

GAHC010278092019



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

CRIMINAL APPEAL [J] NO. 100/2019

Monglu Choutal

.....Appellant

-VERSUS-

The State of Assam

.....Respondent

WITH CRIMINAL APPEAL [J] NO. 101/2019

Taklu Ghatowar

.....Appellant

-VERSUS-

The State of Assam

.....Respondent

Advocates :

Appellant in CrI. A.[J] no. 100/2019 : Mr. R. Sarma, Amicus Curiae

Appellant in CrI. A.[J] no. 101/2019 : Mr. N.K. Baruah, Amicus Curiae
Respondent no. 1 : Mr. S.H. Bora, Additional Public
Prosecutor, Assam.
Date of Hearing : 18.06.2024 & 20.06.2024
Date of Judgment & Order : 20.06.2024

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

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

Both these criminal appeals from Jail are directed against a Judgment and Order dated 30.05.2019 passed by the Court of learned Sessions Judge, Dibrugarh in Sessions Case no. 147 of 2016. By the Judgment and Order dated 30.05.2019, both the accused-appellants who faced the trial, have been convicted for the offence of murder under Section 302, Indian Penal Code [IPC] in aid of Section 34, IPC. Both the accused-appellants have been sentenced to undergo imprisonment for life and to pay a fine of Rs. 1,000/- each, in default of payment of fine, to undergo rigorous imprisonment for another one month. It has been directed to pay compensation to the victim son of the deceased under the Assam Victim Compensation Scheme, 2012.

2. The instant case is regarding the death of one Bina Chawra. The investigation of the case was initiated on the basis of a First Information Report [FIR] [Ext.-2] lodged by the son of the deceased, Dipak Chawra [P.W.6] as the informant before the Officer In-Charge, Naohalia Police Out Post on 10.07.2016. In the FIR, the informant had inter alia alleged that his mother, Bina Chawra was a resident of No. 2 Naohalia Village and she passed away while sleeping on bed

after having dinner in the night intervening 09.07.2016 and 10.07.2016. When the informant son went to the house of his mother, he found the neck of his mother half-cut towards left side and there was blood on and around the bed. The informant had named the two accused-appellants herein in the FIR and stated that they had gone to the house where the incident had taken place, to sleep and it was them who had killed the mother of the informant by cutting her neck with a sharp weapon while she was sleeping.

3. On receipt of the FIR [Ext.-2], the In-Charge, Naohalia Police Out Post received the same vide Naohalia Police Out Post General Diary Entry no. 182 dated 10.07.2016 and forwarded the original FIR to the Officer In-Charge, Duliajan Police Station for registering a case under proper sections of law. At the same time, Uttam Adhikari [P.W.8], In-Charge, Naohalia Police Out Post & Sub-Inspector of Police took up the investigation of the case. On receipt of the FIR [Ext.-2], the Officer In-Charge, Duliajan Police Station registered the same as Duliajan Police Station Case no. 237/2016 for the offence under Section 302, IPC read with Section 34, IPC and took note of the fact that the In-Charge, Naohalia Police Out Post, Uttam Adhikari [P.W.8], Sub-Inspector of Police had already taken up the investigation.
4. From the evidence/materials on record, it has also emerged that it was at about 12-45 p.m. on 10.07.2016, the I.O. of the case, that is, P.W.8 received an information over phone that the woman named Bina Chawra had been killed. On receipt of the said information over phone, P.W.8 registered the information vide General Diary Entry no. 176 dated 10.07.2016. After making the entry, he along with staff proceeded to the place of occurrence [P.O.], that is, the house of Late Bina Chawra, No. 2 Naohalia Village. At the P.O., the I.O. [P.W.8] found the deadbody of Bina Chawra lying on the floor of the house. The I.O. [P.W.8] drew a Sketch Map of the P.O. [Ext.-4] and also recorded the statements of witnesses. The I.O. [P.W.8] also conducted inquest on the deadbody of the deceased through an Executive Magistrate and the Executive

Magistrate prepared an Inquest Report [Ext.-1]. Finding the presence of the two accused persons at the P.O., the I.O. [P.W.8] took them into custody. After sending the deadbody of the deceased to Assam Medical College & Hospital [AMC&H] for post-mortem examination, the I.O. [P.W.8] took both the accused persons to the Naohalia Police Out Post. Thereafter, the son of the deceased, Dipak Chawra [P.W.6] as the informant lodged the written FIR [Ext.-2] at Naohalia Police Out Post. The In-Charge, Naohalia Police Out Post, that is, P.W.8 received the said written FIR [Ext.-2] vide General Diary Entry no. 182 dated 10.07.2016 and forwarded the original copy of the FIR for registration to the Officer In-Charge, Duliajan Police Station under proper sections of law.

5. The post-mortem examination of the deadbody of the deceased was performed at the Assam Medical College & Hospital [AMC&H] on 11.07.2016 by Dr. Saurav Jyoti Gogoi [P.W.7], Demonstrator in the Department of Forensic Medicine, AMC&H, who submitted a Post-Mortem Examination [PME] Report recording his findings thereafter. After completing investigation into the case, Duliajan Police Station Case no. 237/2016 [corresponding G.R. Case no. 1828/2016], the I.O. [P.W.8] submitted a charge sheet under Section 173[2], CrPC vide Charge Sheet no. 119/2016 on 30.07.2016 finding a *prima facie* case established against the two accused persons for the offence of murder under Section 302, IPC read with Section 34, IPC.
6. On submission of the Charge Sheet, the Court of learned Judicial Magistrate, First Class, Dibrugarh secured the appearance of the two accused persons from judicial custody on 22.11.2016. After furnishing the copies under Section 207, CrPC to the two accused persons, the learned Judicial Magistrate, First Class, Dibrugarh committed the case records of G.R. Case no. 1828/2016 to the Court of Sessions, Dibrugarh finding the offence under Section 302, IPC exclusively triable by the Court of Sessions, by an Order of Commitment dated 22.11.2016. On receipt of the case records of G.R. Case no. 1828/2016, the Court of Sessions, Dibrugarh registered the same as Sessions Case no. 147/2016.

7. After appearance of the two accused persons before it, the learned Sessions Judge, Dibrugarh [‘the trial court’, for short], after hearing the learned Public Prosecutor and the learned defence counsel and after perusal of the materials on record, framed the following charge against the two accused persons, on 30.11.2016, :-

That you on 09.07.2016 at Naohalia Gaon under Duliajan Police Station in the district of Dibrugarh have committed murder of Bina Chawra and thereby committed an offence punishable under Section 302/34 of the Indian Penal Code [IPC] and within the cognizance the Court of Sessions.

8. When the charge was read over and explained to the two accused persons, they pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined eight nos. of witnesses and exhibited five nos. of documents in order to bring the charge home against the two of accused persons. After closure of the prosecution evidence, the accused persons were examined under Section 313, CrPC by putting before them the incriminating materials appearing in the evidence led by the prosecution. The plea of the accused person was denial. The defence did not adduce any evidence. Thereafter, the learned trial court after hearing the learned counsel for the parties and after appreciation of the evidence/materials on record, delivered the Judgment and Order dated 30.05.2019, thereby, recording a finding of guilt against the two accused persons for the offence of murder under Section 302, IPC read with Section 34, IPC. After hearing the accused persons on the point of sentence under Section 235[2], CrPC, the accused persons have been sentenced in the manner, indicated above.
9. We have heard Mr. R. Sarma, learned Amicus Curiae for the appellant, Monglu Choutal in CrI. Appeal [J] no. 100/2019 and Mr. N.K. Baruah, learned Amicus Curiae for the appellant, Taklu Ghatowar in CrI. Appeal [J] no. 101/2019. We

have also heard Ms. S.H. Bora, learned Additional Public Prosecutor for the respondent State.

10. Mr. Sarma and Mr. Baruah, learned Amici Curiae have extensively referred to the testimonies of the prosecution witnesses, more particularly, testimonies of P.W.1 and P.W.2, who, according to the prosecution side, were the eye-witnesses to the incident of assault on the deceased. Pointing to the testimonies of P.W.1 and P.W.2, the learned Amici Curiae have submitted that if the testimonies of P.W.1 and P.W.2 are read in juxtaposition, a number of inconsistencies can be noticed regarding their testimonies about the events after the alleged occurrence. It has been contended that while according to P.W.1, the two accused persons went away from the house of the deceased at one point of time in the morning but, according to P.W.2, both the accused persons remained in the house till the arrival of Police. From the conduct of the accused persons it can be easily discerned that they had not made efforts to run away from the alleged place of occurrence. According to the learned Amici Curiae, such conduct is suggestive of their innocence. The learned Amici Curiae have submitted that the I.O. [P.W.8] had also deposed to the effect that the accused persons did not try to run away from the house where the alleged occurrence took place. The learned Amici Curiae have also contended that the prosecution witnesses, P.W.1 and P.W.2 cannot be placed in the category of wholly reliable witnesses. Referring to the testimonies of other prosecution witnesses, that is, P.W.3, P.W.4, P.W.5 and P.W.6, it is submitted that they had also found Bina Chawra lying inside the house but their testimonies were somewhat different from the testimonies of P.W.1 and P.W.2. It has been contended that the alleged weapon of assault was never recovered and the same has a vital bearing in the prosecution case. It has also been contended that the injury found on the body of the deceased was a chopped wound and such kind of wound is not consistent with the testimonies of P.W.1 and P.W.2, who deposed that the neck of the deceased was slit by a *dao*. In support of submissions, the learned Amici Curiae referred to the decisions in *Khalil Khan*

vs. State of M.P., reported in [2003] 11 SCC 19; *Lallu Manjhi and another vs. State of Jharkhand*, reported in [2003] 2 SCC 401; and *Anil Phukan vs. State of Assam*, reported in [1993] 3 SCC 282. It has been submitted that for a serious crime like murder, it is the quality of evidence, not the quantity, which requires evaluation and on a strict scrutiny test, the prosecution case, according to them, has fallen short of the standard required to prove the case beyond all reasonable doubts.

11. Au contraire, the learned Additional Public Prosecutor has supported the Judgment and Order of conviction and sentence passed by the learned trial court. It is the submission of Ms. Bora, learned Additional Public Prosecutor that there were no apparent inconsistencies in the testimonies of the two eye-witnesses, P.W.1 and P.W.2 on any of the material points. The alleged inconsistencies, pointed out by the learned Amici Curiae, are not on material points and those consistencies have not, in any manner, affected the core of the prosecution case. It has been contended that the ocular evidence in the form of testimonies of P.W.1 and P.W.2 are found to be consistent with the medical evidence in the form of PME Report and the testimony of the Autopsy Doctor, P.W.7. As the prosecution has been able to bring the case against the accused-appellants on the standard of beyond all reasonable doubts, the impugned Judgment and Order passed by the learned trial court does not require any interference. A number of citations have been referred in support of such submissions and the same would be referred to in the later part of this order.
12. We have duly considered the submissions of the learned counsel for the parties and have also gone through the materials/evidence on record including the testimonies of the prosecution witnesses and other evidence/materials, available in the case records of Sessions Case no. 147/2016, in original. We have also gone through the citations referred to by the learned counsel for the parties.

13. As both the sides have extensively referred to the testimonies of P.W.1 and P.W.2, their testimonies are found necessary to be considered for appreciation at first. P.W.1, Sam Chawra is the younger son of the deceased whereas P.W.2, Ajit Bhakta is a nephew of the deceased. At the time of giving evidence before the learned trial court, P.W.1 was 16 years of age whereas P.W.2 was 20 years of age.
- 13.1. In his evidence-in-chief, P.W.1 deposed to the effect that his mother, Bina Chawra died on 10.07.2016 and he knew both the accused persons. On the incident, P.W.1 deposed that on the night of the occurrence, he along with his mother, Bina Chawra and his cousin brother, Ajit Bhakta [P.W.2] was sleeping in the interior room of their house while the two accused persons – Monglu Choutal and Taklu Ghatowar – were sleeping in the outer room of their residence, after having party. The accused persons who were sleeping in the outer room, came to his mother's room and held his mother, Bina Chawra to slit her neck with a *dao*. Both the accused persons threatened them, that is, him and P.W.2 not to disclose about the incident, lest they would also be killed. On the following morning, the accused persons had gone away but they [he and P.W.2] were remaining inside their house as they were terrified. P.W.1 further stated that on the morning, he [P.W.1] went to the house of his elder brother, Dipak Chawra [P.W.6] who used to reside separately, to inform him about the incident. Then, his elder brother, Dipak Chawra [P.W.6] came to the house and found their mother dead. Dipak Chawra [P.W.6] then went out in search of the accused persons. Later on, his brother [P.W.6] informed the Police and lodged the FIR. As regards the injury, P.W.1 stated that his mother sustained a cut injury on her neck. Police personnel came and examined the deadbody of his mother and took away the deadbody thereafter, for post-mortem examination. He stated that Police also arrested the two accused persons and recorded his statement during investigation.

- 13.2. In cross-examination, P.W.1 stated that the accused person, Taklu Ghatowar was staying in their house for about two months. He stated that he didn't know if Ajit Bhakta [P.W.2] invited Monglu Choutal to stay in their house on the night of occurrence. As regards the time of occurrence, P.W.1 stated that the incident took place at about 02-00 a.m. midnight. On his relationship with Ajit Bhakta [P.W.2], P.W.1 stated that Ajit Bhakta [P.W.2] was his cousin brother and he had been staying with them for about three/four years. He denied a suggestion put to him by the defence that it was Ajit Bhakta [P.W.2], who had killed his mother. He acknowledged the existence of other households in the vicinity of their house. He further stated that it was his elder brother, Dipak Chawra [P.W.6], who had caught the accused persons and handed them over to the Police personnel.
14. P.W.2, Ajit Bhakta also deposed that he knew both the accused persons. The deceased, Bina Chawra is his *Barma* [Aunt], who died in the month of July. He stated that on the date of the incident, he along with Sam Chawra [P.W.1] and Bina Chawra was sleeping in a room of their house and the accused persons were sleeping in the outer room. It was in the middle of the night, both the accused persons came to their room and caught hold of Bina Chawra. At that point of time, they woke up and saw the accused, Monglu slitting the neck of Bina Chawra with a *dao*. P.W.2 stated that his *Barma* [Aunt] found as died. P.W.2 corroborated P.W.1 by stating that the accused persons threatened both of them not to disclose the incident to anyone, else, they [the accused persons] would kill both of them [P.W.1 and P.W.2]. P.W.2 further stated that as both of them were terrified, they remained in the room as the accused persons were in the house whole night. P.W.2 further stated that in the morning, Sam Chawra [P.W.1] went to the house of his elder brother, Dipak Chawra [P.W.6], who used to reside near their house, to inform about the matter. Dipak Chawra [P.W.6] came thereafter, and saw the body of his mother. Thereafter, the matter was informed to Police by Dipak Chawra [P.W.6]. He further stated that Police personnel came and took the deadbody

with them and also apprehended the accused persons. He stated that his statement was recorded by Police during the investigation.

- 14.1. During cross-examination, P.W.2 stated that the accused, Taklu Ghatowar @ Siba was staying in the house of Sam Chawra [P.W.1] for about two months earlier from the date of the alleged incident. As regards the time of occurrence of the incident, P.W.2 stated that the alleged incident took place at about 01-00 a.m. midnight. He further stated that after the incident, all four of them were in the same room and the deadbody of his *Barma* [Aunt] was lying also in the same room. He further stated that both the accused persons were in the house till the arrival of the Police personnel as they did not try to run away. He further stated that he had no knowledge as to why the accused persons had killed his *Barma* [Aunt]. He claimed ignorance as regards the seizure of *dao*, used by the accused persons, by Police. A suggestion was put to P.W.2 to the effect that it was he who called the accused, Monglu Choutal to stay in the house of Sam Chawra [P.W.1] on the night of the alleged incident and the said suggestion was categorically denied by P.W.2. The defence gave a further suggestion to this witness to the effect that it was he who had killed his *Barma* [Aunt] and had falsely implicated the accused persons with the killing of his *Barma* [Aunt] by giving false evidence. In response to the said suggestion, the witness [P.W.2] had emphatically denied.

15. From a combined reading and appreciation of the testimonies of the aforementioned two prosecution witnesses – P.W1 and P.W.2, it has emerged that both of them were sleeping in a room inside the house along with their mother and *Barma* [Aunt] respectively on the night intervening 09.07.2016 and 10.07.2016. Both of them were categorical in their testimonies that both the accused persons were also in the house during the relevant night and they were sleeping in an outer room of the house. The Sketch Map of the P.O. [Ext.-4] indicates that there were three rooms in the house and the nearest house in the vicinity belonged to Sukru Chawra [P.W.3]. At this point, it is also relevant

to refer to the replies given by the accused, Taklu Ghatowar during his examination under Section 313, CrPC. The accused, Taklu Ghatowar had admitted that he was residing in the house of Sam Chawra [P.W.1] for last about two years. He further stated that the deceased, Bina Chawra was his *Barma* [Aunt] and on the relevant night, his *Barma* [Aunt] asked them to stay in her house and accordingly, they stayed for the night in the house of Bina Chawra. The accused, Taklu Ghatowar further admitted that they were sleeping in the outer room of the house and his *Barma* [Aunt], Bina Chawra, Sam Chawra [P.W.1] and Ajit Chawra [P.W.2] were sleeping inside in the room, which was the third room of the house. During his examination under Section 313, CrPC, the other accused person, Monglu Choutal maintained silence on this aspect without offering any kind of explanation.

16. In the backdrop of the above evidence/materials, we turn to the testimonies of the other prosecution witnesses. Like P.W.1 and P.W.2, P.W.3, Sukru Chawra also deposed that he knew both the accused persons, the informant [P.W.6], Dipak Chawra and the deceased. As regards the incident, P.W.3 deposed to the effect that on the relevant day following the incident, the younger son of Bina Chawra, that is, Sam Chawra [P.W.1] informed him that his mother was lying inside the house. On receipt of the information, he [P.W.3] went there and found that many people had already gathered there. He found the presence of the two accused persons at the P.O. He stated that on the night of the incident, the accused persons had food in the victim's house and they stayed overnight in the victim's house. During cross-examination P.W.3 stated that he did not know if the accused persons were present in the house of the deceased in that night and he got the knowledge only in the morning from Sam Chawra [P.W.1]. He stated that he did not witness the incident.
17. P.W.4, Bina Chawra, wife of Sukru Chawra [P.W.3], stated that the two accused persons were from her village. Apart from the two accused persons, she also knew the victim and the informant. P.W.4 deposed that she saw the

accused, Taklu in the house of the deceased on the next day of the occurrence. She was informed by Sam Chawra [P.W.1] that the deceased was lying unconscious inside the house. P.W.4 stated that she tried to wake up the victim by nudging her but the feet of the deceased, Bina Chawra were found locked and the deceased, Bina Chawra did not wake up. With the help of a lamp, P.W.4 noticed that there was blood on the bed. She stated to have heard from P.W.1 and P.W.2 that the accused persons had killed the deceased. P.W.4 was a witness to the inquest proceeding and she exhibited the Inquest Report [Ext.-1] with her signature therein as Ext.-1[1]. In cross-examination, P.W.4 stated that the deceased victim was a healthy person before her death. P.W.4 stated that at the time of her death, his son, P.W.1 and his nephew, P.W.2 were staying with her. As regards the duration of stay of P.W.2 in the house of the deceased, P.W.4 stated that P.W.2 had been staying in the house of the deceased for a long time. P.W.4 further stated that she did not have any knowledge as to whether the accused persons were present in the house of the victim but she saw them on the following day. P.W.4 also stated that she did not see any injury on the body of the victim but blood stains were noticed by her. She claimed ignorance about the manner of occurrence of the incident.

18. The two accused persons, the informant and the deceased were known to P.W.5, Sandhya Chawra, as they were her neighbours. On the incident, P.W.5 deposed that on the morning following the occurrence, Sam Chawra [P.W.1] came and informed her that the body of his mother was lying in the house with blood stains. P.W.5 stated that she immediately went to the house of the deceased victim and saw blood stains on the body of the deceased on the bed. Thereafter, Police personnel came and took away the accused persons to the Police Station. P.W.5 further stated that she did not witness any injury on the body of the deceased victim. In cross-examination, P.W.5 stated that she did not know if the accused persons were staying in the house of the deceased on the night of the incident and how the deceased victim died.

19. P.W.6, Dipak Chawra was the informant and elder son of the deceased, Bina Chawra. Both the accused persons were known to him. On the incident, P.W.6 deposed to the effect that on the night of the incident, he was in his brother's house. On the following morning, his brother informed him that their mother's body was cold and she had expired. He immediately rushed to the house and found his mother's body on the bed. Then, his brother informed him that on the date of the incident, the accused persons, Monglu and Taklu were present in the house. Then, he went to Naohalia Out Post to lodge FIR which was written by a person named Haren. He exhibited the FIR as Ext.-2 with his signature therein as Ext.-2[1]. P.W.6 stated that he noticed injury on the neck of his mother.

19.1. When this witness, P.W.6 was cross-examined, he stated that he did not know what were the contents in the FIR and did not know how his mother died. He further stated that he did not know when the incident occurred as it was his brother who had informed him about the incident.

20. P.W.7, Dr. Sourabh Jyoti Gogoi was on duty as Demonstrator in the Department of Forensic Medicine, Assam Medical College & Hospital [AMC&H], Dibrugarh on 11.07.2016. P.W.7 in his examination-in-chief, stated that he performed post-mortem examination of the deadbody of Bina Chawra at 12-45 p.m. on 11.07.2016 in connection with Naohalia Out Post General Diary Entry no. 173 dated 10.07.2016. He testified that after post-mortem examination of the deadbody, he found the following :-

External Appearance :-

An average built swarthy complexion female dead body, dressed with a blouse and petticoat, eyes and mouth partly open. Rigor mortis present all over the body. Body cold on touch.

Injuries :-

1. Chop wound of size 15 x 5 cm present over left side of neck upto vertebral body deep underlying muscles vessels, clean cut. Margins of the wound contused. Blood clot adherent to wound margins.
Other organs healthy and pale. Uterus healthy and empty.

OPINION :-

Death was due to hemorrhagic shock resulting from injuries as described which were ante-mortem and caused by moderately heavy sharp cutting weapon and homicidal in nature. Time since death is 18-36 hours approximately.

Exhibiting the Post-Mortem Examination [PME] Report as Ext.-2 and his signature therein as Ext.-2[1], P.W.8 stated that his findings received concurrence of the Head of the Department, Dr. R.K. Gogoi, Professor & Head of the Department, Forensic Medicine, AMC&H and the signature of Dr. R.K. Gogoi in the PME Report [Ext.-2] was exhibited by P.W.7 as Ext.-2[2]. He also exhibited the Inquest Report [Ext.-1] and the Deadbody Challan [Ext.-3]. In cross-examination, P.W.7 stated that the injuries sustained by the deceased could also be accidentally caused.

21. It is noticed that the inquest proceeding was held in reference to Naohalia Out Post General Diary Entry no. 173 dated 10.07.2016. At the time of inquest, the Formal FIR [Ext.-2] was not lodged by the informant [P.W.1]. In the Inquest Report [Ext.-1], it was reported that there was an injury on the neck [left side] and there was bleeding from the injury. In the PME Report [Ext.-2], which was performed at about 12-45 p.m. on 11.07.2016, the findings were recorded as under :-

I-EXTRANAL APPEARANCE

1. Condition of subject stout emaciated, decomposed etc:

An average built swarthy complexioned female dead body dressed with a blouse yellow petticoat. Eyes and mouth

partly open. Rigor mortis present all over the body. Body cold on touch.

2. Wounds – position, and character:

[1] Chop wound of size 15 x 5 cm. present over left side of neck upto vertebral body deep over the side of neck. Underlying muscles vessels, clean cut. Margins of wound contused. Blood clot adherent to wound margins. Which resist washing with running water.

3. Bruise Position size and nature:

4. Mark of ligature on neck dissection, etc.: Not detected.

II – CRANUM AND SPINAL CANAL

1. Scalp, skull, vertebrae : All healthy.
2. Membrane : Healthy.
3. Brain and spinal cord : Brain- Healthy/Pale.

Spinal cord- Not examined.

Note: The spinal canal need not be examined unless any indications of disease or injury exist.

* * * * *

V – MUSCLES, BONES AND JOINTS

1. Injury : As described.
2. Disease or deformity :
3. Fracture :
4. Dislocation :

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE

OPINION OF ASSISTANT SURGEON/SUB-ASSISTANT SURGEON AS TO CAUSE OF DEATH

Death was due to hemorrhage and shock resulting from injury as described which were ante-mortem and caused by moderately heavy sharp-cutting weapon and homicidal in nature.

Time since death is 18 to 36 hrs. (approx.)

Demonstrator FSM
Assam Medical College, Dibrugarh

REMARKS BY POLICE SURGEON
Concur

Professor & Head
Department of Forensic Medicine
Assam Medical College and Ex-Officio Police Surgeon,
Dibrugarh

22. There is no apparent inconsistency between the Inquest Report [Ext.-1] and the PME Report [Ext.-2]. Both had reported that the deceased had sustained an injury on the neck. As per the Inquest Report [Ext.-1], the injury was by sharp weapon. As per the PME Report [Ext.-2], it was a chop wound of size 15 x 5 cm over the left side of the neck upto the vertebral body deep over the side of neck.
23. When the ocular evidence given by the two eye-witnesses, P.W.1 and P.W.2 are compared with the medical evidence in the form of testimony of the Autopsy Doctor [P.W.7] and the PME Report [Ext.-2], the evidence on the point of injury is found to be consistent that the deceased had sustained the injury on the left side of the neck.
24. The ocular evidence of P.W.1 and P.W.2, as recapitulated above, is also found to be consistent as regards the presence of the two accused persons inside the house on the night intervening 09.07.2016 and 10.07.2016. The two eye-witnesses – P.W.1 & P.W.2 – had categorically deposed that it was the accused persons who, during the relevant night, had come near them when they [P.W.1 & P.W.2] were sleeping along with Bina Chawra in a room, and slit the neck of Bina Chawra with a *dao*.
25. The learned Amici Curiae appearing for the two accused-appellant have strenuously urged that there was no recovery of the alleged weapon of assault, *dao* from any of the two accused persons. The alleged weapon of assault, *dao*

was also not recovered from any other place also whereas the two accused persons were all along present within the premises and at the P.O. till they were apprehended by the I.O. [P.W.8]. Contending so, learned Amici Curiae have sought to challenge the testimonies of the two eye-witnesses, P.W.1 and P.W.2 as ones which cannot be relied upon to return a finding of guilt against the two accused persons.

26. It is true, as contended by the learner Amici Curiae, that there is an inconsistency in the testimonies of P.W.1 and P.W.2 seemingly on a point. P.W.1 had deposed that in the morning hours, the two accused persons had gone away after staying with them [P.W.1 and P.W.2] inside the house for the whole night. On the other hand, P.W.2 deposed to the effect that the two accused persons stayed with them [P.W.1 and P.W.2] for the whole night, and they were present in the house till the arrival of Police personnel. According to P.W.2, the accused persons did not try to run away. P.W.1 had stated that he had managed to go out of the house to inform his elder brother, Dipak Chawra [P.W.6] about the incident. From the evidence of P.W.2, P.W.3 and P.W.4, it can be noticed that these witnesses were also informed by P.W.1. A question which arises, therefore, is whether in view of such apparent inconsistency, the testimonies of the two eye-witnesses, P.W.1 and P.W.2 should be disbelieved wholly despite their consistency as regards the manner of assault on Binana Chawra during the night intervening 09.07.2016 and 10.07.2016 by the two accused persons.
27. It is settled that any discrepancy or improvement which does not materially affect the case of the prosecution and is not on a point affecting the core of the prosecution case cannot be made the basis for doubting the case of the prosecution. A court of facts should not concentrate too much on any such discrepancy or improvement. In this regard, the following observations made in the decision in *Kuriya and another vs. State of Rajasthan*, reported in [2012] 10 SCC 433, may be a plea referred to :-

30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur vs. State of Gujarat* [(2012) 5 SCC 724 : (2012) 2 SCC (Cri) 740], *Narayan Chetanram Chaudhary vs. State of Maharashtra* [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546], *Gura Singh vs. State of Rajasthan* [(2001) 2 SCC 205 : 2001 SCC (Cri) 323] and *Sukhchain Singh vs. State of Haryana* [(2002) 5 SCC 100 : 2002 SCC (Cri) 961].

31. What is to be seen next is whether the version presented in the Court was substantially similar to what was said

during the investigation. It is only when exaggeration fundamentally changes the nature of the case, the Court has to consider whether the witness was stating the truth or not. [Ref. Sunil Kumar vs. State Govt. of NCT of Delhi] [(2003) 11 SCC 367 : 2004 SCC (Cri) 1055].

28. The appreciation of ocular evidence is a difficult aspect and there is no set yardstick for appreciation of oral evidence. On appreciation of ocular evidence, the Hon'ble Supreme Court of India in *Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra*, reported in [2022] 12 SCR 196, after considering a catena of decisions on the point, has observed that the appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. It has been observed to the effect that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences

torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Too serious a view to be adopted on mere variations falling in the narration of an incident [either as between the evidence of two witnesses or as between two statements of the same witness] is an unrealistic approach for judicial scrutiny.

29. Reverting back to the facts of the case in hand, it was the testimony of P.W.1, Sam Chawra that after the accused persons had gone away he could come out of the house and he went to the house of his elder brother, Dipak Chawra [P.W.6] to inform him about the incident. That Sam Chawra [P.W.1] came out of the house in the morning following the incident of assault on his mother, Bina Chawra received corroboration from the testimonies of the prosecution witnesses, P.W.3, P.W.4 and P.W.5, who all had deposed to the effect that it was Sam Chawra [P.W.1] who had informed them about the incident of assault on his mother, Bina Chawra. It has not borne out from the evidence/materials on record clearly as to whether the two accused persons had gone out of the inner room of the house where the incident of assault took place or they had gone out of the campus of the house itself. The testimony of P.W.2 was that both the accused persons were in the house till the arrival of Police at the P.O. Just because the younger son of the deceased, Sam Chawra [P.W.1] had managed to go out of the house without the knowledge of the accused persons or was allowed to go out of the house by the accused persons did not create any serious dent to the core of the prosecution case on the point of assault, in respect of which the testimonies of the two eye-witnesses, P.W.1 and P.W.2 are found to be consistent, credible and trustworthy. There is nothing glaring in the evidence of the two eye-witnesses on the incident of assault on the basis of which their evidence can be discarded by holding a view that they are not true or reliable eye-witnesses. The inconsistency on the issue of presence or otherwise of the two accused persons in the house or in the campus in the

morning following the incident of assault cannot be held to be of such significance to discard the entire evidence of the two eye-witnesses, who, aged about 15 years and 16 years respectively, had seen the brutal incident of assault on their mother and aunt just in front of their eyes, thereby, to treat the foundation of the prosecution case to be disturbed.

30. The other points which the learned Amici Curiae have contended are that no incriminating object could be recovered from the two accused persons and the same is a pointer towards their non-involvement with the crime and the prosecution could not successfully prove the motive behind the alleged crime. It has been contended that since the alleged weapon of assault was not recovered during the course of investigation, the lapse has created a serious dent in the case of the prosecution and in such view of the matter, the accused persons are entitled to be accorded the benefit of doubt.
31. We have considered the above contentions of the learned Amici Curiae and have found after consideration, that such contentions are not acceptable.
32. Non-recovery of the weapon of assault could be considered sometimes as a flaw in the investigation. But, at the same time, it is not an inflexible rule that the weapon of assault must be recovered. It is not a general and broad proposition of law that in case of non-recovery of weapon of assault, the whole prosecution case gets weakened.
- 32.1. In *Krishna Mochi and others vs. State of Bihar*, [2002] 6 SCC 81, the Hon'ble Supreme Court of India has held as under :-
 37. It has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them, which goes to show that they had no complicity with the

crime. In my view, the recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so, when their participation in the crime is unfolded in ocular account of the occurrence, given by the witnesses, whose evidence has been found by me to be unimpeachable.

32.2. In the case of *State Through the Inspector of Police vs. Laly @ Manikandan and another*, reported in [2022] 15 SCR 633, it has been held as under :-

7. Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the commission of the offence is not a sine qua non to the convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted.

32.3. Similarly, in the case of *Prabhash Kumar Singh vs. the State of Bihar [Now Jharkhand]*, reported in [2019] 9 SCC 262, it has been observed on the point of non-recovery of weapon as under :-

13. ... As there is clear eye-witness account of the incident and none of the two eye-witnesses could be shaken during cross-examination and they had stuck to the recollection of the facts to the incident, the mere fact that the weapon of assault or the bullet was not recovered cannot demolish the prosecution case.

33. From the evidence/materials on record, it can be noticed that the prosecution has not been able to show any kind of motive attributed to the accused

persons behind the killing of the deceased, who was incidentally *Barma* [Aunt] of one of them. The case in hand is not a case based on circumstantial evidence, as there were two eye-witnesses in P.W.1 and P.W.2. There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of crime, it must necessarily result in acquittal of the accused. When the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for commission of the crime has not been proved. It is a sound principle to remember that every criminal act was done with a motive, but its corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it, as it is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended. Motive for doing a criminal act is generally a difficult area for prosecution, as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause need not necessarily be proportionately grave to do grave crimes. Many a murder have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable. The absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused [Ref : *Thaman Kumar vs. State of Union of Territory of Chandigarh*, (2003) 6 SCC 380]. It is trite to state that even if there is absence of motive, the same will be not of much significance and consequence when direct evidence establishes the commission of the offence. Motive for commission of an offence assumes greater significance in cases of circumstantial evidence. It is already found that the case in hand not a case based on circumstantial evidence, but a case of direct ocular evidence.

34. Section 34, IPC has laid down that when 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.
35. The principle laid down in Section 34 of the Penal Code is about vicarious liability. The testimony of P.W.2, as regards the assault, was to the effect that it was the accused person, Monglu Choutal, who slit the neck of Bina Chawra with a *dao*. In view of such testimony, the issue, therefore, arises as to whether the other accused person, Taklu Ghatowar can be held culpable for the crime with the aid of Section 34, IPC. Section 34, IPC is attracted when a specific criminal act is done by two or more persons in furtherance of their common intention and in such a case, all accused persons are liable for the criminal act in the same manner as the principal accused as if the act were done by all the accused. The scope and ambit of Section 34, IPC has been succinctly explained in the following paragraph of ***Suresh vs. State of U.P.*, [2001] 3 SCC 673, :-**

24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 34 IPC. So, the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from

behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

36. It has conclusively emerged from the testimonies of P.W.1 and P.W.2 coupled with the explanation provided by the accused, Taklu Ghatowar at the stage of his examination under Section 313, CrPC that the crime was committed in an inner room of the house where P.W.1 and P.W.2 were sleeping along side the deceased, Bina Chawra. The testimonies of P.W.1 and P.W.2 were categorical on the point that both the accused persons came from the outer room to the inner room together. From their testimonies, it has further emerged that when the assault was made by one of the accused persons, the other accused persons was also present. Though, *arguendo*, no overt act on the part of the other accused person, Taklu Ghatowar was attributed by the eye-witness, P.W.2 in assaulting the deceased, but at the time of assault, Taklu Ghatowar was very much present with Monglu Choutal, after coming together inside the room, and during the subsequent period also, that is, from the moment of assault till the morning, both the accused persons were inside the same room with P.W.1, P.W.2 and the deadbody of the deceased. The testimony of P.W.1 was to the effect that both the accused persons came to their room and caught hold of Bina Chawra. Both the eye-witnesses, P.W.1 and P.W.2 were

categorical in their versions that both the accused persons had threatened them not to disclose about the incident and they remained present in the same room till the morning hours. As those overt and covert acts were attributed to both the accused persons, we are of the consider view that the principle laid down in Section 34, IPC is clearly attracted in the case in hand.

37. The decision in *Khalil Khan* [supra] is on the point of acceptability or otherwise of a dying declaration implicating the appellant therein as the assailant in the absence of any eye-witness. The decisions in *Anil Phukan* [supra] and *Lallu Manjhi* [supra] are on the point of acceptability or otherwise of the evidence of the solitary eye-witness. In the case in hand, there were two eye-witnesses in P.W.1 and P.W.2 and it has been found from the discussion above, there were no inconsistencies in their evidence on the material points. Rather, they were corroborative on the material points. In such view of the matter, the above decisions, referred to by the learned Amici Curiae, are not found to be of any benefit to the cause of the two accused-appellants herein.

38. After meticulous scrutiny and evaluation of the entire evidence/materials on record, and more particularly, the testimonies of the two eye-witnesses, P.W.1 and P.W.2, we are of the clear view that their testimonies on the point of assault on the deceased by the two accused persons have the ring of truth and it received sufficient corroboration from the medical evidence and the testimonies of the other witnesses. We are of the considered view that the prosecution was successful to bring the charge against the two accused persons beyond the reasonable doubts. In such view of the matter, the inconsistency, pointed out by the learned Amici Curiae, which were on the events after the morning hours, are not of such significance to be attached much weight to discard the core of the prosecution case.

39. Thus, after a detail appreciation of the evidence/materials on record, more particularly, the eye-witness accounts of P.W.1 and P.W.2 and the medical evidence, in its entirety, we are of the considered view that there is no good and sufficient reason to depart from the view taken by the learning trial court on the culpability of the two accused-appellants on the point of committing the offence of murder. Accordingly, we affirm the Judgment and Order of conviction and sentence passed by the trial court in Sessions Case no. 147/2016. Resultantly, this criminal appeal being devoid of merit, fails.
40. This Court records its appreciation for the assistance rendered by the learned Amici Curiae. The learned Amici Curiae are to be paid remuneration as per the rules in force.
41. The records of the learned trial court are to be sent back immediately.

JUDGE

JUDGE

Comparing Assistant