GAHC010017852022

2024:GAU-AS:7979-

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

CRIMINAL APPEAL [Jail] no. 27/2022

Nilkanta Nath, S/o. Lt. Hansa Ram Nath,
Village - Kakaya, P.S. Belsor, Dist - Nalbari, Assam.

……*Appellant*

-VERSUS-

The State of Assam

……*Respondent*

Advocates :

Appellant : Mr. N.J. Das, Amicus Curiae

Respondent : Mr. K.K. Das, Addl. Public Prosecutor

Date of Hearings and Judgment & Order : 06.08.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGMENT & ORDER [ORAL]

[Manish Choudhury, J.]

The present criminal appeal from Jail is preferred under Section 383, Code of Criminal Procedure [CrPC], 1973 against a Judgment and Order dated 02.08.2021 passed by the Court of learned Sessions

Judge, Nalbari ['the trial court', for short] in Sessions Case no. 61 of 2015, which arose out of Belsor Police Station Case no. 81 of 2012 and corresponding G.R. Case no. 927 of 2012. After the trial, the learned trial court finding the accused-appellant guilty of the offence of murder under Section 300, Indian Penal Code [IPC], has sentenced him under Section 302, IPC to undergo rigorous imprisonment for life and to pay a fine of Rs. 50,000/-, in default of payment of fine, to undergo simple imprisonment for another 1 [one] year. It is further observed that the period of detention would be set off under Section 428, CrPC and if the fine amount is paid, the same should be paid to the wife, children and parents, if any, of the deceased equally.

2. The investigation into the case, Belsor Police Station Case no. 81/2012 commenced on receipt of a First Information Report [FIR] from one Mamoni Nath as the informant at about 07-00 p.m. on 11.07.2012, by the Officer In-Charge, Belsor Police Station. In the FIR, the informant had inter-alia stated that at around 01-30 p.m. on 10.07.2012 [Tuesday], her husband, Khitish Nath while returning from Barnibari market, made a halt at Nirala Chowk, Kakaya. The informant had alleged that when after having some rest on a *Bahor Chang* [a raised platform made of bamboo] ['bamboo bench', for short] he got on his motor bike to return home, the accused viz. Nilakanta Nath who hailed from the same village, came near him armed with an iron knife and stabbed her husband all of a sudden on his belly. As a result, her husband sustained grievous injuries on his person. Then, three persons – Kalicharan Nath [P.W.2], Kulen Das [P.W.6] and Jiten Das [P.W.4] - took her husband, Khitish Nath to Nalbari Civil Hospital in a small car. But her husband breathed his last before he was taken to the Gauhati Medical College & Hospital [GMCH] as per the advice of the doctors at Nalbari Civil Hospital.

3. On receipt of the FIR, the Officer In-Charge, Belsor Police Station registered the same as Belsor Police Station Case no. 81/2012 under Section 302, IPC. The investigation of the case was entrusted to one Narayan Kalita [P.W.10], a Sub-Inspector of Police attached to Belsor Police Station, by the Officer In-Charge, Belsor Police Station. On being entrusted with the investigation, Narayan Kalita [P.W.10] visited the place of occurrence [P.O.], that is, Nirala Chowk at Village - Kakaya and prepared a Sketch Map of the P.O. [Ext.-4] As the injured was taken to Swahid Mukunda Kakati [SMK] Civil Hospital, Nalbari prior to his death, the Investigating Officer [I.O.] [P.W.10] visited SMK Civil Hospital, Nalbari to take stock of the situation there and on going there, he found that the injured had already succumbed to the injures there. Accordingly, inquest on the deadbody of the deceased was conducted at SMK Civil

Hospital on 10.07.2012 by the Executive Magistrate & Circle Officer, Nalbari Revenue Circle. After the inquest proceeding, an Inquest Report [Ext.-3] was prepared recording the findings therein. The post-mortem examination on the deadbody of the deceased, Khitish Nath was performed at SMK Civil Hospital, Nalbari on 10.07.2012 and after the post-mortem examination, findings were recorded in a Post-Mortem Examination [PME] Report [Ext-2]. The I.O. also recorded the statements of a number of witnesses under Section 161, CrPC. During the course of investigation, the I.O. also arrested the accused after few days of the alleged occurrence and produced the accused before the Court on 20.07.2012.

4. After completing the investigation into the case, Belsor Police Station Case no. 81/2012 [corresponding G.R. Case no. 927/2012], the I.O. submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 88/2012 on 19.10.2012 finding a prima facie case under Section 302, IPC well established against the accused. The accused was allowed to go on bail prior to submission of the charge-sheet. On submission of the charge-sheet, the Court of learned Chief Judicial Magistrate, Nalbari secured appearance of the accused before it on 02.05.2015. On such appearance of the accused, copies of the documents were furnished to the accused in compliance of the provision contained in Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the Court of learned Chief Judicial Magistrate, Nalbari by an Order of Commitment dated 02.05.2015, committed the case record of G.R. Case no. 927 of 2012 to the Court of Sessions, Nalbari [the trial court]. The accused was allowed to remain on previous bail on an application being filed by him. It was further directed to the accused to appear before the Court of Sessions on 27.05.2015. The learned Public Prosecutor was notified accordingly.

5. Though the case was fixed on 27.05.2015 for appearance before the learned Sessions Judge, Nalbari, that is, the trial court, the accused did not appear on that day showing cause. The accused remained absent with steps on one subsequent date. But thereafter, he remained absent without steps. As a result, the learned trial court had to issue Non-Bailable Warrant of Arrest [NBWA] to secure the appearance of the accused before it. When NBWA could not be executed, the learned trial court had to issue order of Proclamation & Attachment [P&A] against the accused, apart from the NBWA. In the year 2019, the prosecution received an information that the accused, by changing his identity from 'Nilkanta' to 'Nilkamal' was staying at Kamakhya temple as a priest. On receipt of such information, the learned trial court passed an Order dated 21.10.2019 to apprehend the accused and to produce him

before it along with a report on P&A/NBWA. Subsequent to the Order dated 21.10.2019, the accused was arrested and produced before the learned trial court on 22.10.2019. On being so produced, the accused was remanded to judicial custody.

6. On receipt of the case records of G.R. Case no. 927/2012 pursuant the Order of Commitment dated 02.05.2015, the Court of Sessions registered the case as Sessions Case no. 61 of 2015. After securing the appearance of the accused from jail custody on 25.11.2019, the case of the prosecution was opened. After hearing the learned Public Prosecutor and the defence counsel and on perusal of the materials on record, the trial court, on 25.11.2019, framed the following charge :-

> That you on 10.07.2012 at about 01-30 p.m. at Village – Kakaya under Belsor Police Station committed murder of Khitish nath by intentionally causing his death and thereby committed an offence punishable under Section 302, IPC.

7. When the charge was read over and explained to the accused, the accused pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined ten nos. of witnesses and exhibited five nos. of documents in order to bring home the charge against the accused. The prosecution witnesses examined were – [i] P.W.1 : Mamani Nath; [ii] P.W.-2 L Kalicharan Nath; [iii] P.W.3 : Chanakya Thakuria; [iv] P.W.4 : Jiten Das; [v] P.W.5 : Dr. Prabodh Kumar Sarma; [vi] P.W.6 : Kulen Das; [vii] P.W.7 : Soneswar Nath; [viii] P.W.8 : Ramesh Das; [ix] P.W.9 : Hirakjyoti Nath; and [x] P.W.10 : Narayan Kalita, and the documents exhibited during the trial were – [i] Ext.-1 : FIR; [ii] Ext.-2 : PME Report; [iii] Ext.-3 : Inquest Report; [iv] Ext.-4 : Sketch Map of the P.O.; and [v] Ext.-5 : Charge-Sheet.

8. After closure of the prosecution evidence, the accused was examined under Section 313, CrPC for giving him the opportunity to explain the circumstances which appeared against him in the testimonies of the prosecution witnesses. The plea of the accused was of denial. When the accused was asked as to whether he would adduce any evidence in support of his defence, the accused declined to adduce any defence evidence. After hearing the learned counsel for the parties and upon appreciation of the evidence/materials on record, the learned trial court, on 02.08.2021, has rendered the Judgment and Order of conviction and sentence against the accused, as mentioned hereinabove. Hence the instant appeal.

9. We have heard Mr. N.J. Das, learned Amicus Curiae for the accused-appellant and Mr. K.K. Das, learned Additional Public Prosecutor for the respondent State.

10. Mr. N.J. Das, learned Amicus Curiae appearing for the accused-appellant has submitted that the conviction of the accused was made mainly based on the eye-witness accounts of two prosecution witnesses, that is, P.W.2 and P.W.4. Mr. Das has contended that though the injury was sustained on a vital part of the person of the deceased, the evidence on record go to indicate that there was a quarrel between the accused and the deceased prior to the alleged assault at the P.O. wherein the accused had a tea stall. As the P.O. was a place where four shops are situated including the tea stall of the accused, and the deceased at the relevant point of time, made a visit there, it is evident that there was no pre-meditation on the part of the accused as the presence of the accused the P.O. was natural. Mr. Das has submitted that from the evidence/materials on record, it does not emerge that the accused had taken any undue advantage of the situation and the assault was made in the heat of passion. It is submitted by Mr. Das that the learned trial court had erred in convicting the accused for the offence of murder. It is his contention that the accused could not have been convicted for culpable homicide of the first degree.

11. Mr. K.K. Das, learned Additional Public Prosecutor appearing for the State has submitted that the ocular testimonies of the prosecution witnesses, more particularly, the two eye-witnesses, were credible and trustworthy as the defence by cross-examining them, could not elicit any material contradiction or omission to doubt the core of prosecution case in any manner to create a doubt in it. The injury was sustained on a vital part of the person of the deceased and it was sufficient to cause death in the ordinary course of nature. He has contended that the learned trial court has rightly reached the findings that the case is one which is covered under Clause *thirdly* of Section 300, IPC and therefore, the Judgment and Order of conviction and sentence passed against the accused does not require any interference. Mr. Das has also highlighted the conduct of the accused by specifically pointing out that immediately after the occurrence, the accused was found absconding and even after the Order of Commitment, because of the act of abscondance on the part of the accused, changing his name posing himself as a priest, the trial got protracted for a period of four years from 2015 to 2019.

12. We have duly considered the rival submissions of the learned counsel for the parties. We have also perused the evidence/materials on record including the testimonies of the prosecution witnesses

and the documentary evidence, available in the case records of Sessions Case no. 61 of 2015, in original. We have also taken note of the decisions referred to and relied upon by the learned counsel for the parties. The decisions so referred to and relied upon, would be adverted to in the later part of this order at appropriate places.

13. Other than the Autopsy Doctor [P.W.5] and the I.O. [P.W.10], the testimonies of the other witnesses were on the incident. P.W.1 is the informant and was the wife of the deceased and P.W.9 is the son of the deceased. But they [P.W.1 & P.W.9] were not eye-witnesses to the incident of alleged assault which had occurred on 10.07.2012 at Nirala Chowk at Village - Kakaya. Like P.W.1 and P.W.9, the prosecution witnesses – P.W.3, P.W.6, P.W.7 and P.W.8 – in their testimonies, stated that they did not witness the incident of assault. The prosecution witnesses, P.W.2 and P.W.4 had testified to the effect that it was in their presence at the P.O., the incident of assault had occurred. Therefore, it is apt to refer to the testimonies of the prosecution witnesses – P.W.2 and P.W.4 - at first.

14. P.W.2, Kalicharan Nath stated that he is a cycle mechanic by occupation. In his evidence-in-chief, P.W.2 stated that he knew the informant, the deceased and the accused. P.W.2 stated that he owned a cycle repairing shop at Nirala Chowk and the accused owned a tea stall in front of his cycle repairing shop. Deposing on the incident, P.W.2 stated that on the date of the incident, the deceased sat on the bamboo bench in front of the shop of one Dhanjit and was talking with Jiten Das [P.W.4]. When the deceased, Khitish Nath was about to leave the place on his motorcycle, the accused came near him with a knife and stabbed him on his person just below the chest and just above the abdomen on the left side. As a result, Khitish Nath fell down at the spot. Then, he [P.W.2], Jiten Das [P.W.4] and Kulen Das [P.W.6] by stopping a four-wheeler vehicle which reached the place at that time, took Khitish Nath to Kakaya Hospital in that vehicle. The doctor who attended Khitish Nath, on examining him, referred him to SMK Civil Hospital, Nalbari. Accordingly, Khitish Nath was taken by them to SMK Civil Hospital in the same four-wheeler vehicle. At the SMK Civil Hospital, the doctors advised them to take the injured to the Gauhati Medical College & Hospital [GMC&H]. Then, they arranged money and another vehicle to take the injured Khitish Nath to the GMC&H as advised by the doctors. But, by the time they were able to arrange the vehicle, the doctors at SMK Civil Hospital declared the injured, Khitish Nath dead. P.W.2 further deposed that inquest proceeding was done there and thereafter, post-mortem examination on the deadbody of the deceased was also performed there. After the post-mortem examination, the deadbody of the deceased was handed over to them. Subsequently, last rites

were performed. It was on the following day, the wife of the deceased, Mamoni Nath [P.W.1] lodged the FIR. P.W.2 stated that the Police recorded his statement.

14.1. During cross-examination, P.W.2 stated that the deceased, Khitish Nath was is cousin brother [son of his uncle]. P.W.2 deposed that the bamboo bench where the deceased sat before the incident, was owned by Dhanjit, owner of a pan nearby the P.O. As regards the P.O., P.W.2 stated that there were total four shops at Nirala Chowk and the cycle repairing shop was owned by him. Dhanjit was the owner of the pan shop and the accused owned a tea stall. The other shop is a grocery shop which is owned by Malay Das. P.W.2 further stated that the incident took place at about 01-00/01-30 p.m. and at that time, he and Jiten Das [P.W.4] were present at the P.O. Other persons arrived at the P.O. immediately after the incident. P.W.2 stated that the accused used to sell fulari, papad, etc. at his tea stall and the deceased used to take tea at the tea stall of the accused. P.W.2 stated that he also used to take tea sometimes from the tea stall of the accused on credit. P.W.2 clarified that by the time they arranged vehicle and money to take Khitish Nath to the GMC&H, doctors at SMK Civil Hospital declared him dead and as such, they could not take Khitish Nath to the GMC&H. P.W.2 denied suggestions that he did not tell before police that the doctors at SMK Civil Civil Hospital advised them to take the injured Khitish Nath to the GMC&H; and that they arranged money and one vehicle to take Khitish Nath to the GMC&H as advised by the doctors, but by the time they were able to arrange vehicle, the doctor of the at the SMK Civil Hospital declared the injured, Khitish Nath dead. However, no part of P.W.2's such statement were marked by the defence and thereafter, confronted the I.O. [P.W.9] with such marked part of the P.W.2's such statement to bring any kind of contradiction on record. P.W.2 also denied a suggestion that the injured, Khitish Nath went to the tea stall of the accused and asked the accused to give him tea and other eatables on credit and when the accused refused to give those to Khitish Nath, Khitish Nath pushed and pulled the accused down on the ground and sat on the body of the accused and the knife which was in the hand of the accused, pierced into the body of Khitish Nath accidentally.

15. P.W.4, Jiten Das stated that he knew the informant, the accused and the deceased as all of them hailed from his village. P.W.4 testified that the incident occurred seven years ago. On the incident, P.W.4 deposed to the effect that the accused inflicted a stab injury on Khitish Nath by knife just above his abdomen and just below his chest. P.W.4 further stated that on that day just before the incident, Khitish Nath and he [P.W.4] were sitting on the bamboo bench near the shop of Kalicharan Nath

[P.W.2]. When Khitish Nath wanted to go home and went near his motorcycle, the accused came near him and inflicted the stab injury on Khitish Nath by a knife in his presence. The injured, Khitish Nath shouted that the accused gave him stab injury by a knife. Then, he [P.W.4] and Kalicharan [P.W.2] took the injured, Khitish Nath to Kakaya Hospital. But the doctors at Kakaya Hospital referred the injured, Khitish Nath to SMK Civil Hospital. Again the doctors at SMK Civil Hospital, referred the injured Khitish Nath to the GMC&H after stitching the injuries. But after 10 minutes, Khitish Nath succumbed to his injuries at SMK Civil Hospital. Thereafter, the deadbody of Khitish Nath was brought to home after conducting the post-mortem examination.

15.1. During cross-examination, P.W.4 stated that the deceased was his co-villager and their houses were near to each other. On the incident, P.W.4 further stated that when he and the deceased were sitting on the bench, Kalicharan [P.W.2] was present there at that time as the cycle repairing shop of Kalicharan [P.W.2] was nearby that place. The tea stall of the accused was at a distance of about 30 feet from the bamboo bench where he [P.W.4] and the deceased sat on that day. When Khitish Nath shouted that the accused, Nilakanta inflicted him stab injury by a knife, he [P.W.4] was sitting on the bamboo bench with his head down and his distance was about 15 feet from the spot where Khitish Nath and the accused had an altercation which was followed by the stabbing incident. Like P.W.2, P.W.4 also stated that there were four shops at Nirala Chowk and at the time of the incident, only the shops of the accused and Kalicharan [P.W.2] were open and the other two shops were closed that that time. P.W.4 further stated that he was sitting on the bamboo bench from a time prior to arrival of Khitish Nath. P.W.4 further stated that it was he, Kulen Das [P.W.6] and Kalicharan [P.W.2] who took the injured, Khitish Nath to the hospital in a car. After the incident, several villagers came to the P.O. P.W.4 denied the suggestion that the deceased had to pay credit amount to the accused Nilakanta and he had deposed falsely. P.W.4 also denied a suggestion that as the deceased was close to him, he had deposed falsely before the court. P.W.4 saw a knife in the hand of the accused. P.W.4 further stated that it was he who separated the accused from the deceased when he noticed the knife in the hand of the accused at that time but what happened to the knife thereafter, was not known to him.

16. P.W.6, Kulen Das deposed that he knew the informant, the deceased and the accused as all of them hailed from his village. P.W.6 stated that the incident took place seven years earlier. P.W.6 stated that having heard that the accused had stabbed the deceased, he came to the P.O. immediately thereafter and on reaching the P.O., he noticed that Khitish Nath had sustained an injury on his abdomen and

there was profuse bleeding from the injury. P.W.6 acknowledged the presence of the accused, the deceased Khitish Nath, Kalicharan [P.W.2] and Jiten Das [P.W.4] at the P.O. at that time. P.W.6 further stated that the injured, Khitish Nath was immediately taken to Kakaya Hospital in a Maruti car after stopping the car at the P.O. The injured was first taken to the hospital at Kakaya and thereafter, to the SMK Civil Hospital at Nalbari but the injured Khitish Nath succumbed to his injury at the SMK Civil Hospital. It was after ten minutes from arrival at the SMK Civil Hospital, Khitish Nath succumbed to his injury. P.W.6 also stated that the post-mortem examination on the deadbody of the deceased was performed at the SMK Civil Hospital. After the post-mortem examination, the deadbody of the deceased was taken to home and last rite was performed at village.

16.1. In cross-examination, P.W.6 stated that he did not witness the incident of stabbing the deceased by the accused and he heard about the incident from Kalicharan [P.W.2] and Jiten Das [P.W.4] when he reached the P.O. immediately after the incident. As regards his relation with the deceased, P.W.6 stated that the deceased was not his relative and was only a co-villager. P.W.6 stated that he arrived at the P.O. at about 01-30/02-00 p.m. By that time, there was gathering of about 40-50 persons at the P.O. and they were all from the village wherefrom both the accused and the deceased hailed. P.W.6 stated that though both the accused and the deceased hailed from one village but their houses are at different locations within the village. P.W.6 who did not witness the incident, denied a suggestion of the defence that during scuffle between the accused and the deceased, which ensued when the accused demanded payment owed to him by the deceased, the deceased fell down and the knife in the hands of the accused accidentally hit the deceased.

17. The prosecution witnesses – P.W.7, Soneswar Nath and P.W.8, Ramesh - Das are co-villagers of the informant, the accused and the deceased. From their testimonies, it has emerged that they did not witness the incident. P.W.8 stated that hearing the news that the accused had stabbed the deceased, he went to the hospital and found that the deceased was already declared dead.

18. P.W.1, Mamoni Nath was the wife of the deceased and is the informant of the case. P.W.1 stated that on the date of the incident, her husband who worked as a Mason, went to Barnibari Bazar in the morning and she heard, later on, that her husband was assaulted by the accused near his tea stall and the cycle repairing shop of Kalicharan [P.W.2]. When she was informed about the incident that her husband was taken to Kakaya Hospital and thereafter, to the SKM Civil Hospital, Nalbari, she, at first, went to

Kakaya Hospital and thereafter, to SKM Civil Hospital. P.W.1 stated that at the SKM Civil Hospital, she found the deadbody of her husband and thereafter, she lodged the FIR. P.W.1 exhibited the FIR as Ext.-1 with her signature therein as Ext.-1[1]. After the post-mortem examination, the deadbody of her husband was handed over to them. After receipt of the deadbody, last rites were done. P.W.1 further deposed that after submission of the charge-sheet, the accused in order to avoid the trial, changed his place of abode and was staying in a temple as a priest.

18.1. During cross-examination, P.W.1 stated that the P.O., that is, Nirala Chowk was at a distance of about one mile from her house. P.W.1 denied suggestions given to her by the defence that her husband went to the tea stall of the accused and asked the accused to give him tea and other eatables on credit; and that when the accused refused to give tea and other eatables to her husband on credit, her husband pushed and pulled down the accused on ground. She also denied a suggestion that when her husband was sitting over the person of the accused, the knife which was in the hand of the accused, pierced into the body of her husband accidentally and her husband died due to his own fault.

19. P.W.9, Hirak Jyoti Nath was the son of the deceased. In his testimony, P.W.9 deposed to the effect that at the time and on the date of the accident, he was present in his house. He was informed that after stabbing by the accused, his father [the deceased] was taken to the SMK Civil Hospital at Nalbari by Kalicharan [P.W.2], Jiten Das [P.W.4] and Kulen Das [P.W.6]. When he [P.W.9] reached the SMK Civil Hospital, he came to learn that his father succumbed to the injury sustained. After arrival of the Police personnel at the Hospital, inquest on the deadbody was done at the Civil Hospital in his presence and thereafter, post-mortem examination on the deadbody of the deceased was performed. P.W.9 exhibited the Inquest Report as Ext.-3 with his signature therein as Ext.-3[1].

19.1. During cross-examination, P.W.9 stated that the P.O. was at a distance of one km from their house. When he [P.W.9] went to the P.O., that is, Nirala Chowk, he found gathering of people there. A similar suggestion, as given to his mother-P.W.1, was also given to P.W.9 and P.W.9 denied the suggestion.

20. On appreciation of the testimonies of the above prosecution witnesses, we find that the prosecution has been able to establish that the P.O. was at Nirala Chowk at Village - Kakaya. In and around the P.O., there were four shops. One of the shops belonged to the accused and another belonged

to Kalicharan [P.W.2]. It has been established that the incident had occurred at around 01-00/01-30 p.m. on 10.07.2012. At that time, only the shops of Kalicharan [P.W.2] and the accused were open and the other two shops at the P.O. were closed.

21. One of the consideration before analyzing the veracity or otherwise of an eye-witness is to find out whether the presence of the eye-witness at the P.O. is believable or not. It has been established from the evidence/materials on record that Kalicharan [P.W.2] had a shop near the P.O. The presence of Jiten Das [P.W.4] at the P.O. from a time anterior to the incident was not denied in any manner by the defence. One of the objects behind the examination of the accused under Section 313, CrPC is to enable the accused to explain any circumstances appearing in the evidence against him. Though the statement of the accused given under Section 313, CrPC is neither a substantive nor a substitute piece of evidence, but such statement can be used to examine the veracity of the prosecution case. It is trite that such a statement, as not on oath, does not qualify as a piece of evidence. However, the incubatory aspect as may be borne out from the statement may be used to lend credence to the case of the prosecution. When the accused was examined under Section 313, CrPC, he in clear terms stated that his shop and the shop of Kalicharan [P.W.2] were near the P.O. The accused had admitted that Kalicharan [P.W.2] had a cycle repairing shop whereas he used to run a tea stall there. In reply to the query qua the testimony of P.W.2 that at the time and on the date of the incident the deceased sat on the bamboo bench with Jiten Das [P.W.4] at the P.O. and he came with a knife stabbed the deceased when the deceased was about to go home on his bike, the accused had provided an explanation by stating that they came to his shop and asked him for mixture and when he refused to give them mixture, he was assaulted by them on his head and shoulder. From the evidence/materials on record and the explanation provided by the accused during his examination under Section 313, CrPC, it has clearly emerged that the accused had admitted the presence of the prosecution witnesses - Kalicharan [P.W.2] and Jiten Das [P.W.4] - at the P.O. at the time and on the date of the incident, apart from the deceased. Thus, presence of the two prosecution witnesses - P.W.2 and P.W.4 - whom the prosecution claimed as eye-witnesses to the incident of assault on the deceased by the accused, has been established beyond doubt.

22. The prosecution witnesses - P.W.2 and P.W.4 - were equivocal in their testimonies to the effect that the accused had inflicted a stab injury on the person of the deceased below the chest and above the abdomen. In order to find out the veracity of that part of the testimonies of P.W.2 and P.W.4, we now turn to the medical evidence which are in the form of testimony of the Autopsy Doctor, P.W.5 and the

PME Report [Ext.-2].

22.1. P.W.5, Dr. Probodh Kumar Sarma was, on 10.07.2012, serving as the Deputy Superintendent of SMK Civil Hospital, Nalbari. In his evidence-in-chief, P.W.5 testified that on that day, that is, on 10.07.2012, he performed the post-mortem examination on the deadbody of the deceased, Khitish Nath, a male of 35 years, in reference to Belsor Police Station General Diary Entry no. 177 dated 10.07.2012, on being identified by UBC Dwipen Das and Ramesh Das [P.W.8], a relative of the deceased. P.W.5 deposed to the effect that after autopsy, he found the following :-

> On external appearance a young male body of average height and built. Face was place, eyes half closed, rigor mortis absent, penetrating wound over left hypochondrium with sharp inverted margin directing in postero medical direction. Size 3 cm x 1 cm and no exit wound found.
> On opening the abdomen, peritoneum was ruptured and abdomen is full of blood. Stomach is ruptured. Large intestine is ruptured at splenic flexture, head and spinal canal normal.
> Left lobe of liver is ruptured, spleen is ruptured.

P.W.5 opined that the death of the deceased was caused by massive intra abdominal hemorrhage due to injury to liver spleen and large gut; and the injuries were ante-mortem in nature. P.W.5 exhibited the PME Report as Ext.-2 and his signature therein as Ext.-2[1]. P.W.5 further stated that the PME Report was counter signed by the Joint Director, Nalbari. When P.W.5 was cross-examined by the defence, he stated that the deadbody arrived at morgue at 04-35 p.m. on 10.07.2012 and autopsy was conducted at 05-00 p.m. on the same day.

22.2. In the PME Report [Ext.-2], the following findings, were recorded, :-

I – EXTERNAL APPEARANCE

1. Condition of subject stout emaciated, decomposed etc. :
A young male body of average height and built. Face – Pale. Eyes – Half closed. R.M. – Absent.
2. Wounds – position, and character :
Penetrating wound over Lt. hypochondrium with sharp inverted margin directing in

postero-medial directions. Size – [3 cm x 1 cm]. No exit wound is found.

* * * * * *

IV – ABDOMEN

1. * * * * * *
2. * * * * * *
3. * * * * * *
4. Stomach and its contents : Ruptured
5. * * * * * *
6 Large intestine and its contents : Healthy
7. Liver : Lt. lobe of liver in ruptured
8. Spleen : Ruptured
9. * * * * * *
10. * * * * * *
11 * * * * * *

MORE DETAILED DESCRITION OF INJURY OR DISEASE

1) Penetrative wound over the hypochondrium.
2) Abdominal cavity is full of blood.
3) Ruptured Lt. lobe of liver.
4) Ruptured spleen.
5) Ruptured large intestine and splenic flexture.

OPINION OF ASSISTANT SURGEON AS TO CAUSE OF DEATH

SUB – ASSISTANT SURGEON

In my opinion the death is caused by massive intra abdominal haemorrhage due to injury to liver, spleen and large gut. Injuries are ante-mortem in nature.

22.3. Prior to the post-mortem examination, inquest proceeding on the deadbody of the deceased was conducted at 04-30 p.m. on 10.07.2012 and as per the Inquest Report [Ext.-3] conducted by the Executive Magistrate, major injury was present in the left upper side of stomach.

22.4. When the medical evidence, mentioned above, are considered vis-à-vis the testimonies of the two eye-witnesses - P.W.2 and P.W.4 - we have that the ocular testimonies of the two eye-witnesses received corroboration from the medical evidence that the deceased sustained a penetrative wound over left hypochondrium of size 3 cm x 1 cm and the injury was with sharp inverted margin directing in postero medial direction. As a result of the injury, peritoneum was ruptured and the abdomen contained blood. Stomach and large intestine were ruptured as a result of the injury.

23. The issue which has, thus, arisen for consideration is whether the deceased met his death as a result of an act of murder as contended by the learned Public Prosecutor or the death of the deceased was the culpable homicide of the second degree, as contended by the learned Amicus Curiae. Having regard to the nature of the injury sustained by the deceased; the part of the body where the injury was inflicted; the alleged weapon of assault which was used to inflict the injury; and the time-period thereafter within which the deceased succumbed to the injury; it has emerged prima facie that the death of the deceased was a homicidal death.

24. The offence of culpable homicide is defined in Section 299 of the Indian Penal Code [IPC]. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide is the genus and the offence of murder its species, meaning thereby, all murders are culpable homicides but all culpable homicides are not murder. The offence of murders is defined in Section 300, IPC, which reads as under :-

> 300. Murder - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
>
> *Secondly* - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> *Thirdly* - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception I - When culpable homicide is not murder-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :--

First - That the provocations not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly - That the provocations not given by anything done in the lawful exercise of the right of private defence.

Explanation - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2 - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3 - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting or the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

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

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

Exception 5 - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

25. From the evidence/materials on record, it is found that the deceased sustained a bodily injury and such bodily injury was caused in the vital part of the body, that is, over the hypochondrium. The medical evidence has established that it was a penetrative wound over the hypochondrium resulting in massive intra-abdominal hemorrhage due to injury to liver spleen and large intestine, sustained by the deceased, which ultimately led the death of the deceased. From the evidence of the prosecution witnesses, it is also established that such bodily injury was caused by a specific act on the part of the accused and such bodily injury was inflicted by the accused by an iron knife. It was such a bodily injury which was sufficient in the ordinary course of nature to cause death. Though the said iron knife was not recovered by the I.O. during the investigation, we would advert to the factum of non-recovery of the alleged weapon of assault in the later part of the order. From the above evidence, we have no hesitation to hold that it is a case of culpable homicide.

26. The issue which now confronts this Court is whether the offence falls in the category of culpable homicide amounting to murder or culpable homicide not amounting to murder. In the oft-quoted decision of the Hon'ble Supreme Court in **Virsa Singh vs. State of Punjab,** reported in **AIR 1958 SC 465**, *Vivan Bose*, J., explained the meaning of scope of Clause *thirdly* of Section 300, IPC in the following manner :-

> The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

27. In **Thangaiya vs. State of Tamil Nadu**, reported in **[2005] 9 SCC 650**, it has been explained that for the purpose of fixing punishment, proportionate to the gravity of the generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it, is also the lowest amongst the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. It has been explained in **State of Andhra Pradesh vs. Rayavarapu Punnayya**, reported in **[1976] 4 SCC 381** that when a Court is required to answer the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient to approach the problem in three stages. The first question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused

amounts to ‘culpable homicide’ as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of ‘murder’ contained in Section 300. If the answer to this question is in the negative the offence would be ‘culpable homicide not amounting to murder’, punishable under the first or the second part of the Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be ‘culpable homicide not amounting to murder’, punishable under the first part of Section 304, Penal Code.

28. It has been exposited by **Virsa Singh** [supra] and **Rayavarapu Punnayya** [supra] that even if the intention of the accused was limited to infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be ‘murder’. The Hon’ble Supreme Court of India in **Rayavarapu Punnayya** [supra] has referred to Illustration [c] appended to Section 300, IPC and has held that the said illustration has clearly brought out the point.

29. Whether a case would come within the Exception 4 of Section 300, IPC or not has come to be considered in **Dhirajbahi Gorakhbhai Nayak vs. State of Gujarat**, reported in **[2003] 9 SCC 322**. Deliberating on Exception 4 of Section 300, IPC, it has been observed that Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A ‘sudden fight’ implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them started it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused [a] without premeditation, [b] in a sudden fight, [c] without the offender having taken undue advantage or acted in a cruel or unusual manner, and [d] the fight must have been with the person killed. It has been noted

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

30. The learned Amicus Curia has pointed out that though the case of the prosecution was to the effect that the injury was inflicted on the deceased by a knife, there were no recovery of the iron knife during the course of investigation. We have already found, from the above discussion, that there is no reason to disbelieve and doubt the credibility of the two eye-witnesses, P.W.2 and P.W.4. The law is well settled that there can be conviction on the basis of deposition even of a sole eye-witness, if the said witness found to be trustworthy, reliable and credible. The law is also settled that recovery of the weapon used in the commission of the offence is not sine qua non to 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 [Ref : **State through the Inspector of Police vs. Laly @ Manikandan & another etc., (2022) 15 SCR 613**].

31. On further scrutiny of the testimonies of the two eye-witnesses, P.W.2 and P.W.4, it has emerged that at the time when the assault was made by the accused on the deceased, P.W.4 who was sitting on the bamboo bench at a distance of about 15 feet from the accused and the deceased. Kalicharan [P.W.4] did not mention in clear terms as to from where he witnessed the act of assault on the deceased. P.W.2 had a cycle repairing shop near the spot where the deceased was stabbed. P.W.2 did not mention about any altercation between the accused and the deceased. It was P.W.2 who deposed that when he was sitting on the bamboo bench, the accused and the deceased entered into an altercation at a distance of 15 feet from him and such altercation was anterior to the act of stabbing by the accused on the deceased. It is also established that the accused had a tea stall near the spot where he stabbed the deceased. Having a tea stall near the spot where he used to prepare eatables, it is not unusual for the

accused to have an iron knife in his hand or to get an iron knife within a short time. As the accused used to run a tea stall near the P.O., his presence at the P.O. was also not unusual. It was the deceased who on his way to his house, made a halt at the P.O. and the same goes to show that the incident of assault was not with pre-meditation. It has not emerged from the evidence/materials on record that there was any prior animosity between the accused and the deceased.

32. Other than the I.O. and the Autopsy Doctor, all other prosecution witnesses were co-villagers of the accused and the deceased and none of them had deposed to the effect that there was any prior animosity between the accused and the deceased. Had there been any prior animosity or the accused was adversely disposed towards deceased, the wife of the deceased and the son of the deceased, that is, P.W.1 and P.W.9 were best positioned to depose on the said aspect. But, they did not dispose as regards any prior enmity between the deceased and the accused. Thus, it has not emerged that there was any animosity prior to the incident between the accused and the deceased.

33. It cannot be discarded outrightly, as contended by the Amicus Curiae, that the act of assault might had happened during the course of such quarrel and altercation between the accused and the deceased and the accused who had an iron knife in his hand, inflicted the stab injury on the person of the deceased, albeit on a vital part, in the heat of the passion. Although there was no overt act on the part of the deceased to assault the accused but he appeared to have participated in the quarrel, Explanation to Exception 4 of Section 300, IPC has provided that it is immaterial in such cases which party offers the provocation or commits the first assault.

34. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: [i] nature of the weapon used; [ii] whether the weapon was carried by the accused or was picked up from the spot; [iii] whether the blow is aimed at a vital part of the body; [iv] the amount of force employed in causing injury; [v] whether the act was in the course of sudden quarrel or sudden fight or free for all fight; [vi] whether the incident occurs by chance or whether there was any premeditation; [vii] whether there was any prior enmity or whether the deceased was a stranger; [viii] whether there was any grave and sudden provocation, and if so, the cause for such provocation; [ix] whether it was in the heat of passion; [x] whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; [xi] whether the accused dealt a single blow or several blows.

35. In view of the fundamental principle of criminal jurisprudence that the benefit of doubt at all stages goes in favour of the accused. After giving the blow with the knife, the accused did not give any further blow on the deceased. As the injury inflicted was on the vital part of the body, it cannot be presumed that the accused did not have the knowledge that the bodily injury inflicted on the deceased by the knife was not sufficient in the ordinary course of nature to cause death of the deceased.

36. From the above discussion made and the reasons assigned therein, we are of the considered view that the case is one which comes within the scope and ambit of Exception 4 of Section 300, IPC. As because such bodily injury, which led to almost instantaneous death of the deceased, and such death was caused by the accused without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and without the accused having taken undue unfair and undue advantage or acting in a cruel or unusual manner, the accused is guilty of the offence of culpable homicide not amounting to murder punishable under first part of Section 304, IPC. Thus, the conviction of the accused under Section 302, IPC is not found sustainable in law. We, therefore, hold the accused-appellant is guilty for the offence punishable under first part of Section 304, IPC. The conviction of the accused-appellant under Section 302, IPC is therefore, set aside and the same is altered to Part-I of Section 304, IPC.

37. It has been contended by the learned Amicus Curiae that the accused-appellant is about 60 years of age at the time of the incident and is presently about 70 years of age. On the other hand, the learned Additional Public Prosecutor appearing for the State has submitted that immediately after the incident, the accused could not be arrested as he was hiding in a house of his relative, as admitted by him in his examination under Section 313, CrPC. The materials on record has further established that after the submission of the charge-sheet and commitment of the case to the Court of Sessions, the accused-appellant did not appear before the learned trial court and he by changing his identity and name, avoided to face the trial by disguising himself as a priest in Kamakhya temple for a period of four years and as such, no leniency should be shown to him considering the fact that the deceased died at the age of about 35 years leaving behind his wife and minor children at that point of time. In response, learned Amicus Curiae has submitted that the accused had no criminal antecedent other than the one in hand. Having held the guilty of the offence under first degree of the Section 304, IPC and taking account the obtaining fact situation in its entirety including the fact that at the time of committing the offence, the accused had no prior criminal antecedent and at present, he is about 70 years of age, we are of the

considered view that a sentence of 8 [eight] years rigorous imprisonment will subserve ends of justice. In so far as the order as regards fine as passed by the learned trial court is concerned, the same is maintained. Therefore, the sentence on the accused-appellant stands altered from rigorous imprisonment for life to rigorous imprisonment for 8 [eight] years. We also affirm the direction given by the learned trial court as regards disbursement of the fine amount in the manner indicated, if the fine amount is realized.

38. We also reiterate the direction given by the learned trial court to the District Legal Services Authority for determination of claim of compensation to be paid to the next-of-kin of the deceased in terms of the provisions contained in Section 357A, CrPC and the extant Victim Compensation Scheme framed thereunder.

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

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

JUDGE **JUDGE**

Comparing Assistant