

GAHC010027172020



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

Case No. : CRL.A(J)/9/2020

HIREN BAURI
S/O. LT. LAKHICHARAN BAURI, GEREKI, P.S. CHATIA, DIST. BISWANATH,
ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. R D MOZUMDAR, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 28-05-2024

(Kardak Ete, J)

This appeal from Jail preferred against the judgment and order dated 03.06.2019, passed by the learned Additional Sessions Judge (FTC), Biswanath Chariali, Sonitpur, Assam, in Sessions Case No.71/2018, whereby, the accused-appellant was convicted under Section 302 IPC and sentenced to undergo

rigorous imprisonment for life and to pay fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for one month.

2. We have heard Mrs. R.D. Mozumdar, learned *Amicus Curiae* and Ms. S. Jahan, learned Additional Public Prosecutor, Assam for the State respondent.

3. This criminal proceeding was set into motion upon filing of an FIR dated 17-01-2018, by one Sri Jiten Guha, who is the neighbour of the accused-appellant, before the Officer-in-Charge of Sootea Police Station, Sootea, Biswanath, stating that at about 1.00 am, on 16-01-2018, his relative Junta Bauri, who lived in a house adjacent to his house, was strangled to death by her husband, Sri Hiren Bauri (accused). Accordingly, on the basis of the said FIR, police registered Sootea Police Station Case No.09/2018, under Section 302 IPC. During investigation, inquest report was prepared by the Investigating Police Officer and autopsy was done.

4. On completion of investigation, police submitted charge-sheet against the accused-appellant under Section 302 IPC and on committal of the case, trial was conducted by the learned Additional Sessions Judge, FTC, Biswanath Chariali, Sonitpur, Assam.

5. The prosecution examined 10 (ten) witnesses including the Investigating Police Officer (PW9) and the Medical Officer (PW10) to establish the charge against the accused-appellant. The appellant was also examined under Section 313 Cr.P.C. in respect of various incriminating materials and evidence adduced against him, where he reiterated that the allegations are false and denied of committing the offence. He stated that he has been falsely implicated.

6. The learned trial Court, after considering the evidence adduced and after considering the statement made by the appellant, held that the prosecution has

been able to prove the charge against the appellant beyond reasonable doubt and accordingly, convicted the accused-appellant under Section 302 IPC and awarded sentence as indicated above.

7. For proper appreciation of the case in hand, evidence adduced by the PWs are considered.

8. PW1, Sri Dhruba Bowry alias Ratan Bowry, is the son of the appellant and was about 9 years old when he deposed before the trial Court. He stated that the accused is his father and the deceased, Jonta Bowry is his mother. About 4 months ago, at about 1.30 am, his father/accused-appellant had killed his mother by strangulation. He was in the house and he saw his father killing his mother. He raised *hullah* and then his aunt (Pehi), Jonali Guha, whose house is adjacent to the house of the accused-appellant, came out of her house and raised *hullah*. The villagers tried to save his mother by providing heat of fire. In the next morning, the police came and took the dead body for *post-mortem* examination and also arrested his father. He further deposed that he gave his statement under Section 164 of the Cr.P.C. before the Magistrate.

In cross-examination, he stated that he usually goes to sleep at 7 p.m. and quarrel occurred regularly between his father and his mother.

9. PW2, Sri Jiten Guha, is the informant and a neighbour of the appellant. In his statement, he stated that he knew the deceased, who was the wife of the appellant and the occurrence took place four months ago. At about 1.00 a.m. in the morning, PW1 raised alarm. His house is situated at about 30 feet from the house of the appellant and hearing the *hullah*, he went to the house of the appellant and saw that the deceased was lying on the ground inside the house. He deposed that PW1 stated that his mother was killed by his father (accused-

appellant) by strangulation. The other villagers were called by the PW2 and on the next morning, police came and took the dead body for post-mortem examination and he did not see the accused at that time.

10. PW3, Sri Bakul Karmakar, is also a neighbour of the accused-appellant and he deposed that he knew the deceased Jonta Bowry, who was the wife of the appellant. The occurrence took place about four months ago. It was Bihu time, i.e., *Aghon Jatra* and the appellant consumed liquor and, thereafter, he came to the house. At about 1.00/1.30 a.m., the son of the accused-appellant raised *hullah* and hearing the same PW3 went to the house of the accused and saw the deceased lying dead inside the house of the accused-appellant. He also deposed that the PW1 (son of the appellant) told him that Jonta Bowry was killed by his father by strangulation. Thereafter, many people gathered and on the next day, the police came and took the dead body for *post-mortem* examination.

In cross-examination, he stated that he had not seen the incident personally and he has no personal knowledge as to how Jonta Bowry died. He came to know about the occurrence only as per the version of the PW1.

11. PW4, Smt. Jonali Guha, is the wife of the informant (PW2). The accused-appellant is her elder brother. She deposed that the incident took place during the last *Magh Bihu*. About a month prior to the incident, appellant, Biren Bauri went to Balijuri for work and three days before the *Bihu*, he returned. She deposed that quarrels took place between the accused-appellant and his wife frequently and on the day of occurrence, her elder brother assaulted her sister-in-law (deceased). She deposed that the PW1 told the fellow villagers that his father strangled his mother to death then PW1 informed her about the incident.

In the cross-examination, she stated that the courtyard of her house and that of the appellant is the same. She reached thereafter the incident had taken place and when she reached there, her sister-in-law was alright. Thereafter, she did not witness any incident. She also stated that the children were present and at about 3/4 a.m., she went to the house of her sister-in-law (deceased) and saw her dead-body lying.

12. PW5, Sri Jagadish Nayak, deposed that he knows the informant as well as the appellant. About six months back, he went towards the resident of the appellant and saw police there. He further deposed that the dead body was on a bed inside the house. Thereafter, the dead body was brought outside. The police asked him to leave and accordingly, he left the place. He also stated that the accused was not present in the house at that time.

13. PW6, Smt. Trishna Bawri, deposed that the incident took place on 16-01-2018. They were not present at the place of occurrence on the day of incident. On the following day, reaching the village, she came to know that Jonta Bowry, wife of the appellant was dead. She came to know from the villagers that the appellant had murdered the wife.

14. PW7, Sri Kushal Das, deposed that he was not present at the time of incident and the incident took place in the year 2018. He was in Arunachal at the time of incident and his wife informed him, over phone, that his sister-in-law died following a quarrel with the accused-appellant.

15. PW8, Sri Moon Nath, deposed that the incident took place in January, 2018. There used to be quarrel frequently between the appellant and his wife and on the following day of the occurrence, he came to know that the appellant had killed his wife, Jonta Bowry. The incident took place in the night; he came

to know about the incident only in the next morning.

16. PW9, Sri Mohan Chandra Nath, is the Investigating Officer, who conducted the investigation of the case. He testified the manner how he conducted the investigation by visiting the place of occurrence, getting the autopsy done on the dead body, recording the statement of the witnesses, arresting the accused and submitting charge-sheet against the accused.

17. PW10, Dr. Palashmoni Keot, is the doctor, who conducted *post-mortem* examination on the dead body of the deceased. He deposed as under:

“Rigor mortis is present superficial bruising and abrasions are seen over the face, forehead, neck, both arms and over abdomen bruise also seen over the knees and right leg. Finger nail abrasion seen over the neck over left carotid and left side of mandible. On dissection of neck, engagement seen. Extensive bruising seen over the neck muscles. Frequinal bone fracture seen, fracture larynxal and thyroid cartilage seen. On examination of cranium and spinal cord, scalp is congested, congestion present in the brain tissue.

On examination of the thorax, pleurae congestion seen, laryxal and tracheal ring fracture, both the lungs are congested. On examination of the abdomen, super fecal abrasion seen over the abdomen. Internal and external sexual organs are healthy, uterus cavity is empty. Signs of asphyxia are seen in both the internal and external organs of respirations. Scratches and bruises are seen over the face, neck and arms. Changes are ante mortem in nature. Time since death 6 hours to 24 hours.

In my opinion the cause of death is due to asphyxia as a result of throttling. Ext.6 is the post mortem report Ext.6(1) is my signature.”

18. The appellant was also examined and his statement was recorded under Section 313 of the Cr.P.C. In his statement, he denied all the allegations levelled against him as false and fabricated.

19. PW1, who is the son of the appellant also gave his statement under Section 164 of the Cr.P.C. His statement is reproduced as under:

“At about 2.30 am last Monday, my father Hiren Bauri came home under the influence of liquor and assaulted my mother. My father kicked my mother a lot and pulled her by the hair. I saw the incident. My mother fell down to the ground. My mother was lying on bed in the house. My father was at home. Later, my mother died in the night last Tuesday. I screamed and then my father told that he had not strangled my mother to death. Later my mother died. That was all about the incident. My father used to assault my mother.”

20. Ms. R.D. Mozumder, learned Amicus Curiae, while referring to the depositions, submits that PW1 who is the son of the deceased and the accused had allegedly seen the incident. His statement under Section 164 Cr.P.C. was exhibited by him. In the statement under section 164 Cr.P.C. he has stated that his father Hiren Bauri came home under the influence of liquor. PW2 to 8 are all hearsay witnesses. They accepted in cross that they had not seen the incident. The FIR was lodged by PW2. PW3, among other things, had stated that the accused enjoyed Aghon Jatra and consumed liquor and thereafter he came to his house. PW4 is wife of informant and sister of the accused. In cross examination she had stated that she reached the place of occurrence after the incident had taken place. She stated that when she reached, sister-in-law (deceased) was alright. PW5, among other things, had stated that the dead body was on a bed inside the house. He did not see any injury on the dead body. PW6 stated that they were not present near the place of occurrence on the day of the incident. PW7 had stated that he was not present at the time of the incident. PW8 had stated there had been frequent quarrels between the accused person and his wife. PW9 is the I.O who had stated, amongst other things, that he recorded the statement of witness Ratan Bauri under section 164 Cr.P.C; wherein Ratan Bauri stated that he is about 11 years old. In cross examination, amongst other things, he stated that he got the inquest held. Later on he stated that he did not get the inquest report prepared through Executive Magistrate. PW10 is the M.O, he stated, amongst other things, superficial bruising and abrasions are seen over the face, forehead, neck both arms and over abdomen bruise also seen over the knees and right leg. Finger nail abrasion seen over the neck, over left carotid and left side of mandible.

21. It is also submitted by learned Amicus curiae that PW2 had stated that

body of the deceased was lying on ground but PW5 stated that the dead body was on a bed inside the house. PW8 accepted that he recorded the statement of witness Ratan Bauri under section 164 Cr.P.C. which is in fact not permitted under the law. The magistrate, who had recorded the statement under section 164 Cr.P.C. did not adduce evidence in the case and the I/O has submitted the recorded statement under section 164 Cr.P.C.

22. Ms. R.D. Mozumder, learned Amicus Curiae, submits that as per inquest report there were minor injuries found on the belly and neck. But the M.O. stated that superficial bruising and abrasions are seen over the face, forehead, neck, both arms and over abdomen bruise also seen over the knees and right leg. Finger nail abrasion seen over the neck, over left carotid and left side of mandible. She submits that there is no explanation from prosecution as to how the injuries were there. She submits that mitigating factors exist in the case as the accused was under the influence of liquor and the accused and the deceased used to have frequent fights.

23. Ms. R.D. Mozumder, learned Amicus Curiae submits that Exception 3 to Section 300 is attracted in the present case. It is not a case of murder but of culpable homicide not amounting to murder. There is no premeditation rather the incident happened in a sudden fight in the heat of passion upon a sudden quarrel. Therefore, learned Amicus Curiae, submits that this is a fit case to convert the punishment from Section 302 to 304 as the accused might have had knowledge that his act might cause death, but he had no intention to kill. Moreover, he was under the influence of liquor as per the prosecution witnesses.

24. On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor, submits that the eye witnesses in the instant case was the son of the deceased who was examined as PW1. He at the time of occurrence was 9 years of age

and was a student of class IV. The learned trial court after examining him, being a child witness, by putting questions to judge his capacity to understand and reply, was examined as PW1 and the said child witness in no unclear terms deposed before the trial court that at around 1.30 AM, his father, the accused appellant killed his mother by strangulation. He further stated that seeing the same, he shouted and hearing his hue and cry, his aunt, examined as PW4 and other villagers came to his house who tried to save his mother by warming her but the deceased died and in the morning, the police came and took the dead body.

25. Ms. S. Jahan, learned Additional Public Prosecutor, submits that PW1 was cross examined and at no point of time, his statement of seeing the occurrence was demolished. Rather he reiterated the same and further clarified that although he went to sleep at 7 PM, he woke up at the time of incident.

26. Ms. S. Jahan, learned Additional Public Prosecutor, submits that PW2, who is the husband of the aunt of PW1 corroborated the statement of PW1 to the effect that PW1 shouted and on hearing his cries he went from his house which is only around 30 feet away from the house of PW1, to the place of occurrence and saw the victim lying on the ground. This witness further stated that it was PW1 who told him that the appellant killed the deceased. This piece of evidence is relevant as res-gastea evidence under Section 4 of the Evidence Act. Similar is the case of PW3 who also corroborated the evidence of PW1 and would be relevant as res-gastea evidence. This witness too heard the cries of PW1 and on reaching the place of occurrence, he was told by PW1 that his father had killed his mother. However, there is further evidence adduced by this witness to the effect that the appellant consumed liquor on that night and went to his house.

27. PW4 is the aunt of PW1 and she also corroborated the statement of PW1

by deposing that it was PW1 who informed her that appellant had killed the deceased. This witness however stated that there used to be quarrel between the deceased and the appellant very often and that on the night of the occurrence too, they fought.

28. The evidence of quarrel between the deceased and the appellant was brought forth by PW7 as well. He stated that on the night of occurrence, his wife called him over telephone and informed that the deceased died following a quarrel with the appellant. Happenings of frequent quarrels between the appellant and deceased were also stated by PW8 in his deposition before the trial Court.

29. The doctor who conducted autopsy on the body of the deceased opined that the death was due to asphyxia as a result of throttling. This evidence corroborates the evidence of PW1 who was the sole eye witness to the occurrence and who stated that the appellant strangled his mother.

30. Ms. S. Jahan, learned Additional Public Prosecutor, submits that in view of the above evidences, the evidence of quarrel between the appellant and deceased not only on other days but also on the night of occurrence just before the incident, coupled with the fact that the appellant came drunk on the said night, which by itself cannot be a mitigating factor, unless intoxicants are forcibly administered to him, can sequel in converting the conviction and sentence from Section 302 to Section 304 IPC.

31. Now, we would refer to the case laws relied upon by the parties.

32. In the case of **Dauvaram Nirmalkar –vs- State of Chattisgarh** reported in **AIR 2022 SC 3620**, the Hon'ble Supreme Court has held as follows:-

“9.Exception 1 differs from Exception 4 of Section 300 of the IPC . Exception 1

applies when due to grave and sudden provocation, the offender, deprived of the power of self control, causes the death of the person who gave the provocation. Exception 1 also

12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation. The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances. While examining these questions, we should not be short-sighted, and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control. The cumulative or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by Ashworth¹³ in the following words:

“[T]he significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's

retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties.”

Exception 1 to Section 300 recognises that when a reasonable person is tormented continuously, he may, at one point of time, erupt and reach a break point whereby losing self-control, going astray and committing the offence. However, sustained provocation principle does not do away with the requirement of immediate or the final provocative act, words or gesture, which should be verifiable. Further, this defence would not be available if there is evidence of reflection or planning as they mirror exercise of calculation and premeditation.

14. Following the view expressed in K.M. Nanavati (supra), this Court in Budhi Singh v. State of Himachal Pradesh MANU/SC/1126/2012 : (2012) 13 SCC 663 observed that in the test for application of Exception 1 to Section 300 of the IPC, the primary obligation of the court is to examine the circumstances from the point of view of a person of reasonable prudence, if there was such grave and sudden provocation, as to reasonably conclude that a person placed in such circumstances can temporarily lose self-control and commit the offence in the proximity to the time of provocation. A significant observation in Budhi Singh (supra) is that the provocation may be an act or series of acts done by the deceased to the accused resulting in inflicting of the injury. The idea behind this exception is to exclude the acts of violence which are premeditated, and not to deny consideration of circumstances such as prior animosity between the deceased and the accused, arising as a result of incidents in the past and subsequently resulting in sudden and grave provocation. In support of the aforesaid proposition and to convert the conviction from Section 302 to Section 304 Part I of the Indian Penal Code in Budhi Singh (supra), the Court also relied upon Rampal Singh v. State of Uttar Pradesh MANU/SC/0589/2012: (2012) 8 SCC 289

15. For clarity, it must be stated that the prosecution must prove the guilt of the accused, that is, it must establish all ingredients of the offence with which the accused is charged, but this burden should not be mixed with the burden on the accused of proving that the case falls within an exception. However, to discharge this burden the accused may rely upon the case of the prosecution and the evidence adduced by the prosecution in the court. It is in this context we would refer to the case of the prosecution, which is that the deceased was addicted to alcohol and used to constantly torment, abuse and threaten the appellant. On the night of the occurrence, the deceased had consumed alcohol and had told the appellant to leave the house and if not, he would kill the appellant. There was sudden loss of self-control on account of a 'slow burn' reaction followed by the final and immediate provocation. There was temporary loss of self-control as the appellant had tried to kill himself by holding live electrical wires. Therefore, we hold that the acts of provocation on the basis of

which the appellant caused the death of his brother, Dashrath Nirmalkar, were both sudden and grave and that there was loss of self-control.”

33. In the case of **Manjit Singh –vs- State of Himachal Pradesh** reported in **(2014) 5 SCC 697**, the Hon’ble Supreme Court has held which is reproduced as under:-

“17. From the record, we find that neither the accused nor his two companions in the statements recorded under Section 313 Cr.P.C. have stated that the deceased and his companions were the aggressors and that the accused was acting in exercise of the right of private defence. In fact, their case is that of total denial. There is nothing on the record to suggest that the accused or his companions received injuries at the hands of the deceased or the deceased tried to snatch the carbine of the accused. No evidence has been brought on record that the deceased and his companions entered the hall of the hotel with arms

18. Under Section 96 IPC, “Nothing is an offence which is done in the exercise of the right of private defence”. Right of private defence of the body and of property has been enumerated under Section 97 IPC, subject to the restrictions contained in Section 99 IPC. As per the said section every person has a right to defend:

First- His own body and the body of any other person, against any offence affecting the human body;

Secondly- The property, whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is private defence of the body as follows:

“102. Commencement and continuance of the right of private defence of the body- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues.”

The extent and limitations of the right of private defence is prescribed under Sections 96 to 106 IPC. Such a right can be exercised only to defend the unlawful action and not to retaliate.

25. The question now requires to be determined is as to what is the nature of offence that the accused has committed. The evidence produced against the accused does not show that the accused had any motive to cause death of the deceased or have intended to cause such bodily injuries which were sufficient in the ordinary course of nature to cause the death of the deceased. The evidence on record also does not establish that the injuries caused on the body of the deceased must in all probability cause his death or likely to cause his death. On

the spur of the moment, during the heat of exchange of words the accused caused injuries on the body of the deceased which caused his death. Therefore, the ingredients of the murder as defined in Section 300 IPC, have not been established against the accused. In our opinion, the accused was guilty of culpable homicide not amounting to murder under Section 304 IPC, and considering the fact that the accused had not intention to either cause the death of the deceased or cause such bodily injury as is likely to cause death of the deceased, it would be sufficient to impose on the accused a sentence of seven years rigorous imprisonment and to impose on him a fine of Rs.5000 and in default of payment of fine, a further imprisonment of six months."

34. In the case of **Padma Rajbongshi –vs State of Assam** in Criminal Appeal (J) No.38/2016 dated 22.11.2018, this Court has held as under:

"The Hon'ble Supreme Court in the case of Rizan and anr. Vs. State of Chhatisgarh, through the Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, reported in (2003) 2 SCC 661, wherein it was observed as follows:

"Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution."

35. In the case of **Pappu –vs- State of Madhya Pradesh** reported in **(2006) 7 SCC 391**, the Hon'ble Supreme Court has held which is reproduced as under:-

"12. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

13. The Fourth Exception of [Section 300](#) IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact 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 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 in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts 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's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to [Section 300](#) IPC is not defined in the [IPC](#). 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 have 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 cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'

36. We have perused the above decisions of the Hon'ble court and this Court. The relevant case law, in our view, for the purpose of the case in hand is the case of **Pappu –vs- State of Madhya Pradesh** (Supra), wherein the Hon'ble Supreme court has held that for bringing in its operation of the Exception under section 300 IPC it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel

without the offender having taken undue advantage and not having acted in a cruel or unusual manner. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have 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 cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'

37. The evidence on record, the relevant parts of which have been discussed above, makes it succinctly clear that the deceased died due to asphyxia as a result of throttling. The eye witness was the PW1, son of the deceased and the appellant. The PW1 being minor aged about 9 years and child witness, the learned Trial court after examining him by putting questions to judge his capacity to understand and reply, was examined. PW1 had clearly deposed that at around 1.30 AM, his father, the accused appellant killed his mother by strangulation. He had further deposed that seeing the same, he shouted and hearing his hue and cry, his aunt, PW4 and other villagers came to his house

who tried to save his mother but the deceased died. PW1 was cross examined and at no point of time, his statement of seeing the occurrence was demolished. In fact, PW1 reiterated the same.

38. The evidences of PW2, who is the husband of the aunt of PW1, corroborated the statement of PW1 to the effect that PW1 shouted and on hearing the same they went from their houses to the place of occurrence and saw the victim lying on the ground. These witnesses had stated that it was PW1 who told them that the appellant killed the deceased. PW3 further stated that the appellant consumed liquor on that night and went to his house. PW4 is the aunt of PW1 had deposed that PW1 was the one who informed her that appellant had killed the deceased. She further stated that there used to be quarrel between the deceased and the appellant very often and that on the night of the occurrence also, there was a fight between the deceased and the appellant. The evidence of quarrel or frequent quarrels between the deceased and the appellant could be seen from the depositions of PW7 and 8.

39. The evidence of the doctor, who conducted autopsy on the body of the deceased, clearly opined that the death was due to asphyxia as a result of throttling which corroborates the evidence of sole eye witness i.e. PW1, who, in no uncertain terms, stated that his father, the accused appellant, killed his mother, deceased, by strangulation.

40. On having meticulously examined the evidence, we are in agreement with the submission on behalf of the State that the evidence of quarrel between the appellant and deceased not only on other days but also on the night of occurrence just before the incident and the appellant came drunk on the said night of occurrence by itself cannot be a mitigating factor. Thus, we are of the view that the conviction and sentence cannot be converted from Section 302 to

Section 304 IPC for the application of Exception under section 300 IPC, 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 cruel or unusual manner.

41. As noted above, it is settled position of law that for bringing in Exception to section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. In the present case, although the accused appellant may have committed the act without premeditation, there is nothing in the evidence to show that there was a sudden quarrel and the offender has not taken undue advantage or acted in cruel or unusual manner. Rather it is established that appellant had acted in cruel or unusual manner by strangulating the deceased.

42. On the careful examination and scrutiny of the testimony of the prosecution witnesses, we are of the view that the evidence of the PW1 corroborated by the evidence of PW2, 3, 4 and 9 establishes the guilt of the accused appellant and the prosecution has proved the guilt beyond reasonable doubt.

43. From the analysis of the evidence on record herein above, we are of the considered view that and the prosecution has successfully established the guilt of the accused appellant beyond reasonable doubt. Consequently, the judgment and order dated 03.06.2019, passed by the learned Additional Sessions Judge (FTC), Biswanath Chariali, Sonitpur, Assam, in Sessions Case No.71/2018 is upheld.

44. In the result, criminal appeal stands dismissed.
45. We record our appreciation for able assistance rendered by the learned Amicus Curiae and Learned Addl. PP, Assam.
46. Send down the TCR.

JUDGE

JUDGE

Comparing Assistant