

GAHC010190292020



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

CRIMINAL APPEAL [I] NO. 98/2020

Md. Nasim Akhtar

.....Appellant

-VERSUS-

The State of Assam

.....Respondent

Advocates :

Appellant	:	Ms. B. Sarma, Amicus Curiae
Respondent no. 1	:	Mr. K.K. Das, Additional Public Prosecutor, Assam.
Respondent no. 2	:	Mr. P. Dutta, Pro bono Counsel
Date of Hearing, Judgment & Order	:	11.06.2024

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

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

This criminal appeal from Jail is directed against a Judgment and Order dated 02.07.2015 passed by the Court of learned Additional Sessions Judge, FTC,

Lakhimpur at North Lakhimpur in Sessions Case no. 184[NL] of 2014. By the Judgment and Order dated 02.07.2015, the accused-appellant has been convicted for the offence of murder defined in Section 300, Indian Penal Code [IPC] and he has been sentenced under Section 302, IPC to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo simple rigorous imprisonment for another three months.

2. The investigation was initiated on the basis of a First Information Report [FIR] instituted by the informant, Musstt. Ambia Khatoon [P.W.1] before the Officer In-Charge, Bihpuria Police Station on 10.01.2014. In the FIR, the informant alleged that at around 06-30 p.m. on that day itself, that is, on 10.01.2014, the accused named therein, who is an elder brother of the informant, killed her husband, Moubin inside their house by stabbing with a dagger. On receipt of the FIR, the Officer In-Charge, Bihpuria Police Station registered the same as Bihpuria Police Station Case no. 11/2014 for the offence under Section 302, IPC and entrusted the investigation to one Manjit Terang [P.W.7] a Sub-Inspector of Police attached to Bihpuria Police Station.

3. During the course of investigation, the Investigating Officer [I.O.], P.W.7 recorded the statements of a number of witnesses under Section 161 CrPC. He also visited the place of occurrence [P.O.], that is, the house of the informant and prepared a Sketch Map of the P.O. [Ext.-6]. The inquest on the deadbody of the deceased was conducted at Bihpuria C.H.C. on 10.01.2014 by the Circle Officer, In-Charge, Bihpuria Revenue Circle, who after the inquest submitted an Inquest Report [Ext.-5]. Thereafter, the deadbody was forwarded to North Lakhimpur Civil Hospital for post-mortem examination. The post-mortem examination on the deadbody of the deceased was performed at North Lakhimpur Civil Hospital on 10.01.2014. P.W.5, Dr. Manuram Tayeng, who was, 10.01.2014, posted as the Medical & Health Officer-I at North Lakhimpur Civil Hospital. The Autopsy Doctor [P.W.5] recorded his findings in a Post-Mortem Examination [PME] Report [Ext.-3]. In the course of investigation, the I.O. had

seized the alleged weapon of assault vide a Seizure List, M.R. no. 01/2014 [Ext.-2] on 11.01.2014 on being allegedly shown by the accused, in presence of witnesses and also prepared a Sketch Map of the place of recovery [Ext.-7]. After completing investigation into the case, Bihpuria Police Station Case no. 11/2014 [corresponding G.R. Case no. 55/2014], the I.O. [P.W.7] laid the charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 147/2014 [Ext.-4] on 30.08.2014 finding a prima facie case well established against the accused for the offence of murder under Section 302, IPC.

4. On submission of the charge-sheet, the Court of learned Judicial Magistrate, First Class, Lakhimpur caused production of the accused from Jail custody on 27.10.2014. As the copies were ready, the same were furnished to the accused following the procedure laid down in Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Lakhimpur committed by case records of G.R. Case no. 55/2014 to the Court of Sessions, Lakhimpur by an order of commitment dated 27.10.2014. On receipt of the case records of G.R. Case no. 55/2014, the Court of Sessions registered the same as Sessions Case no. 184[NL]/2014. Thereafter, the case was transferred to the Court of Additional Sessions Judge [FTC], Lakhimpur [‘the trial court’, for short] for trial and disposal.
5. On appearance of the accused before the learned trial court and after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials available in the case records, the learned trial court, on 08.12.2014, framed the following charges :-

That you, on or about the 10.01.2014 at about 06-30 p.m. at Ward no. 2 of Bihpuria Town under Bihpuria Police Station, did commit murder by intentionally [or knowingly] causing the death of Moubin Siekh, the husband of the informant,

Musstt. Ambia Khatoon and thereby committed an offence punishable under Section 302 of the Indian Penal Code [IPC] and within the cognizance of the Court of Sessions.

6. When the charge was read over and explained to the accused, he pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side adduced evidence through seven nos. of prosecution witnesses and exhibited documentary evidence through seven exhibits. After closure of the prosecution evidence from the prosecution side, the accused was examined under Section 313, CrPC by putting before him the incrementing circumstances appearing from the evidence led by the prosecution. When the accused was asked as to whether he would adduce evidence in defence, he answered in the affirmative. However, he did not adduce any defence evidence. After hearing the counsel for the parties and after appreciation of the evidence/materials on record, the learned trial court finding him guilty for the charge of murder under Section 302, IPC has convicted the accused and he has been sentenced in the manner, indicated above.
7. We have heard Ms. B. Sarma, learned Amicus Curiae appearing for the accused-appellant; Mr. K.K. Das, learned Additional Public Prosecutor for the respondent no. 1, State of Assam; and Mr. P. Dutta, learned counsel who has appeared as pro bono counsel for the respondent no. 2-informant.
8. Ms. Sarma, learned Amicus Curiae appearing for the accused-appellant has submitted that out of the non-official prosecution witnesses, the testimonies of P.W.1 and P.W.2 are of relevance and significance as they were the only witnesses who seemed to be present in the vicinity of the place of occurrence at the relevant time of occurrence. It is contended by Ms. Sarma that both the witnesses, P.W.1 and P.W.2 seemed to be related and interested witnesses and as such, their testimonies need appreciation with necessary caution. It is further submitted that the manner of recovery of the alleged weapon of assault

is also doubtful. Submitting further, the learned Amicus Curiae has submitted that the charge was only with regard to a single blow. It has emerged from the testimony of P.W.2 that the deceased was not unarmed at the relevant point of time. It is contended that from the evidence on record, it can be easily noticed that the alleged assault was not unilateral. As there were discrepancies on several points, the accused is entitled to the benefit of doubt. Contending so, the learned Amicus Curiae has submitted that the impugned Judgment and Order of conviction and sentence passed against the accused is liable to be interfered with.

9. Mr. Das, learned Additional Public Prosecutor has supported the Judgment and Order of conviction and sentence passed against the accused on the premise that there were no apparent inconsistencies in the testimonies of the two vital witnesses, that is, P.W.1 and P.W.2. The said two prosecution witnesses were related both to the deceased and the accused and as such, they cannot be said as interested witnesses and related witnesses at the same time. It is his submission that the presence of these two witnesses at the relevant point of time at the place of appearance was natural. In absence of any other evidence to a contrary, it is clearly established that it was the accused only who had assaulted the deceased. The matter of recovery of the alleged weapon of assault was not challenged by the accused during the course of the trial in any manner whatsoever. When the incriminating circumstance regarding recovery of the alleged weapon of assault, the dagger was put to the accused during his examination under Section 313, CrPC, the accused did not offer any plausible explanation. As the prosecution has been able to lead evidence to prove the guilt beyond the reasonable doubts, the Judgment and Order of conviction and sentence needs no interference, meaning thereby, the appeal is bereft of any merits.
10. Mr. Dutta, learned counsel who has appeared as pro bono counsel on behalf of the respondent no. 2-informant has submitted that there is nothing in the

evidence wherefrom an inference can be drawn that the informant-wife had implicated her own elder brother on false accusation. He has adopted the submissions advanced by the learned Additional Public Prosecutor on the behalf of the State.

11. We have given our due consideration to the submissions advanced by the counsel for the parties and have also gone through the evidence/materials including the testimonies of the prosecution witnesses and the documentary evidence, available in the case records of Sessions Case no. 184[NL]/2014, in original.
12. Having heard the counsel for the parties, it has emerged that out of the prosecution witnesses, the evidence of the informant-P.W.1 is of vital import and significance as she was one of the two witnesses, who were present at the relevant time in the vicinity of the place of occurrence. The place of occurrence [P.O.] was the house of the father [P.W.2] of the informant as well as the accused.
13. In her evidence-in-chief, P.W.1 stated that the accused is her own elder brother and the FIR [Ext.-1] was lodged by her against the accused. As regards the incident, P.W.1 deposed to the effect that the incident took place at around 05-30 p.m. on 10.01.2014 on the road behind their house. P.W.1 stated that there was a prior incident on that day as in the morning hours on that day, the accused assaulted her husband. Though she got an Ejahar written as regards the said incident of assault, she did not lodge the same at the Police Station. In the evening hours, the accused came to the room where the informant and her husband used to live. The room was situated in front of her parental house. When she saw her elder brother, she made a query to him as to why he assaulted her husband in the morning. In response, the accused chased her in order to assault. As she fell down while running, she raised hue and cry. Then the accused ran away from there. But on the way, he met her husband. Then

the accused assaulted her husband with a dagger. Witnessing the same, she ran towards her husband. She saw the accused and her husband standing face to face. Seeing her, the accused left the place. Then, she held her husband as he was about to fall down on the ground. She noticed that blood was oozing out from the chest of her husband. Thinking that her husband was dead, she started screaming. Hearing her screaming, her father [P.W.2] came near her and held her husband. Her father [P.W.2] also raised alarm. Then, she leaving her husband with her father [P.W.2], went to the Police Station. Her wearing apparels were already stained with blood flowing out of the injury of her husband. P.W.1 further stated that her husband was taken to a hospital at Bihpuria by a '108' Ambulance from the Police Station. But her husband breathed his last, in the meantime.

14. During cross-examination, P.W.1 stated that her elder brother, that is, the accused used to live separately whereas she used to live with her father [P.W.2]. P.W.1 stated she got married after a love affair and the accused did not accept the marriage. P.W.1 further stated that her father's [P.W.2] land was yet to be divided. As regards her husband, P.W.1 stated that he was a driver in Saudi Arabia. After their marriage on 03.09.2011, he went to his workplace only once. Later on, after returning from Saudi Arabia, he did not return. Narrating about the earlier incident in the morning, P.W.1 stated that it was at around 08-00 a.m. the accused assaulted her husband. She stated that she saw the dagger at the time of taking it out and it was stained with blood.
15. P.W.2, the father of the accused and the father-in-law of the deceased, corroborated the testimony of P.W.1 by deposing that it was at around 06-00/06-30 p.m. on 10.01.2014, the incident had occurred. He stated that he was in home at that time. Hearing hue and cry from the direction of the road beside the house, he came out and saw that the accused and his son-in-law, were entering the backside of the house through a narrow path. Then, he also went to the backside. He saw an iron pipe in the hand of his son-in-law with

the accused. Then, he went forward to resist his son-in-law, but he was pushed down. P.W.2 testified about the presence of his daughter, that is, the informant-P.W.1 with him at the place of occurrence. P.W.2 testified that he the informant-P.W.1 holding her husband and heard her screaming that a murder was committed. He corroborated the testimony of P.W.1 by testifying that holding his son-in-law, who became unconscious, he sat down on the ground and sent her daughter, that is, the informant-P.W.1 to the Police Station. P.W.2 also deposed about the ambulance and presence of Police personnel at the place of occurrence with his daughter. He also stated about taking the injured son-in-law to the hospital. He testified that he saw his son, the accused and his son-in-law, the deceased entering into the narrow path and at that time, he did not see presence of any other person. When cross-examined, P.W.2 stated that there was darkness at the time of the incident. He stated that at the time of the incident, only he, his daughter [P.W.1] and his son-in-law were present in the house. He had, however, stated that he did not see the commission of murder. It was his daughter [P.W.1], who stated to him that the murder was committed.

16. P.W.3 is a son of P.W.2. He is an younger brother of the accused and an elder brother of the informant. In his testimony, P.W.3 stated that when the incident took place in the evening hours of 10.01.2014, he was not present as he went to work. He corroborated the version of the informant [P.W.1] on the point that in the morning hours on 10.01.2014, a quarrel took place between his elder brother, that is, the accused and his brother-in-law, that is, the deceased. P.W.3 further deposed that before he left home for work, he told both of them not to fight. Later on, after coming back home from work, he saw gathering in the house. When he asked the informant-P.W.1 finding her crying, it was told to him that the accused had killed her husband. In cross-examination, P.W.3 reiterated that he did not see the occurrence.

17. From the testimonies of the afore-mentioned 3 [three] prosecution witnesses, it is established that the deceased was assaulted inside the premises belonging to P.W.2, where the informant-P.W.1, her husband [the deceased] and her father [P.W.2] used to reside together with the accused, but in separate houses. The accused also used to reside in the same house premises. The accused being closely related to the prosecution witnesses, P.W.1 and P.W.2, his identification was not in doubt though the occurrence took place in the evening hours. P.W.1 was categorical in her testimony that she saw the blood stained dagger when it was being taken out. She had also categorically stated that the injury was on the chest of her husband and blood was oozing out of that injury. As a result of the assault, when her husband was about to fall down on the ground at that time, she held her husband. As her father [P.W.2] reached the place of occurrence at that time, he [P.W.2] then held the injured, who became unconscious in the meantime, while her [P.W.1] to inform at the Police Station about the incident. The testimony of the two prosecution witnesses, P.W.1 and P.W.2 to the effect that the accused was present at the place of occurrence was not challenged in any manner by the accused, meaning thereby, the testimony of these two prosecution witnesses on that point was not shaken.
18. When in the backdrop of such testimonies of P.W.1 and P.W.2, the medical evidence which is led by the prosecution through the testimony of the Autopsy Doctor [P.W.5] and the findings recorded in the PME Report [Ext.-3] are examined, the medical evidence is found to have corroborated the ocular evidence of P.W.1 and P.W.2. The post-mortem examination on the deadbody of the deceased was performed at the North Lakhimpur Civil Hospital at around 02-00 p.m. on 10.01.2014 by P.W.5, Dr. Manuram Tayeng who was serving as the Medical & Health Officer-I, North Lakhimpur Civil Hospital on that day. In his testimony, P.W.5 stated that he found a lacerated injury of 2 inches over the nipple of the left side of the chest. He opined that all the injuries suffered by the deceased were ante-mortem in nature. He deposed that in his opinion

recorded in the PME Report [Ext.-3] exhibited by him, he reported that the cause of death was due to stab injury to major pulmonary vessels which caused massive intrapleural hemorrhage. In cross-examination, P.W.5 stated that he found that the stab [left side] injury was above the nipple of the deceased.

19. In the PME Report [Ext.-3], P.W.5 recorded the findings as under :-

I-EXTRANAL APPEARANCE

1. Condition of subject stout emaciated, decomposed etc.

A male deadbody of average built rigor mortis present in all four limbs eye closed, face pale. A small lacerated injury over left side of the chest 2 inches above the nipple.

* * * * *

III-THORAX

1. Walis ribs and cartilages : *A small lacerated injury over left side of the chest 2 inches above the nipple. Rib - 3rd rib fractured.*
2. Pleurae : *Ruptured at level of 3 rib [left].*
3. Larynx and trachea : *Healthy, congested.*
4. Right Lung : *Healthy, congested.*
5. Left Lung : *Healthy, covered with full of blood about 3 liters.*
6. Pericardium : *Healthy, Congested.*
7. Heart : *Rt. side of the heart is full of dark fluid blood while left side is empty.*
8. Vessels : *Healthy.*

* * * * *

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE

The injuries described are anti mortem in nature.

In my opinion the cause of death was due to stab injury to major pulmonary vessels which caused massive intrapularal hemorrhage.

Time since death 15 – 16 hrs.

The 10th day of January, 2014.

20. In the PME Report [Ext.-3], the Autopsy Doctor [P.W.5] had further opined that the time of death was about 15-16 hours earlier. Such time of death seemed to have approximated with the time of occurrence of assault, as testified by P.W.1 and P.W.2. It is found that the I.O. [P.W.7] in the course of investigation had conducted the inquest on the deadbody of the deceased at Bihpuria PHC through the Circle Officer, Bihpuria Revenue Circle at 08-00 p.m. on 10.01.2014 on 10.01.2014 before sending the deadbody for post-mortem examination. In the Inquest Report, exhibited as Ext.-5, it was reported that there was stabbing by knife on the left chest on the deadbody. P.W.2, was a witness to the Inquest Report [Ext.-5]. The findings in the Inquest Report [Ext.-5] is found consistent with the findings recorded in the PME Report [Ext.-3] and the ocular testimony of P.W.1 and P.W.2.
21. As regards the alleged weapon of assault, it is the case of the prosecution that the weapon of assault was a knife of about 9 inches [approx.] long. P.W.4 testified to the effect that having heard the accused had killed his brother-in-law with a knife, he went to the place of occurrence and saw a knife injury on the chest of the deceased. He further testified that after arrival of the Police personnel, the accused himself showed the knife, which was used in the incident. He further stated that the knife was seized by the Police personnel in his presence vide Seizure List [Ext.-2] wherein he subscribed his signature as Ext.-2[1]. P.W.4 was, however, not confronted by the defence on the point of such seizure of the knife in any manner whatsoever. This part of the testimony

of P.W.4 found corroboration in the testimony of the I.O. [P.W.7], who stated that he taking the accused along went to a place near the Magic Stand, Ward no. 8, Bihpuria Town. At that place, he recovered a knife, as shown by the accused. He [P.W.7] then drew a Sketch Map of the P.O. [Ext.-7] wherefrom the knife was seized, under his signature Ext.-7[1]. The I.O. [P.W.7] exhibited the Seizure List whereby the knife was sized as Ext.-2 and his signature therein. P.W.4 was one of the seizure witnesses of the Seizure List [Ext.-2]. The defence was not successful in eliciting anything contrary, by cross-examining the I.O. [P.W.7]. When the I.O. [P.W.7] was cross-examined, he stated that the knife, as shown by the accused, was recovered in a culvert located between the Magic [Vehicle] Stand and Hanuman Mandir in Bihpuria Town.

22. Upon a close scrutiny and evaluation of the above evidence led by the prosecution, it has clearly emerged that the death of the deceased on 10.01.2014 was caused due to the assault made in the vital part of the body that is, two inches above the nipple on the left chest. As a result of the injury, which was a stab injury to major pulmonary vessels, there was massive intrapuaral hemorrhage. As a result of the injury, the left lung of the deceased was fully covered with blood of about three litres and the right side of the heart was full of dark fluid blood while the left side became empty. The death of the deceased was clearly a homicidal death. From the testimony of P.W.1 and P.W.2, who were found to be consistent throughout, it is clear that it was the accused, who had inflicted the stab injury on the deceased.
23. In the backdrop of the above evidence/materials on record, the question which has, thus, arisen for consideration is whether the offence disclosed by the facts and circumstances established by the prosecution against the accused 'murder' or 'culpable homicide not amounting to murder'. As has been established by a long line of decisions, in the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' is species. All 'murder' is 'culpable homicide' and not vice-

versa. Culpable homicide sense special characteristic of murder is culpable homicide not amounting to murder defines.

24. In *State of Andhra Pradesh vs. Rayavarapu Punnayya*, reported in [1976] 4 SCC 381, 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. It has been explained further that when a Court is required to answer the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient to approach the problem in three stages. The first 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, 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 the Section 304, depending, 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, Penal Code.

25. In Clause '*thirdly*' of Section 300, IPC, it has been set forth that 'culpable homicide' is 'murder' 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. The situation has been explained further in Illustration [c] thereto, which reads as under :-

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

26. In *Virsa Singh vs. State of Punjab*, reported in 1958 SCR 1495, Clause '*thirdly*' of Section 300, IPC has been elucidated 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.

27. From the above exposition and the Rule laid down in *Virsa Singh* [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 be murder and Illustration [c] appended to Section 300 of the Penal Code has clearly brought out the said point.
28. After reaching a finding that the offence here comes within the scope and ambit of Clause *thirdly* of Section 300, IPC, that is, murder what needs an examination is whether the facts and circumstances obtaining in the case brings it within one of the Exceptions to Section 300, IPC.
29. Whether a case would come within the Exception 4 of Section 300, IPC or not has come to be considered in *Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat*, reported in [2003] 9 SCC 322. Deliberating on Exception 4 of Section 300, IPC, it has been observed that Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them started it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused [a] without premeditation, [b] in a sudden fight, [c] without the offender having taken undue advantage or acted in a cruel or unusual manner, and [d] the fight must have been with the person killed. It has been noted that the 'fight' occurring in Exception 4 to

Section 300, IPC is not defined in IPC. It has observed that it takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantages' as used in the provision means 'unfair advantage'.

30. From the evidence of the case in hand, more particularly, from the testimonies of P.W.1, P.W.2 and P.W.3, it has emerged that there was a quarrel between the accused and the deceased in the morning hours on the date of the incident. From the testimony of P.W.3, it has emerged that finding that there was a quarrel between the accused and the deceased in the morning hours on the date of occurrence, he [P.W.3] told both of them before he was leaving for work, not to fight. The caution given by P.W.3 to both the accused and the deceased is suggestive of the fact that the quarrel which took place in the morning, was not unilateral. It is a pointer to the fact that the incident of assault which occurred in the evening hours, was a continuation of the quarrel which broke out between them in the morning on the relevant date. Thus, the quarrel in the morning was a precursor to the incident occurred in the evening hours on the relevant day. From the testimony of P.W.2, it has emerged that at the time of the incident, the deceased was also not unarmed, as P.W.2 testified that at the time of occurrence, the deceased was holding an iron pipe in his hands. P.W.2 further testified that when he went to resist the deceased, he was pushed down. Such situation is clearly suggestive of an aggressive posture

also on the part of the deceased. At the time of occurrence, the accused who is a resident of the same premises as like the deceased, was in home. The weapon of assault, the dagger, seized by the prosecution, is one of a kind which is ordinarily found available in every household in a village. Thus, the nature of weapon used is not one of exceptional nature. From the testimony of P.W.1, it has emerged that when the accused was chasing the informant, he came in confrontation with the deceased on the way. Having come face to face, it was the accused first who had made the assault on the deceased on the vital part of the body of the deceased and the deceased, who was also armed with an iron pipe, did not have the opportunity to retaliate. Explanation to Exception 4 to Section 300 of the Penal Code has provided that it is immaterial in such cases which party offers the provocation or commits the first assault. After giving single blow, the accused did not make any further assault on the deceased as he was about to fall down. Leaving the deceased in that stage, the accused left the place of occurrence. Then, the informant-P.W.1, that is, the wife of the deceased and P.W.2, who were nearby, held the deceased from falling down. In such obtaining facts and circumstances, the case appears to be one which is committed without premeditation. It was an act which emanated in a sudden fight in the heat of passion upon a sudden quarrel and without the accused having taken unfair, undue advantage or acting in a cruel or unusual manner.

31. From the above discussion and the reasons assigned therein, we are of the considered view that the offence committed by the accused is not of the greatest form of culpable homicide, which is defined in Section 300, IPC. It is a case of culpable homicide of the second degree, punishable under the first part of Section 304, IPC. Therefore, Judgment conviction dated 02.07.2015 passed by the learned trial court in so far as under Section 302, IPC is set aside and the same is altered to Part-1 of Section 304, IPC.

32. The learned Amicus Curiae has submitted that the period of incarceration of the accused-appellant is about 10 years 5 months since the date of his initial arrest.
33. Having regard to the provisions contained in Part-1 of Section 304, IPC, we are of the view that the ends of justice will be subserved in converting the sentence of the accused to the period already undergone by him till date, without any alteration on the point of fine. It is accordingly ordered. The accused-appellant is to be released from the custody forthwith, if his detention is not required in connection with any other case. Resultantly, the instant criminal appeal stands partly allowed to the extent indicated above.
34. Before parting with, we reiterated the recommendation of the learned trial court to the District Legal Services Authority, Lakhimpur to make an enquiry for the purpose of granting compensation to the victim as per the extant Victim Compensation Scheme, framed under Section 357A, CrPC.
35. This Court records its appreciation for the assistance rendered by the learned Legal Aid Counsel. The learned Legal Aid Counsel is to be paid remuneration as per the rules in force.
36. The records of the learned trial court are to be sent back immediately.

JUDGE

JUDGE

Comparing Assistant