal from Jail is directed against a Judgment and Order dated 22.12.2016 passed by the Court of learned Sessions Judge, Nalbari in

Sessions Case no. 129 of 2011. By the Judgment and Order dated 22.12.2016, the accused-appellant has been convicted for the charge of murder under Section 300, Indian Penal Code [IPC]. For finding him guilty for the charge of murder, the accused-appellant has been sentenced under Section 302, IPC to undergo rigorous imprisonment for life and to pay a fine of Rs. 20,000/-, in default of payment of fine, to undergo simple imprisonment for another two months. It has been ordered that the period of detention already undergone by the accused-appellant is to be set-off against the period of sentence.

2. The investigation commenced pursuant to institution of a First Information Report [FIR] by one Ajit Saloi [P.W.1] as the informant before the Officer In-Charge, Tihu Police Station at around 09-20 a.m. on 18.02.2011. On receipt of the FIR, the Officer In-Charge registered the same as Tihu Police Station Case no. 14/2011 for the offence under Section 302, IPC.

3. In the FIR [Ext.-1-1], the informant [P.W.1] had inter alia stated that Kaniska Saloi, who was the informant's younger brother, had a grocery shop by the side of the road in front of the residence of the informant and Kaniska Saloi. At about 07-45 a.m. on that day, that is, on 18.02.2011, Kaniska Saloi was having a conversation with one Ambika Barman [P.W.4], who used to reside in front of the informant's house. At that point of time, the accused coming to the place of occurrence with a *dao* on his hands, stopped near them. After a brief conversation amongst the three, the accused had suddenly hacked Kaniska Saloi on his neck from behind with the *dao*. It was further mentioned that after killing Kaniska Saloi, the accused ran away from the place. Expecting that his brother would survive the assault, the informant and others took him to Tihu PHC for treatment. But the doctors there declared Kaniska Saloi dead.

4. Upon registration of the FIR, the Officer In-Charge, Tihu Police Station entrusted the investigation of the case to one Bhaben Das [P.W.15], a Sub-Inspector of Police, attached to Tihu Police Station. On being entrusted and after making enquiry with the informant [P.W.1], the Investigation Officer [I.O.] of the case, P.W.15 proceeded to Tihu Hospital where the deadbody of the deceased was kept. The I.O. [P.W.15] found the deadbody with blood smeared in the wearing apparels. Having noticed a deep oblique cut injury on the neck below ear, the I.O. [P.W.1] took a photograph of the deadbody [Material Ext.-1]. Thereafter, the I.O. [P.W.15] proceeded to the place of occurrence [P.O.], that is, the spot in front of the grocery shop of the deceased where the alleged incident occurred. The I.O. also prepared a Sketch Map of the P.O. [Ext.-15]. A *dao* smeared with blood was also recovered from another place nearby vide a Seizure List [Ext.-10] in presence of witnesses. The statements of a number of witnesses including the seizure witnesses, were recorded by the I.O. [P.W.15] under Section 161, CrPC. In the meantime, an Executive Magistrate performed the inquest on the deadbody of the deceased and prepared an Inquest Report [Ext.-10]. The I.O. seized a number of articles vide two seizure memos, Seizure List [Ext.-2] and Seizure List [Ext.-14] from the P.O. After holding inquest, the deadbody was forwarded to Swahid Mukunda Kakati Civil Hospital, Nalbari for post-mortem examination. The post-mortem examination of the deadbody of the deceased was performed on 18.02.2011 itself by the then Senior Medical & Health Officer, Dr. Ramesh Chandra Goswami [P.W.8], Swahid Mukunda Kakati Civil Hospital, Nalbari and the Autopsy Doctor [P.W.8] prepared a Post-Mortem Examination [PME] Report [Ext.-9] recording his findings therein. The accused was arrested from Tihu town and after being arrested, he was produced before the court at Tihu. The I.O. [P.W.15] also got the statements of a number of witnesses recorded under Section 164, CrPC. The *dao* seized vide Seizure List, Ext.-10 was forwarded to the Forensic Science Laboratory [FSL], Assam at Guwahati for examination along with the articles seized vide the other Seizure List [Ext.-14].

5. The I.O. [P.W.15] after completing the investigation into the case, Tihu Police Station Case no. 14/2011 [corresponding G.R. Case no. 14/2011] submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 27/2011 on 30.06.2011 [Ext.-16] finding a prima facie case well established against the accused for the offence of murder under Section 300, IPC. Along with the charge-sheet, the I.O. had inter alia forwarded a FSL Report [Ext.-11]. On receipt of the charge-sheet, the learned Judicial Magistrate, First Class, Tihu caused the appearance of the accused from Jail custody on 26.09.2011. As the copies were ready, the same were furnished to the accused as per the provisions of Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, 1st Class, Tihu committed the case records of G.R. Case no. 14/2011 to the Court of Sessions, Nalbari by notifying the learned Public Prosecutor and by directing the concerned Jail Authority to produce the accused on 01.10.2011 before the Court of Sessions, Nalbari [‘the trial court’, for short].

6. On receipt of the case records of G.R. Case no. 14/2011, the Court of Sessions, Nalbari registered the same as Sessions Case no. 129/2011. On appearance of the accused before it and after hearing the learned Public Prosecutor and the learned defence counsel, the learned the trial court framed the following charge under Section 302, IPC against the accused on 13.12.2011 :-

That you on or about the 18th day of February, 2011 at about 07-45 a.m. at Khudra Makhibaha [Balabori Supa] under Tihu Police Station in the district of Nalbari have committed murder by causing death of Sri Konishka Saloi by hurting him with dao on his neck from his backside and thereby committed an offence punishable under Section 302, IPC and within my cognizance.

7. When the charge was explained and read over to the accused, the accused abjured his guilt and claimed to be tried. During the course of the trial, the prosecution side examined fifteen nos. of witnesses; exhibited sixteen nos. of documents; and one material exhibit to bring home the charge against the accused.
8. The witnesses examined by the prosecution were :- [i] P.W.1 – Sri Ajit Saloi; [ii] P.W.2 – Sri Narayan Barman; [iii] P.W.3 – Sri Nripen Barman; [iv] P.W.4 – Sri Ambika Barman; [v] P.W.5 – Smti. Rina Barman; [vi] P.W.6 – Smti. Himani Saloi; [vii] P.W.7 – Sri Rubul Barman; [viii] P.W.8 – Dr. Ramesh Chandra Goswami; [ix] P.W.10 – Sri Sanatan Kalita; [x] P.W.11 – Sri Jayanta Saloi; [xi] P.W.12 – Sri Sankar Chandra Rabha; [xii] P.W.13 – Sri Bonajit Deka; [xiii] P.W.14 – Sri Hemanta Kumar Chakrabarty; and [xiv] P.W.15 – Sri Bhaben Das. The documents exhibited by the prosecution in the trial were as follows :- [i] Ext.- 1 : FIR; [ii] Ext.-2 : Seizure List; [iii] Ext.-3 : Statement of P.W.2 recorded under Section 164, CrPC; Ext.-4 : Statement of P.W.3 recorded under Section 164, CrPC; Ext.-5 : Statement of P.W.4 recorded under Section 164, CrPC; Ext.-6 : Statement of P.W.5 recorded under Section 164, CrPC; Ext.-7 : Statement of P.W.6 recorded under Section 164, CrPC; & Ext.-8 : Statement of P.W.7 recorded under Section 164, CrPC; [iv] Ext.-9 : Post-Mortem Examination [PME] Report; [v] Ext.-10 : Inquest Report; [vi] Ext.-10 : Seizure List; [vii] Ext.-11 : FSL Report; [viii] Ext.-12 : FSL Report; [ix] Ext.-13 : Statement P.W.13 recorded under Section 164, CrPC; [x] Ext.-14 : Seizure List; [xi] Ext.-15 : Sketch Map of the P.O.; and [xii] Ext.-16 : Charge-Sheet.
9. After closure of the prosecution evidence, the accused was examined under Section 313, CrPC. When the accused was asked whether he would adduce defence evidence, the accused answered in the negative. After hearing the learned counsel for the parties and upon evaluation of the

evidence/materials on record, the learned trial court finding the accused guilty of the offence of murder, heard him on the point of sentence under Section 235[2], CrPC. Thereafter, the accused has been sentenced for the offence of murder in the manner, mentioned above.

10. We have heard Ms. N.J. Das, learned Amicus Curiae for the accused-appellant and Mr. K.K. Das, learned Additional Public Prosecutor for the respondent, State of Assam.
11. Mr. Das, learned Amicus Curiae appearing for the accused-appellant has submitted that out of the non-official witnesses, only one of them had claimed to have witnessed the alleged incident. Mr. Das has contended that the learned trial court had ignored the pleas of the defence taken during the course of the trial. It is his contention that the accused was a daily wage labour and as a part of his occupation, he used to carry a *dao* in his hands. It was normal for the accused to go out of his residence in the morning with a *dao* in his hands. The accused used to go in the morning searching for works. Thus, it cannot be said that the alleged incident was pre-meditated. He has further pointed out that there was only one single injury found on the deadbody of the deceased. He has further submitted, in the alternative, that element of provocation can be inferred from the evidence/materials on record and therefore, the offence cannot be held to be murder of the first degree.
12. Mr. Das, learned Additional Public Prosecutor appearing for the State has supported the Judgment and Order of conviction and sentence passed by the learned trial court. He has strenuously submitted that there is no scope for interference in the case in hand. Though there was one eye-witness, but his testimony was consistent and reliable all throughout and his testimony was amply corroborated by the testimonies of the other witnesses and documentary evidence. The other prosecution witnesses had seen the

accused either just prior to the incident or just after the incident. The supporting evidence of the prosecution witnesses had clearly established the case of the prosecution. It is his submission that though there was only a single blow but that blow was by a *dao* and from the nature of injury, as reported from the PME Report, such a blow was sufficient in the ordinary course to cause death. As such, the only conclusion that can be drawn from the evidence/materials on record is that the accused had committed the offence of murder. According to him, the defence pleas sought to be urged by the learned Amicus Curiae were feeble in nature as there were no supporting materials to substantiate such defence pleas.

13. We have given consideration to the submissions of the learned counsel for the parties and have also perused the evidence/materials available in the case records of Sessions Case no. 14/2011, in original. We have also gone through the testimonies of the witnesses as well as the documentary evidence led during the course of the trial and the decisions cited at the Bar.
14. It was the witness, Ambika Barman [P.W.4] who had claimed to have witnessed the incident. In his testimony, P.W.4 stated that he was a daily wage labourer and his house was situated in front of the house of the informant [P.W.1] and the deceased with a road in between. P.W.4 deposed that the incident occurred in front of his house, which was at Balabori Chuburi. The shop of the deceased was nearby. At around 07-30/07-45 a.m. on the relevant day, he and Kaniska Saloi were standing in front of Kaniska Saloi's shop [P.O]. At that time, the accused came from the western side and stopped near them. When he [P.W.4] asked the accused whether he would go for work, the accused replied that as he was not feeling well, he would not go for work. P.W.4 stated that he and the accused sometimes used to work together. Thereafter, both of them proceeded to the residence of Narayan Barman [P.W.2] to oversee the work and after overseeing the work there, they returned to the P.O. again. Then the accused asked him to

prepare tobacco. When he [P.W.4] was busy preparing tobacco, the accused gave a blow on the backside of Kaniska Saloi by the *dao*, which he was carrying in his hand. After giving the blow, the accused ran away from the P.O. towards the western side with the *dao* in his hand. Finding the injury on Kaniska Saloi's neck, he [P.W.4] started raising alarm. On hearing his alarm, the wife of Kaniska Saloi and his wife, Rina Barman [P.W.5] came to the P.O. immediately. People from the neighborhood also gathered at the P.O. immediately thereafter. The victim was thereafter, taken to the hospital in an auto rickshaw. P.W.4 further stated that his statement was recorded by Police as well as in the court. He exhibited his statement recorded under Section 164, CrPC as Ext.-5 with his signature therein as Ext.-5[1].

15. A number of suggestions were put to P.W.4 by the defence and those suggestions were categorically denied by this witness. Some of the suggestions were with regard to his previous statement. It is to be noted that when the I.O. was examined as P.W.15, he was not confronted in any manner with any marked part of the previous statement of P.W.4 in order to bring out any material contradiction or omission, on record, in the evidence of P.W.4 given before the court with his previous statement. In such view of the matter, further discussion on this aspect appears not necessary. Despite cross-examination at length, nothing substantial was elicited from this witness to discredit his testimony.
16. On evaluation of the testimonies of the prosecution witnesses – P.W.1, P.W.2, P.W.3, P.W.5 & P.W.7 vis-à-vis the testimony of P.W.4, it is noticed that these prosecution witnesses had supported and corroborated the case of the prosecution and the testimony of P.W.4 on material points.
17. P.W.1, Ajit Saloi was the informant and an elder brother of the deceased, Kaniska Saloi. He used to reside in the same house with the deceased. P.W.1 testified that the incident occurred at about 07-45 a.m. on 18.02.2011. He

has stated that just prior to the incident, when he was going to another place from home, he saw the accused proceeding towards east direction with a *dao* in his hand. When he returned, he saw that the accused and P.W.4 were in conversation with his younger brother in front of the grocery shop of his younger brother. P.W.1 went inside his residence behind. When he was inside his residence, he heard the cry of P.W.4 that the accused had inflicted a blow by the *dao* on his younger brother. He immediately came to the P.O. and saw the accused running towards the western direction with the *dao* in his hand. He stated that he found a cut injury on the backside of the head of his younger brother with blood oozing out of it. P.W.4 was holding his younger brother at that point of time and his younger brother's clothes and hands were soaked with blood. His younger brother was thereafter, taken to Tihu Hospital but the doctor's there declared him already dead. P.W.4 also testified about the seizure of *dao*. He heard that the accused had inflicted the injury on his brother when his brother asked the accused to pay the balance amount. In cross-examination, P.W.4 stated that he did not witness the incident of inflicting the blow on his brother by the accused as he was not present at the P.O. at that time.

18. Like P.W.1, P.W.2 also testified that the incident had occurred at 07-45 a.m. on 18.02.2011. P.W.2 was a co-villager. P.W.2 deposed about visiting his residence by the accused at about 07-30 a.m. on the relevant date. P.W.4 testified that at about 07-30 a.m., the accused came to his residence and told him that he would go for work in another place. At that time, the accused was holding a *dao* in his hand. After telling him so, the accused proceeded towards the western side. It was after about ten minutes, he found the deceased with a cut injury on his backside, with P.W.4 holding him. He stated that it was reported by P.W.4 to him that it was the accused who gave the blow on the deceased by *dao*. P.W.2 stated that the *dao* was recovered from the backside of the house of the accused. He stated that he was a witness to the seizure of articles seized vide Seizure List, Ext.-2. P.W.2

exhibited his statement recorded under Section 164, CrPC as Ext.-3. When P.W.2 was cross-examined, he stated that the accused used to earn his livelihood as a daily wage labourer and he used to carry a *dao* whenever he was to go for working. He stated that the accused used to purchase articles from the shop of the deceased on credit sometimes.

19. P.W.3, Nripen Barman was a relative of the accused. He knew the accused, the deceased and the informant. On the incident, P.W.3 deposed that the incident had occurred before 08-00 a.m. on 18.02.2011. He testified that he saw the deceased near the shop with the accused and P.W.4. At that time, he was proceeding towards the shop of the deceased. Prior to reaching the P.O., he heard sounds like cutting of banana tree and the alarm raised by P.W.4. He then saw the accused running with a *dao* in his hand. He stated that immediately thereafter, P.W.2, P.W.13 and others came to the P.O. P.W.3 was told by P.W.13 that the accused after leaving the *dao* near his [P.W.13] house ran away. P.W.3 also testified that the injury on the deceased was on the backside of the neck. P.W.3 was a witness to the Seizure List, Ext.-2. He further stated that the prior to the incident, the accused was once convicted in a theft case and the accused was sentenced for two years for that offence. P.W.3 exhibited his statement recorded under Section 164, CrPC as Ext.-4, with his signature therein as Ext.-4[1]. A number of suggestions were put to this witness in relation to his previous statement recorded by the I.O. But when the I.O. [P.W.15] was examined, no marked part from the previous statement of P.W.3 was put to the I.O. after P.W.3 categorically denied those suggestions. The defence also made a suggestion to this witness that when the accused was proceeding towards his residence, it was the deceased who gave a kick from the backside and in return, the accused moved his *dao* which accidentally hit the deceased. The suggestion was denied by P.W.3.

20. P.W.5, Rina Barman is the wife of P.W.4. She stated to have reached the place of occurrence at 07-30 a.m. hearing alarm raised by her husband [P.W.4] to the effect that 'Buburam had cut'. P.W.5 testified that she saw the accused running away towards the western side with a *dao* in his hand. P.W.5 corroborated the version of the previous prosecution witnesses, discussed hereinabove, that the injured was kept held by her husband [P.W.4]. P.W.5 further stated that blood was oozing out from the neck of the deceased. P.W.5 like the other witnesses, stated that the deceased was taken to hospital immediately thereafter, but the doctor at the hospital declared him already dead. P.W.5 also exhibited her statement recorded under Section 164, CrPC as Ext.-6 with her signature therein as Ext.-6[1]. A number of suggestions were put to P.W.5 and those suggestions were categorically denied by P.W.5.
21. P.W.6, Himani Saloi is the wife of the informant [P.W.1] and was the sister-in-law of the deceased. P.W.6 also stated that the incident occurred at 07-45 a.m. on the relevant day and on the road in front of the house of the deceased. At the time of the incident, she was standing in the courtyard. P.W.6 testified that she heard the alarm raised by P.W.4 to the effect that 'Buburam had cut'. Then, she ran towards the road and saw the accused running away from the P.O. towards the western side of the road with a *dao* in his hand. P.W.4 was seen to have been holding the deceased with his wife [P.W.5] and her husband [P.W.1] standing nearby. P.W.6 exhibited her statement recorded under Section 164, CrPC as Ext.-7 with her signature therein as Ext.-7[1]. When P.W.6 was cross-examined by defence, P.W.6 reiterated that she saw the accused running towards the western side. P.W.6 was given a suggestion that the accused owed money to the deceased as against purchase of goods from the shop of the deceased on credit. In reply, P.W.6 stated that she did not have any knowledge in that regard. P.W.6 also denied a suggestion that she did not state before the Police that the accused had owed money to the deceased against purchase of goods on credit and

when accused demanded the same, the accused gave the *dao* blow on the deceased. No marked part from the previous statement of P.W.6 was put to the I.O. [P.W.15] when he was cross-examined by the defence in order to bring out any material contradiction/omission on record.

22. P.W.7, Rubul Barman was an owner of a Tempo. He deposed about taking the deadbody of the deceased to Swahid Mukunda Kakati Civil Hospital, Nalbari for post-mortem examination on 18.02.2011. He exhibited his statement recorded under Section 164, CrPC as Ext.-8 with his signature therein as Ext.-8[1].
23. The statements of the prosecution witnesses – P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 and P.W.7 – were recorded under Section 164, CrPC and the prosecution exhibited those previous statements as Ext.-4, Ext.-5, Ext.-6, Ext.-7, Ext.-8 and Ext.-9 respectively. It is trite law that the statements recorded under Section 164, CrPC are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witnesses. The prosecution witnesses – P.W.2, P.W.3, P.W.4 and P.W.5 – were not related to the deceased. Out of them, the prosecution witness, P.W.3 was related to the accused whereas the prosecution witnesses, P.W.6 and P.W.7 were related to the deceased. There is no evidence/materials on record to the effect that any of these prosecution witnesses was adversely disposed towards the accused for any reason to be branded him/her as an interested witness. The prosecution witnesses – P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 – are co-villagers of the accused and the deceased and, as such, their presence or their arrival at the P.O. immediately after the incident was quite natural. The prosecution side has brought the previous statements of these prosecution witnesses for the purpose to bring home the point that these prosecution witnesses were consistent throughout supporting the prosecution case that the at the time and place of occurrence there was an assault by the accused on the deceased with a *dao* on a vital part on the

person of the deceased leading to his instantaneous death. Despite the previous statements of these prosecution witnesses being exhibited by the prosecution, the defence did not make any effort to contradict the testimonies of these prosecution witnesses with their previous statements.

24. P.W.10, Sanatan Kalita being a co-villager of the accused, the deceased and the informant, testified that he knew all three of them. As regards the P.O., P.W.10 stated that the incident occurred on the road on Balabori Suburi road of Khudra Makhibaha. He stated that when Police personnel visited the paddy field of one Ghanashyam Barman [not a witness], which was at a distance of half *furlong* from the P.O., he also went there. The Police personnel recovered a blood stained *dao* of about seven inches length from that place and he subscribed his signature in the Seizure List [Ext.-10] prepared in that connection. P.W.10 stated that he did not see the incident of assault.
25. P.W.11, Jayanta Saloi is also a co-villager. Being so, he testified that he knew the accused, the deceased and the informant. As regards the time of incident, P.W.11 stated that the incident occurred at 07-45 a.m. On the date of the incident, when he went out to tether the cows, he saw the accused and P.W.4 proceeding, with a *dao* in the hand of the accused. Later on, he heard that the accused cut a person. On his return, he witnessed that the accused was proceeding with a *dao* in his hand through the field of P.W.13. At the P.O., he saw the deceased lying. P.W.11 stated that a blood stained *dao* was seized by the Police from the paddy field of Ghanashyam Barman and he recognized the seized *dao* to be the *dao*, which he saw in the hands of the accused earlier on the day. P.W.11 was a witness to the Seizure List [Ext.-10], whereby the *dao* was seized.
26. P.W.13, Bonajit Deka deposed that being a co-villager, he knew the informant, the deceased and the accused. P.W.13 further deposed that at

the time and on the date of the incident, that is, at about 08-00 a.m. on 18.02.2011, he was sitting on the verandah of his house. He heard sound of wailing and weeping. Simultaneously, he saw the accused, armed with a blood stained dao, running along his courtyard towards the rear of his house. When P.W.13 asked the accused as to what had happened, the accused said, 'Moi Roh, Moi Roh' [It's me, It's me]. P.W.13 then proceeded to the P.O. P.W.13 heard that the accused had cut Kaniska Saloi. P.W.13 saw Kaniska Saloi being lifted in a Tempo. P.W.13 exhibited his statement recorded under Section 164, CrPC as Ext.-13, with his signature therein as Ext.-13[1].

27. The prosecution witnesses – P.W.11 and P.W.13 – deposed on the point of post-occurrence conduct of the accused. Their testimonies had lent support to the evidence of other prosecution witnesses on the aspect that after the assault the accused ran away from the P.O. with a *dao* in hand. The testimonies of these two prosecution witnesses, P.W.11 and P.W.13 bear relevance from the standpoint of Section 8 of the Evidence Act, 1872.
28. P.W.14, Hemanta Kumar Chakrabarty was a witness to the Seizure List, M.R. no. 11/2011 [Ext.-14], whereby, the I.O. [P.W.15] seized few wearing apparels of the deceased, Kaniska Saloi viz. [1] Blood stained clothes worn by deceased Kaniska Saloi; [2] A pair of ash coloured shorts; [3] A cream coloured vest; and [4] A dark blue coloured T-shirt.
29. After the ocular evidence and the connected documentary and other evidence, it is now necessary to turn to the medical evidence.
30. P.W.8, Dr. Ramesh Chandra Goswami who was posted as the Senior Medical & Health Officer at Swahid Mukunda Kakati Civil Hospital at Nalbari, on 18.02.2011, performed the post-mortem examination on the deadbody of the deceased on 18.02.2011. After performing autopsy on the deadbody of the

deceased, he recorded his findings a Post-Mortem Examination [PME] Report, which he exhibited as Ext.-9. In the PME Report [Ext.-9], he recorded his findings as under :-

I - External appearance :

1. *Condition of subjects tout emaciated, decomposed, etc. :- Deadbody of male of about 37 years, fair complexion, average built, short haired, eyes closed mouth closed, rigor mortis present.*
2. *Wounds-position, and character :- Deep cut wound present in the upper most part of back of neck. Size 15 cm x 2.5 cm x 5 cm. Margin regular blood stained and cervical vertebrae with spinal cord completely cutting vessels of neck.*

* * * * *

V - Muscles, Bones and Joints:

1. *Injury :- As already described in Cloumn No. 1.*
2. *Disease or deformity :- Nil*
3. *Fracture :- 2nd cervical vertebrae fractured*
5. *Dislocation :- Nil*

More detailed Description of Injury or Disease

1. *Deep cut wound over upper part of back of neck, margin blood stained can't be washed out with water ante-mortem wound.*
2. *Spinal Cord completely severed.*
3. *Big vessels injured.*

On the basis of the above findings, P.W.8 opined that the cause of death was shock [neurologic and hemorrhagic] due to injury to the vital fracture [spinal cord and big vessels of neck]. Initially, the defence raised a question on the PME Report, which the witness, P.W.8 had exhibited, as a carbon copy. In reply, P.W.8 stated that Ext.-9 is a carbon copy having original signature.

P.W.8 was again called for re-examination. During re-examination, P.W.8 stated that the PME Report used to be prepared in triplicate. The first copy and the second copy of the PME Report were handed over to Police. During re-examination, he [P.W.8] exhibited the second copy of the PME Report with his signature therein. He further stated that there was a deep cut wound at the upper most part of the back of the neck measuring 15 cm x 2.5 cm x 5 cm. He further stated that the spinal cord of the deceased was found completely severed and a big vessel of the neck was found injured. The defence declined to cross-examine P.W.8 after re-examination.

31. The I.O. [P.W.15] during the course of investigation, seized [i] one wooden handle *dao* of length 46 cm with stain of suspected blood [Sero 2783/A]; [ii] one glass bottle of soil containing stain of blood mix [Sero 2783/B]; [iii] one ash coloured half-pant with stain of suspected blood [Sero 2783/C]; [iv] one cream colour banion with stain of suspected blood [Sero 2783/D]; and [v] one deep sky colour sporting stain of suspected blood [Sero 2783/E]. Those articles seized vide Seizure Lists, Ext.-10 and Ext.-14 were forwarded for serological examination to the Forensic Science Laboratory [FSL]. P.W.12, Dr. Sankar Chandra Rabha who was a Junior Scientific Officer, Serology Division, Directorate of Forensic Science, Assam testified before the learned trial court as P.W.12. In his testimony, P.W.12 deposed about the results of examination on the items forwarded to the FSL. In his testimony, he has stated that he recorded the results of FSL Examination as under :-

1. *Ext. No. Sero 2783/A, Sero 2783/B, Sero 2783/D and Sero 2783/E gave positive test for human blood of Group 'AB'*
2. *Ext. No. Sero 2783/C gave positive test for blood only but its origin and blood Group could not be given due to degradation of blood.*

P.W.12 exhibited the FSL Report as Ext.-11 with his signature therein as Ext.-11[1]. The defence did not cross-examine P.W.12.

32. From the testimony of the Autopsy Doctor [P.W.8] and the Post-Mortem Examination Report [Ext.-9], it has clearly emerged that the deceased sustained a deep cut wound in the upper most part of back of the neck. The size of the wound was 15 cm x 2.5 cm x 5 cm. As a result of the injury, the cervical vertebrae with the spinal cord had completely cut the vessels of the neck. The spinal cord was completely severed and there were injuries in the big vessels. The injury sustained by the deceased was ante-mortem. The cause of death was shock [neurologic and hemorrhagic] and the deceased sustained injury on a vital part of his body. From the injury and the material exhibit, Mat. Ext.-1, it has clearly emerged that the deceased sustained the injury from a sharp edged weapon. The photograph, Mat. Ext.-1 was not challenged in any manner whatsoever by the defence at any point of time.
33. On evaluation of the entire evidence including the testimonies of the prosecution witnesses and the medical evidence, led by the prosecution, which is found consistent to one another, the only conclusion that can be reached is that the deceased met instantaneous death at the P.O. due to the injury sustained on his person. Such kind of injury can be inflicted by a sharp-edged cutting weapon. The *dao* is a sharp-edged cutting weapon. That the accused was present at the P.O. with a *dao* in his hand and that the blow was given by the accused on the deceased have been clearly established and the defence has not been able to bring anything on record to dislodge them during the course of the trial.
34. The offence of culpable homicide is defined in Section 299 of the Indian Penal Code [IPC]. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to

cause death, commits the offence of culpable homicide. Culpable homicide is the genus and the offence of murder its species, meaning thereby, all murders are culpable homicides but all culpable homicides are not murders. The offence of murder is defined in Section 300, IPC, which reads as under :-

300. Murder -

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

35. The Hon'ble Supreme Court of India in *Abdul Waheed Khan @ Waheed and others vs. State of Andhra Pradesh*, reported in [2002] 7 SCC 175, had considered its earlier decisions in *Virsa Singh vs. State of Punjab*, AIR 1958 SC 465, and *State of Andhra Pradesh vs. Rayavarapu Punnayya*, [1976] 4 SCC 382, and the distinction between the offences of

culpable homicide and murder, defined in Section 299, IPC and Section 300, IPC. For ready reference, the relevant excerpts from *Abdul Waheed Khan* are quoted hereinbelow :-

11. *This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of IPC culpable homicide is the genus and 'murder', its specie. ALL 'murder' is 'culpable homicide' but not vice versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.*

* * * * *

15. *For cases to fall within clause [3], it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant Singh vs. State of Kerala, AIR 1966 SC 1874, is an apt illustration of this point.*

16. *In Virsa Singh vs. State of Punjab [AIR 1958 SC 465]* Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause [3]. It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
17. The ingredients of clause 'thirdly' of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows : [AIR p. 467, para 12]
12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly';
First, it must establish, quite objectively, that a bodily injury is present;
Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

18. *The Learned Judge explained the third ingredient in the following words [at p. 468] : [AIR para 16]*

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is

proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

19. *These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh case [AIR 1958 SC 465] for the applicability of clause 'thirdly' is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied i.e. [a] that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and [b] that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.*

20. *Thus, according to the rule laid down in Virsa Singh case [AIR 1958 SC 465] even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration [c] appended to Section 300 clearly brings out this point.*

36. In this connection, the decision in *Pulicherla Nagaraju @ Nagaraja Reddy vs. State of Andhra Pradesh*, reported in [2006] 11 SCC 444, can be referred to. In the said decision, some of the circumstances which are

to be taken note of to draw inference as regards presence of intention, have been mentioned. It has been observed therein that the intention to cause death 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; and [xi] whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.

37. The learned Amicus Curiae has raised a point that as the deceased had sustained only one injury, an intention on the part of the accused to cause death cannot be readily inferred.
38. In this connection, it is also apt to refer to the following observations made in *Jagrup Singh vs. State of Haryana*, reported in [1981] 3 SCC 616, which are made following the ratio laid down in *Virsa Singh* [supra] :-

6. *There is no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting the death must always necessarily reduce the offence to culpable homicide not*

amounting to murder punishable under Section 304 Part II of the Code. If a man deliberately strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause a fracture of the skull, he must, in the absence of any circumstances negating the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death, and the case may be covered by either clause 1stly or clause 3rdly. The nature of intention must be gathered from the kind of weapon used, the part the body hit, the amount of force employed and the circumstances attendant upon the death.

39. The learned Amicus Curiae has raised a plea to the effect that there was an element of provocation from the end of the deceased and it was in response to such provocation, the accused had reacted and the provocation was sudden and grave. To support such plea, the learned Amicus Curiae has drawn attention to the suggestions put by the defence to few of the prosecution witnesses to the effect that the accused used to purchase goods on credit from the grocery shop of the deceased, who was the owner of the grocery shop.
40. Exception 1 to Section 300, IPC has laid down that 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. Explanation thereto has provided that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

41. The Hon'ble Supreme Court of India in *B.D. Khunte vs. Union of India and others*, reported in [2015] 1 SCC 286, has considered the ingredients of Exception 1 to Section 300 of the Penal Code in the following manner :-

12. What is critical for a case to fall under Exception 1 to Section 300 IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:

[1] The deceased must have given provocation to the accused.

[2] The provocation so given must have been grave.

[3] The provocation given by the deceased must have been sudden.

[4] The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and

[5] The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control.

42. Taking into consideration the afore-mentioned ingredients vis-à-vis the evidence/materials on record of the case in hand, we find that the plea of grave and sudden provocation is not to be accepted. If a person buys goods from a shop on credit, then such a person at all point of time thereafter, has the knowledge that he owes money to the shop owner. It is natural that when the shop owner meets such a person, he would ask as to when he would get his money against the goods delivered to the person on credit. For the person also such a query from the shop owner is an expected one. When something is expected, it cannot be sudden. Thus, there cannot be any

element of grave and sudden provocation even if the deceased as the shop owner had made a query to the accused as to when he would be paying his money against the goods purchased on credit. *Arguendo*, there is nothing in the evidence/materials on record that the deceased had, apart from asking the money, provoked the accused in any manner whatsoever. Noticeably, the accused did not offer any kind of explanation during his examination under Section 313, CrPC in that connection.

43. It is, thus, clear that in order to find out whether the act will come within the scope and ambit of Clause 'thirdly' of Section 300, IPC, some of important factors which are required to be considered to ascertain about the intention, are the kind of weapon used, the part of the body hit, the amount of force employed, etc. From the evidence/materials on record, it has unerringly emerged that at the time of occurrence, the accused was carrying a *dao*, a sharp-edged cutting weapon. There is conclusive evidence that it was the accused who had inflicted the bodily injury on the person of the deceased at the P.O. at the time and on the date of the incident. The bodily injury was inflicted on a vital part of the person of the deceased, that is, the back side of the neck. It has also emerged that the blow was struck by the accused with the intention to cause the particular injury. Even if there was a single blow by the *dao*, but from the ferocity and the force with which the blow was struck and the suddenness of the attack, the only conclusion possible to be drawn is that the accused had struck the blow with the intention to cause that particular bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause death of a person and as a result, the deceased met his death instantaneously. The law is well settled that even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would still be murder. Illustration [c]

appended to Section 300, IPC has clearly made this point and it reads as under :-

Illustration [c] :

A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

44. Taking into consideration the facts and circumstances obtaining in the case in its entirety, as discussed above, and for the reasons assigned therein, we are of the clear view that the case clearly falls under Clause 'thirdly' of Section 300 of the Penal Code, which is punishable under Section 302 of the Penal Code. Therefore, we find no ground, not to speak of good and sufficient ground, to interfere with the conclusion recorded by the learned trial court for the charge of murder in the case in hand. Resultantly, the criminal appeal is found to be bereft of any merit. Consequently, affirming the Judgment and Order of Conviction and Sentence passed by the learned trial court in Sessions Case no. 129/2011, the appeal is dismissed.
45. Before parting with, we reiterate the recommendation made by the trial court for awarding adequate compensation to the victim, that is, the wife of the deceased under Section 357A, CrPC. The District Legal Services Authority, Nalbari shall consider the matter of granting compensation to the victim as per the extant Victim Compensation Scheme, framed under Section 357A, CrPC.
46. This Court records its appreciation for the assistance rendered by the learned Legal Aid Counsel. The learned Legal Aid Counsel is to be paid remuneration as per the rules in force.

47. The records of the learned trial court are to be sent back immediately.

JUDGE

JUDGE

Comparing Assistant