

GAHC010195272017



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

Case No. : CRL.A(J)/32/2017

BIJAY SONAR

VERSUS

THE STATE OF ASSAM

2:SRI KUMUD DAS
S/O-LT. PARIKHIT DAS
R/O-BARPETA NEPALI BASTI
P.S.-SARBHOG
DIST.-BARPETA
ASSAM

Advocate for the Petitioner : MS B SARMA, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER (CAV)

18-07-2024

[Robin Phukan]

Heard Ms. Bijita Sharma, learned Amicus Curiae for the accused/appellant.
Also heard Ms. S.H. Borah, learned Addl. P.P. Assam, for the state respondent.

2. This appeal, under section 374(2) Cr.P.C. is preferred from Central Jail, Jorhat by accused/appellant, namely, Shri Bijay Sonar against the judgment and order dated 04.01.2017, passed by the learned Sessions Judge, Jorhat, in Sessions Case No. 156(JJ) of 2014, arising out of Jorhat P.S. Case No. 1091/2013, under Sections 302/325/34 of the IPC. It is to be noted here that vide impugned judgment and order, the learned trial court had convicted the appellant, under Sections 302/323 of the IPC and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Rs. 15,000/- (Rupees Fifteen Thousand) only, in default, to suffer rigorous imprisonment for six months and further sentenced him to pay a fine of Rs. 1000/- (Rupees One Thousand) only, in default to suffer simple imprisonment for one month, under Section 323 of the IPC.

03. The background facts, leading to filing of the present appeal, under Section 374 (2) of the Cr.P.C. are adumbrated herein below:-

“On 16.08.2013, the informant Kumud Das and his younger brother Jayanta Das started off their journey for Kolkata in a Tanker, bearing registration No. WB-23-C-1238, loaded with chemicals, from a chemical factory in Namrup. On the way, his brother Jayanta Das had picked up three acquaintances of him, from an oil depot in Namrup and brought them to Sivasagar. Along the way, they had chatted and exchanged tobacco, betel nuts, etc. and also taken Roti, etc. in a Punjabi Hotel at Sivasagar. But, the acquaintance did not get down at Sivasagar saying that it would be inconvenient for them to go home at such late hours of the night and they continued to travel with them saying that they have acquaintances ahead of the road. Then at about 2-30 a.m., on 17-08-2013, his brother shouted as “O - Maa” and told him that he had been stabbed, and then he halted the vehicle. The accused assaulted

him too before fleeing away from the scene through the window of the vehicle. Then he chased them, but could not succeed. Then he raised alarm, but no one came out. Then he took his brother in "108" (ambulance service) to the Civil Hospital, but, he died during the course of treatment at the Hospital. Then he learnt that the incident took place at Charigaon bye-pass, and that the name of one of the assailants is Naresh Das and he hails from Sonari Sapekhati and that the rest of the accused were his companions.

The informant then lodged an FIR (Exhibit-6) with the In-Charge (I/C), Bhogdoi Police Out Post, on 17.08.2013, and then the I/C Bhogdoi Police Out Post had recorded a General Diary Entry (GDE), being GDE No.- 460, Date- 17/8/2013, and forwarded the ejahar to the Officer-in-Charge (O/C) Jorhat P.S. for registering a case, under proper sections of law. In the meantime, the investigation was being taken up by S.I. Asan Ali Sheikh. On receipt of the ejahar, the O/C Jorhat P.S. had registered a case being Jorhat P.S. Case No.- 1091/2013, under Sections 302/325/34 I.P.C. Dated- 17.8.2013, and endorsed S.I. Asan Ali Sheikh to investigate the same.

The I.O. then visited the place of occurrence, examined the witnesses and prepared Sketch Map (Exhibit-7) and got the inquest held upon the dead body of deceased Jayanta Das by Executive Magistrate and collected the report, (Exhibit-2) and also got the autopsy conducted upon the dead body of the deceased, at Jorhat Medical College Hospital (JMCH) and collected the Inquest Report (Exhibit-8). He also seized the Tanker, vide seizure list- Exhibit-3 and

also seized one Sword, vide seizure list- Exhibit- 4. Then he arrested accused/appellant from Kothia Khanda village, under Sapekhati P.S. and forwarded him to the court and then on transfer, he had handed over the Case Diary to the O/C Jorhat P.S. Then on completion of investigation, Charge Sheet was laid against accused/appellant, Bijay Sonar, under Sections 302/325/34 IPC, to stand trial in the court under the said sections of law, before the court of learned Chief Judicial Magistrate, Jorhat.

Then the learned Chief Judicial Magistrate, Jorhat, complying with the provision of Section 207 Cr.P.C. and having found the case triable exclusively by the court of Sessions, committed the case to the court of learned Sessions Judge, Jorhat. Then the accused/appellant was produced before the court of learned Sessions Judge, Jorhat. Thereafter, the learned trial court, after hearing learned Advocates of both sides, had framed charges against the accused/appellant under Sections 302/323 IPC

and on being read and explained over the charges to him, the accused/appellant pleaded not guilty and claimed to be tried. Thereafter, the prosecution side has examined as many as 10 witnesses and also exhibited as many as 8 documents in support of charges. Then closing the prosecution evidence, the learned trial court had examined the accused/appellant under Section 313 of the Cr.P.C. Thereafter, hearing both the parties, the learned trial court had convicted the accused/appellant under Section 302/323 IPC and sentenced him as aforesaid.

4. Being highly aggrieved and dissatisfied with the aforesaid judgment and

order of conviction and sentence, the accused/appellant has preferred the present appeal on the ground that he is not satisfied with the said judgment and order of conviction and sentence

5. Ms. Bijita Sharma, the learned Amicus Curie for the accused/appellant, has canvassed the following points before this court for consideration:-

- (i) That, there is no eye witness to the occurrence and the informant, who is the brother of the deceased, was sleeping at the relevant point of time.
- (ii) That, the weapon of offence could not be recovered and seized by police. And though the I.O. had seized one sword, yet, the same was not weapon of offence as no blood stain was found in the same.
- (iii) That, after the incident, according to the informant, the deceased himself had called his friends, from his mobile phone and the same appears to be not natural and also not believable in as much as he had sustained serious injury;
- (iv) That, the evidence of the informant, who had implicated the accused/appellant, is not at all believable;
- (v) That, the finding of guilt of the accused/appellant, so recorded by the learned trial court is erroneous and outcome of wrong appreciation of the provision of law;

These circumstances, according to Ms. Sharma, cast a serious doubt about

the veracity of the prosecution version, and therefore, Ms. Sharma has contended to extend, at least the benefit of doubt to the accused/appellant.

6. Per-contra, Ms. S.H. Borah, the learned Addl. P.P. has supported the impugned judgment and order of conviction. Ms. Borah has pointed out that apart from direct evidence against the accused/appellant, there are also circumstantial evidences and that the theory of last seen together is also applicable here in this case. Ms. Borah has also referred following case laws in support of her contention:

(i) **Ram Gopal vs. The State of Madhya Pradesh** reported in **(2023) 5 SCC 534;**

(ii) **Brathi Alias Sukhdev Singh vs. State of Punjab** reported in **(1991) 1 SCC 519**

7. Having heard the submissions of learned Advocates of both sides, we have carefully gone through the record of the learned court below and also gone through the case laws, referred by the learned Addl. P.P.

8. It is to be noted here that the prosecution side has examined the informant, Shri Kumud Das as P.W.2. His evidence reveals that the occurrence took place less than two years ago, at night, at Charigaon Bye-pass, and in the said occurrence his younger brother Jayanta Das, sustained injury and he was shifted to the Hospital, wherein he had breathed his last, at about 5 pm. The ejahar, Exhibit-6, which contains the thumb impression of the informant also corroborated the evidence of the informant in respect of the death of his younger brother on 17.08.2013, at Hospital, on account of the injury sustained

by him. The FIR also indicates that the occurrence took place at about 2.30 am, at Charigaon Bye-Pass. The evidence of P.W.3 - Shri Mukunda Nath reveals that the occurrence took place on 17.08.2013, at night, at Charigaon Bye-Pass, where in the deceased sustained injury and he suffered demise at the Hospital. The evidence of P.W.4 - Shri Lakhindra Borah, who had shifted the deceased to the Hospital in 108 Ambulance, from the site of the occurrence, i.e. Charigaon Bye-Pass, on the date of occurrence, also reveals that the deceased Jayanta Das suffered demise at Hospital on account of the injuries sustained by him over his stomach. The evidence of the I.O., i.e. P.W.6, reveals that he had visited the place of occurrence and prepared Sketch Map (Exhibit-7) which also indicates that the occurrence took place at Charigaon Bye-Pass, Jorhat on 17.08.2013.

9. Thus, it is apparent from the evidence discussed above that the occurrence took place on 17.08.2013, at about 2/2.30 am, at Charigaon Bye-Pass of Jorhat, wherein the younger brother of the informant (P.W.2) namely, Jayanta Das sustained injury and subsequently, during the course of treatment he succumbed to the injury. It is to be noted here that the accused/appellant had not disputed the date, time and place of occurrence and also he had not disputed the death of Jayanta Das.

10. Now, it is to be seen as to whether the death of Jayanta Das was suicidal or homicidal or accidental in nature. In this regard the evidence of the Doctor-Shri Tapan Das (P.W. 9), who had conducted autopsy on the dead body of the deceased, is relevant. His evidence reveals that on 17-08-2013, he was working as Demonstrator, at Jorhat Medical College & Hospital, in the Department of Forensic Medicine and on that day, as per police requisition, and in connection with Bhogdoi O.P. G.D. Entry No. 455, dated 17/08/2013, he had

conducted autopsy over the dead body of Jayanta Das, on being brought and identified by UBC Constable No. 198 -Sri Mantu Ram Dutta and on examination of the dead body of Jayanta Das, he found the following:

A male dead body of average built, brown complexion found wearing a blue full shirt, red banyan and a green, red and white gamocha. Eyes & mouth found closed. Body and mucus membranes found pale. Body is cold on touch. Rigor-mortis present all over the body. Coils of intestine found protruding out through the abdominal wall on the left side and foecal matter found adherent to abdominal wall at places.

INJURIES:-

1. A stab injury of size 4 cm x 1.5 cm x peritoneal cavity deep, present on the front of abdomen, left side 2 cm away from and at the level of umbilicus in the left lumbar quadrant. The injury is obliquely placed; mindle shaped with wall defined clean cut injuries. On dissection, the injury passes through skin, subcutaneous tissues, muscles, norms and vessels, peritoneum underlying intestines and found perforated at places. The direction of injury is front to back, left to right and slightly above downwards. Blood clots found adherent to the wound margins which resist washing with running water.

MARKS OF LIGATURE ON NECK DISSECTION ETC.

No ligature mark detected. On dissection neck tissues found healthy.

SCALP, SKULL & VERTEBRAE -Healthy.

MEMBRANE - Healthy and pale.

BRAIN AND SPINAL CORD examined. Brain healthy and pale. Spinal cord-Not

LIVER, SPLEEN, KIDNEYS AND BLADDER - Healthy and pale.

WALLS, RIBS & CARTILAGE - Healthy.

ORGANS OF GENERATION, EXTEMA & INTERNAL - Healthy.

WALLS, PERITONEUM, MOUTH, PHARYNX AND OESOPHAGUS : As described, Peritoneal cavity contains 2000 ml of liquid and clotted blood mixed with stool

particles.

STOMACH AND ITS CONTENTS - Healthy. Contains 100 grams of partly digested food material without any characteristic smell.

SMALL INTESTINE AND ITS CONTENTS - As described.

LARGE INTESTINE AND ITS CONTENTS - As described.

PLEURAE - Healthy and pale.

RIGHT AND LEFT LUNG - Healthy and pale.

HEART - Healthy. Chambers contains liquid and clotted blood.

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE :- NIL

11. Upon aforesaid examination, he opined that the cause of death was due to haemorrhage and shock, as a result of the stab injury sustained. The injury was ante-mortem and caused by moderately heavy sharp-cutting pointed weapon and homicidal in nature. Approximate time, since death was 6 to 12 hours. He confirmed the Post Mortem Report, Exhibit-8, with his signature.

12. The Post Mortem Report, Exhibit-8, is also consistent with his evidence. The accused/appellant had cross-examined this witness, but, nothing tangible could be elicited, except, however, that the injury was on the left side of the abdomen. Thus, the evidence of P.W.9 and the Post Mortem Report (Exhibit-8), goes a long way to establish that the victim Joyanta Das suffered a homicidal death.

13. Now, it is to be seen who had caused the injury. In this regard the evidence of the informant, Shri Kumud Das, whom the prosecution side had examined as P.W.2, and P.W.3 - Shri Mukunda Nath and P.W.4 - Shri Lakhindra Borah and of the P.W.6, the I.O., are relevant. The informant, P.W.2, is the star witness of this case.

His evidence reveals that less than two years ago, in the month of August, he and his deceased younger brother Jayanta Das, were coming back from Namrup in one Tanker. The Tanker was driven by his brother. Then, on the request of accused Bijay Sonar, co-accused Nareswar and two other boys, they were being taken to Sivasagar, in the said Tanker by his brother. Then, after reaching Sivasagar, they had dinner in a Hotel. Thereafter, they again boarded the Tanker and arrived at Charigaon Bye-Pass. Then he heard his younger brother shouting "*Aaio- Maa*". At that time he was sleeping in the seat of the handyman of the Tanker, beside the driver's seat. Having heard the shouting of his brother, when he looked towards him, he saw accused Nareswar assaulting his brother with the help of an iron instrument, like lever. His evidence also reveals that at that time accused Bijay Sonar was helping co-accused Nareswar in assaulting his younger brother, with the help of the lever. When he saw them assaulting his younger brother, both the accused persons also assaulted him and thereafter, they threw him out of the Tanker, as a result of which he fell down on the *pucca* road and received fracture injury on his leg. Then his younger brother had stopped the Tanker and asked him to call his friends. But, as he did not know anyone, he had asked his brother to call his friends. Then his brother, with his own mobile phone, called his friends to the spot.

13.1. His evidence also reveals that thereafter, two friends of his brother, namely, Lakhindra (P.W.4) and Mukunda (P.W.3) arrived at the spot, and they called 108 Ambulance and thereafter, he and his brother were shifted to Hospital for medical treatment. His younger brother succumbed to his injuries at the Hospital at about 5.00 P.M.

on the same day. Thereafter, he lodged an FIR with the police and he put his thumb impression there. He also gave his statement before the Magistrate,

wherein also he had put his thumb impression. His evidence also reveals that the accused persons namely, accused Bijay Sonar and Nareswar were known to his younger brother from before. He also identified accused Bijoy Sonar in the court.

13.2. It is to be noted here that during investigation the I.O. (P.W.6) got the statement of the informant recorded in the court under Section 164 Cr.P.C. Perusal of the statement also reveals that the same also lends unstinting support to the evidence of the P.W.2 in material particulars and also in respect of date, time and place of occurrence and also in respect of the assailants of his brother, namely, Nareswar Das and Bijay Sonar. The prosecution side had exhibited the statement of the P.W.2, recorded under Section 164 Cr.P.C. as Exhibit-9, through P.W.10, Mr. S. Dhar, the learned Chief Judicial Magistrate, Jorhat.

13.3. It also appears that the FIR, Exhibit - 6, also lends corroboration to the evidence of the P.W.2, on material points.

13.4. Further, it appears that P.W.2 was examined by Doctor Palash Borah, whom the prosecution side had examined as P.W.5. The evidence of P.W.5 reveals that he had examined Shri Puluk Das, (sic) (actually Kumud Das), on 17.08.2013, at about 3.15 P.M. as per Hospital record No. 2053/2013, at Jorhat Medical College and Hospital, wherein, he was working as Casualty Medical Officer, in

connection with Jorhat P.S. Case No. 1091/2013, and found following:-

- (i) Pain and swelling over the heel of left foot. No other injury was detected on the person of the injured.

According to him, the injury was simple in nature and caused by blunt force impact. Then he had submitted his report, Exhibit-5. It is elicited in cross-examination that he had not found any fracture over the body of the victim, but found only pain and swelling over the heel of left foot. The Injury Report, Exhibit-5 is also consistent with his version. And the same clearly indicates that the person he had examined on 17.08.2013, at about 3.15 pm was none other than Kumud Das, the informant of this case, not Puluk Das, as deposed by him.

13.5. Thus, it appears that P.W.5, Doctor Palash Borah, and his report-Exhibit-5 also lends corroboration to the version of the informant-P.W.2 in respect of the injury, though not fracture, sustained by him, over his leg on account of being assaulted and thrown out of the Tanker by the accused persons.

13.6. The accused/appellant had cross-examined this witness (P.W.2), at length. But, probative value of his evidence that accused Nareswar Das had administered the blow upon his brother and that accused Bijoy Sonar had helped Nareswar Das in causing the injury to him, remained un-rebutted in cross-examination. It is elicited that Accused Bijay Sonar was the handyman of the aforesaid Tanker, in which his deceased brother was the driver. Bijoy Sonar had accompanied his brother from Kerala and he (P.W.2) boarded the tanker at Barpeta district. It is also elicited that accused Bijay Sonar was accompanied by Nareswar and two other boys from Namrup and on their request his brother took them towards Sivasagar. It is also elicited that accused Nareswar was also a driver by profession and he was sitting at the backside seat, along with accused Bijay Sonar and two other boys and accused Bijay Sonar was sitting at the left side of Nareswar. It is also elicited that when they arrived at Sivasagar all of them came down from the Tanker and took lunch at a Hotel. It is further elicited that Nareswar consumed liquor at the Hotel and his

brother also consumed alcohol. However, he admitted having not aware of any money transaction between his deceased brother and Nareswar.

14. Thus, probative values of the evidence of P.W.2 remained unshaken in cross-examination. Moreover, he is also the victim of assault and an injured witness. The principles, which are to be kept in mind, while appreciating the evidence of an injured eye-witness are laid by Hon'ble Supreme Court in the case of **Balu Sudam Khalde v. State of Maharashtra**, reported in 2023 SCC OnLine SC 355, as follows:

“26. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not

allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.”

15. In the case in hand, no doubt, some sorts of contradictions are there in the evidence of P.W.2. But, and having assessed his evidence, on the touch stone of probability, its intrinsic worth and animus of the witness, and also keeping in mind the principles, laid down in the case of **Balu Sudam Khalde** (supra), we find no ground to disbelieve him. He has fully supported the prosecution case that it was accused Nareswar Das, who had administered the fatal blow upon his brother and accused/appellant Bijoy Sonar, who was the handyman of the Tanker, had helped Nareswar Das.

16. The evidence of P.W.2 also finds support from the evidence of P.W.3-Shri Mukunda Nath and P.W.4 -Shri Lakhindra Borah @ Lakhiram Borah. It is however, a fact that these two witnesses have not seen the actual occurrence. But, they are the persons, who had arrived at the place of occurrence first, after receiving the phone call of the deceased Jayanta Das. The evidence of Mukunda Nath (P.W.3) reveals that on 17/08/2013, his related brother Lakhindra was informed over phone by the deceased that a dacoity has been committed in the Tanker. On hearing the incident, he along with Lakhindar, came to the spot and found the driver of the Tanker at the driver's seat and he was found to be alive and conscious at that time and blood was oozing out from the wound. His evidence also reveals that the driver stated before them that the handyman and one Nareswar had badly assaulted him and his elder brother (P.W.2). They have found the elder brother of the driver lying on the road. His leg was fractured. The driver then requested Lakhindra to save him. Accordingly, Lakhindra had called 108 Ambulance, and both the injured persons were shifted to Jorhat Medical College & Hospital for

treatment. His evidence also reveals that the driver stated before them that accused Bijay Sonar and aforesaid Nareswar had assaulted him with the help of a lever. Further, his evidence reveals that they did not find Nareswar near the place of incident. Thereafter, he came to Bhogdoi O.P. and reported the incident. Also his evidence reveals that police had seized some documents of the Tanker, vide seizure list, Exhibit-1, wherein he signed as witness and he was also present when Magistrate held inquest on the dead body of the deceased driver and Exhibit-2 is the Inquest Report wherein he signed as witness.

16.1. It is elicited in his cross-examination that he does not know wherefrom the Tanker had come, and how many passengers were

travelling in the aforesaid tanker. It is also elicited that when he reached the spot, along with his related brother, he saw the driver as well as his elder brother at the spot and the driver was at that time alive and he had telephoned his related brother. Thus, nothing tangible could be elicited in cross-examination of this witness to discredit his version, which in turn, lends unstinting support to the version of P.W.2.

17. The evidence of PW-4, Sri Lakhindra Borah also reveals that on the date of occurrence, he was present in his house, situated at Bahona Nath Gaon. At about 2.00 am, on that night of occurrence, deceased Jayanta Das rang him up and requested him to come immediately to the place of incident as he was assaulted. Then he came out of his house and proceeded towards the place of incident and found the deceased with injuries on his person and he also noticed the elder brother of deceased sitting near the Tanker. The elder brother of deceased stated to him that he was thrown away from the Tanker. The deceased then disclosed before him that accused persons, namely Bijay Sonar and Sri Naresh Das had assaulted him and his elder brother by a dagger

(Kirpan). He noticed one injury in the stomach of deceased. His evidence further reveals that the deceased was driving a Tanker, bearing No. WB-23C/1283, on the date of incident and the same was coming from Namrup towards Kolkata. His evidence also reveals that the incident took place near Charigaon Bye-Pass. Then he called 108 Ambulance and shifted both the injured persons to Hospital. The deceased succumbed to the injury, at the Hospital after sometime.

17.1. His evidence also reveals that he had taken the Tanker to the Bhogdoi O.P. as requested by police. His evidence also reveals that both the accused persons fled away from the spot after committing the crime, and that on the next day of incident accused Bijay Sonar was arrested by police and the other co-accused could not be apprehended by police. His evidence also reveals that the Tanker, along with its relevant documents were seized by police in connection with the case, vide Seizure-list, Exhibit-1 and he signed over it as witness. Further, his evidence reveals that one Executive Magistrate held inquest over the dead body in his presence and Exhibit-2 is the Inquest Report, where he signed as witness. Further, his evidence reveals that police seized the Registration Book, along with National Permit of the Tanker, vide seizure-list, Exhibit-3, and there also he had signed as witness. Further, his evidence reveals that when police arrested accused Bijay Sonar, he had shown the police one long sword called as Kirpan, and then police seized the same, vide seizure-list, Exhibit-4, and he signed over the same as witness and he confirmed the Material Exhibit-1, the seized long sword, called as Kirpan in the court. Further, his evidence reveals that accused Bijay Sonar was working as a handyman in his private vehicle, prior to the occurrence and he identified him in the dock of the court.

17.2. Though the accused/appellant had cross-examined this witness at length, yet, what he had deposed in his examination - in-Chief remained un-rebutted. It is, however, elicited that deceased Jayanta Das, accused Bijay Sonar were working in a private company where he is also working and that deceased Jayanta Das and

accused Naresh Das were close friends and Naresh Das was also a handyman. It is also elicited that from the elder brother of deceased, he came to know that accused Bijoy Sonar, along with Naresh and one boy, had accompanied the deceased from Namrup, and that deceased Jayanta Das disclosed before him that accused Bijay Sonar and Naresh Das had committed the aforesaid crime. Further, it is elicited that he noticed one injury over the left side of the stomach of deceased, and that the weapon of offence was lying underneath the Tanker, near the elder brother of deceased, and that the deceased at the relevant point of time, was shouting in pain.

18. Thus, it appears that the evidence of P.W.3 and 4 also fully corroborated the version of P.W.2 and also in respect of the assailants, who had administered the fatal blow to deceased Jayanta Das. They were the persons who had arrived at the place of occurrence at first and found the deceased as well as P.W.2 in injured condition. They were informed by the deceased Jayanta Das and having arrived at place of occurrence they also found the deceased in injured condition, who had disclosed before them that accused Bijay Sonar and Sri Naresh Das had assaulted him and his elder brother. However, there is one contradiction in their version in respect of weapon used. While P.W.3 stated that it was lever, P.W.4 stated that it was a Kirpan (Material Exhibit-1) which the I.O. had seized from the Tanker, which was lying underneath the Tanker, near the elder brother of the deceased, vide seizure list, Exhibit-4, on being shown by the accused

Bijay Sonar.

19. But, this contradiction appears to be not material in as much as both P.W.3 and 4, were not the eye witness to the occurrence. They

have heard it from the deceased and P.W.2. On the other hand, the evidence of P.W.2, who happened to be the eye witness to the occurrence, and who had also sustained injury in the occurrence, in no uncertain terms stated that it was an instrument, like lever, by which the accused Nareswar had administered the fatal blow to his brother Jayanta Das. In the FIR, Exhibit-6, which is the earliest version of P.W.2, it is stated that his brother told him that he was stabbed. In his statement under Section 164 Cr.P.C., Exhibit-9, he stated that it was small knife, which he had seen in the hand of Nareswar and while he grabbed the third person, Bijay hit over his leg with a lever. The seizure list, Exhibit-4, indicates that on 18-08-2013, at the AT road, in front of Bhogdoi Police Out Post, from the Tanker bearing Registration No. WB 23C/1283, P.W.6 had seized:-

One sword, which is of 2 feet in length, including the handle. The fore part of the sword is double edged, with the upper edge having saw teeth like shape.

Exhibit- 4 also reveals that there was no blood stain in the same. The evidence of the P.W.6 indicates that this Material Exhibit-1 was seized having been found in a box, inside the cabin of the Tanker.

20. But, the evidence of the P.W. 9, Dr. Tapan Das, who had conducted autopsy on the dead body of the deceased reveals that he had found a stab injury of size 4 cm x 1.5 cm x peritoneal cavity deep, present on the front of abdomen, left side, 2 cm away from and at the level of umbilicus, in the left lumbar quadrant. He found the injury was obliquely placed; mindle shaped with well defined clean cut injuries. On dissection, he found the injury passes through

skin, subcutaneous tissues, muscles, norms and vessels, peritoneum underlying intestines and found perforated at places. The direction of injury is front to back, left to right and slightly above downwards. He found blood clots adherent to the wound margins. He also found the injury was ante-mortem and caused by moderately heavy sharp-cutting pointed weapon and homicidal in nature.

21. Given the nature of injury (well defined clean cut injury) and description of weapon used to cause the same, so given by the autopsy Doctor, P.W.9, it can be logically concluded that the injury was caused by a sharp cutting pointed weapon. This view stands fortified from the evidence of P.W. 4, who had testified that the deceased told him that he and his elder brother was assaulted by accused Nareswar Das and Bijay Sonar by a dagger(Kirpan). The statement of P.W.2 recorded under Section 164 Cr.P.C., Exhibit-9 also consistent to some extent in respect of the weapon, wherein P.W.2 stated that he had seen one small knife in the hand of Nareswar. It is to be noted here that though P.W.6, in his evidence, had not testified that Material Exhibit-1 was recovered at the instance of the accused/appellant Bijay Sonar, yet, the evidence of P.W.4 reveals that when police arrested accused Bijay Sonar, he had shown the long sword called Kirpan (Material Exhibit-1), which was seized by Police, vide Seizure List-Exhibit-4. The seizure also indicates that the Material Exhibit-1 was seized on being produced by accused Bijay Sonar from a box inside the cabin of the seized Tanker.

22. However, Exhibit-4 indicates that no blood stain was found on the Material Exhibit-1. But, absence of blood does not lead to the conclusion that Material Exhibit-1 was not the weapon of offence. A conjoint reading of the evidence of the Doctor-P.W.9, P.W.4, and the FIR-Exhibit-6 and the statement of P.W.2, recorded under Section 164 Cr.P.C.-Exhibit-9, and also

the Exhibit-4, lead to an inescapable conclusion that the injury sustained by the deceased was caused by none other than a sharp weapon and that with all probability, Material Exhibit-1 was the weapon of offence, notwithstanding, absence of blood on it. There is, however, no contradiction in respect of assaulting the P.W.2 by a lever, which is supported by P.W.5 and his report Exhibit-5.

23. We have considered the submission of Ms. Sharma, the learned Amicus Curiae in this regard, i.e. in respect of the contradiction in the versions of the prosecution witnesses as regard weapon used and also in respect of absence of blood in the Material Exhibit-1. No doubt there is substance in her submission. But, there is no contradiction on the material point that it was accused Nareswar Das, who had administered the fatal blow to the deceased by whatever weapon, be it called as lever or a sword (Kirpan), and that the accused/appellant Bijoy Sonar had helped Nareswar Das in causing the same, which was the immediate cause of death of deceased Joyanta Das. The contradictions, upon which the learned Amicus Curie has pointed out, being trivial and minor in nature and not on core issue, to the considered opinion of this court, cannot spell inveracity to the prosecution version. In arriving at such a conclusion we derived authority from a decision of Hon'ble Supreme Court in the case of **State of Rajasthan vs. Kalki**, reported in **AIR 1981 SC 1390**, wherein, it has been held as under:-

“In the deposition of witnesses there are always normal discrepancies due to error of observation, normal errors of memories due to lapse of time and mental disposition such as shock and horrors at the time of occurrence and the like and these discrepancies are normal for witnesses, however honest and truthful they may be and the same cannot be treated as material discrepancies.”

24. Moreover, the background facts, under which the occurrence took place, the time, the place and presence of light at the place of occurrence also required to be looked into while dealing with the contradictions. In the case in hand, the occurrence took place at late night, in the cabin of a running Tanker, which was being driven by the deceased on the National Highway. P.W.2, who was travelling in the said Tanker, is an illiterate person, who even could not read and write. Moreover, he was sleeping in the seat of the handyman. He got up hearing the shouting of his brother. And then he saw Nareswar Das administering blow on his brother and also saw accused Bijoy Sonar helping him. P.W.2 was also attacked by the assailants and thrown out of the cabin of the Tanker. Because of the shock and horror, being suddenly confronted with, it is quite natural for an illiterate person, like P.W.2, to commit an error in identifying the nature of weapon used by the assailant in committing the offence. P.W.3 and P.W.4 had arrived at the scene only after the occurrence. What they had heard from the deceased and P.W.2, they have deposed before the court. In the given fact situations, the contradictions, so pointed out by the learned Amicus Curiae, cannot be treated as material to obliterate the otherwise clear and cogent

prosecution version. We are, therefore, unable to record concurrence to the submission of the learned Amicus Curiae in this regard.

25. P.W. 6 is the I.O., namely, Asan Ali Sheikh. His evidence reveals that on 17/08/2013, at about 9.10 A.M. while he was posted at Bhogdoi O.P. under Jorhat P.S. the In-charge, Bhogdoi O.P. received telephonic information about the incident and then at about 9.30 A.M., he along with the In-charge, Bhogdoi

O.P. visited the place of occurrence. Thereafter, one FIR, Exhibit- 6, was lodged by the informant at Bhogdoi O.P., which was sent to the Jorhat P.S. for registration of a case and subsequently, Jorhat P.S. Case No. 1091/2013, was registered and he was entrusted to investigate the same. His evidence also reveals that after visiting the place of occurrence he drew one Sketch Map; Exhibit-7, and examined the witnesses. He found the dead body of the deceased at Jorhat Medical College & Hospital and he held inquest on the dead body of the deceased by the Executive Magistrate, Shri B.D. Sharma, in presence of witnesses and collected the Inquest Report; Exhibit-2. Thereafter, he had sent the dead body of the deceased for autopsy. He had found the Tanker, bearing registration No. WB-23 C/1283, filled with chemical, at the place of occurrence and seized the same vide seizure-list, Exhibit-3 [SIC], [actually Exhibit-4] in presence of witnesses. P.W.1 Shri Rupam Bharali is a witness of the seizure of the Tanker and also the signatory of the Exhibit-3 [SIC]. But, the prosecution side had not exhibited the said seizure list through this witness. Be that as it may, the evidence of P.W.6 also reveals that he then examined the Tanker and noticed blood stains in the cabin, and then he brought the Tanker to the police station and after search he found one sword from the tool-box of the Tanker which he had seized vide seizure list, Exhibit-3 (SIC).

25.1. The evidence of P.W.6 also reveals that on 18.08.2013, he arrested accused Bijay Sonar from Kothia Khanda village under Sapekhati P.S. It is to be noted here that Kothia Khanda village is the village of accused Nareswar Das. And accused/appellant, Bijay Sonar belongs to the village - No.2 Rohan Bhalak Bil. He also got the informant Kumud Das, the elder brother of the deceased,

examined by a Doctor, who was also injured in the incident and also he got the statement of Sri Kumud Das recorded by the Magistrate under Section 164 Cr.P.C. Then on being transferred from Bhogdoi O.P. on 09.02.2014, he had handed over the case diary to the Officer-in-charge, Jorhat P.S. on 09.02.2014.

25.2. It is elicited in his cross-examination that having received the information at Bhogdoi O.P. at about 9.10 A.M., on 17.08.2013 General Diary Entry (GDE), being G.D.E. No. 455 dated 17.08.2013, was recorded and seizure was made with reference to the same. It is also elicited that the sword was found in the tool-box of the Tanker which was closed at the time of search and there was no blood stain present over it. Thus, the evidence of P.W.6 remained unshaken in cross-examination. And the same also lends support to the prosecution version.

26. Besides, the evidence of P.W.2, 3, 4, 5, 6 and 9, and the Exhibits, discussed herein above, there are numbers of circumstances, which stands established from the evidence lead by the prosecution and the same also unerringly supported the prosecution version. These circumstances are:-

- (i) Accused Bijay Sonar and Nareswar Das were travelling together in the Tanker driven by the deceased Jayanta Das, bearing registration No. WB-23 C/1283, from Namrup to the place of occurrence, on the date of occurrence i.e. intervening night on 17.08.2013.
- (ii) After commission of the offence, both fled away from the place of occurrence together. In his statement under Section 313 Cr.P.C., accused/ appellant had admitted this fact.
- (iii) Accused Bijay Sonar was arrested on 18.08.2013 from Kothia Khanda village, under Sapekhati P.S. from the village of accused Nareswar Das. Notably, he belongs to the village- No.2 Rohan Bhalak Bil.

(iv) In his statement under Section 313 Cr.P.C. accused/ appellant had admitted that he was present at the time of occurrence at the Tanker with accused Nareswar Das.

(v) The accused/ appellant also admitted having fled away from the place of occurrence in his statement under Section 313 Cr.P.C.

27. These circumstances together with the evidence of P.W.2, 3, 4, 5, 6 and 9 go a long way to establish beyond all reasonable doubt that it was accused Nareswar Das, who had administered that fatal blow to the deceased Joyanta Das, which is the immediate cause of his death, and that accused/appellant Bijay Sonar had helped him in causing the said injury.

28. Thus, we find sufficient force in the submission of Ms. S.H. Borah, the learned Addl. P.P. who had rightly submitted that apart from direct evidence, against the accused/appellant there are also circumstantial evidences against him. However, in the given facts and circumstances on the record, the theory of last seen together is found to be not applicable, in view of availability of direct evidence, though Ms. Borah has submitted to that effect. It is to be noted here that the last seen together theory is a piece of circumstantial evidence. In absence of eye witness and tangible evidence, it is the last resort of the prosecution.

29. We have also gone through the case of **Ram Gopal** (supra) referred by Ms. Borah and we find that there is no quarrel at the Bar about the proposition of law laid down in the said case. Relying upon two of its earlier decisions in **Rajender v. State (NCT of Delhi)**, reported in **(2019) 10 SCC 623** and in **Satpal v. State of Haryana**, reported in **(2018) 6 SCC 610**, Hon'ble Supreme Court has held that

In view of the aforestated legal position, it is discernible that though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused does owe an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon, etc. forming a chain of circumstances is established, the conviction could be based on such evidence.

30. But, that was a case based on circumstantial evidence. In the case in hand there is direct evidence and the theory of last seen together is not applicable and as such the ratio laid down in the aforementioned case, to the considered opinion of this court, would not advance the argument of Ms. Borah, the learned Addl. P.P.

31. Thus, we find from the aforesaid discussion that P.W.2 is the injured eye witness to the occurrence and he had fully corroborated the prosecution version. P.W.3 and 4 had arrived at the place of occurrence first, after receiving information of the occurrence from the deceased Jayanta Das and they heard from the deceased that Nareswar Das had administered the blow to him over his stomach by means of lever/kirpan and accused/appellant Bijay Sonar had helped him. P.W.5 is the Doctor who had examined P.W.2 and found injury on the person of P.W.2 which was simple in nature and caused by blunt object. P.W.9 is the Doctor, who had conducted autopsy on the dead body of the deceased Jayanta Das and he found well defined clean cut injury on the stomach of the deceased and according to him the injury was caused by heavy sharp cutting pointed weapon and this description of the weapon resemblance

with the Material Exhibit-1, seized vide seizure list Exhibit-4 at the instance of accused/appellant Bijay Sonar as per evidence of P.W.4 and Exhibit-4. The injury was on the vital part of the body i.e. stomach. Thus, it certainly fall in the clause thirdly, of Section 300 IPC, which provides that – “If the act by which death is caused 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 nature to cause death.” In the case in hand, it appears that the assailants had the intention of causing bodily injury to Jayanta Das and they had the knowledge that the bodily injury intended to be inflicted is sufficient in the ordinary nature to cause his death, and as such, it is a clear case of culpable homicide of first degree i.e. ‘murder’ punishable under Section 302 IPC.

32. Now, what left to be seen is can the accused/appellant Bijoy Sonar be held guilty of the charge under Section 302 IPC, while the fatal blow, that lead to death of the deceased Joyanta Das, was inflicted by accused Nareswar Das. The answer is got to be emphatic no. As it was the direct liability of accused Nareswar Das, whose act leads to death of Jayanta Das.

33. But, the evidence of the eye witness reveals that Bijoy Sonar helped Nareswar Das in causing the said injury. Besides, the evidence on record reveals that Bijay Sonar was travelling along with accused Nareswar Das from Namrup to Sivasagar, in the Tanker driven by the deceased Jayanta Das. Thereafter, they had dinner at a Hotel at Sivasagar with the deceased and P.W.2. They had not parted the company of the deceased at Sivasagar, though their destination was up to Sivasagar. After the dinner, accused Nareswar and Bijoy Sonar again boarded the Tanker, stating that it would be inconvenient for them to go home

at such late hours of night and that they have acquaintance ahead of the road and continued to travel in the said Tanker. Further, it appears that while the Tanker reached Charigaon Bye-pass, then accused Nareswar Das

administered the fatal blow on the stomach of the deceased with a weapon and accused Bijoy Sonar helped Nareswar in administering the blow that caused the injury to Jayanta Das. After commission of the offence, Nareswar Das and Bijoy Sonar fled away from the scene of crime. Further, it is established that Bijay Sonar was arrested from the village of accused Nareswar Das, on 18.08.2013, on the very next day of the occurrence.

34. A careful analysis of these series of facts and circumstances, which were mostly the pre and post crime conduct of accused Nareswar Das and Bijay Sonar, and the dimension of the injury so inflicted and the place of such injury, would lead us to an un-escapable conclusion that there was simultaneous consensus of the minds of accused Nareswar Das and Bijay Sonar in participating in the criminal action to bring such a particular result, i.e. the death of Jayanta Das. And ultimately they become successful in bringing out the desired result. In the given facts and circumstances, we are of the considered opinion that instead of charge under Section 302 IPC a charge under Section 302 read with Section 34 IPC is established against accused/appellant Bijay Sonar.

35. But, notably, though the I.O. had laid charge sheet against accused Nareswar Das and Bijoy Sonar under Sections 302/323/34 IPC, yet, no charge was framed under Section 302 read with Section 34 IPC against the accused Bijay Sonar. Now, the question before this court is can the accused/appellant Bijay Sonar be convicted and sentenced under Section 302 IPC read with Section 34 IPC, without there being a charge under Section 34 IPC.

36. This question stands answered by Hon'ble Supreme Court in the case of **Dhanna v. State of M.P.**, reported in **(1996) 10 SCC 79** as under:-

“8. Legal position on this aspect remained uncertain for a time after this Court rendered a decision in *Nanak Chand v. State of Punjab* [(1955) 1 SCR 1201] But the doubt was cleared by a Constitution Bench of this Court in *Willie (William) Slaney v. State of M.P.* [AIR 1956 SC 116] , where this Court observed at para 86, thus:

“Sections 34, 114 and 149 of the Penal Code, 1860 provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.”

9. It is, therefore, open to the court to take recourse to Section 34 of IPC even if the said section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. This view was followed by this Court in later decisions also. (*Amar Singh v. State of Haryana* [(1974) 3 SCC 81, *Bhoor Singh v. State of Punjab* [(1974) 4 SCC 754]. The first submission of the learned counsel for the appellant has no merit.”

37. Thereafter, in the case of **Gurpreet Singh v. State of Punjab**, reported in **(2005) 12 SCC 615**, in para No. 15 and 16 Hon'ble Supreme Court has held as under:

“15. Further, it has been reiterated by this Court in *Ramji Singh v. State of Bihar* [(2001) 9 SCC 528 : 2002 SCC (Cri) 760] wherein also charge was framed under Section 302 simpliciter but conviction was under Section 302 read with Section 34 IPC and it was laid down that conviction under Section 302 read with Section 34 IPC was warranted as the accused person shared the common intention to cause death of the victim and no prejudice was caused to them because of non-framing of charge under Section 302 read with Section 34 IPC.

16. In the present case, it cannot be said that the accused persons were prejudiced merely because charge was framed under Section 302 IPC simpliciter and no charge was framed under Section 302 read with Section 34 IPC. From the evidence of two eyewitnesses, namely, PWs 2 and 3 it would appear that the accused persons shared the common intention to cause death of the victim. They were cross-examined at length from all possible angles and from the suggestions that were put forth to the eyewitnesses, we are fully satisfied that the accused persons were not in any manner prejudiced in their defence. That apart, in their examination under Section 313 of the Code, the appellants were specifically told that they along with the other accused persons armed with kirpan came to the place of occurrence and assaulted the deceased whereafter they fled away which shows that the appellants shared the common intention to cause death of the deceased.”

38. In the case of **Brathi** (supra), so referred by Ms. Borah, the learned Addl. P.P., also Hon’ble Supreme Court had dealt with the principle of vicarious liability under Section 34/120(B)/149 IPC, and it has been held by Hon’ble Supreme Court as under:-

“15. Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by

several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34.

16. In *Sukh Ram v. State of U.P.* [(1974) 3 SCC 656] this Court held that in view of the unambiguous evidence tendered by the prosecution in the Sessions Court, no prejudice can be said to have been caused to the appellant by reason of his conviction under Section 302 read with Section 34, IPC, even though the two other accused specifically named in the charge had been acquitted. The High Court was certain that there were three culprits and the appellant was one of them. It is clear that notwithstanding the charge, the acquittal of the two accused raised no bar to the conviction of the appellant under Section 302 read with Section 34, IPC.”

39. This being the legal position, we have no hesitation in our mind to hold that inspite of absence of charge under Section 302 read with Section 34 IPC, an accused can be convicted and sentenced under Section 302 read with Section 34 IPC. The accused/appellant herein this case was adequately put to the notice about his participation in the crime with the common intention and the same is apparent from the trend of his cross-examination of the prosecution witnesses, and from his examination under Section 313 Cr.P.C., that he had such knowledge. And as such, it cannot be said that any prejudice is caused to him.

40. Thus, on a meticulous analysis of the evidence, both direct as well as

circumstantial, on the record, in the light of the submissions of learned Advocates of both sides, and in the light of the principles laid down in the cases discussed herein above, we are of the considered opinion that the prosecution side had succeeded in establishing the charge under Section 302 read with Section 34 IPC and also under Section 323 IPC against the accused/appellant Bijoy Sonar, beyond all reasonable doubt that he helped accused Nareswar Das (since absconding), in administering the fatal blow to the deceased Jayanta Das, on the relevant date of occurrence.

41. Thus, while upholding the conviction and sentence of the accused/appellant under Section 323 IPC, his conviction under Section 302 IPC simpliciter, is altered to Section 302 IPC read with Section 34 IPC.

42. The maximum period of punishment prescribed under Section 302 IPC is death. The learned trial court had imposed the alternate punishment i.e. the imprisonment for life, as prescribed under the said Section. Having drawn up a balance sheet of both aggravating and mitigating factors, so available on the record and having regards to the nature and gravity of the offence, the sentence, so handed down, by the learned trial court appears to be reasonable and justified and it warrants no interference of this court.

43. Thus, we find and hold that the accused/appellant had failed to demonstrate from the record any substantial and compelling reason to interfere with the impugned judgment and order of conviction and sentence, except however, what has been recorded herein above. The learned trial court had appreciated the evidence in its proper perspective and arrived at a just decision supported by clear and cogent reason.

44. In the result, we find no merit in this appeal, and accordingly, the same stands dismissed. Send down the record of the learned court below, with a copy of this judgment and order. The parties have to bear their own costs.

45. It appears from the impugned judgment and order that the learned trial court, has, however, not granted any compensation to the family members of the victim under Section 357A Cr.P.C. Notwithstanding, keeping in mind the object behind enacting such a benevolent provision, and also considering plight of dependent family members, of the deceased, if any, in absence of only earning member of the family, we are inclined to direct the District Legal

Services Authority, Jorhat to examine the matter and if found eligible under the Rules/Schemes, to grant adequate amount of compensation, as per the Assam Victims Compensation Schemes, 2012, as amended from time to time, to the family members of the deceased driver, namely Jayanta Das. And this exercise has to be carried out within a period of three months from the date of receipt of a copy of this judgment and order. The Registry shall forward a copy of this judgment to the Secretary, District Legal Services Authority, Jorhat.

46. Before parting with the record, we would like to place on record our deep appreciation, to Ms. B. Sharma, for the assistance rendered by her as Amicus curiae, in disposal of this appeal. The Registry shall pay her the fee, which she is entitled to, as per the Rule.

JUDGE

JUDGE

Comparing Assistant