

GAHC010180322022



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

CRIMINAL APPEAL NO. 247/2022

1. Md. Faruk Ahmed @ Faruk Ahmed Choudhury, S/o Late Abdul Mannan, Village - Kanishail, P.S. and Dist.- Karimganj, Assam.
2. Md. Sabir Ahmed @ Maju, S/o Faruk Ahmed @ Faruk Ahmed Choudhury, Vill.- Kanishail, P.S. and Dist.- Karimganj, Assam.
3. Jaina Begum, W/o Faruk Ahmed @ Faruk Ahmed Choudhury, Vill.-Kanishail, P.S. and Dist.- Karimganj, Assam.

.....Appellants

-VERSUS-

1. The State of Assam, represented by the Public Prosecutor, Government of Assam.
2. Musstt. Sabiha Mehbub Choudhury, D/o Lt. Masuk Ahmed Choudhury, R/o Vill- East Khanishail, P.O- East Khanishail, P.S and Dist.- Karimganj, Assam, Pin- 78871.

.....Respondents

Advocates :

Appellants : Mr. B.B. Narzary, Senior Advocate
Mr. S. Chouhan, Advocate
Respondent no. 1 : Ms. S. Jahan, Addl. P.P., Assam
Respondent no. 2 : Mr. A. Ahmed, Advocate
Date of Hearings : 13.03.2024 & 14.03.2024
Date of Judgment & Order : 14.03.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MRS. JUSTICE MARLI VANKUNG

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

The instant criminal appeal under Section 374[2], Code of Criminal Procedure, 1973 [‘the CrPC’ or ‘the Code’, for short] is directed against a Judgment and Order dated 22.06.2022 passed by the Court of learned Sessions Judge, Karimganj [‘the trial court’, for short] in Sessions Case no. 88 of 2012 [The State of Assam vs. Md. Faruk Ahmed @ Faruk Ahmed Choudhury and two others]. By the said Judgment and Order dated 22.06.2022, all the three accused-appellants have been convicted under Sections 302/34, Indian Penal Code and all of them have been sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- each, in default of payment of fine, to undergo rigorous imprisonment for another period of 1 [one] year each.

2. The case of the prosecution, in brief, was that on 07.12.2009, a First Information Report [FIR] was lodged before the Officer In-Charge, Karimganj Police Station by the informant – P.W.1. In the said FIR, it was *inter alia* alleged that at around 06-00/06-30 a.m. on 06.12.2009, the informant’s father, Masuk Ahmed Choudhury was going towards the pond to

freshen up after getting up from bed. At that point of time, the accused no. 1, Faruk Ahmed came near him and asked her father whether he would settle the earlier land-related dispute. To the said query, Masuk Ahmed Choudhury replied to the accused, Faruk Ahmed [A-1] that the mediator would settle the matter after coming back from *Haj*. After saying so, Masuk Ahmed Choudhury freshened up and got inside his house. According to the informant – P.W.1, she was listening the conversation between her father and Faruk Ahmed [A-1] by standing in the courtyard of their house. Then, hurling abuses with use of filthy words at them, the accused, Faruk Ahmed [A-1] caught hold of the informant by hair and dealt blows, punches, etc. and also slapped her. Hearing her screams, the mother of the informant, P.W.2 came out of the house and the accused no. 1, Faruk Ahmed also slapped her. Then, Masuk Ahmed Choudhury came out of the house and asked Faruk Ahmed [A-1] why he was assaulting them. At that point of time, Faruk Ahmed [A-1] also struck Masuk Ahmed Choudhury on his head with a hoe that was lying in the courtyard. Thereafter, the other accused persons armed with *lathi*, etc. came there and assaulted Masuk Ahmed Choudhury in various parts of his body causing grievous injuries on his person. Masuk Ahmed Choudhury due to the assault, fell on the ground and became unconscious. Hearing the screams let out by all of them, the persons from the neighbourhood gathered at the spot and seeing the persons from the neighbourhood, the accused person retreated from the place. The informant stated that with the help of the neighbours, she took her father to Karimganj Civil Hospital at first. But finding the condition of Masuk Ahmed Choudhury critical, the doctors at the Karimganj Civil Hospital advised them to go to the Silchar Medical College, Silchar. Accordingly, the injured was taken to the Silchar Medical College but there also, the doctors finding the condition of the injured critical, advised them to take the injured to Guwahati. The informant stated in the FIR that at the time of lodging the FIR, the injured was undergoing treatment at Guwahati. It was stated in the FIR that as the family of the informant was busy attending the injured, there was some delay in lodging the FIR. In the FIR, apart from naming Faruk Ahmed [A-1] as an accused, the informant named three other persons as accused viz. [i] Sabir Ahmed @ Maju, son of Faruk Ahmed; [ii] Ikbal Ahmed @ Saju, son of Faruk Ahmed; and [iii] Smti. Joyna Begum, wife of Faruk Ahmed.

3. On receipt of the said FIR, the Officer In-Charge, Karimganj Police Station registered the

same as Karimganj Police Station Case no. 524/2009, on 07.12.2009, for the offences under Sections 354/323/326/34, Indian Penal Code and entrusted the investigation to one Sri Benu Madhab Deb [P.W.8], Sub-Inspector of Police attached to Karimganj Police Station.

4. The Investigating Officer [I.O.] of the case, during the course of investigation recorded the statements of the witnesses under Section 161, CrPC. During the course of the investigation, the injured, Masuk Ahmed Choudhury succumbed to his injuries at the GNRC Hospital, Guwahati on 12.12.2009. The inquest on the dead body of the deceased was performed at the GNRC Hospital on 13.12.2009 by a Sub-Inspector of Police from Dispur Police Station in reference to Dispur Police Station General Diary Entry no. 704 dated 13.12.2009 and Karimganj Police Station Case no. 524/2009. Thereafter, the post-mortem examination on the dead body was carried out at the Gauhati Medical College & Hospital [GMC&H] on 13.12.2009. The I.O. of the case upon completion of investigation, submitted a charge sheet under Section 173[2], CrPC vide Charge Sheet no. 245/2010 on 30.08.2010 in connection with Karimganj Police Station Case no. 524/2009 [G.R. Case no. 1110/2009] finding a *prima facie* case for the offences under Sections 354/323/326/34, IPC with added Section 302, IPC well established against all the four accused persons, named in the FIR. On submission of the Charge Sheet, the learned Additional Chief Judicial Magistrate, Karimganj upon appearance of the three accused persons viz. [i] Faruk Ahmed [A-1]; [ii] Sabir Ahmed [A-2]; and [iii] Smti. Joyna Begum [A-3], furnished copies to them in compliance of the provisions of Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Additional Chief Judicial Magistrate, Karimganj committed the case records of G.R. Case no. 1110/2009, arising out of Karimganj Police Station Case no. 524/2009, to the Court of Sessions, Karimganj as per the provisions of Section 209, CrPC by an Order of Commitment dated 09.05.2012 and by allowing the said three accused persons to remain on previous bail, in the meantime. As the fourth accused named in the FIR, Ikbal Ahmed @ Saju was found to be below 18 years of age at the time of the incident and a juvenile in conflict with law, the case against him was split up with a direction to him to appear before the learned Principal Magistrate, Juvenile Justice Board, Karimganj. On receipt of the case records of G.R. Case no. 1110/2009 pursuant to the Order of Commitment dated 09.05.2012, the Court of Sessions [‘the trial court’] registered the same as Sessions Case no.

88/2012.

5. On appearance of the three accused persons before the trial court, the learned trial court after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials on record, framed the following charges :-

[a] That you, on or about the 06.12.2009 at about 06-30 a.m. at village Kanishail under Karimganj Police Station in furtherance of common intention outraged the modesty of complainant and her mother and thereby committed an offence punishable U/Ss354/34 of the Indian Penal Code and within my cognizance;

[b] That you, on or about the same time, date and place in furtherance of common intention of all inflicted hurt on the person of Masuk Ahmed, father of complainant with spade, lathi, chata causing grievous injuries knowing that such injuries would likely to cause death of the person and as a result of such injured succumbed to injuries at GNRC, Gauhati after 7 days during treatment and thereby committed an offence punishable U/Ss 302/34 of the Indian Penal Code and within my cognizance.

6. When the charges were read over and explained to the accused persons, they pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined 9 [nine] nos. of witnesses and exhibited 14 [fourteen] nos. of documents to bring home the charges against the accused-appellants. The witnesses examined by the prosecution were :- [i] P.W.1 : Sabiha Mahbub Choudhury, the informant & daughter of the deceased; [ii] P.W.2 : Musstt. Sajeda Begum Choudhury, the wife of the deceased; [iii] P.W.3 : Ahmed Reza Choudhury, a son of the deceased; [iv] P.W.4 : Imrana Khanam; [v] P.W.5 : Badrun Nessa; [vi] P.W.6 : Kamrul Jaman; [vii] P.W.7 : Dr. Bijan Bihari Dey; [viii] P.W.8 : Benu Madhab Deb, the I.O. of the case; and [ix] P.W.9 : Dr. Nitu Kumar Gogoi. After closure of the evidence from the prosecution side, the accused-appellants were examined under Section 313, CrPC and their pleas were denial. The defence did not adduce any evidence. After appreciation of the evidence on record and hearing the learned counsel for the parties, the

learned trial court had convicted the accused-appellants for the offences, mentioned above, and they had been sentenced in the manner, indicated above. The accused-appellants were, however, acquitted from the charge under Sections 354/34, IPC.

7. We have heard Mr. B.B. Narzary, learned Senior Counsel assisted by Mr. S. Chauhan, learned counsel for the appellants; Ms. S. Jahan, learned Additional Public Prosecutor for the respondent no. 1, State of Assam; and Mr. A. Ahmed, learned counsel for the respondent no. 2 – informant.

8. Mr. Narzary, learned Senior Counsel appearing for the appellants has submitted that there were inconsistencies in the testimonies of the prosecution witnesses, more particularly, in the testimonies of the three witnesses – P.W.1, P.W.2 & P.W.3 – who were related to the deceased. The inconsistencies were, most importantly, with regard to the alleged act of assault. It is his contention that no evidence was available as regards formation of any common intention among the appellants. The evidence was deficient with regard to any act of assault on the deceased by any of the accused-appellants. In absence of any cogent evidence, the defence version that the deceased had sustained the injury due to a fall on the stony surface near the pond was the most plausible one. Yet, the learned trial court ignoring the same had proceeded to hold all the accused-appellants guilty of the charge under Section 302, IPC read with Section 34, IPC. With regard to the injuries sustained by the deceased, it is his contention that there was no evidence to the effect that the deceased had sustained more injuries than one though the version of the other side was that all the accused-appellants participated in assaulting the deceased with spade, *lathis*, etc. and in the process, also assaulted P.W.1 and P.W.2. Mr. Narzary has further contended that the alleged eye-witnesses – P.W.1, P.W.2 & P.W.3 – had improved their versions from their previous statements made before the police while adducing their evidence in the trial and the defence had clearly brought out the contradictions by confronting them with their previous statements with confirmation subsequently through the I.O. of the case. As such, the learned trial court had erred in accepting the versions of the said prosecution witnesses given in their testimonies *in toto*. It is contended by him that though P.W.1 and P.W.2 had testified that they were also assaulted in the process, there was no evidence to that effect. Moreover, the I.O. of

the case recorded the statements of the witnesses – P.W.1 & P.W.3 – after much delay.

9. Ms. Jahan, learned Additional Public Prosecutor has submitted that the defence did not bring any contradiction in the evidence of the prosecution witnesses by properly bringing their previous statements and as such, it is incorrect on the part of the accused-appellants to say that the prosecution case had suffered due to contradictions on the vital aspects. It is also the contention of Ms. Jahan that the prosecution case was consistent right from the version in the FIR till the testimonies of the eye-witnesses. The eye-witnesses' accounts also stood corroborated by the other prosecution witnesses and the medical evidence. As regards common intention, Ms. Jahan has contended that it is not always necessary to have a pre-oriented plan as common intention can be formed in the course of occurrence also. There was clear evidence that all the three accused-appellants had participated in the act of assault resulting into the injuries, which ultimately resulted into the death of Masuk Ahmed Choudhury. Although the injured succumbed to his injuries after a few days that would not be sufficient to hold that it was not a case of murder simplicitor. The learned Additional Public Prosecutor has referred to the testimonies of P.W.1 and P.W.2 to controvert that why there was no evidence as regards their injuries, there was sufficient explanation. To buttress her submissions, Ms. Jahan has referred to the decisions in V.K. Mishra and another vs. State of Uttarakhand and another, reported in [2015] 9 SCC 588; Goudappa and others vs. State of Karnataka, reported in [2013] 3 SCC 675; and Hari Om vs. State of Uttar Pradesh, reported in 1993 Supp [2] SCC 1.

10. Mr. Ahmed, learned counsel appearing for the respondent no. 2-informant while adopting and supporting the submissions of the learned Additional Public Prosecutor, has contended that merely because the death had occurred after a few days, the same would not bring the case in hand within the ambit of the offence, culpable homicide not amounting to murder. The nature of the injury and the part of the body where such injury was inflicted are vital to separate an act of murder from an act of culpable homicide not amounting to murder. He has contended that all the accused-appellants had acted in concert with a pre-meditated plan and the assault was with the intention to cause death. The injury was inflicted on the head of the deceased. With regard to the submission advanced regarding the defence

bringing out contradictions, he has contended that the defence failed to bring the previous statements to the notice of the prosecution witnesses in the manner required. It is his contention that the eye-witnesses were consistent in their testimonies and there was no reason for the learned trial court to disbelieve them. He has further drawn attention to the statements of the accused-appellants made during their examinations under Section 313, CrPC to submit that the presence of the accused-appellants at the place of occurrence was admitted by themselves. He has relied in the decision of the Hon'ble Supreme Court in Prasad Pradhan and another vs. the State of Chattisgarh, reported in AIR 2023 SC 643, to buttress his contention that the learned trial court had rightly convicted the accused-appellants for the offence of murder. He has further submitted that the case which was registered on the basis of an FIR lodged by the accused side, ultimately resulted in a final report. Thereafter, a protest petition was filed, which was registered as a complaint case. On the basis of the complaint case, Sessions Case no. 175/2012 was registered. But Sessions Case no. 175/2012 was dismissed by a Judgment dated 22.06.2022 with a finding that the accused, Faruk Ahmed [A-1] did not sustain any injury in the incident. By placing a copy of the Judgment dated 22.06.2022, Mr. Ahmed has pointed out that P.W.2 and P.W.3 were arraigned as accused therein.

11. We have given due consideration to the submissions advanced by the learned counsel for the parties and have also gone through the materials/evidence on record including the testimonies of the witnesses, available in the case records of Sessions Case no. 88/2012, in original. We have also gone through the decisions cited by the learned counsel for the parties.

12. In order to appreciate the submissions of the learned counsel for the parties, it appears necessary, at first, to refer to the testimonies of the prosecution witnesses.

13. P.W.1 had exhibited the FIR as Ext.-1 with her signature on it. In her testimony, P.W.1 deposed to the effect that at about 06-00/06-30 a.m. on 06.12.2009, her father went out of the house for washing hands in the pond. At that time, the accused, Faruk Ahmed [A-1] came near him and asked her father as to why he did not solve the land dispute with them. In

reply, the informant's father told A-1 that the matter might be resolved after return of the mediator from *Haj*. The informant, P.W.1 stated that at that time, she was near to her father. Her father after telling so to A-1, returned back to his house. The accused, A-1 then uttering slang language rebuked and assaulted her with fists and blows. Hearing the alarm raised by her, her mother, P.W.2 came out of the house and tried to resist the accused persons. But the accused persons – A-1, A-2, A-3 and Ikbal Ahmed @ Saju – also assaulted P.W.2. On hearing the noise, the informant's father, Masuk Ahmed Choudhury also came out of the house. P.W.1 had stated that at that point of time, the accused, A-1 assaulted Masuk Ahmed Choudhury on his head from the back side with a spade. As a result, Masuk Ahmed Choudhury [hereinafter referred to as 'the injured' or 'the deceased', also, at places, for easy reference] fell down on the ground. Hearing commotion, the persons from the neighbourhood started to gather at the place of occurrence. P.W.1 had further stated that the accused, A-3 gave the spade to the accused, A-1 who with the said spade assaulted her father. When people started to come near the place of occurrence, the accused named Ikbal Ahmed @ Saju [the juvenile in conflict with law] had allegedly restrained them with the threat that if they would come near then they would also be assaulted. P.W.1 had also deposed to the effect that thereafter, the accused persons fled away from the place of occurrence. P.W.1 stated to have narrated the entire incident to the neighbourhood people who came to the place of occurrence. Her brother, P.W.3 was also there apart from persons named AbulHussain, Imrana Khanam [P.W.4], Badrun Nessa [P.W.5], Kamrul Zaman [P.W.6], etc. The injured was thereafter, taken to the Civil Hospital at Karimganj for treatment and P.W.1 stated that she went along with the injured. From the Civil Hospital, Karimganj, the injured was referred to the Silchar Medical College, Silchar. But from the Silchar Medical College, the injured was again taken to the GNRC Hospital at Guwahati where the injured had undergone treatment for 5-6 days before succumbing to the injuries. P.W.1 had stated that she lodged the FIR on the day following the date of incident. According to P.W.1, the I.O. of the case visited the place of occurrence and seized the spade and one wooden piece. P.W.1 also referred to an FIR lodged by the accused persons against them. P.W.1 also exhibited a seizure list, Ext.-2 along with her signature thereon. P.W.1 testified to the effect that due to assault on her by the accused persons, A-1 and A-2, she sustained swelling injuries but due to the serious condition of her father, she did not take any treatment for such injuries.

13.1. In her cross-examination, P.W.1 stated that they got bail in the cross-case filed by the accused persons. P.W.1 stated that as regards the juvenile, she had adduced evidence before the Juvenile Justice Board, Karimganj. She testified to the effect that when the injured was being taken to the Civil Hospital at Karimganj, her brother [P.W.3] was with her along with many other persons. It was at about 06-45 a.m., the injured was taken to the Civil Hospital, Karimganj and the release from there was at about 08-30 a.m. for the Silchar Medical College. It was P.W.2 and P.W.3 who along with others, took the injured to Silchar. P.W.1 had stated that she did not go to Silchar. Instead, she returned home along with her uncle, Abul Hussain and she stayed in her house on that day. It was on the following day, that is, on 07.12.2009, she lodged the FIR. In her cross-examination, P.W.1 had disclosed that the accused, A-1 is her own uncle and the accused, A-2 is the son of A-1. She stated that Abul Hussain is her another uncle. P.W.1 had further stated that her family and the family of the accused reside in the same campus and there was a pond in the backside of her house. The pond was used by the members of all the families. She had further stated that at the time of the incident, her father went to the *ghat* of the pond for washing his face. She denied of having any knowledge regarding any injury sustained by the accused, A-1. She further stated that the accused persons had a prior intention to assault her father and for that purpose, they made several attempts. P.W.1 had, however, expressed ignorance as to how many blows were inflicted by the accused persons. She denied the suggestion from the accused that the incident was an accident. It was further denied by P.W.1 that the alleged incident was due to any scuffling between her father and the accused, Faruk Ahmed [A-1] as a result of which her father fell on the side of the pond sustaining the injury and the accused, Faruk Ahmed [A-1] also sustained injury due to a fall in a similar manner. P.W.1 also stated that it was her grandfather [not examined as a witness], who handed over the spade and the wooden piece/lathi to the police, who seized the same on the day following the date of the incident. P.W.1 had denied that she did not state before the I.O. to the effect that the accused, Sabir Ahmed [A-3] handed over the spade to the accused, Faruk Ahmed [A-1] and that P.W.4, P.W.5, P.W.6, Abul Hussain, etc. came to the place of occurrence just after the incident.

14. P.W.2 was the wife of the deceased. In her examination-in-chief, P.W.2 stated that the accused persons were relatives and they reside within the same campus. On the date of the incident, at about 06-00/06-30 a.m., her husband went outside the house to the nearby pond, situated at the backside of their homestead, for washing his mouth. Then, the accused, A-1 asked her husband about demarcation of the land. She stated to have heard her husband replying to the accused, A-1 that the matter would be decided after return of the mediator, who went for *Haj*. P.W.2 who was at the door of the house, stated to be near to her husband at that time. P.W.2 stated that her daughter, P.W.1 also came near them hearing the conversation between their husband/father and the accused, A-1. Thereafter, her husband, Masuk Ahmed Choudhury returned back to the house but the accused, A-1 uttering slang language, followed him. As in the meantime, her husband had already entered into the house, the accused, A-1 finding her daughter, P.W.1 near him started assaulting her. Seeing the accused, A-1 assaulting her daughter, P.W.1, she went out to resist the accused, A-1. Then all the other three accused persons – A-2, A-3 & juvenile – also started assaulting her. Seeing the assault, Masuk Ahmed Choudhury came out of the house to save her. At that point of time, the accused, A-3 came there with a spade and the accused, A-1 inflicted a blow on the head of Masuk Ahmed Choudhury with the spade. As a result, the injured fell down on the ground and the other accused persons with the spade, *lathi*, bamboo stick, wooden piece continued the assault on the injured. At that moment, hearing hue and cry, her son, P.W.3 came to the spot. Seeing P.W.3 at the spot, the accused persons left the place. P.W.2 also deposed to the effect that on hearing commotion, the other residents of the campus - P.W.4, P.W.5, P.W.6, AbulHussain, Abdul Wahid, Abdul Khalique, etc., also came to the place of occurrence. As regards the medical treatment of her husband, P.W.2 deposed in the similar manner like P.W.1. P.W.2 also stated that her husband was in the GNRC Hospital, Guwahati for about a week in an unconscious condition and finally, he succumbed to his injuries there on 12.12.2009. About the cross-case lodged against them by the accused persons, P.W.2 stated that the said case ended in a final report. Subsequently, a protest petition was filed and in that connection, summons were issued to them by the Court of learned Magistrate for their appearance. On receipt of the summons, they appeared in the case, which was pending at the time of her deposition. P.W.2 also exhibited her statement recorded under Section 164, CrPC as Ext.-3 along with her signatures thereon.

14.1. In her cross-examination, P.W.2 stated that it was after 40 days of the incident, she gave her statement before the Magistrate. She stated that she did not give any statement to police. It was further deposed by P.W.2 that it was on her advise, P.W.1 lodged the FIR. In her cross-examination, P.W.2 also stated that she did not hear any altercation and no outsiders were present at the time of the incident and at the place of occurrence, except the family members of both the sides. She had disclosed that the entire incident occurred within a time period of 5 to 10 minutes and it was after the incident, the villagers assembled at the place of occurrence. P.W.2 further deposed that as the accused inflicted the injury in a spur of the moment, she did not get any scope to restrain him. When suggestions were put to P.W.2 in her cross-examination, she denied that she did not state before the I.O. to the effect that at the time of the incident, she was at the door, near to her husband; that she went out to resist the accused, A-1 and then, all the other accused persons, A-2, A-3 and the juvenile started to assault her and seeing the assault, her husband came out to save her; that when her husband fell down, the accused persons assaulted him with spade, *lathi*, bamboo stick, wooden piece, etc.

15. P.W.3 in his testimony, stated that the accused, A-1 is his uncle and his other uncles also reside in separate houses but within the same campus. In his evidence-in-chief, P.W.3 stated that on hearing the alarm raised by his mother, P.W.2 and his sister, P.W.1, he got up from bed and came out of the house. Coming out, he saw the accused, A-3 handing over a spade to the accused, A-1. Immediately thereafter, the accused, A-1 inflicted the injury on the head of his father by the spade. At that time, the other accused persons, that is, A-2, A-3 and the juvenile also assaulted his father with *lathi* and as a result, his father fell down. In his deposition, it was stated by him that on hearing alarm, the neighbourhood people gathered at the place of occurrence and with their help, he took his father to the Civil Hospital, Karimganj. He also stated about referring the injured to the Silchar Medical College from the Civil Hospital, Karimganj and thereafter, to the GNRC Hospital at Guwahati from the Silchar Medical College. He stated that his mother, P.W.2 went with the injured to the GNRC Hospital, Guwahati along with him. It was after 7 days of treatment, his father expired on 12.12.2009. He also stated that after inquest and post-mortem examination, they brought the dead body

from Guwahati to Karimganj.

15.1. In his cross-examination, P.W.3 had mentioned that police examined him after about forty days from the date of the incident. Suggestion was also put to him by the defence and P.W.3 denied that he did not state before the I.O. that the accused persons had assaulted his father with *lathi*, etc. P.W.3 acknowledged the presence of 4-5 persons including P.W.6, Abdul Wahid and Abul Hussain at the place of occurrence. He denied the suggestion of the defence that he did not see the accused, A-3 handing over the spade to the accused, A-1 and the accused, A-1 assaulting his father with the spade.

16. P.W.4 is the wife of Juber Ahmed, an younger brother of Masuk Ahmed Choudhury. She stated that the accused persons were from the same campus. Narrating about the incident, P.W.4 stated that in the early morning hours on 06.12.2009, she was preparing tea. At that time, she hearing alarm, went out of the house. When she was on her way to the place of occurrence wherefrom the commotion originated, she was restrained by the juvenile telling her not to proceed further. She testified to the effect that she saw the accused, A-1 holding a spade and the accused, A-2 holding a piece of wood. P.W.4 also testified that she saw the accused, A-3 near to the accused, A-1 and A-2. She further deposed to the effect that she saw the accused, A-1 and A-2 assaulting Masuk Ahmed Choudhury with the spade and the wooden piece. At that point of time, all the inmates of the house raised alarm and hearing noise, the persons from the neighbourhood gathered at the place of occurrence, which was the courtyard of Masuk Ahmed Choudhury. Seeing persons gathering at the place of occurrence, the accused persons left the place. P.W.4 also stated that she saw Masuk Ahmed Choudhury lying with a serious injury on his head with bleeding. As regards the medical treatment, P.W.4 deposed in similar manner like the other P.W.s. She stated that during investigation, her statement was recorded by the I.O.

16.1. When P.W.4 was cross-examined, suggestions were made to her that she did not state before the I.O. to the effect that she and other inmates of the homestead had raised alarm; that the incident of assault took place in the courtyard of Masuk Ahmed Choudhury; that seeing the persons gathering at the place of occurrence, the accused persons left the

place; that she saw the injured lying with a head injury, etc. and all those suggestions were denied by P.W.4. In her cross-examination, P.W.4 stated that she adduced evidence before the Principal Magistrate, Juvenile Justice Board, Karimganj against the delinquent juvenile. She denied the questions of the defence that she did not see the incident and that no such incident, as deposed by her, had occurred.

17. P.W.5 in her evidence-in-chief, deposed that the deceased was younger cousin of her husband, Habibur Rahman, whose house was adjacent to their house within the same campus. The house of the accused persons was also within the same campus. As regards the incident, P.W.5 stated that at about 06-30 a.m., about 3-4 years ago, she came out of the house hearing commotion and saw all the four accused persons, that is, A-1, A-2, A-3 and the juvenile delinquent armed with spade, *lathi*, etc. assaulting Masuk Ahmed Choudhury in the common courtyard of both the parties. When she approached towards the place of occurrence, the juvenile delinquent threatened her by showing a *lathi* and asked her not to proceed further. When she raised alarm calling Imrana Khanam [P.W.4] and her son, Kamrul Jaman [P.W.6] they came out and rushed towards the place of occurrence. Seeing them at the place of occurrence, the accused persons left the place of occurrence. Then, she also went to the place of occurrence and found Masuk Ahmed Choudhury lying unconscious with blood oozing out from his mouth. P.W.5 further stated that she saw the wife and the daughter of Masuk Ahmed Choudhury, that is, P.W.1 and P.W.2 sitting and crying near him. P.W.5 also deposed that she saw Ahmed Reza Choudhury [P.W.3] and Abul Hussain taking the injured to the hospital. It was deposed by P.W.5 that other persons also gathered at the place of occurrence. P.W.5 had deposed in the similar manner like the other prosecution witnesses as regards the treatment of the injured at the Civil Hospital, Karimganj, the Silchar Medical College and the GNRC Hospital, Guwahati where he ultimately succumbed to his injuries after 1 [one] week of treatment. The said witness stated that the police came to the place of occurrence and recorded her statement in the night of the incident itself.

17.1. In her cross-examination, suggestions were put to her to the effect that she did not state before the I.O. that she saw the accused persons assaulting Masuk Ahmed Choudhury in the common courtyard of both the parties; that when she raised alarm calling

P.W.4 & P.W.6, they came out and rushed towards the place of occurrence; that she found the wife and the daughter of Masuk Ahmed Choudhury, P.W.1 & P.W.2 sitting near the deceased and crying; etc. All those suggestions were categorically denied by P.W.5.

18. P.W.6 who is the son of P.W.5, deposed to the effect that Masuk Ahmed Choudhury was his uncle. At about 06-00/06-30 a.m. on 06.12.2009, he woke up hearing hue and cry from a place within the campus and he proceeded towards that place. He saw the accused persons, Faruk Ahmed [A-1], Sabir Ahmed [A-2] and Joyna Begum [A-3] and the juvenile armed with *lathi*, spade, etc. He stated that Faruk Ahmed [A-1] was armed with a spade and others were armed with *lathis*. Seeing him they left the place and he found Masuk Ahmed Choudhury lying injured with blood coming out from his head. By that time, many others gathered at the place of occurrence. He stated about the treatment of Masuk Ahmed Choudhury at the Civil Hospital, Karimganj, the Silchar Medical College and finally, at the GNRC Hospital, Guwahati where he succumbed to the injuries after 7 [seven] days of treatment. In his evidence-in-chief, P.W.6 stated that the place of occurrence was the common courtyard of both the families, that is, the accused side and the informant side. He deposed that the place of occurrence was near a pond. He stated that he learnt that there was a demand for partition of the joint family property to Masuk Ahmed Choudhury by the accused, Faruk Ahmed. Then, Masuk Ahmed Choudhury told the accused, Faruk Ahmed [A-1] that the matter of partition would be discussed after the return of the mediator from *Haj*. P.W.6 stated to have learnt that there was an altercation thereafter and in the process, the accused persons caused hurt.

18.1. In his cross-examination, P.W.6 stated that he was examined by the I.O. of the case on the date of the incident itself and also on the following day. In his cross-examination by the defence, a number of suggestions were put to him. He was asked to the effect that he did not state before the I.O. of the case that the offence took place in the common courtyard of both the parties; that he found the accused persons running away with spade, *lathi*, etc. from the place of occurrence; that he found Masuk Ahmed Choudhury lying near the pond in senseless condition, etc. All those suggestions were, however, denied by P.W.6.

19. P.W.7 was a doctor posted at the GNRC Hospital as Senior Consultant, Neuro-Surgery

during the period from 07.12.2009 to 12.12.2009 when Masuk Ahmed Choudhury was being treated in the Hospital as an indoor patient till his death at 10-00 a.m. on 12.12.2009. He had deposed about the injuries sustained by Masuk Ahmed Choudhury and exhibited two documents, Ext.-4 : Death Summary & Death Record and Ext.-5 : Medical Certificate of Death. The contents of the said two exhibits, Ext.-4 & Ext.-5 would be referred to in the later part of the order.

19.1. In his cross-examination, P.W.7 stated that Masuk Ahmed Choudhury was initially treated at the Silchar Medical College and thereafter, he was brought to the GNRC Hospital, Guwahati. There was a discharge certificate from the Silchar Medical College which indicated that conservative treatment was given to him. The report of the Silchar Medical College depicted head injury with cranial caudal injury. As regards the period of treatment, he stated that Masuk Ahmed Choudhury was admitted in the GNRC Hospital on 07.12.2009. As regards Ext.-5, he had stated that he was not aware as the same was seized by the police or not. As per Ext.-5, the injury was increased intra-cranial pressure due to head injuries and the same was the cause of death.

19.2. P.W.8 was the Investigating Officer of the case. In his deposition, P.W.8 stated that on 07.12.2009, P.W.1 lodged the written FIR which led to the registration of Karimganj Police Station Case no. 524/2009 and he was entrusted with the investigation of the case. According to him, on being entrusted with the investigation, he opened the case diary and examined the informant, P.W.1 who was at the Police Station. Thereafter, he went to the place of occurrence at Kanishail near the pond and prepared the sketch map of the place of occurrence, which he exhibited as Ext.-7. He testified to the effect that he recorded the statements of the witnesses and recovered one spade with butt measuring 3 feet in and one piece of wood measuring 2 cubits and seized the same vide a seizure list, Ext.-2. He stated about the inquest conducted at the GNRC Hospital, Guwahati by the police official of Dispur Police Station. Additionally, he had exhibited the following documents :-Ext.-6 : Printed form of First Information Report; Ext.-8 : Letter forwarding the dead body of GMCH for autopsy; Ext.-9 : Information to Dispur Police Station that the injured Masuk Ahmed Choudhury had expired on 12.12.2009; and Ext.-10 : Charge Sheet. He also identified the material exhibits,

Mat.Ext.-1 [collectively], corresponding to the Seizure List, Ext.-2. The material exhibits were those which seized vide seizure list, Ext. 2.

19.3. In his cross-examination, he stated that as per the FIR, the alleged occurrence took place at about 06-30 a.m. on 06.12.2009. He had stated that he had not collected any report from the GNRC Hospital, Guwahati and he did not know about any medical report mentioning the injury sustained by the victim was accidental or otherwise. He stated that he did not seize any blood clotted cloth or blood clotted soil from the place of occurrence, other than the spade [M.Ext-1]. The defence side had referred to him that the prosecution witnesses – P.W.1, P.W.2 & P.W.3 – did not state before him in the manner they had stated in their depositions before the Court. For example, he stated that P.W.1 did not state before him that after the alleged incident, when the people started to come near the place of occurrence, the accused persons restrained them. Similarly, P.W.8 stated that P.W.2 did not state before him that at the time of incident, she was near her husband at the door and was hearing conversation and her daughter, P.W.1 was also there; and that she went to resist the accused person, A-1 and then, all the accused persons started to assault her and seeing the same, her husband, Masuk Ahmed Choudhury came to save her; etc.

20. P.W.9 was a Post Graduate [PG] on duty in the Department of Forensic Medicine in the Gauhati Medical College & Hospital [GMC&H] on 13.12.2009 when, in connection with Dispur Police Station General Diary Entry no. 704 dated 13.12.2009 and Karimganj Police Station Case no. 524/2009, the corpse of the deceased, Masuk Ahmed Choudhury was brought to the GMC&H. He performed the post-mortem examination on the body. On performing the post-mortem examination, he found the following injuries :-

Stitch wound of size 6 cm X 2 cm X scalp deep present over left side of forehead, 4 cm away from the midline and 14 cm above the left mastoid process. The wound is repaired by 3 surgical stitches underneath scalp is contused at places.

Black eyes present on the left side involving both upper and lower eyelids.

Cranium and Spinal Canal

Scalp as described;

Skull depressed fracture present over left fronto temporal region, upper part, measuring 5 cm X 1.5 cm X cavity deep; sutural fracture of the frontal bone from left side extending up to the right temporal bone;

Fracture base of the Skull.

Vertebrae : healthy.

Membranes : congested, extradural blood clot of size 4 cm X 3 cm X 0.5 cm present over right temporal region, middle part. Diffuse subdural haemorrhage over both cerebral hemispheres.

Brain congested, intra cerebral haemorrhage present over both cerebral hemispheres at places.

As regards his opinion in the Post-Mortem Examination Report [Ext.-11], he reported that the death had occurred due to coma as a result of the head injury. All injuries were reported as ante-mortem in nature and the same were caused by blunt force impact. He further stated that as the deceased was undergoing treatment at another hospital and died during treatment there, it would be difficult to give a final opinion as to whether the death of the deceased was homicidal or not and for that purpose, the opinion of the treating doctor would be required to be taken. It was further stated by him that after the post-mortem examination, he gave the Post-Mortem Examination Report [Ext.-11] to Dr. Kanak Chandra Das, Associate Professor, Department of Medicine, GMCH as he worked under him. He stated that Ext.-11 bore the signature of Dr. Kanak Chandra Das as well as of Dr. R. Chaliha, Professor & Head, Department of Forensic Medicine, GMC&H, as they concurred with his opinion.

20.1. In his cross-examination, P.W.9 stated that it was not likely that the head injury sustained by the victim would have been as a result of a fall on a stony surface. He further clarified that if a person falls from a height of 3-4 feet on a stony surface and sustained a head injury he would also sustain other injuries on his body.

21. It has been canvassed strenuously by the learned Senior Counsel for the appellants that

the defence was successful in bringing the contradictions on record which had the effect of shaking the credibility of the prosecution witnesses. In order to appreciate such contention, a reference to the provisions contained in Section 162, CrPC and Section 145, Evidence Act appear necessary.

21.1. As per sub-section [1] of Section 162, CrPC, no statement made by any person to a police officer in the course of an investigation under the Chapter XII [Information to the police and their powers to investigate], shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as provided in the proviso thereto, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. As per the proviso to sub-section [1] of Section 162, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced as aforesaid, any part of his statement [hereinafter also referred to as 'the previous statement', at places, for brevity], if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872; and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. As per the Explanation to Section 162, CrPC, an omission to state a fact or circumstance in the previous statement may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. Section 145 of the Evidence Act, 1872 has dealt with the issue of cross-examination as to previous statement in writing. Section 145 of the Evidence Act has provided that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

21.2. Thus, a combined reading of the afore-mentioned provisions goes to indicate that Section 162, CrPC prohibits use of statement of a witness recorded by police, that is, use of previous statement, except for the limited purpose of contradiction of such witnesses, as indicated there. The statement made by a witness before the police under Section 161[1], CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as set forth in the proviso to Section 162[1], CrPC. The previous statement recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purposes, *firstly*, for contradicting such witness by an accused under Section 145 of the Evidence Act; *secondly*, for contradicting such witness also by the prosecution but with the leave of the Court; and *thirdly*, for re-examination of the witness for the purpose of only explaining any matter referred to in the cross-examination. It is amply clear that the court on its own cannot make use of the previous statements not proved and ask question with reference to them which are inconsistent with the testimony of the witnesses in the court.

22. It has been elucidated in V.K. Mishra and another vs. State of Uttarakhand and another, reported in [2015] 9 SCC 588, that the words in Section 162 CrPC 'if duly proved' have clearly shown that the record of the statements of witnesses [the previous statements] cannot be admitted in evidence straightway nor they can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the Investigating Officer. The statement before the Investigating Officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act, that is, by drawing attention to the parts intended for contradiction. When it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness, as prescribed by Section 145 of the Evidence Act, must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. The attention of witness is to be drawn to that part and this must be reflected in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record,

but it is yet to be proved. Thereafter, when Investigating Officer is examined in the court, his attention should be drawn to the passage *marked* for the purpose of contradiction, it will then be proved in the deposition of the Investigating Officer who again by referring to the previous statement will depose about the witness having made that statement. The process again involves referring to the previous statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the previous statement with which the defence wanted to contradict him, then the court cannot suo moto make use of the statements made to police not proved in compliance with Section 145 of Evidence Act, that is, by drawing attention to the parts intended for contradiction.

23. When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. From the statutory prescription contained in Section 145 of the Evidence Act, it is evident that the object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. If the previous statement or parts of the previous statement as such is not put to the witness nor the witness was given an opportunity to explain it, then it is of no assistance to the defence to prove their case.

24. On an analysis of the depositions of the prosecution witnesses, more particularly, of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 & P.W.6, it is amply clear that the defence during the trial did not bring the previous statements or any part of the previous statements to the notice of those witnesses, by marking it. It is only in the event the attention of those prosecution witnesses was drawn to any part of their previous statement, marked for the purpose of contradicting, then only the same could have been taken for the purpose of examining as to whether the defence has been able to bring out any contradiction to disturb the credibility of those prosecution witnesses. Though the defence had put many suggestions to those prosecution witnesses that they did not state before the Investigating Officer in their previous statements in the manner suggested therein, all those prosecution witnesses had

categorically denied those suggestions. In such view of the matter, it is evident that the defence side has not been able to bring any contradiction out of those prosecution witnesses by adhering to the procedure prescribed in the Code and the Evidence Act, for the court to appreciate whether any omission had amounting to contradiction on any significant and relevant aspect. Thus, the suggestions remained in the realm of suggestions only and at best, it indicated about the defences sought to be put forward by the accused in course of the trial. Such suggestions do not require any exercise of finding out for omissions amounting to contradictions.

25. From the evidence of P.W.7, it has emerged that Masuk Ahmed Choudhury was admitted in the GNRC Hospital, Guwahati on 07.12.2009 with history of alleged assault on 06.12.2009. The injured, Masuk Ahmed Choudhury was found unconscious since the alleged assault. Masuk Ahmed Choudhury as an injured, was found making incomprehensive sound and movements were abnormal and extensor. CT scan of brain revealed bilateral fronto-temporo-parietal epidural haematoma with mass effect and subfalcine herniation of right frontal lobe to the left region. There were multiple contusions in both the sides of brain, subarachnoid haemorrhage in right parietal region, diffuse brain swelling with effacement of basal cisterns, comminuted fractures in left frontal and temporal bone with involvement of superior orbital margins on the left side and depressed linear fracture of right temporal bone. P.W.7 stated that the injured was treated with medicines and mechanical ventilations but his condition gradually deteriorated and he breathed his last at 10-00 p.m. on 12.12.2009. Such facts were substantiated by Ext.4 – Death Summary and Death Report issued by the GNRC Hospital, Guwahati P.W.7, in his cross-examination, stated that the Report of the Silchar Medical College Hospital [SMCH] also depicted head injury with cranial caudal injury. The factum of head injury also got corroboration from the Post-Mortem Examination Report [Ext.11]. In Ext.11, the injuries were reported as follows :- a stitch wound of size 6 cm x 2 cm x scalp deep present over left side of forehead, 4 cm away from midline and 14 cm above the left mastoid process. The underneath scalp was found contused at places. Depressed fracture was found present over left fronto temporal region, upper part measuring 5 cm x 1.5 cm x cavity deep. Autopsy doctor, P.W.9 stated that the death was due to coma as a result of head injury and all injuries were ante-mortem and caused by blunt force impact.

26. The prosecution witness, P.W.1 had categorically stated that there was assault upon her with fists and blows by the accused, Faruk Ahmed [A-1]. On the alleged date of incident, hearing her alarm, her mother [P.W.2] came out of the house and tried to resist the accused persons but the four accused persons assaulted her mother [P.W.2] also. At that point of time, the deceased came from inside the house and it was at that time, the accused, Faruk Ahmed [A-1] assaulted on the head of the deceased from backside with a spade and as result, the deceased fell down on the ground. The testimony of P.W.2 was also to the effect that after the reply given by the deceased that the land dispute would be decided only after the return of the mediator from *Haj*, the accused, Faruk Ahmed [A-1] followed the deceased hurling abusive words and he finding her daughter [P.W.1] in the way, assaulted her and when she [PW.2] came out to resist the accused, Faruk Ahmed [A-1] and all the accused persons assaulted her also. Seeing the situation, her husband [the deceased] came out to save them but at that point of time, Faruk Ahmed [A-1] inflicted a blow on the head of the deceased with a spade. After the deceased fell down on the ground, the other accused persons had also assaulted the deceased with lathi, bamboo stick, etc. The versions of P.W.1 and P.W.2 had got corroboration from P.W.3 in that when he came out of the house, he saw the accused, Faruk Ahmed [A-1] inflicting injuries on the head of his father [the deceased] with a spade. The place of occurrence was a common courtyard of all the families including the family of the deceased and the accused persons. The exact place of occurrence was near a pond located within the same campus wherein the families, who were close relatives, were residing. The other three prosecution witnesses - P.W.4, P.W.5 and P.W.6 - who are related to the families of the deceased and the accused by the same degree, corroborated the versions of P.W.1, P.W.2 and P.W.3 in material particulars. As all the witnesses were residing within the same campus at close distances, their presence at the place of occurrence within a short period of time, in the course of the incident, cannot be said to be unnatural.

27. When the accused, Sabir Ahmed [A-2] was examined under Section 313, CrPC, he stated that the place of occurrence was a place near a pond and also stated that the incident took place at about 06-00 a.m. on 06.12.2009. While stating that his father, Faruk Ahmed [A-1] had sustained bleeding injury on his head, A-2 stated that his paternal uncle, Masuk Ahmed

also sustained bleeding injury in the backside of his head. He sought to explain that the incident was a mere accident. The accused, Faruk Ahmed [A-1] when he was examined under Section 313, CrPC, had admitted about sustaining injuries by the deceased but he sought to explain that the injury was sustained when the deceased fell on the steps of the pond. He also admitted that at one point, he and his elder brother [the deceased] were present at the place of occurrence near the pond.

28. 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 murder. The offence of murders 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 |
| | <i>Secondly</i> | - | 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 |
| | <i>Thirdly</i> | - | 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 |
| | <i>Fourthly</i> | - | 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. |

28. It is found that the deceased sustained a bodily injury and such bodily injury was caused in the vital part of the body, that is, on the head. The medical evidence has established that it was the bodily injury sustained by the deceased on his head which ultimately led to his death. From the evidence of the prosecution witnesses, it is also established that there was *inter-alia* a bodily injury caused by specific act on the part of the accused, Faruk Ahmed [A-1], as evidence has established that he assaulted the deceased on his head with a spade. Thus, we have not hesitation to hold that it is a case of culpable homicide. It was such bodily injury which was sufficient in the ordinary course of nature to cause death. The Post-Mortem Examination Report [Ext.-11] had recorded that there were ante-mortem injuries and all the injuries were caused by blunt force impact. The same shows that there were other injuries, other than head injury and that there were other injuries also due to assault by lathi, wooden piece, etc., as deposed by the prosecution witnesses, are found to be established.

29. 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. In the oft-quoted decision of the Hon'ble Supreme Court in *Visa Singh vs. State of Punjab*, reported in AIR 1958 SC 465, *Vivan Bose, J.*, explained the meaning of scope of Clause *thirdly* of Section 300, IPC in the following manner :-

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. 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.

30. The issue has been explained further in *State of Andhra Pradesh vs. Rayavarapu Punnayya and another*, reported in [1976] 4 SCC 382. It has been observed that according to the rule laid down in *Virsa Singh's case* [supra], even if the intention of 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 has brought out the said point. Explaining further, the Hon'ble Supreme Court in *Rayavarapu Punnayya* [supra] has observed that whether the offence is murder or culpable homicide not amounting to murder is dependent on the facts of a case and the problem has to be approached in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, of the Penal Code.

31. In the case in hand, it is found that the wife of the deceased, P.W.2, in her cross-examination, had stated that the accused, Faruk Ahmed [A-1] inflicted the injury on the deceased in a spur of the moment and she did not get any scope to restrain him. She further stated that the entire incident of assault took place within a period of 5 to 10 minutes. The informant-P.W.1 had stated, in her cross-examination, that it was at about 06-45 a.m., the injured was taken to the Civil Hospital, Karimganj. From the evidence on record, it has further emerged that in the morning hours on 07.12.2009 at about 06-00/06-30 a.m., the deceased

and the accused, Faruk Ahmed [A-1] were having a conversation. None of the prosecution witnesses had deposed to the effect that at the time the accused, Faruk Ahmed [A-1] was having the conversation with the deceased, he was armed with any instrument/weapon. The evidence on record have not pointed towards the fact that the spade was carried by any of the accused persons from their household. Rather, the evidence on record have pointed out that the spade was picked up by Joyna Begum [A-3] as it was found lying at some place in the common courtyard. In the FIR [Ext.-1] which was lodged by P.W.1, an educated lady, on the next day of the incident, meaning thereby, not hastily, it was stated that the spade was lying in the courtyard. The conversation allegedly was with regard to partition/demarcation of land and it was the accused, Faruk Ahmed [A-1] who asked the deceased, as to when the deceased would solve the land dispute. From the evidence of P.W.1 and P.W.2, who were in the close vicinity when the conversation was going on, it has emerged that the deceased had replied that the dispute would be solved only after the return of the mediator from *Haj*. From the evidence of P.W.1 and P.W.2, it has also emerged that after giving such reply, the deceased went inside his house without any further conversation. At that moment, Faruk Ahmed [A-1] assaulted the daughter of the deceased, P.W.1 followed by assault on the wife of the deceased, P.W.2 by all the accused persons. It was at that moment the deceased came out of the house again and he was assaulted on his head by the accused, Faruk Ahmed [A-1] with a spade, which was handed over to him just prior to the assault, by his wife, Joyna Begum [A-3]. Such assault was followed by assault on the deceased by all other accused persons with lathi, wooden piece, etc. The entire incident of assault happened within a time period of 5 to 10 minutes, preceded by the conversation between Faruk Ahmed [A-1] and the deceased, has established that there was no premeditation on the part of the accused, Faruk Ahmed [A-1] to assault the deceased, who was his elder brother. The cryptic reply given by the deceased to the query made by Faruk Ahmed [A-1] and non-continuation of the conversation might have agitated him and resulted into the assault on the daughter of the deceased, P.W.1 first, who came on the way when he was following the deceased hurling abusive words. The medical evidence do not conclusively indicate that other than the injury on the vital part of the head, there were other fatal injuries on the body of the deceased. All these evidence make it clear that the assault on the deceased by the accused was without any premeditation. The evidence on record indicate that the assault was with a spade, which

was exhibited as Mat.Ext.1, seized vide the seizure list, Ext.2. Spade is a tool which is generally found in a rural household. It is, thus, not difficult for us to reach a conclusion that the present case would come within the ambit of Exception 4 of Section 300 of the Indian Penal Code, which reads as under :-

Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

Meaning thereby, the offence is culpable homicide not amounting to murder as it is committed without premeditation in a sudden fight on the spur of moment.

32. The appellants in Prasad Pradhan [supra] were cousins of the deceased. On the date of the incident, 28.02.2012, when the deceased was getting his land levelled through a JCB, the appellants reached the place and attacked him which resulted into several injuries including head injuries. The deceased did not survive long as he died on 22.03.2012. The question that was considered by the Court in Prasad Pradhan [supra] was whether there was any sudden quarrel between the deceased and the appellants so that the case would not be murder but culpable homicide in terms of Exception 4. The Hon'ble Supreme Court in Prasad Pradhan [supra] has reached an opinion that there was no sudden quarrel as the appellants, who were in the adjacent property, climbed the wall and entered the house of the deceased and attacked him with axes. Holding that such case do not constitute a sudden quarrel and finding that the appellants were armed with axes, it has been held that there was premeditation on their parts. It was in such fact situation, the appellants therein were not granted the benefit under Exception 4 of Section 300, IPC. As it is settled that a case is to be decided on the facts and circumstances obtaining in that particular case, the decision of Prasad Pradhan [supra] is not found applicable to the case in hand as the facts and circumstance of the present case were not similar.

33. The next point agitated by the parties is that as to whether in the fact situation obtaining in the case, Section 34, IPC is applicable or not. Section 34, IPC is with regard to acts done by several persons in furtherance of a common intention. When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons shall be liable for that act in the same manner as if it were done by him alone. Section 34 lays down a principle of joint liability in the doing of a criminal act. Every man is otherwise, singularly responsible criminally for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by another. The principle of criminal liability is that the person who commits an offence is responsible for that and he can only be held guilty. Section 34, IPC describes an exception whereby a person can also be held responsible for the acts of another if he had common intention to do the offence.

34. In Goudappa [supra], it has been observed that the essence of the liability under Section 34, IPC is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person was liable for the result of that as if he had done that act himself. Therefore, if the act is the result of a common intention that every person who did the criminal act shared, that common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. The common intention is gathered from the manner in which the crime had been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them. For arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

35. It is settled proposition that common intention otherwise means a pre-oriented act and acting in pursuance to the act. But the most vital fact for inferring common intention is that the same must exist prior to the commission of the act in point of time. Common intention

can be formed suddenly in the course of occurrence. We have already observed hereinabove the entire incident occurred within a time period of 5 to 10 minutes but within that time period, the accused, Joyna Begum [A-3] had picked up the spade from a place in the common courtyard and handed over the same to her husband, Faruk Ahmed [A-1], who, in turn, had inflicted a blow on the head of the deceased. The other accused, Sabir Ahmed [A-2] was also present at the place of occurrence and collaborated in the act of assault. The overt act on the part of the accused, Joyna Begum [A-3] in handing over the spade [Material.Ext.1] to her husband, Faruk Ahmed [A-1] and the immediate overt act on the part of the accused, Faruk Ahmed [A-1] in assaulting the deceased by the same spade and simultaneous participation of the accused, Sabir Ahmed [A-2] in the act of assault with lathi go to indicate that there was formation of a common intention among them to assault the deceased in the course of occurrence. It has been held in *Hari Om vs. State of Uttar Pradesh*, reported in 1993 Supp[2] SCC, that prior conspiracy or premeditation is not required to attract Section 34, IPC and a common intention can be formed suddenly in the course of occurrence. Thus, we find that all the accused-appellants are liable for the act of assault as there was formation of a common intention attracting the provision of Section 34, IPC.

36. As regards the issue raised by the learned counsel for the appellants that there was delay in examining atleast two prosecution witnesses – P.W.1 & P.W.3 – by the I.O of the case, it cannot be said outrightly that just because there was some delay on the part of the I.O in examining some of the witnesses their testimonies cannot be relied upon. It has been held in *Sunil Kumar vs. State of Rajasthan*, reported in [2005] 9 SCC 283, that the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a core of witness to falsely support the prosecution case. In *V.K Mishra [supra]*, the Hon'ble Supreme Court has observed that it cannot be held as a rule of universal application that the testimony of a witness becomes unreliable merely because there is delay in examination of a particular witness. In the case in hand, many of the prosecution witnesses had stated that they were examined immediately after the incident. The two witnesses – P.W.1 & P.W.3 – who had stated that they were examined by the I.O. after forty days, were witnesses who were present at the place of occurrence at the time of the incident and were natural witnesses.

These two witnesses had taken the injured/their father to the hospital immediately after the incident and were busy with the medical treatment of their father during that entire day, whereas, the I.O. of the case examined many other witnesses on the date of the incident itself. In such facts and circumstances, it cannot be held that examination of these two witnesses after a period of delay had made a dent in the prosecution case. As regards the injury sustained by the informant - P.W.1 and P.W.2, P.W.1 - herself had mentioned about the nature of injuries P.W.1 and P.W.2 had sustained in the incident and their injuries were swelling injuries.

37. The appellant no. 1 is the husband of the appellant no. 3. The appellant no. 2 is the elder son of the appellant no. 1 and the appellant no. 3. On the other hand, all the prosecution witnesses are close relatives of the appellants. All the families reside within the same premises where the incident occurred in their common courtyard.

38. We have already found that it is a case which comes within the ambit of Exception 4 of Section 300, IPC. Hence, the appellants who had shared a common intention and in furtherance of such common intention, had caused such bodily injuries to the deceased, which led to his death, are guilty of the offence of culpable homicide not amounting to murder under Section 304 Part-1, IPC. Thus, their conviction under Section 302, IPC is found not sustainable in law. Having held all the appellants guilty of the offence under Section 304 Part 1, IPC with Section 34, IPC, we after taking into account the facts and circumstances in entirety, have found that a sentence of 6 [six] years of rigorous imprisonment each will subserve the ends of justice, without any alteration as regards the amount of fine to be paid by each of them, in terms of the Order of the learned trial court. Therefore, the sentence of each of the accused-appellants stands altered from imprisonment for life to rigorous imprisonment for 6 [six] years each. The criminal appeal stands partly allowed to the extent indicated.

39. The direction to award compensation to the victim under the provision of Section 357A, CrPC by the learned trial court is to be complied with.

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

JUDGE

JUDGE

Comparing Assistant