



GAHC010207762022



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

**CRL.A.No.264 of 2022**

*Md. Somed Ali,*  
*Son of Late Md. Ismat Ali,*  
*Aged About 52 Years*  
*Resident of village – Rajagadhua, P.S Lahorighat*  
*District – Morigaon, Assam*

.....Appellant

Versus

*1. The State of Assam*  
*Represented by the Public Prosecutor*

*2. Mojibur Rahman*  
*Son of Samsuddin,*  
*Resident of village - Rajagadhua,*  
*Ps. Lahorighat, District Morigaon,*  
*Assam.*

.....opposite parties

**- B E F O R E -**

**HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY**

For the Appellant : Mr. M.A Seikh, Adv  
For the Respondents : Mr. M.P. Goswami, Addl. PP  
Date of hearing : 03.05.2024



Date of judgment : 22.05.2024

JUDGMENT & ORDER (CAV)

1. Heard Mr. M.A Seikh, learned counsel for the appellant and Mr. M.P. Goswami, learned Addl. PP, appearing for the State of Assam.

2. **The challenge:**

I. This appeal under section 374 Cr.P.C is filed by the appellant assailing the impugned judgment and order of conviction and sentence dated 13.09.2022 passed by the learned Sessions Judge, Morigaon in Sessions Case No.36/2013, whereby the appellant was sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.20,000/- in default to undergo further simple imprisonment for 6 months for offence punishable under section 304 Part-I IPC and further sentenced to pay a fine of Rs.500/- in default to SI for one month for offence punishable under section 334 IPC.

II. By the said judgment eight accused persons were also convicted under section 334 IPC with fine of Rs.500. Another 14 accused persons, who were tried were acquitted by the learned trial court below from the charges under sections 147/148/102B/341/323/325/302 IPC. One accused, namely, Mormuj Ali expired during the trial.

3. **The Prosecution Story:**

I. The prosecution case in brief is that on



30.12.2011 one Md. Mojibur Rahman lodged an FIR with the Officer-in-Charge of Lahorighat PS alleging inter alia that on the fateful day i.e., 30.12.2011 at about 8.00 AM, the FIR named 19 accused persons in pursuance of a criminal conspiracy armed with dao, spear, lathi etc came to the informant's land on a dispute as regards a road and assaulted the father of the informant, namely, Samsuddin with sharp object causing grievous injuries on his person. On knowing about such incident, the other brothers of the informant, namely, Saiful Islam, Mokbul, Najrul, Khajul Islam, Dulal (since deceased), uncle Abdul Hekim, nephew Ikramul Hussain and cousin Nurul Amin went to the place of occurrence and found that the accused persons assaulted them with a sharp weapon and caused grievous injuries to them.

II. On receipt of the FIR Laharighat PS Case No.181/2011 under sections 147/148/120B/326/325/379 IPC was registered and investigation was started. Subsequently the injured brother of the informant, namely, Dulal Uddin expired on 01.01.2012, while he was under treatment for the injuries sustained in the incident. Accordingly, section 302 IPC was added.

III. On completion of investigation the Investigating Officer had submitted charge sheet against the 24 numbers of accused including the present appellant. On the basis of the charge-sheet, the learned Sessions Judge had framed



charges under sections 120B/341/323/325/302 IPC. Since the appellant had pleaded not guilty the matter went up for trial.

IV. During the trial, the prosecution had examined as many as 16 witnesses to bring home the charges framed against the accused. In the statement recorded under section 313 Cr.P.C, the accused had denied all the incriminating circumstances put to him. The defence also examined as many as four witnesses.

V. The learned trial Court after consideration of the materials produced by the prosecution on record, concluded the following:

i. The case is a free fight between both the sides on the right of use of a path as the path was claimed by both the sides. Prima facie the accused side has the possession over the disputed plot of land; but apparently it appears that the informant's side was the aggressor to infringe the right of possession.

ii. Though the accused side had the Right of Private Defense to save their property but apparently the accused side had taken the law in their hands knowing fully well that a civil proceeding arising out of same dispute is pending before the District Magistrate, Morigaon. The accused side had exceeded their right.

iii. The appellant/accused had physically assaulted the deceased Dulal Uddin on his vital part i.e., on his head.



Such assault is covered under exception 2 and 4 of Section 300 IPC and therefore, though the prosecution has been able to prove the case against the accused/appellant Samed Ali for commission of offence under section 304 (Part-I) but failed to prove beyond reasonable doubt as regards the commission of offence under section 302 IPC.

iv. Accordingly, the accused is liable to be convicted under section 302 (Part-I) IPC inasmuch as the accused had knowledge and intention.

4. Mr. Seikh learned counsel for the appellant argues the following:

I. The prosecution had miserably failed even to bring home the charges under section 304 (Part-I) IPC, inasmuch as it was a free fight and there was a serious doubt who actually inflicted the injury upon the deceased. Therefore, such benefit of doubt should be granted to the appellant inasmuch as without having any cogent materials only the present appellant is convicted under section 304 (Part-I) IPC and all other accused persons who were also part of the fighting group has only been convicted under section 334 IPC.

II. Mr. Seikh further argues that even serious doubt has been created as regards the weapon used in the commission of the offence. Some of the alleged eye witnesses had deposed that the weapon by which the injury was inflicted was a "Khunti", another witness



deposed it to be "Siprang" and yet another witness deposed that it was a "wooden buttum". Therefore, in view of such doubt the appellant is entitled for acquittal, more particularly, in a situation where admittedly the fight was a free fight involving two groups consisting of 35 persons. So far relating to the weapon used in the commission of offence, Mr. Seikh further submits that investigating authority did not seize the alleged weapon used in the commission of offence which is fatal to the prosecution case.

III. Alternatively, Mr. Seikh argues that even if it is held that the appellant was involved in the commission of the offence or had actually inflicted the injury upon the deceased then also the case in the given facts can at best be an offence under section 304 (Part-II) IPC, inasmuch as there was sufficient materials available on record that there is no intention of the accused to cause death of the deceased. Further it is established by the prosecution themselves that the deceased were the aggressors. Accordingly the appellant is entitled for lesser punishment.

IV. Per contra Mr.M.P. Goswami learned Addl. PP submits the following:

I. The testimony of the eye witnesses examined remained firm all throughout and it is established that the accused appellant inflicted the fatal blow with a blunt weapon. In fact during the cross examination they have



reaffirmed such stand. Therefore, the prosecution has been able to prove beyond any reasonable doubt that it is the accused/appellant who inflicted the fatal blow on the head of the deceased.

II. Mr. Goswami further contends that such testimony of the eye witness has also been corroborated by the doctors who first examined the injured as well as the deceased and the doctor who conducted the post mortem. The injury report exhibited remained unchallenged. Accordingly, the learned trial court has rightly passed the judgment.

III. As regards the alternative argument of Mr. Seikh, Mr. Goswami learned Addl. PP submits that when it is established that the fatal blow was caused by the accused/appellant and when it is established that the deceased sustained injury on his head which was caused by the accused/appellant and when such injury is established to be in the vital part of the body i.e, the head, the learned trial court below has rightly convicted the appellant under section 304 (Part-I) IPC. He further submits that in fact the learned Sessions Judge was lenient and convicted the appellant under section 304 (Part-I) IPC and not under section 302 IPC.

IV. He further contends that free fight cannot be a ground to disbelieve the eye witnesses, inasmuch as except the deceased nobody was inflicted with grievous



injury. As regards non seizure of the weapon used in the commission of the offence as well as the doubt as regards the actual weapon used, Mr. Goswami, learned counsel submits that when eye witnesses testimonies had remained unshaken, non seizure of the weapon used in the commission of offence shall not be fatal. He further contends that though one witness used the word that wooden buttum was used as weapon, the other accused has clarified that Khunti/Siprang was having a wooden handle. Therefore, such minor discrepancy in the backdrop of the unshaken evidence/testimony of the injured eye witness is not fatal to the prosecution case.

5. I have given anxious considerations to the arguments advanced by the learned counsel for the parties.

6. Before dealing with the arguments advanced by the learned counsel for the parties, let this court first look into the depositions and testimonies of the witnesses.

I. Pw-1 Md. Majibur Rahman who is the informant of this case has deposed in his evidence that on the date of occurrence at about 8 am, his younger brother Fajar Uddin informed him over telephone to bring a vehicle as his father Samsuddin and others sustained injuries caused by the accused side with dao, lathi, siprung etc. He immediately reached the place of occurrence with a Tata Sumo and found that both the hands of his father Samsuddin were fractured and have injuries all over his body. Dulaluddin





sustained injuries on his head and face, cut injury on hand and chest, Najrul Islam sustained injury on head and shoulder, Mukbul Hussain and Fajaluddin sustained injury all over their body, Ikramul Hussain sustained injury on his head and others also sustained injuries on their persons. Some injureds' were taken to Laharighat Hospital. Injured Dulaluddin and Najrul were referred to Morigaon Civil Hospital. As Dulaluddin's condition was serious he was referred to GMCH, Guwahati on the same day but on the next day due to non chance of survival of Dulaluddin he was released from GMCH and again at Dispur Poly Clinic at 4.00 Pm but on the next day morning the doctors declared him dead. Pw-1 filed the ejahar at Laharighat PS. Exhibit.P(1) is the said ejahar and exhibit.P-1(1) is his signature. Pw-1 in his cross examination stated that he cannot say what weapons were used by the accused in the conflict. There is a path on his paddy field near his house and they were using that path to come out from his house. Accused Sabjali destroyed the said path by ploughing with a tractor, so prior to the occurrence, a quarrel took place between his father Samsuddin and accused Sabjali and his wife. Pw-1 denied the suggestion put to him by the defence that there was no such path on the place of occurrence and they were always using the path situated between the residence of Samed Ali and Mormuj Ali. He further denied the suggestion that the land where the



occurrence took place is a disputed land and claimed by Sabjali. A proceeding under section 145 Cr.P.C (MR Case No.84/2012) is pending on the said land and that case was filed by his father Samsuddin and uncle Abdul Hakim. He denied the suggestion that he has stated before police that the occurrence took place when his father arrived at the boundary of Abdul Samed and then Abdul Samed. He denied the defence suggestion that the injureds did not sustain any injury as narrated by him. He denied the defence suggestion that seven accused persons sustained injuries on being assaulted by his brothers.

II. Pw-2 Dr. Nurul Amin in his evidence deposed that on 30.12.2011 at 10.25 am he examined 14 persons, details of which are given below:

i. Md. Rofikul Islam, 25 years, son of Md. Sabjali of village Rajagadhowa. On examination he found: Right thumb on medial aspect distal phalanx 1 cm x 4 cm. wound incised looking. Simple injury caused by sharp weapon.

ii. Md. Haibul Islam, 25 years, son of Harmuj Ali of village Rajagadhowa. On examination he found: Tender swollen right mid arm Simple injury caused by blunt weapon.

iii. Martat Ali, 30 years, son of Md. Aroj Ali of village Rajagadhowa. On examination he found: Tender left mandible. No external injury.



- iv. Md. Aroj Ali, 49 years, son of Lt. Ismile Ali of village Rajagadhowa. On examination he found: Left forearm laterally abrasion. Simple injury caused by blunt weapon.
- v. Sahajan Ali, 25 years, son of Md. Sabjali, of village Rajagadhowa. On examination he found abrasion left upper occipital region 1 cm. x 2 cm. Simple injury caused by blunt weapon.
- vi. Md. Sabjali, 46 years son of Late Samar Ali of village Rajagadhowa. On examination he found: Abrasion left mandibular area. Simple injury caused by blunt weapon.
- vii. Md. Samsuddin, 70 years, son of Late Mazid Fakir of Rajagadhowa village. On examination he found: Sessions Case No. 36/2013 Page 19 of 70 Tender both shoulder with abrasion. Simple injury caused by blunt weapon.
- viii. Md. Saiful Islam, 40 years, son of Md. Samsuddin of village Rajagadhowa. On examination he found: Both elbow swollen with abrasion. Simple injury caused by blunt weapon.
- ix. Makbul Hussain, 32 years, son of Samsuddin of village Rajagadhowa. On examination he found: Both scapular regions with irregular laceration. Inference Simple injury caused by blunt weapon.
- x. Najirul Islam, 25 years, son of Md. Samsuddin of village Rajagadhowa. On examination he found: Abrasion frontal region with clouding of consciousness. Inference



simple injury caused by blunt weapon. The patient was immediately referred to Morigaon Civil Hospital.

xi. Fajal Uddin, 20 years son of Samsuddin of village Rajagadhowa. On examination, he found: Tender both arm with abrasion both sides. Simple injury caused by blunt weapon.

xii. Dulal Hussain, 20 years, son of Samsuddin of village Rajagadhowa. On examination he found: Lacerated wound on occipital region. Patient was unconscious. Inference - grievous injury caused by blunt weapon. The patient was referred to Morigaon Civil Hospital.

xiii. Rabia Khatun, 25 years wife of Majibur Rahman of village Rajagadhowa. On examination he found: Tender back. No external injury.

xiv. Halima Khatun, 25 years wife of Saiful Islam of village Rajagadhowa. On examination he found: Tender with abrasion both knee. Simple injury caused by blunt weapon.

Pw-2 proved the injury report as exhibit.P-2 and his signatures as exhibit.P-2(1) to P-2(7). In his cross examination he stated that the injuries sustained by Rafikul islam son of Sabjali of Rajagadhowa village was caused by sharp weapon and other injuries were caused by blunt weapon. Some of the injuries might have been caused by falling on hard substance or by dashing against any hard substance. He further stated that the injuries sustained by



Rafikul Islam, Nazirul Islam and Dulaluddin (son of Samsuddin) cannot be caused by fall or dashing against hard substance. Clouding of consciousness means degree of consciousness of the part of the body. He further mentioned that out of 14 injured first 6 at serial (i) to (vi) are accused persons facing trial and other eight (vii) to (xiv) are from informant's side. The injured Dulaluddin was subsequently shifted to Morigaon and then to Guwahati where he died. He further mentioned that as per the medico legal report except the deceased Dulaluddin, none has sustained any grievous injuries on that day.

III. Pw-3 Mokbul Hussain deposed in his evidence that on 30.12.2011 at about 8 am on hearing hue and cry he went out from his house and saw Sabjali, Raham Ali, Sahera Khatun wife of Sabjali engaged in an altercation with Samsuddin. Thereafter Samed Ali and others armed with weapons gharaoed all of them. Accused Rafikul Islam, Sahjahan, Miraj Ali caused hurt to his father Samsuddin by lathi and dao on both his hands and Matam Ali and Mukter Ali assaulted him by lathi causing injuries on both his legs. Thereafter he could not see who assaulted whom because there were 30 persons gathered. Dulaluddin and Nazrul Islam were referred to Morigaon Civil Hospital and from there he was referred to GMCH and from there he was shifted to Dispur Poly clinic wherein he died. Inquest was done on the dead body of Dulaluddin. Exhibit.P-3 is the



inquest report and exhibit.P-3(1) is his signature. During his cross examination PW-3 stated that the land where the occurrence took place is the in the name of his father Samsuddin and uncle Abdul Hakim. He stated that there was no dhaniya cultivation on the said land at the time of occurrence. He also denied the suggestion that on hearing hue and cry some of the residents came to the place of occurrence for rescue of Sabjali and his wife. He stated that his father Samsuddin filed a case under section 145 Cr.p.C vide M.R. Case No.86/2012 and that case is pending. He further denied the suggestion that Dulaluddin took part in assaulting the accused persons.

IV. Pw-4 Saiful Islam deposed in his evidence that the occurrence took place on the cultivable land of his father. While he was in his house on hearing hue and cry Mokbul came first then Dulaluddin followed by others. He saw that his father Samsuddin was lying on the ground with injuries on his hand. Accused Samed Ali, Araj Ali, Ashrab Ali and Sofikul Islam assaulted Dulaluddin by siprung on his head and accused Araj inflicted dao blow on his hand. The injured persons were taken to hospital. Dulaluddin was referred to Dispur poly clinic wherein he died the following day. In his cross examination Pw-4 deposed that he was not present at the time of starting of the occurrence. He also denied the suggestion put to him by the defence that the land where the occurrence took place belonged to



accused Sabjali and Raham Ali. He further stated that they know the accused persons as they are residing in the same village. He denied the defence suggestion that as the other accused persons except Abubakkar Siddique and Hipjur Rahman are related to Sabjali, they were falsely implicated.

V. PW-5 Md. Talibur Rahman deposed in his evidence that on the date of occurrence at about 8 am, on hearing hue and cry, he came to the place of occurrence. After reaching the place of occurrence he saw that both the sides were involved in the said quarrel. Both the parties were hitting each other so he could not remember who assaulted whom. Samsuddin and Dulal Uddin sustained injuries and they were taken to the hospital and after two three days of the occurrence Dulal Uddin died. Pw-5 in his cross examination deposed that he did not see any injury on the accused persons as they left.

VI. Pw-6 Md. Abdur Rahim deposed in his evidence that on 30.12.2011 at about 7.30 am, on hearing hue and cry he came to the place of occurrence and saw Dulal Uddin, Samsuddin, Najrul and two other female persons lying on the ground with injury on their body. Samsuddin told PW-6 that the accused Samed Ali caused hurt to his son Dulal Uddin on his head. Dulal Uddin was first referred to Morigaon and thereafter to Guwahati. Dulal Uddin died at Guwahati during treatment. Pw-6 in his cross examination deposed that when he reached the place of



occurrence he found the accused persons in angry mood. He further stated in his cross examination that he had not seen accused Abubakkar Siddique and Hifijur at the place of occurrence but the other accused persons were there and he had not seen any injury on the body of the accused persons.

VII. Pw-7 Musstt. Rabiya Khatun deposed in her evidence that on the date of occurrence, on hearing hue and cry she along with Halima, Mofida, Jubeda went to the place of occurrence and saw that Samed Ali, Sabjali, Asraf Ali, Raham Ali, Sahera Khatun were putting mosquito net on the paddy field of Pw-7's father in law Samsuddin. When her father in law protested then quarrel started between them. Sabjali assaulted Samsuddin with lathi. Raham Ali and Asraf Ali also assaulted Samsuddin with bamboo piece and wooden piece. Dulal Uddin also came to the place of occurrence and Samed Ali assaulted Dulaluddin on his head by pickets (khanti). Later on 6-7 persons came from the house of Samed Ali. Hipjur and Abubakker sent 10-12 persons to the place of occurrence. After causing hurt the accused persons left the place. Samsuddin, Fajaluddin, Najrul Islam, Mukbul, Nur Amin, Ikramul also sustained injuries and they were taken to the hospital. Dulaluddin and Najrul were referred to Morigaon Civil Hospital from Rajagadhowa hospital and from there Dulal Uddin was again referred to Guwahati and he died on the next day.





During cross examination Pw-7 deposed that except Mojibur Islam all were present at the place of occurrence. He stated that there is a passage on the agricultural land which was ploughed by Samsuddin and accused Sabjali put the mosquito net fencing on the said passage preventing the persons to go by using that passage as a result of which quarrel started with Samsuddin, Sabjali, Samed Ali, Asraf Ali, Raham Ali, Araj Ali and Sahera Khatun. The above persons did not start marpit. Thereafter Mormuj Ali, Sahed Ali, Matam Ali, Mukter Ali, Miraj Ali and Sahjahan came there armed with dao and lathi and after their arrival marpit started. Pw-7 denied the defence suggestion put to him that at the time of occurrence there was dhaniya cultivation on the disputed land and the quarrel took place as the path was closed by the accused persons. She stated that she has not deposed falsely that the accused persons assaulted her father in law.

VIII. Pw-8 Musstt Asmina Begum deposed that on 30.12.2011 at about 8 am while she was present near the place of occurrence, Sabjali, Raham Ali and Sahara Khatun put plastic net on their way on the paddy field through which they used to come to their paddy field. Prior to the occurrence Samsuddin was coming from the said way and had altercation with Sabjali and others for putting the net. On hearing altercation Pw-7 and others came to the place of occurrence. Then after they came Samed Ali along with



Arsab Ali, Araj Ali, Sifikul Islam, Mormuj Ali, Miraj Ali came out from the house of Samed Ali armed with dao, pickaxe, lathi etc. Samed Ali assaulted Dulal Uddin on his head by a siprang. Samsuddin, Makbul, Fajaluddin, Saiful Islam, Najrul Islam, Ikramul Hussain, Nurul Amin, Ashadul Islam, Rofikul Islam, Halima Begum, Rabia Begum, Jubeda Begum were also assaulted by the accused persons who sustained injuries on their body. Dulaluddin and Najrul Islam were referred to Morigaon Civil Hospital. Dulaluddin was admitted at Dispur nursing home where he died on the next date. Pw-8 in her cross examination stated that she was not aware whether there was dhaniya cultivation in the paddy field. Sabjali, Raham Ali and Sahera Khatun claimed the land as their own but Samsuddin claimed the land as his land so a dispute arose between them and the accused persons were total 24 in numbers. She denied the suggestions put to her that her side was also armed with weapons. She stated that she has not deposed falsely that she saw accused Samed assaulted Dulaluddin.

IX. Pw-9- Dr. Putul Mahanta deposed in his evidence that he performed post mortem examination on the dead body of Md. Dulaluddin. On examination he found the following:

1. Stitched wound apposed by black silk 5 in numbers over occipital region on mid line. On removal of the stitches, the margins were found contused. The adjacent



area of scalp is contused covering an areas of 4 \* 2.5 cm over occipital region. The skull underneath the said scalp found fractured depressed and communicated.

2. Contusion of size 15 \* 10 cm over right temporo-parietal region 4 cm right from midline 3 cm above the right ear. Underneath skull found fractured, depressed and communicated. Extra-dural and sub-dural hemorrhage present over frontal lobes and occipital lobes with congested membrane.

Pw-9 the doctor opined that death was due to comma as a result of injuries sustained on head. All the injuries were ante mortem in nature. The approximate time of death is 2-4 hours. He proved the post mortem report as exhibit – P-4 and his signature as exbt-P-4(1). During his cross examination Pw-9 stated that he found injuries on head region in two places. Heavy stick of wood, iron, wooden piece, hammer etc are heavy blunt weapon. He further stated that the injuries are unlikely be caused by falling on hard substance but such injury cannot be ruled out also. The fracture over the skull may be caused by assault with heavy bamboo stick. On a pointed query by the court Pw-9 answered that contusion might be caused by fall as he had not found any related injury on the body of the deceased.

X. Pw-10 Ikramul Hussain deposed that on 30.12.2011 at about 7 am on being informed about the scuffle he went to the place of occurrence and found the



accused persons assaulting his father and other persons with lathi. He was also assaulted but he cannot identify who assaulted him. The injured persons were taken to the hospital. The accused Samed Ali assaulted Dulaluddin on his head by a piece of wood while other persons gharaoed him. Dulaluddin died on the next date as he sustained grievous injuries. Pw-10 in his cross examination deposed that he had not deposed falsely regarding assault to Dulaluddin by Samed Ali and Sabjali. He denied the suggestion put to him by the defence that Mokbul attempted to assault Araj Ali and Dulaludin tried to save Araj Ali for which he sustained injury. He also denied the suggestion that the land belonged to Sabjali and Raham Ali and they possessed the said land prior to the occurrence.

XI. Pw-11 deposed that on hearing hue and cry he came out and saw Dulaluddin lying on the ground. He does not know who caused hurt to him. Pw-11 in his cross examination stated that he knows that Sabjali and Raham Ali cultivated the land where the occurrence took place and the land belong to them.

XII. Pw-12 deposed that on hearing about the occurrence she went to the place of occurrence and saw Samsuddin was being gheraoed by accused Samed Ali and others who were assaulting Samsuddin. Samed Ali assaulted Dulaluddin by an iron khunti because of which he sustained injuries on his head. In her cross examination



Pw-12 deposed that her house is situated about 1-2 fulong away from the place of occurrence. She denied the suggestion put to her by defence that she and her friends supplied lathi to the witnesses to assault accused persons. She further denied the suggestion that as she is the daughter in law of Samsuddin so she deposed in the court as tutored by him.

XIII. Pw-13 Dr. Binanda Patir deposed in his evidence that while he was in ICU at Dispur Polyclinic & Nursing Home as on duty doctor, Dulaluddin was admitted Dispur Polyclinic & Nursing Home on 31.12.2011. He was under treatment of Nero Surgeon, Dr. B.K. Baishya & Dr. Parag Barman ICU In-charge. He stated that on the following day Dulaluddin died. Exhibit P-5 is the death certificate and exhibit P-5(1) is his signature with seal and impression. In his cross examination Pw-13 stated that patient was initially admitted at ICU and as per rule of the hospital he used to issue Death Certificate.

XIV. Pw-14 Samsuddin deposed in his evidence that on the date of occurrence at about 7-8 am while he was returning home from field he saw that accused Sabjali, Asraf Ali, Mormuj, Muktar and three other women were putting fencing on the way to his house. On being called accused Samed and others came there and assaulted him by khanti and lathi. On raising alarm his sons Dulal, Saiful, Fajrul, Najrul and Majubur came. His son Dulal was



assaulted by Asraf Ali, Samed, Araf Ali with khanti (siprang). The handle of the siprang was made with wood. Dulal was taken to Morigaon Civil hospital and then referred to Guwahati where he died after two days. During his cross examination Pw-14 stated that the place where the occurrence took place belonged to him. He purchased that plot of land with his brother Abdul Hakim in 1975 by registered deed from one Suraj Deka. He denied the suggestion put to him by the defence that earlier Samar Ali father of Sabjali purchased the land by deed No.9686 of 1975. He filed a case bring M.R case No.84/2013 under section 144 Cr.P.C at D.C. Office Morigaon regarding said plot of land against Sabjali, Raham Ali and others. He denied the suggestion that there was dhaniya cultivation on the place of occurrence. He deposed that accused Samed Ali assaulted him. The narrow path was blocked by the fishing net. He denied the suggestion put to him that to grab the land he filed a false case against the accused. A civil litigation is pending on being filed by him and his brothers.

XV. Pw-15 Bakul Bora the IO in his evidence deposed that on 30.12.2011 he visited the place of occurrence and drew the sketch map. Exhibit P-6 is the said sketch map. He arrested the accused persons and forwarded them to court. He collected the PM report and inquest report and had also collected the injury report. He deposed that he



had almost completed the investigation. SI Milan Chandra Nath has submitted the charge sheet vide exhibit P-7. In his cross examination Pw-15 deposed that exhibit P-1 is the FIR which named 19 accused persons. In the charge sheet there are 24 persons shown as accused. The FIR was received on 30.12.2011 at 12.30 PM. Witness Saiful Islam in his statement has not stated who assaulted whom. Witness Samsuddin in his statement has also not stated that as to why the quarrel took place. The IO denied the suggestion that he had not made proper investigation.

XVI. Pw-16 Sri Milan Chandra Nath another IO of the case deposed that he submitted the charge sheet as most of the investigation was already done. Exhibit P-7 is the charge sheet and exhibit P-7(i) is his signature. In his cross examination he stated that he simply filed the charge sheet. He was not at Lahorighat PS when the occurrence took place. In the FIR total number of accused is shown as 19. He had charge sheeted against 24 accused persons. Name of the five accused persons were additionally included. Wife of Dulaluddin named Mafida was not examined under section 161 Cr.P.C.

### **DEFENCE WITNESS**

XVII. Dw-1 Araj Ali deposed in his evidence he is one of the accused of this case. On the day of the occurrence on hearing hullah coming from the paddy field he went there. The land on which the occurrence took place belonged to



Sabj Ali and Raham Ali and there was dhaniya cultivation on that land. The accused tried to construct a path on that land. The dhaniya cultivation was done by accused Sabj Ali and others tried to erect fencing towards the west side of the land by using fishing net to erect that fencing. On this Samsuddin and others started assaulted them. In his cross examination by the prosecution DW-1 stated that marpit took place between both the sides. He denied the prosecution suggestion that Dulal did not come there to lift him and Moqbul had not dealt blow. He further denied the prosecution suggestion that he deposed falsely.

XVIII. DW-2 one of the accused in this case deposed that the land for which this occurrence took place belongs to him which was purchased by his father. After the death of his father the land was mutated in their name. Dw-2 submitted the sale deed and jamabandi copy in the court. Exhibit-A is the jamabandi copy and exhibit-B is the sale deed. The land was around 2 bigha in which he had done dhaniya cultivation. On the day of the incident he constructed fencing on his land to protect the cultivation from cattle by using fishing net. While fencing Samsuddin along with Moqbul and others came there and tried to obstruct him from doing fencing work. Ikramul assaulted him by means of a cycle chain and Fazrul gave him a single slap on his neck. During his cross examination he stated that there is no road going across his land. He further





denied the suggestion that while he was erecting the fencing Samsuddin came to him with a request not to block the road which lead to his property. He also denied the suggestion that initially he started assaulting Samsuddin and on seeing him assaulting, family members came and then they also assaulted all of them. He denied that he deposed falsely.

XIX. DW-3 deposed that accused Somed Ali was with him when the occurrence took place. In his cross examination he deposed that he could not recollect the date of incident clearly. He further denied the suggestion that on 30.11.2011 no occurrence took place. His further cross examination was declined.

XX. Dw-4 deposed that on hearing hulla he came to the place of occurrence. He saw Ikramul assaulting his father by a cycle chain. During cross examination he denied the suggestion that there is a path on their land which was used by other side as road and on that grudge they assaulted them and Dulal died in that incident and other sustained injuries.

7. From the materials and evidences laid, more particularly from the deposition of PW-3, PW-5, PW-6, PW-7, PW-8 as well as from the deposition of the DWs, it is proved beyond doubt that the incident took place on 30.12.2011 at about 8.00 AM in the paddy field at Rojagadhua village near the houses of the appellant and the informant and deceased.



8. It is also established from the testimonies of the aforesaid witnesses including the PW-13 the doctor, who conducted the post mortem examination that the death of the deceased was homicidal in nature. The inquest report exhibit- 3 and post mortem report exhibit-4 also establishes such fact.

9. The deposition of the eye witnesses namely Pw-3, Pw-4, Pw-5, Pw-7, Pw-8, Pw-10 and Pw-12 firmly establish that a quarrel had taken place between the family of the deceased and the accused persons regarding raising a fence in the path inside the paddy field belonging to the accused persons.

10. The defence had also not denied such quarrel, rather adduced positive evidence to suggest that land belongs to them and there was aggression from the informant's side. Pw-5 who is an independent eye witness clearly establishes that both the parties were involved in the fight. Such testimony was reaffirmed in the cross examination.

11. The question that would require the consideration of this court is as to whether the accused appellant had acted in the hit of a moment having lost his self control and acted without pre meditation.

12. The offence of culpable homicide amounting to murder is explained under Section 300 of the IPC. The Exception 4 to Section 300 of the IPC provides that the 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 offender having taken undue advantage or acted in a cruel or unusual manner. It is



immaterial in such cases, which party offers the provocation or commits the first assault.

13. After consideration of the materials available on record, the conclusion recorded hereinabove and the provisions of Section 300 of IPC, more particularly the Exception 4, this court is of the opinion that the present case would come under the Exception 4, so far the same relates to the accused/ appellant.

14. In the case in hand, there are clinching evidences from the eye witnesses as recorded hereinabove, more particularly, the injured witness Pw-3, Pw-4, Pw-7, Pw-8 that the accused Somed Ali inflicted the fatal blow on the head of the deceased victim and the same has been proved beyond any reasonable doubt. Though there are certain discrepancies as regards the weapon that is whether it is a siprang or khunti or lathi cannot be fatal in the present case, more particularly, when there is direct evidence of the eye witness that the fatal blow was inflicted by none other than the appellant, with a blunt weapon and such evidence is also corroborated by the testimony of the doctor. When the prosecution case is based upon the deposition of eye witnesses the minor discrepancies whether it is a lathi or it is a khunti/siprang with a wooden handle shall not be fatal to the prosecution case. It is a recognized principle that there are bound to be some discrepancies between the narrations of different witnesses, when they speak on details and unless the contradictions are of material dimension, same should not be used to discard the entire evidence.

15. In the case in hand, the discrepancies as regards the



nature of weapon shall not be fatal, more particularly for the reason that there are no discrepancies between the testimonies of the eye witness as regards the factum of inflicting the fatal injury by the appellant herein.

16. In view of the aforesaid, such contentions of Mr. Sheikh do not find favour of this court and accordingly the same is dismissed.

17. Based on the materials available on record, more particularly the established fact that both the parties were involved in the quarrel, the informant party is the aggressor in the case. As materials are available beyond doubt that the informant's side including deceased went to the paddy field belonging to the accused side inasmuch as the learned trial court below had also concluded that the informant side were aggressor and went to the place of occurrence with an object to infringe the right of possessors. The fatal blow is also a single blow and fact established is that both the quarreling parties got injured. Therefore, in the totality of evidences this court is of the considered opinion that being provoked by the deceased side the accused appellant had acted in the hit of a moment having lost his self control and there was no premeditation.

18. From the materials on record, this court is also of the considered opinion that it cannot be said that the accused did not have knowledge that the fatal blow would cause death to the deceased in the manner he has used the weapon, however, the materials also establish that the accused appellant did not have the intention to cause death to the deceased.



19. For the reasons stated hereinabove, this court is of the considered opinion that the case of the accused would come under section 304 (part-II) of IPC. Accordingly, the conviction of the appellant under section 304 (Part-I) IPC is set aside and the appellant is convicted under section 304 (part-II) of the IPC and accordingly the accused namely Samed Ali is awarded sentence of 7 years of rigorous imprisonment. The fine imposed by the learned trial court, would, however, remain unaltered. The period of jail sentence already undergone by the appellant is set off and be reduced from the 7 years of rigorous imprisonment awarded to the appellant by this court.

20. The appeal is partly allowed.

21. Send back the LCR.

**JUDGE**

**Comparing Assistant**