
(2009) 09 GAU CK 0048
In the Gauhati High Court

Benu Namasudra

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 02-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 161, 162, 313

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 114, 149, 302, 34

Citation : (2010) CriLJ 781 : (2010) 1 GLR 296 : (2009) 4 GLT 963

Hon'ble Judges : I.A. Ansari, J;C.R. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—By judgment and order, dated 21-3-2002, passed in Sessions Case No. S. T. 9 (NT/KMP) 2001, by the learned Additional, Sessions Judge, Kamalpur, North Tripura, the accused-appellant stands convicted u/s 302 read with Section 34, I. P. C. and sentenced to suffer imprisonment for life and pay fine of Rs. 5,000/- and, in default of payment of fine, suffer simple imprisonment for a period of two years.

2. Prosecution's case may, in brief, be described thus:

(i) Deceased Rabindra Namasudra was the younger brother of Subodh Namasudra (PW 2). On 20-11-1999, at about 9/10 p.m., Niranjana Namasudra (since absconder), accompanied by the accused-appellant, Benu Namasudra, came to the house of Rabindra Namasudra and, calling him to the house of Subodh (PW 2), they took him to the house of Subodh (PW 2). Reaching the house of Subodh (PW 2), Rabindra (since deceased), accused-appellant, Benu, and Niranjana (since absconder), entered into the room of Subodh and started gossiping there. While they were so gossiping inside the hut, Jagadish (PW 3), who was passing through the road by the side of Subodh's house, entered into Subodh's house, on being called by Subodh (PW 2), and asked him as to who inside his (PW 2's) room was. Subodh (PW 2) informed Jagadish (PW 3) that

Benu and Niranjana were gossiping with Rabindra Jagadish (PW 3), then, peeped into the said room and found Rabindra, Niranjana (since absconder) and Benu (accused-appellant) sitting on a cot and gossiping. Jagadish (PW 3), then, sat by the side of Subodh, who was making pitcher with the help of cane and bamboo, and started talking to PW 2 at his courtyard. All of a sudden, they heard Rabindra's cries. Instantly, thereafter, accused Niranjana, holding a dao in his hand and accompanied by accused Benu, came out of the room, and, both of them threatened Subodh (PW 2) and Jagadish (PW 3) with dire consequences if any of them raised alarm. After the two accused fled away, Subodh (PW 2) informed his neighbours, including Aswani, (PW 12), as to what had happened. Subodh's neighbours came to his house and they saw the dead body lying in a pool of blood inside the hut with injuries on neck, head, chest and belly.

(ii) Subodh (PW 2) and Jagadish (PW 3) went as suggested by their co-villagers, to Salema Police Station on the very night of the occurrence and verbally informed the police officer there about the occurrence. But the police officer told them that Assam Rifle personnel were conducting raids in their locality and they would take action on the following morning. Both Subodh (PW 2) and Jagadish (PW 3) spent the night at the police station and returned, accompanied by the investigating officer, in the morning of the following day (i.e., on 21-11-1999), to the place of occurrence. By the time the police could arrive at the place of occurrence, co-villagers of the deceased, including his widow, had already gathered there and they were informed by Subodh (P.W. 2) and Jagadish (PW 3) as to what had happened.

(iii) Gobinda (PW 1), one of the brothers of the deceased, on coming to know, on the following day, in the morning, i.e., on 21-11-1999, about the fact that his brother, Rabindra, had been killed by Benu and Niranjana, went to Salema Police Station to lodge "Ejaha" (i.e., written information regarding offence), but the police officer, present there, asked him to bring a formal written "Ejaha" (information) as regards the occurrence, whereupon Gobinda (PW 1) went back to his village and as per his instructions, Satya Debnath (PW* 16) wrote an "Ejaha". The "Ejaha" so written, was, then, handed over, at the place of occurrence, to the police officer, who had come there for investigation. Based on the said written Ejaha and treating the same as the First Information Report (FIR), Salema Police Station Case No. 26/1999 was formally registered, under Sections 302/34, I. P. C., against the two accused persons aforementioned. By the time, however, the "Ejaha" was written, police had, as indicated hereinbefore, already arrived at the place of occurrence, held inquest over the dead body and drawn sketch map.

(iv) On 21-11-1999, the investigating officer raided the houses of the two accused, namely, Benu and Niranjana, but both of them were found absconding. On the following day, i.e., on 22-11-1999, the Investigating Officer, again, raided the houses of the two accused, but they were still found absconding. On 24-11-1999, too, the investigating officer visited the houses of the two accused,

this time, too, the two accused were found absconding. Accused Benu, was, eventually, arrested by the Officer-in-Charge, Kamalpur Police Station, on 28-11-1999, and the Investigating Officer took him in police custody. While in police custody, accused Benu led the police to the house of accused Niranjan and produced a dao from inside the house of accused Niranjan, who had been still absconding. Treating the said dao as the weapon of offence, it was seized by the police. Accused Niranjan could not be arrested and, on completion of investigation, police laid charge-sheet against both the accused aforementioned, under Sections 302/34, I.P.C., showing accused Niranjan as absconder.

3. As the co-accused, namely, Niranjan, had absconded, learned trial Court framed, against the accused-appellant, Benu, a charge u/s 302, I.P.C. simpliciter, though it was stated in the charge that accused-appellant, Benu, had committed the offence of murder along with accused Niranjan. Be that as it may, the accused-appellant pleaded not guilty to the charge so framed against him. In support of their case, prosecution examined 18 (eighteen) witnesses. The accused-appellant was then, examined u/s 313, Cr. P. C. and in his examination aforementioned, he denied that he had committed the offence alleged to have been committed by him along with Niranjan, the case of the defence being a mixed plea of complete denial and also a plea that Rabindra had been killed by Subodh (PW 2) and Jagadish (PW 3). No evidence was, however, adduced by the defence. The learned trial Court, having found the accused-appellant guilty of the offence u/s 302 read with Section 34, I. P. C., convicted him accordingly and passed sentence against him as mentioned hereinabove. Aggrieved by his conviction and the sentence passed against him, the accused-appellant has preferred this, appeal.

4. We have heard Mr. A. C. Bhowmik, learned Counsel for the accused-appellant, and Mr. D. Sarkar learned Additional Public Prosecutor, Tripura.

5. At the time of hearing of this appeal, it has been submitted, on behalf of the accused-appellant, that the accused-appellant was falsely implicated in the present case, the evidence, given by P. Ws. 2 (Subodh) and 3 (Jagadish), were completely false and if their evidence is found to be false, or not reliable, the remaining evidence on record cannot improve the case of the prosecution. We agree with the submissions so made. We, therefore, scan the evidence of PW 2 and PW 3, in the light of the evidence given by other witnesses, particularly, PW 4 (widow of the deceased), PW 12(Aswini), a co-villager of the deceased and PW 1, who is the informant and also one of the brothers of the deceased.

6. Coming to the evidence of PW 2, we notice that according to his evidence, while he was working at his courtyard, Rabindra (since deceased) and the two accused, Benu and Niranjan, came to the house of Subodh and entered into the room, where PW2 used to live alone, and while they (i.e., Rabindra, Benu and Niranjan) were gossiping inside the room of PW 2, Jagadish (PW 3), a co-villager, who was passing through the road by the side of the house of PW 2, came, on being called by PW 2, to PW 2's house. On his arrival there, PW 3 asked PW 2 as

to who were sitting inside the room of PW 2, PW 2 informed PW 3 that Benu , Niranjan and Rabindra were gossiping whereupon Jagadish sat by the side of PW 2 at the courtyard. PW 2 has deposed that all of a sudden, he heard Rabindra's cries, accused Niranjan and Benu came out of the said room, accused Niranjan holding a dao in his hand, and they threatened PW 2 and PW3 with dire consequences if alarm was raised. It is in the evidence of PW 2 that he informed his neighbour, Aswini (PW 12), Sudhir and Promodh and they all saw the dead body, inside the hut, lying on the ground in a pool of blood with injuries on the neck, head, chest and belly, whereupon he went to Salema Police Station and verbally informed the Daroga babu (i.e. police officer), but police officer told him that Assam Rifle personnel were conducting raids and they would visit on the next day. PW 2 has also deposed that he passed whole night at the police station and, on the following day, he returned with the police to his house and found the dead body lying, there he had seen the dead body. It is also in the evidence of P. W. 2 that a large number of people had gathered at his house including deceased Rabindra's wife and he told all of them about the occurrence.

7. Broadly in tune with the evidence of PW 2 is the evidence of PW 3 (Jagadish), whose evidence is that on the night of the occurrence, at about 9 O'clock, while he was coming from the house of their co-villagers, Sashi Mohan, and passing by the side of the house of PW 2, he (PW 3) was called by PW 2, who was making pitcher, at his courtyard, by bamboo and cane. PW 3 has deposed that he heard somebody talking and, on making a query, PW 2 told him (PW 3) that Benu, Niranjan and Rabindra were gossiping inside his hut, he (PW 3), then, peeped into the room and found the said three persons gossiping sitting on a chouki (i.e., cot), whereupon he (PW 3) too started talking to PW 2 at the courtyard. It is in the evidence of PW 3 that after sometime, he heard Rabindra's cries and Niranjan and Benu came out of the room. It is also in the evidence of PW 3 that while Niranjan had a dao in his hand, Benu had a torchlight and they threatened PW 2 and PW 3 not to raise alarm and fled away, whereupon he (PW 3) and PW 2 ran to the house of Aswini (PW 12), Promod and a few others and returned to the place of occurrence and found Rabindra's dead body lying with injuries on his neck, head, chest and belly. PW 3 has further deposed that both he (PW 3) and PW 2 went to Salema Police Station, but as per the request of police officer there, they spent the night at the police station and returned to the house on the next morning, where a large number of people had already gathered, and they (PW 2 and PW 3) narrated the incident to the people, who had gathered there.

8. Close on the heels of the evidence of PW 2 and PW 3 is the evidence of PW 4 (Sandhya Rani), widow of the deceased, Rabindra. Her evidence is that, one day in the morning, on hearing some persons whispering in front of her house, she woke up and found her brother, Rukmini Namasudra, in front of her house. PW 4 has deposed that her brother, Rukmini, informed her that her husband, Rabindra, had been killed by Benu and Niranjan at Subodh's hut, whereupon she when to Subodh's house and found her husband's dead body lying, on the ground, inside Subodh's hut. It is in the evidence of PW 4 that she found huge gathering there

and that she heard Subodh (PW 2) and Jagadish (PW 3) telling people that on the previous night, Benu and Niranjana had killed Rabindra by inflicting dao blows inside Subodh's room, while Subodh and Jagadish were gossiping at the courtyard of Subodh.

9. What is, now, of utmost importance to note is that PW 4 has also deposed that on the previous night, at about 9/10 p.m., accused Niranjana and Benu had come to her house and called her husband to the house of Subodh and, thereafter, her husband never returned home.

10. Before proceeding any further, we may pause and look into the evidence of PW 1 (Gobinda Namasudra), brother of deceased Rabindra Namasudra. His evidence, we notice, is that he was informed, one day in the morning, by his father-in-law, that Rabindra had been killed by Niranjana and Benu at Subodh's house on the previous night at about 10 p.m., whereupon he went to the house of Subodh and found Rabindra's dead body lying inside the house of Subodh with cut injuries on his neck, head and other parts of the body. On query being made by him, Subodh and Jagadish told him that on the previous night, while Subodh was working at his courtyard, Rabindra was gossiping with Benu and Niranjana and, all of a sudden, Subodh heard Rabindra's cries and found Niranjana inflicting blows on Rabindra. It is in the evidence of PW 1 that at the house of Subodh, he found Subodh (PW 2), Jagadish (PW 3), Aswini (12) and a few others.

11. What is, now, of some significance to note, in the evidence of PW 1, is that according to him, he went to Salema Police Station to inform the police about the occurrence, but "Darogababu" (i.e., police officer) asked him to lodge a written information and he (PW 1) got an "Ejahaar" written by one Satya Debnath (PW 16) as per his own version and carried the same to the police station and lodged there the "Ejahaar".

12. Lending some support to the evidence of PW 1, PW16 (Satya Debnath), has deposed that on hearing about the murder of Rabindra, he went to the place of occurrence and saw Rabindra's dead body and, on being asked by Gobinda (PW 1), elder brother of the deceased, he wrote an "Ejahaar" at the house of Sudhir Namasudra, who is one of the neighbours of Subodh. What is, however, extremely important to note, in the evidence of PW 16, is that at the time of his writing the "Ejahaar", the Officer-in-charge, Salema Police Station, was present at the place of occurrence.

13. Turning to the evidence of PW 12 (Aswini), we note that this witness has deposed that on the night of the occurrence, at about 11 p.m., when he (PW 12), Promodh and Prabodh were proceeding towards their houses, they happened to meet Subodh (PW 2) and Jagadish (PW 3), who were visibly nervous, both of them told him and others that Niranjana had killed Rabindra in the hut of Subodh, whereupon they went to the house of their "Pradhan", namely, Gauranga Debnath, but he was not found available and, then, they went to the house of Narendra Das, who is a leader in their village, but he was too found not

available. It is in the evidence of PW 12 that they, then, went to the house of Kalu Babu, who is also a leader in the village, Kalu Babu had telephonic discussion with the Officer-in-Charge of Salema Police Station and, then, Jagadish and Subodh were sent to Salema Police Station. It is also in the evidence of PW 12 that he, then, went to the house of their ex-Pradhan, Manoranjan Sarkar, and informed him about the incident and, out of fear, he (PW 12) spent the night at the house of Manoranjan Sarkar and, on the following day, in the morning, he returned to the house of Subodh.

14. Let us, now, analyse, in the light of the evidence of PW 1 and PW 12, the evidence of PW 2, PW 3 and PW 4. On a combined reading of the evidence of the witnesses aforementioned, what attracts our attention, most prominently, is that according to the evidence of PW 4 (Sandhya Rani), widow of deceased Rabindra Namasudra, on the night of the occurrence, accused Niranjana and Benu had come to her house at about 9/10 p.m. and called her husband, Rabindra, to the house of Subodh (PW 2) and, thereafter, her husband, Rabindra, never returned home and, on the following day, on being informed by her brother, Rukmini, that her husband had been killed by Niranjana and Benu at the house of Subodh (PW 2), she went to Subodh's house and found her husband lying there dead and, at the house of Subodh, both Subodh (PW 2) and Jagadish (PW 3) not only told her but others too that Rabindra had been killed by Benu and Niranjana inside the hut of Subodh by giving him blows with dao, while Subodh and Jagadish were gossiping at the courtyard of Subodh.

15. We have minutely scanned the entire cross-examination of PW4. What we notice is that as regards her evidence that accused Benu and Niranjana had come to her house and had called her husband, Rabindra, on the night of the occurrence, to the house of Subodh (PW2), this witness was not at all cross-examined except that a suggestion was offered to her that the two accused had not called her husband to the house of Subodh(PW2). The suggestion, so offered, was denied. Apart from the fact that nothing was elicited from the cross examination of PW4 to show that what she had deposed, as regards the fact that the two accused had called her husband, Rabindra, to the house of Subodh, at about 9/10pm, and her husband never returned home thereafter, were untrue or false, as she had not been, as indicated hereinbefore, cross-examined, at all, on these aspects of her evidence. In; such circumstances, we not only find it frightfully difficult to ignore her evidence, but we see no reason to disbelieve her or not to rely upon the evidence so given by her. There is no evidence, whatsoever, on record that deceased Rabindra's relation with his brother, Subodh, was, at any point of time, strained or inimical or that deceased Rabindra had any enmity with Jagadish either. As against this, the clear evidence of PW4 is that her husband had a quarrel with Mukunda Namasudra, brother-in-law of accused Niranjana, and, with Bhagawan Namasudra over the issue of giving poison to their pond and that Benu used to work as a day labourer at the paddy field of her deceased husband and he had taken an advance of Rs. 1,000/- from her husband.

16. From the evidence of PW4, what surfaces unscattered is that on the night of the occurrence, accused Niranjana (since absconder) and accused appellant, Benu, did come to her house at about 9/10 p.m., they called her husband to the house of Subodh (PW2) and, on the following day, on being informed by her brother, Rukmini, that her husband had been killed by the said two accused, at the house of Subodh, when she went there, she found her husband's dead body lying inside the house of Subodh.

17. In the backdrop of the fact that the evidence on record convincingly prove that the two accused aforementioned had called the deceased to the house of his brother, Subodh(PW2), when we revert to the evidence of PW2 and PW3, we notice that their evidence is in effect, thus : on the night of the occurrence, at about 9.30 p.m., while PW2 was making pitcher with the help of bamboo and cane, Rabindra, Benu and Niranjana, came to his house and started gossiping inside his room, where he used to live "alone", and while the said three persons were so gossiping, or talking to each other, PW3, who happened to have been passing by the side of the house of PW2, was called by PW2 and, on being called, PW3 entered into the house of PW2 and sat by his side. While both of them were chatting, PW3, on hearing some persons talking inside the hut of PW2, inquired from PW2 as to who were talking and PW2 told PW3 that Benu, Niranjana and Rabindra were gossiping inside his hut. PW3, then, looked inside the room and found the said three persons sitting on a chowki (i.e., cot) and gossiping, whereupon he (PW3) too started gossiping, at the courtyard, with Subodh (PW3).

18. What is, now, crucial to note is that the evidence of PW2 as well as PW3 is that they heard Rabindra's cries and accused Niranjana came out of the room accompanied by accused appellant, Benu, and that accused Niranjana was holding a dao in his hand and that both of them threatened PW2 and PW3 not to raise alarm and fled away, whereupon they (PW2 and PW3) informed Aswini (PW12), Promodh and others.

19. Coming to the evidence of Aswini (P.W. 12), we notice, as already pointed out above, that when he (P.W. 12), accompanied by Promode and Prabodh, was proceeding towards his house from Salema market, they happened to meet PW2 and PW3, in front of the house of PW 12, both PW2 and PW3 were visibly nervous and they told Aswini (PW12) and others that Rabindra had been killed by Niranjana and Benu at Subodh's hut. PW12 has also described, in his evidence, as to how they went to the house of their Pradhan, but having not found him there, they went to the house of Harendra Das, a leader in their village, but Harendra too not being available, they went to the house of their another leader, Kalu Babu, who, in turn, had telephonic discussion with the Officer-in-Charge, Salema Police Station, and thereafter, PW2 and PW3 were sent to Salema Police Station.

20. We have closely scrutinized the evidence of PW12 and what we notice is that neither the defence has cross examined him on his evidence as to how he happened to meet PW2 and PW3, what PW2 and PW3 had reported to him and Ors. nor has the defence cross examined him on his evidence as to how PW2 and

PW3 were both sent to Salema Police Station. Thus, all material aspects of the evidence of PW12 have remained unchallenged and undisputed. From the undisputed evidence of PW12, what, at least, emerges unchallenged is that PW2 and PW3 informed PW12, on the very night of the occurrence, that Rabindra had been "killed, at Subodh's hut, by accused Niranjana" and that both Subodh and Jagadish were sent by them (PW12 and others) to Salema Police Station.

21. Bearing the above unchallenged aspects of PW 12's evidence, when we, once again, revert to the evidence of PW2 and PW3, we do not find that the defence has been able to elicit anything from their cross examination to show that their evidence, as regards the fact that Rabindra happened to be killed by the two accused aforementioned, is untrue or false. What cannot be ignored is that, according to the unshaken evidence of PW2 and PW3, accused Niranjana as well as accused Benu were present along with Rabindra inside Subodh's room. Rabindra's cries were heard and immediately, thereafter, Niranjana, holding a dao, in his hand, came out of the room, he was accompanied by accused appellant, Benu, and not only accused Niranjana, but also accused Benu threatened them (PW 2 and PW 3) by warning them not to raise alarm and, then, the two accused fled away. In the face of these unshaken facts, it is quite possible for a villager, such as, PW 2 and PW 3, to report to their neighbours and relatives, such as, PW, 12, that Niranjana had killed Rabindra. It was Niranjana, who had been seen by PW2 and PW3 coming out from the room with a dao in his hand. This does not mean and cannot be stretched to mean that accused appellant, Benu, was not present in the company of accused Niranjana nor can it be stretched to mean, contrary to what PW 2 and PW 3 had deposed, that both accused Niranjana and accused Benu had not threatened PW 2 and PW3 with dire consequences restraining them from raising alarm.

22. Trying to pick holes in the evidence of PW 2 and PW3, it has been pointed out, at the time of hearing of this appeal, on behalf of the accused appellant, Benu, that while PW 2 has claimed that he went "alone" to the police station to inform the police about the occurrence, PW3 has claimed that he (PW3) too went with PW2 to the police station. This shows, according to the learned Counsel for the appellant, that both the witnesses were lying. While considering this aspect of the case, it needs to be born in mind that PW 2 has, nowhere, used the word "alone". What he has deposed is that he went to Salema Police Station and verbally informed the "Darogababu" (police officer) about the occurrence. It was neither enquired from PW2 nor did he say that he had gone "alone" to the police station or that while going to the police Station, he (PW2) had been accompanied by none else. In such a situation, when the evidence of PW 3 and, particularly, the unchallenged evidence of PW12 are considered together; there remains no doubt in the mind of this Court that both PW2 as well as PW3 had been sent to the police station by PW12 and their other co-villagers. While cross examining PW2, the defence suggested to PW 2 that he had not gone to police station on the night of the occurrence; but while cross-examining PW3, no such suggestion was offered, or assertion was made , by the defence. This apart, and as already

indicated above, the defence did not dispute the evidence of PW 12 that PW 2 and PW 3 had been sent to police station. Hence, when the evidence given, on this aspect of the case, by PW 2, PW 3 and PW 12 are considered dispassionately, there remains no doubt that on the very night of the occurrence, PW 2 and PW 3 had gone to the police station. What unfortunately, happened, in the light of the evidence on record, is that the police officer, at the said police station, did not record the oral information given by PW 2 and PW 3. In fact, in the light of the evidence of PW 1 and PW16 (Satyandra), i.e., the subscriber of the "Ejahaar", even when PW1 (elder brother of the deceased), went to the police station on the following day and orally informed the police about the occurrence, the information, so given, was not reduced into writing; rather, the police officer, present there, demanded that a formal written information be handed over to them. In the light of the undisputed evidence of Satyandra Debnath (PW 16), what has come out undisputed is that it was at the place of occurrence that the "Ejahaar" was written by Satyandra (PW16) and that too according to what PW1 had told him, and, then, the written information was handed over to the police at the place of occurrence itself. Before this written information (i.e., "Ejahaar"), which has been taken on record by the learned trial Court as the First, Information Report (Ext. 1), was received by the police, the investigation had already commenced. It becomes abundantly clear that notwithstanding the fact that the police, the prosecution as well as the learned trial Court has treated Ext. 1 as the FIR, this Ext. 1 could not have been legally treated as the FIR inasmuch as this FIR was lodged after the police investigation had already started inasmuch as the police, on being orally informed about the occurrence, had already visited the place of occurrence and inquest over the dead body had been held. The contents of Ext. 1 could have, therefore, been used, at best, as a statement of PW1 made, during the course of investigation, to the police.

23. A careful analysis of the scheme of the Code of Criminal Procedure clearly shows that when any information, relating to commission of a cognizable offence, is given to an Officer-in-Charge of a police station, it is his duty to reduce such information into writing or to get the information reduced into writing, read over the information, so reduced into writing, to the informant and, then, the information, whether given orally, or in writing, shall be signed by the person giving the information and the substance thereof shall be entered in the General Diary as the State Government may prescribe. (See Section 154).

24. Closely following Section 154, Section 156 lays down that any Officer-in-Charge of a police station may, without the order of the Magistrate, investigate any cognizable case within his territorial jurisdiction. When the investigation commences, the police officer, carrying out the investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such oral examination may be reduced into writing. (See Section 161). However, u/s 162, such a statement, even if reduced into writing, cannot be used for any purpose at any enquiry or trial except for the purpose of contradicting the witness by defence in terms of Section 145 of the Evidence Act or, with

permission of the Court, by the prosecution as embodied in the proviso to Section 162. When the Officer-in-Charge of a police station, on receiving oral information, as regards commission of a cognizable offence, does not, in terms of the requirements of Section 154, reduce the information into writing and starts investigation, any subsequent statement made to him, orally or in writing, giving him information, as regards such an offence, cannot be treated as the FIR and must be treated as the statement of the person, who gives such oral or written information during the course of investigation. The contents of such information cannot be used as substantive evidence and can be used for the purposes as indicated in Section 162.

25. In the present case too, when, on the very night of the occurrence, oral information was given by PW2 (Subodh) to the officer-in-charge of Salema Police Station, it was the duty of the Officer-in-Charge of the said police station to reduce, or to get reduced, the oral information, so received by him, into writing. The Officer-in-Charge, however, failed to discharge his statutory obligation. This apart, without reducing the oral information, given to him, into writing, the Officer-in-Charge of the said police station entrusted another police officer to investigate the case and the officer, so entrusted with the investigation (i.e., PW17), came, in course of investigation, to the place of occurrence," examined the place of occurrence, drew sketch-map and held inquest over the dead body. At this stage, when he received information in the form of Ejahar (Ext. 1) from PW1, at the place of occurrence, such information could not have been treated as the FIR inasmuch as investigation had already commenced and, hence, the said information could have, at best, been treated as the statement made by PW 1 to the said police officer during the course of investigation of the case.

26. It is also noteworthy that while PW2 and PW3 were being cross examined, the defence did not even whisper that Rabindra had been killed by PW2 and PW3. However, when the investigating officer (PW17) was cross examined, the defence sought to project by suggesting to the investigating officer that PW-1 (Gobinda) had lodged an "Ejahar", at the said police station, alleging that Subodh (PW2), Jagadish (PW3) and accused Niranjana (since absconder) had murdered Rabindra and, on the basis of the information, so received, both PW2 and PW3 had been attested and detained in custody, but, subsequently in order to save PW2 and PW3, a wholly false and concocted version involving the accused appellant, Benu, was projected. Apart from the fact that the suggestion, so offered by the defence, had been denied by the investigating officer, what must be pointed out, at the cost of repetition, is that at no stage, until the investigating officer was examined, any such case was projected by the defence that an "Ejahar" by PW1 had been lodged at the said police station on the night of the occurrence itself, naming, PW2, PW3 and Niranjana as assailants of deceased Rabindra. What has, rather, emerged from the cross examination of the investigating officer is that the complainant party had, indeed, come to the police station on the night of the occurrence itself and though they had informed the Officer-in-charge about the occurrence, the Officer-in-charge told them that police personnel were not

available and that they should lodge FIR on the following day. It appears that even according to the admitted evidence of the investigating officer, the Officer-in-Charge of the police station completely failed in his duty to record the oral information, which PW2 and PW3 had given, reduce the said oral information into writing and treat the same as FIR. As to what PW2 and PW3 had deposed can easily be gathered from the fact that the evidence of PW2 is that he orally informed Darogababu about the occurrence. To the same effect is the evidence of PW3. Thus, as far as PW2 and PW3 are concerned, they did report the occurrence, in the light of the evidence of PW 12, to the police, without any delay.

27. Though the defence has sought to project that the accused appellant, Benu, was not present along with accused Niranjan at the place of occurrence and that is why, PW2 and PW3 had not, initially, named accused Benu, as the assailant, to PW12; the fact remains that the evidence of PW 12 shows that both PW2 and PW3 were visibly nervous and it is quite possible that in their anxiety ridden moment, when they were nervous, they (as already pointed out above), having seen accused Niranjan holding a dao in his hand, had named accused Niranjan as the person, who had killed Rabindra. The evidence of PW12 does not show how the incident had taken place. Obviously, because PW2 and PW3 were too nervous to describe, in detail, the occurrence. Even in their examination-in-chief, neither PW2 nor PW3 has deposed that Benu had killed Rabindra. What they have deposed is that, while they (PW2 and PW3) were talking to each other at the courtyard of the house of PW 2, Rabindra was talking with Niranjan and Benu inside the said room and, suddenly, they heard Rabindra's cries and, then, they found Niranjan and Benu standing together, Niranjan was holding a dao in his hand. Now, what is of paramount importance to note is that it was not only Niranjan, but also Benu, who had, according to the evidence of PW2 and PW3, threatened PW2 and PW3 with dire consequences if alarm was raised and, then, both the accused fled away. It is transparent that PW2 and PW3 had not seen the act of killing of Rabindra. What has, however, remained unshaken, in their evidence, is that both the accused aforementioned were present inside the room, where the occurrence had taken place, that they came out together, the accused Niranjan was holding a dao and that both the accused intimidated PW2 and PW3 restraining them from raising alarm and, then, the two accused fled away. In the light of such unshaken evidence, when one considers the evidence of PW 4 that not only accused Niranjan, but also accused Benu had come to her house on the night of the occurrence and called her husband to the house of PW2, we see no reason to disbelieve the evidence given by PW2 and PW3 describing the occurrence of killing of Rabindra.

28. Though a large number of witnesses has been examined by the prosecution, it is necessary to point out that the evidence of these witnesses are not of material significance. Of course, some of them are Witnesses to the alleged seizure of the dao by the police on the same being allegedly produced by accused Benu. In view, however, of the fact that no statement, oral or written, prior to such recovery, made by accused appellant Benu, has been placed on

record and nothing exists on record to show that the dao, which the accused appellant, Benu, had allegedly produced, was the weapon of offence, the evidence, of the remaining witnesses are not of any significance.

29. The above discussion of evidence brings us to the evidence of PW 18, i.e., the doctor, who conducted post mortem examination on the dead body of Rabindra. The findings of the doctor are as under:

The body was stout and there was mark of injuries at abdominal wall, posterior chest wall and left side of the neck.

Scalp and vertebra-healthy, membranes - healthy, brain and spinal cord-healthy.

Walls, ribs and cartilages-healthy, pleura-healthy, larynx and trachea-healthy, right lung, left lung-healthy. Pericardium-healthy, heart-healthy, vessels-healthy.

Abdomen:

(1) Walls, peritoneum, mouth, oesophagus-All are healthy.

(2) Stomach-healthy and containing clotted blood.

Small intestine and large intestine-healthy, liver, spleen, kidney, bladder-all are healthy.

Injury- NIL.

Disease of deformity-NIL.

Fracture- Nil.

Dislocation - Nil.

Description of injuries

(1) There were 3" x 1" cut injury in the lower abdomen

(2) 4" x 1" cut injury in the posterior chest wall.

(3) 4" x 1" cut injury in the left side of the neck.

30. In the opinion of the doctor (PW18), the death was due to cardio respiratory failure arising out of multiple cut injuries and that these injuries could have been caused by means of a sharp cutting weapon, such as, dao.

31. The medical evidence on record clearly shows that the deceased has sustained cut injuries on the abdominal wall, posterior chest wall and left side of the neck leading to cardio respiratory failure. The medical evidence, thus, supports the ocular evidence of PW 2 and PW3 that Rabindra had been put to death by giving him blows with a weapon, such, as dao, which accused Niranjana (since absconder), in the company of accused appellant, Benu, was seen holding in his hand.

32. Though it has not been specifically agitated, at the time of hearing of this

appeal, that while framing the charge, the learned trial Court framed a charge u/s 302 simplicitor and did not take the aid of Section 34 IPC and yet the accused-appellant was convicted u/s 302 read With Section 34 IPC, we deem it necessary to consider as to whether, in the facts and circumstances of the present case, conviction of the accused appellant, with the help of Section 34 IPC, was justified and legally sustainable. To put it a little differently, we have, in this appeal, the responsibility to decide if, in the facts and circumstances of the present case, there being no specific charge u/s 34 IPC, whether the accused appellant could have been convicted u/s 302 IPC read with Section 34 IPC.

33. Section 34 IPC, as it originally stood, read:

3.4. When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone.

34. In the year 1870, Section 34 underwent an amendment and the amended provisions of Section 34 have not been altered any further since then. The amended provisions, which exist even today, read as under:

34. Acts done by several persons in furtherance of common intention.:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

35. By insertion of the words "in furtherance of the common intention of all, after the word "persons" and before the word "each", the Legislature has made the object of Section 34 clear and unambiguous. What is now, important to note is that Section 34 IPC does not say "the common intentions of all" nor does it say "an intention common to all". u/s 34, the essence, of liability is founded in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. This position was noted in AIR 1945 118 (Privy Council) .

36. Section 34 embodies the principle of joint liability in the doing of a criminal act. The provisions, contained in Section 34, form rule of evidence and do not create any substantive offence. The distinctive feature of Section 34 is the element of participation in an action. Section 34 makes a person vicariously liable for the act of another, if the act, done by the other person, has been done in furtherance of an intention, which was common to both the persons. The liability of a person for an offence, committed by another person in the course of a criminal act, arises, u/s 34, if such criminal act is done in furtherance of a "common intention" of the persons, who joined in committing the crime. In order to convict a person vicariously liable u/s 34 (or Section 149), it is not necessary to prove that each and everyone of them had indulged in overt acts. (See Rambilas Singh and Others Vs. State of Bihar, To apply Section 34, apart from the fact that there should be two or more accused, two factors must be established : (i) common intention, and (ii) participation of accused in the

commission of an offence. If "common intention" is proved, but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability, but if participation of the accused, in the crime, is proved and "common intention" is absent, Section 34 cannot be invoked. (See *Jai Bhagwan and others Vs. State of Haryana*, If some act is done by the accused person in furtherance of "common intention" of his co-accused, he is equally liable like his co-accused. (See *State of Punjab v. Fauja Singh* reported in (1997) 3 Crimes 170 (P&H).

37. As was observed by the Supreme Court, in *Chinta Pulla Reddy and Others Vs. State of Andhra Pradesh*, Section 34 is applicable even if no injury has been caused by the particular accused himself, for, in order to apply Section 34, it is not necessary to show some overt act on the part of the accused.

38. A direct proof of "common intention" may not always be available and, therefore, such an intention can be inferred from the circumstances, which appear from the proved facts and/or proved circumstances. In order to bring home a charge of "common intention", the prosecution has to establish, by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34; such meeting of minds may be pre-planned or may be formed on the spur of the moments. At any rate, however, the meeting of minds must, necessarily, be before the commission of the crime. Made it clear the Apex Court, in *Hari Om and Others Vs. State of U.P.*, that in order to bring a case u/s 34 IPC, it is not necessary that there must be a prior conspiracy or pre-meditation, the "common intention" can be formed in the course of occurrence. Reiterated the Apex Court, in *Ramashish Yadav and Others Vs. State of Bihar*, that it requires a prearranged plan and pre-supposes prior concert therefore there must be prior meeting of mind. It can also be developed at the spur of moment, but there must be pre-arrangement or premeditated concert.

39. The true contents of the Section are that if two or more persons intentionally do an act jointly, the law treats each one of them having done the act individually by himself, no matter as to whether he has done the particular act or not. (See *Anil Sharma and Others Vs. State of Jharkhand*, 40. In *Anil Sharma and Others Vs. State of Jharkhand*, the Apex Court, while dealing with the above aspect, held, in paragraph 20, thus:

20. ...As a result of the application of principles enunciated in Section 34, when an accused is convicted u/s 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party, who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.

41. In *Willie (William) Slaney Vs. The State of Madhya Pradesh*, the Apex Court examined the legality of conviction by applying Section 34 IPC in the absence of any specific charge having been framed in this regard. Dealing with the question as to whether Section 34 could have been applied without there being a specific charge, the Court held as follows:

86. Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; " and the charge is a rolled up one involving the direct liability and the constructive liability" without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

42. The above position of law has been reiterated in *Dhanna v. State of M.P.* reported in (1996) 10 SCC 79 : 1996 Cri LJ 3516 inasmuch as the Apex Court held, in *Dhanna (supra)*, that even if a charge, u/s 302 read with Section 149 IPC, was framed and no charge, u/s 302 read with Section 34 IPC, was framed, it will remain open to the Court to take recourse to Section 34 IPC if the Court can reach a finding that the accused persons, facing the trial, shared a common intention with the main perpetrator of the crime. (See also *Amar Singh Vs. State of Haryana*, and *Bhoor Singh and Another Vs. State of Punjab*,

43. In *Willie (William) Slaney Vs. The State of Madhya Pradesh*, the Apex Court held that in the absence of a specific charge u/s 34, conviction cannot, by itself, become fatal and, before a conviction for a substantive offence can be set aside on the ground of absence of Section 34, which relates to constructive liability, prejudice must be shown to have been caused to the person, who stands convicted.

44. In the case at hand, none has witnessed the actual assault on Rabindra at the hands of any of the two accused. However, the circumstances, as discernible from the evidence on record, are that accused Niranjan (since absconder) and Benu Namasudra went, on the night of the occurrence, to the house of Rabindra and called him to the house of Subodh (PW2). Rabindra accordingly came, accompanied by the two accused aforementioned, to the house of Subodh. Entering into the room, where Subodh used to live alone, these three persons as deposed to by PW 2 and PW3, started gossiping. When they were so gossiping, PW 2 and PW3 were outside the room sitting at the courtyard and talking to each other. At that time, PW2 was making pitcher with the help of cane and bamboo.

When PW 2 and PW3 were so talking to each other they heard Rabindra's cries raised from inside the room. At that very moment, they also found both the accused aforementioned standing outside the room and, at that time, accused Niranjan was holding a dao in his hand.

45. What is, now, imperative to note and reiterate is that both the accused aforementioned threatened PW2 and PW3 with dire consequences if they raised alarm and, having intimidated PW2 and PW3, the two accused fled away. Tensed and nervous as they became, PW 2 and PW3 rushed to their neighbours and informed them, including PW12 (Aswini), who happened to be proceeding towards his house, in the company of Probodh and Promod, about the occurrence. All of them, then, returned to the house of Subodh and found Rabindra lying dead with injuries on his body.

46. In the circumstances as indicated above, there remains no room for doubt that both the accused aforementioned went to Rabindra's house and called him to the house of Subodh, both of them were present inside the room, where Rabindra was assaulted and killed, and both of them came out together and though accused Niranjan was holding a dao in his hand, the fact remains that both the accused intimidated PW2 and PW 3 by threatening them with dire consequences if alarm was raised. In the face of these facts, which are clearly proven on record, there can be no reason to doubt that both the accused had acted in furtherance of their "common intention", the "common intention" being to put Rabindra to death. The number of injuries, which Rabindra had sustained, the type of weapon, which was, in all likelihood, used in causing the injuries, and the vital parts of the body, where injuries were inflicted, leave no room for doubt, and lead one to the lone and only conclusion, that it was in furtherance of the "common intention" of accused Niranjan (since absconding) and accused appellant, Benu, that Rabindra was killed.

47. Hence, though no specific charge u/s 34, IPC had been framed, there was no impediment, on the part of the learned trial Court, to convict the accused appellant by taking the aid of Section 34 inasmuch as the facts, as proved on record, leave, if we may repeat, no room for doubt that the "common intention" of both the accused was to put Rabindra to death and it was in furtherance of this "common intention" that Rabindra was, eventually, put to death. Such finding of guilt cannot, in the absence of any prejudice having been shown to have been caused to the accused appellant, be interfered with in appeal, particularly, when the accused appellant knew from the very beginning that he was alleged to have killed Rabindra along with Niranjan in furtherance of their "common intention", for, the charge sheet was submitted, u/s 302 read with 34, IPC, naming accused Niranjan as well as accused appellant, Benu, as the assailants, showing, however, accused Niranjan as absconder, and even while framing the charge, though the learned trial Court had not taken the aid of Section 34, IPC, the fact remains that the charge, in no uncertain words, made it clear to the accused appellant that he was being charged to have intentionally

killed Rabindra along with Niranjan and thereby committed offence of murder.

48. Because of what have been discussed and pointed out above, we are firmly of the view that the evidence on record proved beyond all reasonable doubt that the accused was guilty of offence u/s 302 read with Section 34, IPC. His conviction and also the sentence passed against him do not, therefore, call for interference in appeal.

49. In the result and for the reasons discussed above, this appeal fails. The conviction of the accused appellant and the sentence passed against him are hereby maintained.

50. Send back the LCR.