

GAHC010127712022



2024:GAU-AS:9476-DB

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

Case No. : Criminal Appeal [J] No. 64/2022

Siva Karmakar

.....Appellant

-VERSUS-

The State of Assam Represented by the
Public Prosecutor, Assam, GHC, Guwahati.

.....Respondent

Advocates :

Appellant : Mr. A.K. Bhuyan, Amicus Curiae.

Respondent : Mr. K.K. Das,
Additional Public Prosecutor, Assam.

Date of Hearing, Judgment & Order : 12.09.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MRS. JUSTICE MITALI THAKURIA

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

1. The present criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 ['CrPC' or 'the Code', for short] is directed against a Judgment and Order 18.05.2022 passed by the Court of learned Sessions Judge, Dibrugarh in Sessions Case no. 72 of 2020. By the Judgment and Order dated 18.05.2022, the Court of learned Sessions Judge, Dibrugarh has convicted the accused-appellant on finding him guilty for the offence of murder and has held that the offence committed by the accused falls within Clause thirdly of Section 300, Indian Penal Code [IPC]. The accused-appellant has accordingly been sentenced under Section 302, IPC to undergo rigorous imprisonment for life and to pay a fine of Rs. 3,000/-, in default of payment of fine, to undergo simple imprisonment for another month. The accused-appellant has also been found guilty for the offence under Section 447, IPC and for the offence under Section 447, IPC, he has been sentenced to undergo rigorous imprisonment for three months. It has been ordered that both the sentences are to run concurrently.

2. The genesis of the trial of Sessions Case no. 72 of 2020 is traceable to a First Information Report [FIR] lodged by one Suraj Naik as the informant before the In-Charge, Borbari Police Out Post of Dibrugarh Police Station at 12-15 p.m. on 13.04.2020. On receipt of the FIR, the In-Charge, Borbari Police Out Post first registered the FIR as Borbari Police Out Post General Diary Entry no. 307 on

13.04.2020 and thereafter, forwarded the FIR to the Officer In-Charge, Dibrugarh Police Station for registering a case under proper sections of law. While forwarding the FIR, the In-Charge, Borbari Police Out Post, Dilip Kumar Kotoki [P.W.8] took up the investigation of the case himself as the Investigating Officer [I.O.]. On receipt of the FIR, the Officer In-Charge, Dibrugarh Police Station registered the same as Dibrugarh Police Station Case no. 629 of 2020 [corresponding PRC no. 916 of 2020 and G.R. Case no. 1376 of 2020] for the offences under Sections 447/302, IPC.

3. In the FIR [Ext.-1], the informant - P.W.1 had inter alia alleged that at about 05-30 p.m. on 12.04.2020, the accused, Siva Karmakar, a resident of Pucca Line, Maijan Tea Estate killed his father, Bhim Nayak by stabbing him on the neck with a scissor in the courtyard of the house of the deceased.

4. During the course of investigation, I.O. [P.W.8] recorded statements of the witnesses under Section 161, CrPC by visiting the place of occurrence [P.O.], that is, the house of the deceased. Prior to institution of the FIR, the family members of Bhim Nayak, in order to provide him medical treatment, took him to the Casualty Department of the Assam Medical College & Hospital [AMC&H] on the date of the incident itself, that is, on 12.04.2020. It has emerged from the materials on record that the deceased was brought to the Casualty Department, AMC&H at a time prior to 05-50 p.m. on 12.04.2020, but the doctors there on examination, declared Bhim Nayak to be brought dead. The particulars of the deceased was forwarded to the Officer In-Charge, Borbari Police Out Post, AMC&H vide an Intimation Letter dated 12.04.2020 [Ext.-7] and on that basis, General Diary Entry no. 302 was registered at 09-30 a.m. on 13.04.2020

5. Prior to lodgment of the FIR, it was also telephonically informed to the In-Charge, Borbari Police Out Post by the Manager of Maijan Tea Estate on 12.04.2020 that one person had been killed in the Pucca Line area of the Tea Estate and on receipt of such telephonic information, one entry was made in the General Diary of Borbari Police Out Post vide General Diary Entry no. 288 dated 12.04.2020. It was pursuant to the General Diary Entry no. 288 dated 12.04.2020, the I.O. [P.W.8] visited the P.O. and recorded the statements of the witnesses available at the P.O. and prepared a Sketch Map of the P.O. [Ext.-6].

6. As the I.O. [P.W.8] learnt on reaching the P.O. that Bhim Nayak had already died, he took steps for conducting the inquest on the deadbody of the deceased. The inquest on the deadbody of the deceased was conducted in the premises of the AMC&H at 10-30 a.m. on 13.04.2020 by an Executive Magistrate in reference to General Diary Entry no. 302 dated 13.04.2020. After inquest, an Inquest Report was prepared recording the findings. Thereafter, the deadbody was forwarded by a Deadbody Challan of even date [Ext.-6] for post-mortem examination. The post-mortem examination on the deadbody of the deceased was performed at the AMC&H, Dibrugarh at around 01-10 p.m. on 13.04.2020 by Dr. Debarshee Chakraborty [P.W.7] who was on duty on 13.04.2020 as a Demonstrator, Department of Forensic Medicine, AMC&H.

7. The I.O. [P.W.8] had, earlier to the institution of the FIR, seized one curved steel scissor with a black handle, about 6 inches long, from the house of the accused at 07-45 p.m. on 12.04.2020 vide a Seizure List, M.R. no. 84/2020 [Ext.-3] in presence of witnesses, [i] Raju Karmakar [P.W.2], [ii] Anita Nayak

[P.W.3], and [ii] Jonali Karmakar [not a witness] during his visit to the P.O. on 12.04.2020. The I.O. [P.W.8] also forwarded Anita Nayak [P.W.3] and Sumitra Mundra [P.W.4] to the Court for recording their statements under Section 164, CrPC. The statements of Anita Nayak [P.W.3] and Sumitra Mundra [P.W.4] were recorded under Section 164, CrPC on 22.04.2020. After collecting the Post-Mortem Examination [PME] Report and completing the remaining part of the investigation, the I.O.[P.W.8] laid a charge sheet under Section 173[2], CrPC vide Charge-Sheet no. 380/2020 on 22.07.2020 finding a prima facie case well established against the accused who was named in the FIR, for committing offences under Sections 447/302, IPC.

8. The accused was apprehended immediately after the incident and after being apprehended, he was produced before the Court of learned Chief Judicial Magistrate, Dibrugarh along with the Seizure List, M.R. no. 84/2020 [Ext.-3], the seized articles, arrest memo, etc. on 13.04.2020. On being so produced, the accused was remanded to judicial custody. The Court of learned Chief Judicial Magistrate, Dibrugarh after seeing the Seizure List as well as the seized articles produced by the I.O., returned back the original Seizure List and the seized articles to him. Since 13.04.2020, the accused is in custody. After the trial, which returned with the verdict of guilt, the accused is undergoing his sentence till date.

9. On submission of charge-sheet, the Court of learned Chief Judicial Magistrate, Dibrugarh secured the appearance of the accused through VC on 22.10.2020. As the copies were found ready, the same were furnished to the accused in compliance of the procedure laid down in Section 207, CrPC. As the

offence under Section 302, IPC is exclusively triable by the Court of Sessions, the Court of learned Chief Judicial Magistrate, by an Order of Commitment dated 22.10.2020, committed the case records of G.R. Case no. 1376/2020 to the Court of Sessions, Dibrugarh after notifying the learned Public Prosecutor. The Jail Superintendent was also directed to produce the accused before the Court of Sessions, Dibrugarh on 05.11.2020.

10. On receipt of case records of G.R. Case no. 1376/2020, the Court of Sessions, Dibrugarh [‘the trial court’, for short] registered the same as Sessions Case no. 72 of 2020. On appearance of the accused; after hearing the learned Public Prosecutor and the learned Legal Aid Counsel for the defence; and upon perusal of the materials available in the record, the learned trial court, on 04.01.2021, framed the following charges against the accused :

On 12.08.2020, at about 05-30 p.m., at Maijan Tea Estate Pakka Line under Dibrugarh Police Station.

Firstly – That you committed criminal trespass by entering into the house premises of Suraj Nayak with intent to commit an offence, and thereby committed an offence punishable under Section 447 of the Indian Penal Code and within the cognizance of the Court of Sessions.

Secondly – That at the same time and place, you committed murder by intentionally causing the death of Bhim Nayak, and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within the cognizance of the Court of Sessions.

11. When the charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried. During the course of trial, the

prosecution examined eight nos. of witnesses and exhibited eight nos. of documents apart from one material exhibit to bring home the charges against the accused. The prosecution witnesses examined and the documents and materials exhibited were as follows :-

Prosecution Witnesses		
P.W.	Name	
P.W.1	Suraj Nayak	Informant – Son the deceased
P.W.2	Raju Karmakar	Neighbour
P.W.3	Anita Nayak	Daughter of the deceased
P.W.4	Sumitra Mundra	Neighbour of the deceased
P.W.5	Purtam Karmakar	Gaonburah
P.W.6	R. Sharma	Judicial Magistrate, 1 st Class, Dibrugarh
P.W.7	Dr. Debarshee Chakraborty	Demonstrator, AMC&H
P.W.8	Dilip Kumar Kotoki	I.O. & In-Charge, Borbari Police Out Post
Documentary Exhibits		
Exhibit no.	Description	
Exhibit - 1	FIR dated 13.04.2020	
Exhibit - 2	Inquest Report	
Exhibit - 3	Seizure List, M.R. no. 84/2020 dated 12.04.2020	
Exhibit - 4	Statement of Anita Nayak recorded under Section 164, CrPC	
Exhibit - 5	Post-Mortem Examination [PME] Report	
Exhibit - 6	Deadbody Challan	
Exhibit - 7	Intimation letter of the AMC&H dated 12.04.2020 about death	
Exhibit - 8	Charge-Sheet no. 380/2020 on 22.07.2020	
Material Exhibit		
Mat. Ext. 1	One steel scissor of length 6 inches with black handle.	

12. After the closure of the evidence from the prosecution side, the accused was examined under Section 313, CrPC in order to provide him the opportunity to explain the circumstances appearing against him in the evidence of the

prosecution. The plea of the accused was denial and according to him, he was falsely implicated. After hearing the learned counsel for the parties and upon evaluation of the evidence/materials on record, the learned trial court proceeded to deliver the Judgment and Order of conviction and sentence, impugned herein.

13. We have heard Mr. A.K. Bhuyan, learned Amicus Curiae for the accused-appellant and Mr. K.K. Das, learned Additional Public Prosecutor for the respondent State of Assam.

14. Mr. Bhuyan, learned Amicus Curiae appearing for the accused-appellant has submitted that if the testimony of the three witnesses – P.W.2, P.W.3 and P.W.4 – projected as vital from the prosecution side, are examined and analysed together, a number of inconsistencies can be noticed. He has further contended that the version given previously by P.W.3 in her statement recorded under Section 164, CrPC is not consistent with her testimony given before the Court, thereby, making her a witness whose testimony cannot be believed without corroboration from other independent evidence on material points. There is insufficient supporting evidence to lend corroboration to the case projected by the prosecution through P.W.3. Neither P.W.2 nor P.W.4 deposed to the effect that they had witnessed the incident. It is, thus, not sufficient to base a conviction on the basis of such discrepant nature of evidence. He has further contended that the wound sustained by the deceased cannot be held to be sufficient to frame a charge of murder and it has not been brought on record by the prosecution that such a wound could be caused by a scissor. The scissor, Mat. Ext.-1 produced by the prosecution before the sole eye-witness [P.W.3]

during the trial was found to be one which was not used and as such, the present one is a case of non-recovery of the weapon of assault. He has alternatively submitted that even if after appreciation of evidence/materials on record if a ring of truth is noticed then also the alleged homicidal death of the deceased cannot be brought within the scope and ambit of the offence of murder, defined in Section 300, IPC.

15. Opposing the contentions of the learned Amicus Curiae, Mr. Das, learned Additional Public Prosecutor has submitted that the deceased had met his death immediately after the incident as by the time he was taken to the AMC&H at Dibrugarh, he was already dead. From the testimony of the Autopsy Doctor [P.W.7] and the PME Report [Ext.-5], it has clearly emerged that the death was a homicidal one and the death was due to hemorrhagic shock as a result of the injury sustained over the neck of the deceased. As it has also emerged that the injury was caused by a sharp pointed weapon and a scissor falls in the said category, the learned State Counsel has contended that no interference to the Judgment and Order of the learned trial court is called for. It is his further contention that there was an intention on the part of the accused as he came to the P.O. with a scissor in his hands. That the scissor was used in inflicting the injury has been testified by the sole eye-witness, P.W.3. He has contended that the minor discrepancies pointed out by the learned Amicus Curiae have not created any dent to the core of the prosecution case. He has, thus, supported the conviction of the accused-appellant for the charges framed against him.

16. We have duly considered the submissions of the learned counsel for the parties and have also perused the evidence/materials on record including the

testimony of all the prosecution witnesses and the documentary evidence, available in the case records of Sessions Case no. 72 of 2020, in original.

17. Out of the eight nos. of prosecution witnesses, the prosecution witnesses, P.W.1, P.W.3 and P.W.4 were related to the deceased. P.W.2 is a neighbour to the houses where P.W.1, P.W.3 and P.W.4 and the deceased used to reside. The evidence given by P.W.5 is in the nature of hearsay and is of no assistance to any of the two sides. P.W.6, R. Sharma was serving, on 22.04.2020, as the Judicial Magistrate, First Class, Dibrugarh and on that day, P.W.6 recorded the statements of P.W.3 and P.W.4 under Section 164, CrPC. P.W.7, as mentioned above, was on duty on 13.04.2020 in the capacity of Demonstrator in the Department of Forensic Science, AMC&H, Dibrugarh and on that day, P.W.7 performed autopsy on the dead body of the deceased. P.W.8, Dilip Kumar Kotoki, the then In-Charge, Borbari Police Out Post investigated the case as the I.O.

18. P.W.3, Anita Nayak is the daughter of the deceased. As regards the incident, P.W.3 testified that in the evening hours on the date of the incident, she was in her house and her sister-in-law, Sumitra Munda [P.W.4] was in her house. Both their houses are nearby to each other with a common courtyard. The accused came to their house and asked P.W.4 to give him a scissor to cut hair. But P.W.4 did not give any scissor to the accused. It was at that time, the deceased reached his house from work. Then the accused asked the deceased to give the scissor to cut the hair. When the deceased did not respond, the accused attacked the deceased on the side of the neck with a scissor. P.W.3 stated that the scissor was brought by the deceased from his house. As a result

of the assault, the deceased fell down on ground. Then she ran out to call her brother, Suraj Nayak [P.W.1] from the field where he was playing at that time. The deceased was thereafter, taken in a vehicle to the hospital but her father breathed his last on the way. P.W.3 stated that Police personnel came to their house in that night itself and made an enquiry with her. The Police also seized the scissor from the house of the accused by preparing a Seizure List [Ext.-3] wherein she gave her signature as Ext.-3[2]. When a scissor as Mat. Ext.-1 was shown to P.W.3 during her deposition, P.W.3 stated that the scissor was not the one which was seized and the seized scissor was a small one. P.W.3 also exhibited her statement recorded under Section 164, CrPC as Ext.-4 with her signature therein as Ext.-4 [1] and Ext.-4 [2] respectively. During her cross-examination, the defence elicited from P.W.3 that there was no one at the P.O. when the incident took place but Raju Karmakar [P.W.2] came to the P.O. when she shouted. A number of suggestions were given to P.W.3 by the defence and all those suggestions were categorically denied by P.W.3.

19. In her testimony, P.W.4, Sumitra Munda stated that the incident had occurred in the evening hours. At the time of the incident, she was standing in the courtyard. The accused came to the precinct of their houses first and thereafter, the deceased reached his house. At that time, she went inside the house but she had to rush out of the house hearing screamings of the daughter of the deceased, Anita Nayak [P.W.3]. She saw that the deceased was lying on the ground with blood oozing out from the side of his neck. The accused was found standing there at that time. P.W.3 then ran out of the house to call her brother. The accused thereafter, left for his house. The deceased was thereafter, taken to hospital. Police personnel visited the P.O. in night. P.W.4 stated that

Anita Nayak [P.W.3] was present near her father, that is, the deceased when the incident took place. The Police also inquired about the incident from her. P.W.4 further stated that she was brought to the court to record her statement wherein she put her thumb impression. A number of suggestions were put to the witnesses and all those suggestions were denied by the witness.

20. The fact that Police personnel visited the P.O., that is, the house of the deceased on the night itself when the incident occurred on 12.04.2020, stands substantially corroborated from the testimony of the I.O. [P.W.8] and P.W.4. The fact that the daughter of the deceased, Anita Nayak [P.W.3] was present at the P.O. at the time of the incident has received corroboration from the testimony of P.W.4. The testimony of P.W.3 that the accused came to the courtyard of the house of the deceased is also corroborated by P.W.4. The fact that a scissor was seized from the house of the accused by the I.O. during his such visit is evident from the Seizure List, M.R. No. 84/2020 [Ext.-3] dated 12.04.2020. The fact that the death of the deceased had occurred prior to 05-50 p.m. on 12.04.2020 is evident from the Doctor's Orders and Progress Note, AMC&H, Dibrugarh [Ext.-7] issued on 12.04.2020 to the In-Charge, Borbari Police Out Post.

21. P.W.2, Raju Karmakar is a neighbour of the houses of the deceased and the accused. In his evidence-in-chief, P.W.2 stated that on the date of the incident in April, 2020, he was having lunch in his house at around 03-00/03-30 p.m. At that time, he heard screamings of Anita Nayak [P.W.3], that is, the daughter of the deceased that her father, Bhim Nayak had been killed. P.W.2 then immediately rushed out of his house to reach the house of the deceased and reaching the P.O., he saw that the accused was coming out from the

courtyard of the house of the deceased uttering '*Moi koisilu nohoi mur logot nelagibi, ji hol atia tohote bujibi*' [I told you not to confront me, now you all would understand what has happened]. P.W.2 stated that the accused crossed him while going out. At the courtyard of the house of the deceased, P.W.2 saw Bhim Nayak lying on the ground with blood coming out from a cut injury on his neck and the deceased was heard making some hissing sounds from his mouth. P.W.2 then came out and called a cousin of the deceased named Rajesh. Though Rajesh [not a witness] did not come to the P.O., one Bholu Nayak [not a witness] who was an uncle of the deceased, came to the P.O. and called an ambulance to take the deceased to a hospital. On that night itself, Police personnel came searching for the accused and at that time, P.W.2 narrated the incident to the Police. P.W.2 stated to have heard that the deceased was referred to AMC&H from the tea estate hospital and on the way he expired. When Police personnel came to the P.O., he [P.W.2] along with the Police personnel entered into the house of the accused and there, the daughter of the accused showed a bloodstained scissor kept on the table. The said scissor was seized by the Police by a Seizure List, Ext.-3 wherein he gave his signature as Ext.-3 [1]. When the scissor was shown to P.W.2 as Mat. Ext.-1 during his deposition, he identified the scissor to be the one which was seized in his presence from the house of the accused. P.W.2 stated that at the time of seizure, the accused was not present in his house. In cross-examination, P.W.2 stated that he had a grocery shop adjacent to his house and when he came for lunch, the shop was kept open. It was elicited by the defence from P.W.2 that the daughter of the deceased, Anita Nayak [P.W.3] and Sumitra Munda [P.W.4] were near the deceased at the time of the incident. P.W.2 denied the suggestion that he had deposed falsely due to old grudge against the accused.

22. From the testimony of P.W.2, corroboration is found on the point that at the time of the incident, the two prosecution witnesses, P.W.3 and P.W.4 were present near the deceased. From the Sketch Map of the P.O. [Ext.-3], it is evident that two houses were nearby with the same courtyard, as deposed by P.W.2, P.W.3 and P.W.4. The fact that the house of the P.W.2 is near to the house of the deceased and the accused has not been disputed by the defence in any manner whatsoever. If an incident like stabbing on a father occurs, it is natural for a minor daughter like P.W.3 to react by raising noise asking for help and it is also natural for a neighbour like P.W.2 to hear such screamings and after hearing screamings, to proceed for the P.O., at least out of curiosity. Though it has emerged that P.W.2 and P.W.4 did not witness the incident at the exact point of assault on the neck of the deceased by the accused but P.W.4 had witnessed the events closely followed after the assault. Similarly, P.W.2 also witnessed the events which occurred after the assault. On a combined reading of the testimonies of P.W.2, P.W.3 and P.W.4, it is found established that at the time of the incident, the deceased and the accused were present in the courtyard of the house of the deceased and as a result of the assault on the neck of the deceased, which was none other but by the accused, the deceased sustained the injury on his neck. All these were prosecution witnesses, P.W.2, P.W.3 and P.W.4 had categorically testified that the deceased sustained an injury on his neck and from the injury, blood started oozing out.

23. We now turn to the medical evidence led by the prosecution in the case. The medical evidence/injuries are described in the testimony of the Autopsy Doctor, Dr. Debarshee Chakraborty who testified as P.W.7 and the Post- Mortem

Examination [PME] Report which was exhibited as Ext.-5. P.W.7 stated that the post-mortem examination on the deadbody of the deceased was performed on Police requisition on 13.04.2020. The deadbody was brought and identified by EBC, Simanta Konwar. After performing the post-mortem examination, P.W.7 recorded the findings in the PME Report [Ext.-5] in the following manner :-

<i>I- EXTERNAL APPEARANCE</i>	
<i>1. Condition of subject stout emaciated, decomposed etc.</i>	<i>Sex of the deceased : male</i> <i>Built : average;</i> <i>Wearing garments : a long pant, a red half pant and an underwear and a shirt</i> <i>Eyes and mouth : Closed.</i> <i>Temperature : Cold to touch both externally and internally</i> <i>Rigor mortis : Fully developed all over the body</i>
<i>2. Wounds – position, and character</i>	<i>Following injuries are found on the body :</i> <i>A stab injury of size 1 cm X 0.5 cm X</i> <i>muscle deep is present over right side on</i> <i>the posterolateral aspect of the right side</i> <i>of the neck 12 cm from the midline and</i> <i>7cm below the lobule of left ear. The</i> <i>margins of the wound are found regular</i> <i>and skin tags are found at places. The</i> <i>shape of the wound is spindle shaped and</i> <i>the injury is directed upward and medially</i> <i>and traverses through the floor of the</i> <i>posterior triangle muscles that is levator</i> <i>scapulae, speniuscapitis and</i> <i>simispinaliscapitis muscle upto the apex of</i> <i>the triangle to injure the occipital artery</i>
<i>Bruise – position, size and nature</i>	

	<i>and the artery is completely ruptured. The subcutaneous tissue planes of the whole left side of the neck are filled with liquid and clotted blood.</i>
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24. P.W.7 further testified that after recording the findings, he gave his opinion as under :-

Death was due to hemorrhagic shock as a result of the injury sustained over neck as described. The injury described was ante mortem and caused by sharp pointed weapon and was homicidal in nature.

25. Like in the PME Report [Ext.-5], the Executive Magistrate after conducting inquest proceeding, reported in the Inquest Report [Ext.-2] that there was an injury mark on the neck of the deceased. On the basis of the nature of the injury, he further recorded that the cause of death might due to stab injury with sharp weapon.

26. From a combined reading of the testimonies of the afore-mentioned prosecution witnesses and the medical evidence, it is established that the deceased sustained an injury on his neck and the said injury was cause of his death. The death was due to hemorrhagic shock as a result of the injury sustained and the injury was ante mortem in nature. The injury was caused by a sharp weapon and was homicidal in nature. The Autopsy Doctor [P.W.7] was not confronted by the defence in any manner whatsoever with regard to the opinion rendered by him. The defence did not also lay any challenge to the findings recorded in the PME Repot [Ext.-5].

27. From the testimony of the informant - P.W.1, it is found that at the time of the incident, he was not at the P.O. According to him, at the time of the incident, he was playing at a place in his village and it was P.W.3 who came there to inform him that their father, Bhim Nayak had been killed by the accused. On hearing the news, he came to his house and finding his father injured, took him for medical treatment. P.W.1 stated that after post-mortem examination, the deadbody of the deceased was taken back to their house to do the rituals. Thereafter, the FIR [Ext.-1] was lodged. P.W.1 further stated that in the Inquest Report, he had also given his signature.

28. The defence has raised a point that by the Seizure List, M.R. no. 84/2020, one curved steel scissor with black handle about six inches long was seized from the house of the accused in presence of three witnesses mentioned above. One of those three witnesses was Anita Nayak [P.W.3], the daughter of the deceased, who witnessed the incident of assault on her father by the accused with a scissor. According to the defence, when a scissor as Mat. Ext.-1 was shown to P.W.3 before the Court, P.W.3 stated that Mat. Ext.-1, scissor was not the scissor which was used in the assault. On the other hand, P.W.2 who was also a witness to the Seizure List [Ext.-3], testified, when Mat. Ext.-1, scissor was shown to him in the Court, to the effect that it was the one which was seized by Police on 12.04.2020 vide Seizure List, M.R. No. 84/2020 [Ext.-3]. As the evidence of P.W.2 and P.W.3 as regard the seizure [Mat.Ext.-1] are found at variance with each other, the factum of recovery of weapon of assault has come under a cloud and in turn, the entire prosecution case has become doubtful. The ground raised by the defence as regards the weapon of assault after consideration, is found to have not created a serious dent to the core of the

prosecution case. The identification of the scissor in a different manner by the two seizure witnesses, P.W.2 and P.W.3 goes to indicate that either the scissor seized on 12.04.2020 was presented before the Court or a different scissor was presented before the Court or one of the said two prosecution witnesses failed to identify it correctly due to failure of memory or for any other reason. The same might be a defect on the part of the investigating authority or on the part of the prosecution. We are of the unhesitant view that such defect would not result in any benefit to the accused for the fact that the ocular evidence of the prosecution witnesses – P.W.2, P.W.3 and P.W.4 – are found to be consistent, reliable and credible all throughout.

29. It is true that the prosecution witnesses, P.W.3 and P.W.4 are closely related to the deceased but for the said fact, their evidence cannot at all be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence on the allegation that they were interested witnesses. A related witness may be called interested against a particular accused only when he or she is likely to derive some personal benefit from the result of the litigation. There can be two categories of related, *firstly*, a related and therefore, an interested witness having an interest in seeing the real accused punished; and *secondly*, a related and therefore, an interested witness having an interest in seeing the accused punished and also having some enmity with the accused. It is in respect of the second category of related and interested witnesses, a more stricter scrutiny is required while appreciating their evidence. Nothing has been brought on record by the defence that there was any kind of enmity between the accused and the deceased or for that matter, between the accused and the prosecution witnesses, P.W.3 and

P.W.4 or the family of the deceased. As the prosecution witnesses, P.W.3 and P.W.4 used to reside in the houses located in close proximity to each other and in the same courtyard, where the incident of assault occurred, their presence at the P.O. was found to be quite natural. There is not apparent inconsistency between the previous statement of P.W.3 [Ext.-4] and the testimony of P.W.3 resulting in any material contradiction or omission. The versions of the P.W.3 has been found to be consistent throughout. Even on strict scrutiny, we find the evidence of P.W.3 and P.W.4 consistent, reliable and credible to inspire the confidence of the Court.

30. For the purpose of appreciation of the evidence of P.W.2, a reference to the rule of evidence embodied in Rule 6 of the Evidence Act appears necessary. Rule 6 of the Evidence Act is an exception to the general rule where the hearsay evidence is not admissible. For bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the cause and there should not be any interval to allow the mind to make any improvement or embellishment. The statement sought to be admitted therefore as forming part of *res gestae* has to be made contemporaneous with the cause or immediately thereafter.

30.1. As per Section 6 of the Evidence Act [***Relevancy of facts forming part of same transaction***] - Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. The Hon'ble Supreme Court of India in ***Gentela Vijayavardhan Rao and another vs. State of Andhra Pradesh, [1996] 6 SCC 241,***

after considering the rule of evidence embodied in Section 6 of the Evidence Act, has held as under :-

15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue 'as to form part of the same transaction' becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement on fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

30.2. Illustration [a] to Section 6, which are quoted hereinbelow ready reference, has aptly demonstrated the said rule. ***Illustration [a] : A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.*** In the context of the case in hand, the utterance made by the accused while leaving the place of occurrence after assault and heard by the P.W.2 while entering the house of the deceased and crossing the path with the accused is admissible in evidence by the rule of evidence embodied by the rule of *res gestae* under Section 6 of the Evidence Act. The utterance made by the accused, quoted in a preceding paragraph, is clearly suggestive of an act of assault by him after some kind of confrontation, and such evidence has lent corroboration to the case of the prosecution. The conduct of the accused as

regards leaving the house of Bhim Nayak with Bhim Nayak lying in an injured condition in the courtyard along statements accompanying such act of leaving also assumes relevance under Section 8 of the Evidence Act.

31. Law is settled that if there is direct evidence in the form of eye-witness, even in the absence of recovery of the actual weapon of assault the accused can be convicted. It is also settled that recovery of the weapon used in the commission of the offence is not *sine qua non* to convict the accused. A reference to the decision in *State through the Inspector of Police vs. Laly @ Manikandan @ another etc.*, reported in [2022] 15 SCR 613, can be referred to.

32. From the discussion made above and for the reasons mentioned therein, we are of the clear view that the prosecution has been able to lead cogent, reliable, credible and clinching evidence to establish that the fact that it was the accused only and none else, who had inflicted the wound on the neck of the deceased on the date of the incident by a scissor in the courtyard of the house of the deceased and as such injury sustained by the deceased led to his instantaneous or almost instantaneous death.

33. The issue which now confronts this Court is whether the offence falls in the category of culpable homicide amounting to murder or culpable homicide not amounting to murder. The offence of culpable homicide defined in Section 299 of the IPC whereas the offence of murder is defined in Section 300, IPC. As per Section 299, 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.

34. Culpable homicide is the genus and the offence of murder, meaning thereby, all murders are culpable homicide but all culpable homicide are not murders. To bring in a case of culpable homicide within the scope and ambit of murder, the conditions of any of the clauses prescribed in Section 300, IPC, that is, either firstly or secondly or thirdly or fourthly, are required to be satisfied. Section 300, IPC 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 —
2ndly.—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—
3rdly.—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—
4thly.—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.

There are also four exceptions provided in Section 300, IPC. If an offence despite fulfilling all the conditions of any of the clauses stated therein, comes within any of the exceptions then the offence would be culpable homicide not amounting to murder punishable under the first part of Section 304, IPC.

35. In ***Thangaiya vs. State of Tamil Nadu***, reported in **[2005] 9 SCC 650**, it has been explained that for the purpose of fixing punishment,

proportionate to the gravity of the generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the greatest 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 amongst the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304, IPC.

36. It has been explained in *Angazhagan vs. The State represented by the Inspector of Police*, reported in [2023] 10 SCR 1091, that the difference between the two parts of Section 304, IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300, IPC, while under the second part, the crime of murder is never established at all. It has been held that for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304, IPC, the accused need not bring his case within one of the exceptions to Section 300, IPC.

37. 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; [xi] whether the accused dealt a single blow or several blows.

38. Reverting back to the facts of the case in hand, we find that nothing has been brought on record by the prosecution that there was any kind of previous enmity between the accused and the deceased. None of the vital prosecution witnesses, P.W.2, P.W.3 and P.W.4 had deposed that either the deceased or the accused or any of them was adversely disposed against one another. From the evidence of P.W.3 it has emerged that in the initial period of his presence in the courtyard of the house of the deceased, the accused had not demonstrated any act of aggressiveness and had acted aggressively after exchange of few words between him and the others. From the evidence on record, it has emerged that the accused when he came to the courtyard of the house of the deceased he had a scissor in his hands which he had brought with him. By the Seizure List, M.R. no. 84/2020 [Ext.-3], one curved steel scissor with a black handle, about six inches long, was shown to be seized in presence of P.W.3, the sole eye-witness. When a scissor as Mat. Ext.-1 was shown to P.W.3 in the Court, P.W.3, the sole eye-witness, stated that Mat.Ext.-1, scissor was not the one which was used by the accused in assaulting the deceased and P.W.3 proceeded to clarify that the scissor which was used for the offence was a smaller one than Mat.

Ext.-1. Meaning thereby, the scissor, according to the sole eye-witness, used in the offence was shorter than six inches.

39. The wound described in PME Report [Ext.-5] was a stab injury of size 1 cm X 0.5 cm X muscle deep. Other than causing damages in various manner, the injury had caused damage to the occipital artery and the artery was found to be completely ruptured. The Autopsy Doctor had opined that the injury was ante-mortem in nature and was caused by sharp pointed weapon and also was homicidal in nature. It cannot be denied, in view of absence of any kind of challenge by the defence, that the death was a homicidal one. The crucial point is whether the accused had the intention to cause death of the deceased and whether such act on his part brings the homicidal death to fall either in the category of culpable homicide of the first degree or in the category of culpable homicide of the second degree or the act would fall outside of these two categories.

40. The event of entry of the accused was not preceded by any kind of restraint to prevent him from entering into the house/courtyard of the deceased freely. In other words, the accused had all the time to arm himself with a weapon of assault from the choices available to him like an axe, a sword, a dao, a knife, a dagger, etc. before entering the courtyard/house of the accused. But, it was only a scissor, that too, shorter than six inches in length, with which he came to house/courtyard of the deceased. The assault was made when both the accused and the deceased were both in standing positions. It is difficult to follow that the accused, by standing in such position, all on a sudden, knew that he would be able to cause an injury of the nature and size, described in the PME

Report, with such precision. It is true that though the nature and size sustained by the deceased seemed to be not a major proportion, yet, the damages caused by the injury were extremely serious leading to instantaneous or almost instantaneous death of the deceased. Still, it is not possible for us to conclude that the accused had struck at the neck of the deceased with a scissor with the intention to cause his death to bring his act of causing homicidal death to fall either the category of culpable homicide of the first degree or in the category of culpable homicide of the second degree.

41. Having considered all the circumstances preceding, attending and succeeding the incident of assault, we are of the considered view that the assault made by the accused on the deceased with a scissor was not with the requisite intention to cause an act which would bring the act within the scope and ambit of either of the offence, culpable homicide of the first degree or culpable homicide of the second degree. The act of assault resulting in an injury had, however, led to an almost instantaneous death of the deceased. Therefore, it cannot be denied that the offence committed by the accused is culpable homicide but it is culpable homicide of third degree. Therefore, from the evidence and circumstances obtaining in the case, we are of the considered view that the act of the accused would bring the offence as one of culpable homicide which is punishable under Part II of Section 304 of the Penal Code.

42. As at the time of entry of the accused into the courtyard/house of the deceased, he did not have the intention to commit an offence and the incident occurred by chance, the conviction and sentence for the offence under Section 447, IPC is also found not sustainable in law.

43. There is nothing on record to suggest that the accused had been convicted earlier for an offence prior to his conviction and sentence in the case in hand. The accused was a worker in tea garden and has a family consisting of his wife and a daughter. At the time of his conviction, the accused was aged 31 years.

44. Accordingly, this criminal appeal is partly allowed by converting the sentence of the accused from under Section 302, IPC to Section 304 Part II, IPC and the sentence is altered from rigorous imprisonment for life to rigorous imprisonment for eight years, by maintaining the fine imposed upon the accused-appellant with the same default stipulation as passed by the learned trial court.

45. It is observed that the period of detention already undergone by the accused during the course of investigation, inquiry or trial shall be set-off in terms of Section 428, CrPC. We also reiterate the direction given by the learned trial court as regards award of adequate compensation to the family of the victim in terms of the provisions contained in Section 357A, CrPC and the extant victim compensation scheme framed thereunder.

46. Before parting with the record, we wish to place our appreciation on record as regards the services rendered by Mr. A.K. Bhuyan, learned Amicus Curiae appearing for the accused-appellant and direct the Registry to make available to him just remuneration as per the notified fee structure applicable to the Amicus Curiae.

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

JUDGE

JUDGE

Comparing Assistant