

GAHC010065632018



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

Case No. : CRL.A(J)/33/2018

PARBINA BEGUM
NAGAON

VERSUS

THE STATE OF ASSAM
REP. BY P.P., ASSAM

Advocates:

Appellant	:	Mr. I.A. Hazarika, Amicus Curiae.
Respondent	:	Ms. B. Bhuyan, Senior Advocate & Additional Public Prosecutor, Assam; Ms. M. Chakraborty, Advocate.

Date of Hearing and Judgment & Order : 22.05.2024.

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

JUDGMENT & ORDER

[M. Choudhury, J.]

The instant criminal appeal from jail under Section 374[2], Code of Criminal

Procedure, 1973 ['CrPC', for short] is directed against a Judgment and Order dated 27.10.2017 passed by the learned Additional Sessions Judge no. 1, Nagaon, Assam ['the trial court', for short] in Sessions [T1] Case No. 361[N]/2012. It needs mention that two accused persons including the present accused-appellant, stood the trial in Sessions [T1] Case no. 361[N]/2012 for a charge under Section 302, Indian Penal Code ['IPC', for short] read with Section 34, IPC. By the Judgment dated 27.10.2017, both the accused persons including the present accused-appellant, had been convicted under Section 302, IPC read with Section 34, IPC. By separate Orders on sentence dated 30.10.2017, each of two accused persons had been sentenced to undergo rigorous imprisonment for life each and to pay a fine of Rs. 10,000/- each, in default of payment of fine, to undergo rigorous imprisonment for 6 [six] months each.

2. We have heard Mr. I.A. Hazarika, learned Amicus Curiae for the accused-appellant; and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor assisted by Ms. M. Chakraborty, learned counsel for the respondent State.

3. Mr. Hazarika, learned Amicus Curiae appearing for the accused-appellant has submitted that the other accused person, Md. Abdul Motalib subsequent to the Judgment of conviction and Order on sentence passed in Sessions [T1] Case no. 361[N]/2012, had preferred an appeal under Section 374[2], CrPC separately and the said criminal appeal was registered as Criminal Appeal no. 37/2018. By a Judgment and Order dated 22.04.2019 rendered in Criminal Appeal no. 37/2018, the co-accused person, Abdul Motalib [hereinafter referred to as 'the co-accused person', for easy reference] has been acquitted by a coordinate bench of this court, finding his conviction under Section 302, IPC read with Section 34, IPC unsustainable in law. It is the contention of the learned Amicus Curiae that with the acquittal of the co-accused person, who stood the trial with the present accused-appellant, the spectre of Section 34, IPC stood removed. Submitting further, Mr. Hazarika has contended that there is no iota of evidence, not to speak of any cogent and reliable evidence, to rope in the accused-appellant for the murder of the deceased who was the husband of the accused-appellant, with the aid of Section 34, IPC. It is contended that there was no eye-witness to the incident, though the incident of assault had occurred inside the dwelling house of the

deceased and the accused-appellant. At the time of the incident, apart from the deceased and the accused-appellant, one son and two daughters of the deceased and the accused-appellant were present inside the dwelling house. The incident had occurred in the midnight hours itself. The learned trial court has convicted the accused-appellant on the basis of the testimonies of some of the prosecution witnesses, who suspected an extra-marital relationship between the accused-appellant and the co-accused person, who stood acquitted *inter-alia* in the absence of any motive. It has been urged that the accused-appellant could not have been convicted with the aid of Section 34, IPC merely on the basis of such baseless suspicion. In such obtaining fact situation, the impugned Judgment of conviction and Order on sentence are not sustainable in law insofar as the accused-appellant is concerned.

4. *Au contraire*, Ms. Bhuyan, learned Senior Counsel & Additional Public Prosecutor has contended that the incident of murder had occurred inside the dwelling house of the deceased and the accused-appellant in and around midnight. Being an inmate of the house, it was incumbent upon the accused-appellant to offer a plausible explanation as to how the incident had occurred. The learned trial court had recorded the finding that the extra-marital relationship between the accused-appellant and the co-accused person was established from the evidence on record and since the deceased had a land dispute with the co-accused person, there was a motive on the part of the co-accused person to perpetrate the crime of murder and the accused-appellant, who had an extra-marital relationship with the co-accused person, also had a motive to aid the co-accused person. In such view of the matter, the learned trial court has rightly reached the finding that both the accused persons in furtherance of their common intention and common motive, committed the murder of the deceased on that fateful night, when the deceased was sleeping inside his house on a bed. Ms. Bhuyan has further submitted that even if the co-accused has been acquitted from the charge of murder, the evidence on record *qua* the charge of murder read with Section 34, IPC are to be independently assessed to consider the case against the accused-appellant. If viewed independently, the evidence/materials on record go to indicate that the accused-appellant was involved with the co-accused in perpetrating the crime, the conviction of the accused-appellant would be sustainable. A reference is made to the decision of the Ho'ble Supreme Court of India in *Brathi @ Sukhdev Singh vs. State of Punjab*, reported in

[1991] 1 SCC 519.

5. We have duly considered the submissions of learned counsel for both the parties and have also perused the materials available in the case records of Sessions [T1] Case no. 361[N]/2012, in original. We have also gone through the other decisions referred to by the learned counsel for the parties.

6. The case of the prosecution started with the institution of a First Information Report [FIR] by one Md. Amiruddin [P.W.1] before the In-Charge, Dumdumia Police Out Post on 18.04.2011. On receipt of the FIR, the In-Charge, Dumdumia Police Out Post registered the same vide Doomdomia P/P General Diary Entry no. 256 dated 18.04.2011 and took up the investigation of the case himself, while forwarding the FIR to the Officer In-Charge, Dhing Police Station for registering a case under proper sections of law. On receipt of the FIR, the Officer In-Charge, Dhing Police Station registered the same as Dhing Police Station Case no. 94/2011 dated 18.04.2011 under Section 302, IPC [corresponding G.R. Case no. 1111/2011].

7. In the FIR, the informant had *inter-alia* stated that at about 01-00/01-30 a.m. in the night intervening 17.04.2011 and 18.04.2011, some unidentified miscreants killed his nephew, Babar Ali by stabbing on his head with a sharp weapon, while Babar Ali was sleeping on bed. The informant further stated that when he reached the house of Babar Ali on hearing hue and cry of the children of Babar Ali, he saw the deadbody of Babar Ali lying on the bed.

8. From the materials on records, it has emerged that after registering General Diary Entry no. 256, the Investigating Officer [I.O.], P.W.14 along with his staff, proceeded to the Place of Occurrence, that is, the house of the deceased. On reaching the Place of Occurrence, he found that the house of the deceased was made of bamboo walls with CI sheet roofing; and the door of the house was made of bamboo which was movable. The deadbody of the deceased was found lying on a bed. The I.O. conducted inquest on the dead body of the deceased at the Place of Occurrence itself; and drew a Sketch Map of the Place of Occurrence. The I.O. seized a number of materials vide Ext.-2, Seizure List. The accused-

appellant was found at the Place of Occurrence and she was arrested on that day itself. The co-accused person was, however, arrested on 22.04.2011. The statements of few of the witnesses were recorded under Section 161, CrPC by the I.O. at the Place of Occurrence and thereafter, the deadbody of Babar Ali was sent to the B.P. Civil Hospital, Nagaon for conducting post-mortem examination. The post-mortem examination on the deadbody of the deceased was performed on 18.04.2011 at the B.P. Civil Hospital, Nagaon by the Senior Medical & Health Officer, Dr. Bhupen Chandra Bora [P.W.9] who was posted at B.P. Civil Hospital, Nagaon on that day. The Autopsy Doctor [P.W.9] after performing the post-mortem examination on the deadbody of the deceased, prepared and submitted a Post-Mortem Examination [PME] Report, which was exhibited during the trial as Ext.-3. The I.O. of the case, P.W.3 after completing the investigation into Dhing Police Station Case No. 94/2011, submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 104/2011 dated 30.09.2011 finding a *prime-facie* case for the offence under Section 302, IPC read with Section 34, IPC established against the two accused persons viz. the accused-appellant and the co-accused.

9. On submission of the Charge-Sheet, the learned Judicial Magistrate, 1st Class, Nagaon as the Committal Court secured the appearance of the two accused persons before it on 05.10.2012. The two accused persons were furnished with all the copies in terms of the provisions of Section 207, CrPC. Since the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the case records of G.R. Case no. 1111/2011 was forwarded to the Court of Sessions by the Court of learned Judicial Magistrate, 1st Class, Nagaon by an Order of Commitment dated 05.10.2012. The learned Public Prosecutor was notified accordingly.

10. On receipt of the case records of G.R. Case no. 1111/2011, the learned Court of Sessions registered the same as Sessions [T1] Case no. 361[N]/2012 and transferred the case records to the Court of learned Additional Sessions Judge no. 1, Nagaon ['the trial court', for short] for disposal. On 09.05.2013, the learned trial court after hearing Public Prosecutor and the learned defence counsel and after considering the materials on record, framed the following charge against the accused persons as under :-

That you on or about the 18.04.2011 at 1:30 p.m. at Joramari, P.S. Dhing, Dist. Nagaon in furtherance of committed murder by intentionally or knowingly causing the death of Babar Ali and thereby committed an offence punishable U/S 302/34 of the Indian Penal Code and within my cognizance.

11. When the charge was read over and explained to the accused persons, they pleaded not guilty and claimed to be tried. During course of the trial, the prosecution side in order to bring home the charge against the accused persons, examined the following prosecution witnesses :- [i] P.W.1 - Amiruddin; [ii] P.W.2 - Subed Ali; [iii] P.W.3 - Habibur Rahman; [iv] P.W.4 - Irfana Khatun; [v] P.W.5 - Hasen Ali; [vi] P.W.6 - Yakub Ali [Gaonbura]; [vii] P.W.7 - Rasidul Islam; [viii] P.W.8 - Lokman Hekim @ Islam; [ix] P.W.9 - Bhupen Ch. Bora; [x] P.W.10 - Siraj Ali; [xi] P.W.11 - Wahidur Rahman; [xii] P.W.12 - Mojibur Rahman; [xiii] P.W.13 - Samir Uddin; [xiv] P.W.14 - Haren Gogoi. The prosecution side also exhibited the following documents :- [i] Ext.-1 – Ejahar; [ii] Ext.-2 – Seizure List; [iii] Ext.-3 – Post-Mortem Examination Report; [iv] Ext.-4 – Sketch Map; [v] Ext.-5 – Forwarding Report of the accused Abdul Motalib; [vi] Ext.-6 – Forwarding Report of the accused Parbina Begum; [vii] Ext.-7 – Charge-Sheet; [viii] Ext.-8 – Format of FIR. After closure of prosecution evidence, the accused persons were examined under Section 313, CrPC. Their plea was that of denial.

12. During the course of the trial, the prosecution declared two of its witnesses - P.W.12 and P.W.13 - as hostile and the learned Public Prosecutor sought permission from the learned trial court to cross-examine the said two witnesses. On permission being granted, the prosecution side cross-examined P.W.12 and P.W.13 with their previous statements made before the Police. However, the prosecution did not bring out any contradiction in connection with the depositions made before the Court *qua* their previous statements as per the procedure prescribed in Section 145 and Section 154 of the Evidence Act read with Section 162, CrPC. In any view of the matter, P.W.12 and P.W.13 did not say anything as regards the accused-appellant is concerned.

13. P.W.1, Amiruddin was an uncle of the deceased and he deposed that he knew both the accused persons. P.W.1 stated that his house was situated near the house of the

deceased and at about 01-00/01-30 a.m. on the relevant night, he went to the house of the deceased on hearing hue and cry from there. On going there, the daughter and son of the deceased, that is, P.W.4 and P.W.7 told him that their father was murdered but they did not say who had murdered their father. Then, P.W.1 went near the body of the deceased and saw one head injury on the body, which according to him, was caused by a sharp weapon. P.W.1 also found the accused-appellant sitting near the deadbody of the deceased. Then, he raised alarm and hearing his alarm, people from the neighborhood gathered there. P.W.1 further stated that he had lodged the FIR on the following morning. P.W.1 further stated that he did not know how Babar Ali died. He exhibited the FIR as Ext.-1 and his signature therein as Ext.-1[1].

13.1. In his cross-examination, P.W.1 admitted that he did not know who killed the deceased. He further stated that none of the persons who gathered at the house of the deceased after the incident could say to him how the death had occurred. He further stated that in the FIR, he mentioned that some unknown miscreants had killed Babar Ali at night.

14. The deceased, Babar Ali was a nephew of P.W.2, Subed Ali who knew both the accused persons. Narrating about the incident, P.W.2 deposed that at the relevant point of time, he was in his house, which was situated at a distance of about 100 metres from the house of the deceased. At about 01-00/01-30 a.m., P.W.1 came to his house and told him that Babar Ali had been killed. Then, P.W.2 rushed to the place of occurrence along with P.W.1. Going there, he saw Babar Ali lying dead in his bed in a pool of blood. He suspected that Babar Ali was caught by one person and killed by another person. P.W.2 testified that he did not know how Babar Ali died and he was also not told by anybody how Babar Ali had died.

14.1. In his cross-examination, P.W.2 stated that he did not know how the incident took place.

15. P.W.3, Habibur Rahman was a cousin of the co-accused person and he knew the accused-appellant and the informant, P.W.1. As regards the incident, he stated that the

occurrence took place at about 01-30/2-00 a.m. on 18.04.2011 and at that time, he was in his house, which was at a distance of about 100 metres from the house of the deceased. On hearing commotion raised by the children of the deceased, he came to the place of occurrence and saw the deadbody of the deceased lying on his bed. According to him, the deceased was killed with sharp weapon and there was bleeding from the head. P.W.3 admitted the presence of the accused-appellant there as she was found sitting near the deadbody of her husband. P.W.3 further deposed that when he asked P.W.4, that is, the daughter of the deceased regarding the incident, he was told by P.W.4 that she saw someone going out from their house but she could not recognize the person. P.W.3 expressed a suspicion about an extra-marital relationship as before the incident, the deceased found the two accused persons roaming together and regarding the same, a quarrel took place between the deceased and the accused-appellant. P.W.3 further stated that he suspected that out of the said quarrel and in view of the relationship between the two accused persons, the two accused persons had killed the deceased.

15.1. In his cross-examination, P.W.3 admitted that he did not know how the incident took place as he did not see the incident. He further stated that he did not have any knowledge who killed the deceased. Though suggestions were put to this witness as regards his previous statement, after his specific denial, the defence did not bring the previous statement or any part of the previous statement for the purpose of bringing out any contradiction on record.

16. P.W.4, Irfana Khatun was the daughter of the deceased and she was present inside the house at the relevant point of time, along with the accused-appellant and her elder brother, P.W.7. P.W.4 testified that the co-accused person was an elder brother of her father. She further stated that the incident took place at night when she was sleeping with her father. At that time, she woke up after hearing her mother's cry and saw her mother sitting next to her father, that is, the deceased. She further stated that she saw the co-accused person going out from their room along with 3/4 other persons but she could not recognize any of them. P.W.4 further deposed that when she asked her mother, she was told that the co-accused person killed her father and ran away. P.W.4 saw an injury on the head of her

father. Then, she called her elder brother, P.W.7.

16.1. In her cross-examination, P.W.4 stated that on the night of the incident she was sleeping along with her sister and parents on the same bed. As regards the house, P.W.4 stated, at one point, that the room where her father and she used to sleep was the first room but, at another point, she stated that her elder brother's [P.W.7] room was the first room. Suggestions were put to this witness by the defence and those suggestions were denied by P.W.4.

17. P.W.5, Hasen Ali was an uncle of the deceased. He stated that at around 00-03-00/03-30 a.m. on the relevant night, he woke up from sleep on hearing hue and cry and went to the house of the deceased. Going there, he found the deceased lying on his bed. This witness stated that he found the head of the deceased in two parts with brain particles lying scattered in and around the bed. At the place of occurrence, P.W.5 found the accused-appellant. He stated that he had knowledge about a land dispute between the deceased and the co-accused person and he suspected that both the accused persons had killed the deceased. P.W.5 was a seizure witness to the Seizure List, Ext.-2. When a question was put to P.W.5 as regards his suspicion, P.W.5 replied to the Court by stating that he noticed that the co-accused person used to roam with the accused-appellant and over that issue, the deceased had a quarrel with the accused-appellant.

17.1. In his cross-examination, P.W.5 admitted that he did not see the incident. P.W.5 stated that apart from the FIR lodged by P.W.1, there was another FIR, which was lodged by one Habibur as he accompanied Habibur when Habibur lodged the FIR [other than Ext.-1, FIR, no FIR was exhibited before the learned trial court]. P.W.5 further stated that he saw the accused persons roaming together in the village and denied a suggestion of the defence that he did not state before the Police that the accused persons used to roam together.

18. P.W.6, Yakub Ali knew both the accused persons as they were co-villagers. He also knew the informant, P.W.1 and the deceased. In his examination-in-chief, P.W.5 stated that it was in the morning hours of 18.04.2011, he heard that somebody had killed Babar Ali.

He then went to the house of Babar Ali and found the deadbody of Babar Ali on the bed inside his house. He noticed that a cut mark on the neck of Babar Ali and the deadbody was in a pool of blood. He was also a witness to the Seizure List, Ext.-2.

18.1. In his cross-examination, P.W.6 stated that when he went to the place of occurrence, there was gathering of about 200 people but none of them had told him as to who killed Babar Ali. P.W.6 like the other witnesses, found the accused-appellant sitting and crying near the deadbody of her husband. P.W.6 testified that the deceased and the accused-appellant had good relation and they had three children.

19. P.W.7, Rasidul Islam was the son of the deceased and the accused-appellant. P.W.7 narrated about the incident. P.W.7 deposed that on the relevant night, he was in the house in a separate room. After hearing alarm raised by his mother, that is, the accused-appellant and his sister, P.W.4 he woke up from sleep and came out from his room. He found his father lying on his bed. Then, P.W.4 told him that she noticed some people leaving their house and she could identify those people with one of them was the co-accused person. Having seen the head injury on the body of his father, he suspected that it was caused by an axe. P.W.7 also stated about a land dispute between the deceased and the co-accused. P.W.7 stated that it was P.W.4 from whom he came to know that the co-accused person had killed his father.

19.1. In his cross-examination, P.W.7 stated that there were two rooms in their house. On hearing alarm, he woke up from the sleep but did not witness the incident. Suggestions were put to this witness by the defence and the witness denied those suggestions.

20. P.W.8 was a neighbour and he deposed that hearing the news of death of Babar Ali, he went to the house of the deceased and found the deadbody of Babar Ali lying on a bed with a head injury. He stated that he did not know who killed Babar Ali.

20.1. In his cross-examination P.W.8 stated that the accused-appellant and the children of Babar Ali were present in the house when he went to the house of Babar Ali, the

deceased.

21. P.W.9 was the Doctor, who performed the post-mortem examination on the deadbody of the deceased on 18.04.2011 and made the Post-Mortem Examination [PME] Report, Ext.-3. In his PME Report, he after examination on the deadbody, reported the following injuries :-

I - External Appearance

1. Condition of subject stout emaciated, decomposed etc:

One male dead body of average built wearing a blue colour Lungi. Rigor mortis present.

2. Wounds - position and character:

- 1] One incised would continue from left eye to left mandible.
2] Fracture left maxillary & left mandible bone.*

* * * * *

II - Cranium and Spinal Canal

1. Scalp, Skull, Vertebrae:

Scalp: Large incised area from frontal to parietal left side about 10 cm x 4.5 cm.

Skull: Fracture of frontal & parietal bone [left side] [Elevated#].

Membran: Membrane: All membranes are rupture in left frontal & parietal are.

2. Brain and spinal cord:

Brain: Brain matter comes out in left parietal & frontal parietal area.

* * * * *

More detailed description of injury or disease : Injuries in Column I, II are ante mortem in nature.

Opinion of Assistant Surgeon as to cause of death : In my opinion the cause of death was due to shock and hemorrhage as a result of hear

injury which was ante mortem in nature.

21.1. In his cross-examination, P.W.9 stated that external injury was not curved and the injury might have probably been caused from left frontal or parietal side.

22. P.W.10 stated that on the date of the incident, he was sleeping in his house. On hearing hue and cry from the house of the deceased, he woke up from sleep and went to the house of the deceased. Going there, he saw Babar Ali lying on a bed in a pool of blood with a cut injury on his head. He saw many people at the place of occurrence. He deposed that apart from him many persons had seen the accused persons roaming on bike and on that issue, the deceased had a quarrel with his wife.

22.1. In his cross-examination, P.W.10 stated that he also saw the quarrel which took place between the deceased and his wife and he suspected like other villagers.

23. P.W.11, Wahidur Rahman stated that he heard that the deceased was killed by someone inside his house. It was reported to him by his elder brother on the next morning. Then, he went the house of the deceased. Going there, he found that many persons had already gathered there. He found the wife of the deceased and the children sitting near the deadbody of the deceased. He noticed a head injury on the deadbody of the deceased. This witness had deposed that prior to the incident, the deceased stated to him that he had a land dispute with one Kajimuddin, who was the brother-in-law of the co-accused person. He was also told that in respect of the said land dispute, Kajimuddin and the co-accused person quarreled with the deceased and the accused-appellant had an extra-marital relationship with the co-accused person. He was also told that the deceased suspected such extra-marital relationship between his wife and the co-accused person. P.W.11 had also stated that the two accused persons had visiting relationship with one another.

23.1. In his cross-examination, P.W.11 stated that he had no knowledge as regards the alleged land dispute between the deceased on one side and the co-accused person and Kajimuddin on the other side. He further stated that he did not know who had killed the

deceased.

24. On a meticulous examination of the testimonies of the prosecution witnesses - P.W.1, P.W.2, P.W.3, P.W.5, P.W.6, P.W.8, P.W.10 and P.W.11, it has emerged that none of these witnesses had seen the incident of assault on the deceased. Each of these prosecution witnesses had deposed that they did not know as to how the deceased had died or who had killed the deceased. Many of them had reached the place of occurrence after hearing alarm from the house of the deceased.

25. Ms. Bhuyan, learned Additional Public Prosecutor has referred to the decision of the Hon'ble Supreme Court of India in *Brathi @ Sukhdev Singh vs. State of Punjab*, reported in [1991] 1 SCC 519. The factual matrix of that case was that the appellant, Sukhdev Singh and his uncle, Teja Singh were tried for the charge under Section 302/34, IPC for the murder of one Sucha Singh. The trial court acquitted Teja Singh and convicted Sukhdev Singh for the offence under Section 302, IPC and sentenced Sukhdev Singh to undergo imprisonment for life and to pay a fine of Rs. 1000/-. The State did not file any appeal against the order of acquittal of Teja Singh. Sukhdev Singh appealed against his conviction before the High Court. The High Court altered the conviction of Sukhdev Singh to one under Section 302, IPC read with Section 34, IPC and maintained the sentence. The appellant by special leave approached the Hon'ble Supreme Court of India. It was apprised that the order of acquittal of Teja Singh became final as no appeal was filed by the State challenging the same. It was, thus, contended that the appellant could not have been convicted for the offence under Section 302, IPC with the aid of Section 34, IPC in view of acquittal of Teja Singh. In such background, the Hon'ble Supreme Court has observed that the power of the appellate court in dealing with an appeal, as defined under Section 386[1] [b], CrPC against an order of conviction and appreciation of evidence is as wide as that of the trial court and it has full power to review the whole evidence. The appellate court is entitled to go into the entire evidence and all the relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused person. Reference has been made to another decision of Hon'ble Supreme Court in *Sundar Singh vs. State of Punjab*, reported in AIR [1962] SC 1211. In *Sundar Singh*, the Hon'ble Supreme Court has held

that the appellate provision in the Code do not create a bar against the appellate court from considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who is convicted. In considering the evidence as a whole, the appellate court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons were alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the appellate court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality.

26. In our considered view, the proposition laid down in *Brathi* [supra] and *Sundar Singh* [supra] is not directly applicable to the case in hand. As has already been mentioned hereinabove, in the present case the learned trial court has convicted both the accused persons by a common Judgment and Order of conviction and sentence dated 27.10.2017 under Section 302, IPC read with Section 34, IPC. On being convicted, the co-accused person had preferred a criminal appeal, Criminal Appeal no. 37/2018 separately. The accused-appellant has preferred the present criminal appeal separately assailing the same Judgment and Order of the learned trial court. The co-accused person has been acquitted by a Judgment and Order dated 22.04.2019 passed by a coordinate bench of this court in Criminal Appeal no. 37/2018. It is settled that a judgment of a co-ordinate bench of equal strength is to be respected. In other words, a coordinate bench of the same court should not embark on an exercise of re-appreciation of the evidence in respect of the acquitted co-accused person, like an appellate court, to find out as to whether the co-accused person had been wrongly acquitted by the co-ordinate bench of equal strength, more particularly, when such order of acquittal of the co-accused person passed by the coordinate bench of equal strength has not been reversed on appeal and the co-ordinate bench of equal strength on appreciation of evidence has acquitted the co-accused person. We rest the discussion on this aspect here.

27. The learned trial court had referred to the testimonies of the three prosecution witnesses - P.W.3, P.W.5 and P.W.10 - to reach a finding that the prosecution has been able to prove an extra-marital relationship between the accused-appellant and the co-accused person. Therefore, it requires a consideration of the testimonies of the said three prosecution witnesses. P.W.3, in his testimony, deposed to the effect that he had a suspicion in his mind because before the incident, the deceased found the accused-appellant and the co-accused person moving around together; and that there was a quarrel on that issue between the deceased and the accused-appellant. He had a suspicion that because of the said quarrel and relationship, the accused-appellant and the co-accused person had killed the deceased. P.W.5 in his examination-in-chief, deposed to the effect that he had a suspicion that the accused-appellant had killed the deceased with the help of the co-accused person. In his cross-examination, P.W.5 stated that he saw both the accused persons moving together around their village. P.W.10 deposed that he saw both the accused persons moving together on bike and the deceased had a quarrel on that issue with the accused-appellant. In his cross-examination, P.W.10 stated that he drew the suspicion on the basis of opinion received from the village people.

27.1. The said three prosecution witnesses - P.W.3, P.W.5 and P.W.10 - had only seen the two accused persons moving together. Their suspicion as regards an extra-marital relationship between the two accused persons was based on the fact that they had seen the two accused persons moving together on occasions. As per the Oxford Dictionary of English, Third Edition, 'extra marital' means an extra-marital affair [especially of the sexual relationship] occurring outside the marriage. An extra-marital relationship is understood to be a sexual relationship between a married person and another person who is not such person's husband or wife. The learned trial court had observed that the conduct and behaviour of the two accused persons, that is, their act of moving together which raised eyebrows of the general public, was sufficient to establish the factum of extra-marital relationship. The learned trial court had observed that their such conduct and behavior had proved existence of an extra-marital relationship between the two accused persons. In the considered view of this court, just because one man and one woman were seen on occasions

going together, without anything more, the same would not establish existence of an extra-marital relationship between the two. Such act of moving together might give rise to suspicion in the minds of others, like the suspicion which arose in the minds of P.W.3, P.W.5 and P.W.10 in the present case. In our view, the learned trial court had erred in drawing such conclusion on the basis of the testimonies of P.W.3, P.W.5 and P.W.10, who had only suspected about existence of an extra-marital relationship. Suspicion, however grave and strong it might be, cannot take the place of proof. The distance between 'may be true' and 'must be true' is required to be covered by the prosecution by way of cogent and clinching evidence. Therefore, suspicion allowed to be breded by the prosecution witnesses – P.W.3, P.W.5 and P.W.10 – in their minds as regards existence of an extra-marital relationship between the two accused persons, by no stretch, can take the place of proof in absence of any further material.

28. In the absence of any evidence as regards any overt act on the part of the accused-appellant in the act of assault on the deceased, the learned trial court drew inferences of common intention on the basis of certain circumstances such as :- [a] the deceased was murdered while sleeping on his bed at around 1-00/1-30 a.m. on the fateful night; [b] there was light from a burning lamp inside the room at the relevant time of occurrence; [c] the door attached to the room in which the crime was committed was found open at the time of occurrence; [d] P.W.4 and her parents, Babar Ali and Parbina Begum also slept on the same bed on the fateful night while her elder brother, P.W.7 was sleeping in a different room of the same house; [e] P.W.4 and P.W.7 were in deep sleep at the relevant time; and [f] the accused-appellant who was found only crying nearby the dead body of Babar Ali by her daughter [P.W.4] just after the occurrence of murder of Babar Ali proved that the accused-appellant had first-hand knowledge of the crime. But the accused-appellant did not raise any shout/alarm even after having first-hand knowledge of the crime.

29. As per Section 34, IPC, when a criminal act is done by several persons in furtherance of common intention of all, each of such persons is liable for that and in the same manner as if it was done by him alone. Section 34, IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held

vicariously responsible for the act of others if he has the 'common intention' to commit the offence. The phrase 'common intention' implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34, IPC is to be understood in a different sense from the 'same intention' or 'similar intention' or 'common object'. The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34, IPC. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. The ingredients of Section 34, that is, that the accused had acted in furtherance of their common intention is required to be proved specifically or by inference, in the facts and circumstances of the case. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The applicability of Section 34, IPC is dependent on the facts and circumstances of each case. No hard-and-fast rule can be made out regarding applicability or non-applicability of Section 34. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case. The Section 34 is only a rule of evidence and does not create a substantive offence, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. [Ref: *Abdul Sayeed vs. State of Madhya Pradesh*, reported in {2010} 10 SCC 259].

30. It is not in dispute that at the time of the incident, the accused-appellant was present inside the house where the act of assault on the deceased had occurred. Apart from the accused-appellant, P.W.4 and P.W.7, that is, the daughter and the son of the deceased and the accused-appellant were also present inside the house. The daughter, P.W.4 had deposed that she woke up from sleep after hearing her mother's alarm and on waking up,

she saw her mother sitting next to her father and crying loudly. P.W.7 - the son of the deceased and the accused-appellant - was sleeping in the other room of the two-room house, on the relevant night. In his testimony, P.W.7 stated that he woke up after hearing alarm raised by his mother and his sister and on hearing such alarm, he came out of his room and found his father lying dead on his bed in the other room. The presence of the accused-appellant along with her two children inside the house was quite natural. Both the children had stated that they found the accused-appellant raising alarm and crying near the body of her husband, which was quite natural for a wife, who had to suffer bereavement all on a sudden. P.W.6, the Gaonburah of the village, had deposed that the accused-appellant had a good relationship with the deceased. The act of crying of the accused-appellant sitting near the deadbody of her husband after her husband was assaulted to death, cannot be considered to be one of the circumstances to draw an adverse inference against the accused-appellant and it cannot be treated as a link in the chain of circumstances. It is difficult to anticipate as to how a woman would react after being aware, all on a sudden, that her husband had been assaulted to death in the middle of the night, despite presence of a number of inmates in the house at the relevant time. There was nothing in the evidence to establish that the door of the house of the deceased was kept open during the night by the accused-appellant. There was no evidence that there was any lamp kept lighted up during the relevant night. The circumstances relied on by the learned trial court to draw inference of culpability on the accused-appellant are, on analysis, found to be circumstances which are not sufficient enough to draw any kind of adverse inference against the accused-appellant. There is no material in the evidence led by the prosecution suggesting, even remotely, that the accused-appellant had acted in concert with any third person in furtherance of any common intention to achieve something.

31. In our considered view, none of the circumstances, as referred by the learned trial court, go to establish any element of participation in action on the part of the accused-appellant herein in the incident which led to the death of the deceased, by acting in concert with the co-accused person in furtherance of common intention. It needs iteration that the co-accused person has already been acquitted from the charge under Section 302, IPC read with Section 34, IPC. Nothing has been brought on record to show that any appeal has been

preferred by the State against the Judgment and Order dated 22.04.2019 passed in Criminal Appeal no. 37/2018, acquitting the co-accused person.

32. Upon making an analysis of the entire evidence/materials available on records, we find nothing inculpatory on the part of the accused-appellant, in absence of any direct or indirect evidence indicating/suggesting any element of participation in the act of assault on the deceased.

33. In the above fact situation of the case, the criminal appeal succeeds. Resultantly, the Judgment and Order dated 27.10.2017 passed by the learned trial court is set aside in so far as against the accused-appellant is concerned. The accused-appellant is, therefore, acquitted of the charge under Section 302, IPC read with Section 34, IPC. The accused-appellant is to be released forthwith from custody, if her detention is not required in connection with any other case. We reiterate the recommendation made by the learned trial court regarding grant of compensation to the children of the deceased.

34. Before parting with, we wish to place our appreciation on record as regards the services rendered by Mr. I.A. Hazarika, 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.

35. The Registry to send back the case records of the learned trial court forthwith.

JUDGE

JUDGE

Comparing Assistant