

(1996) 02 GAU CK 0006

In the Gauhati High Court

Case No : Criminal Appeal No. 8 of 1990

Bhusan Lal Das and Ors.

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 29-02-1996

Acts Referred:

Criminal Procedure Code, 1973 — Section 162, 293, 294
Criminal Procedure Code, 1973 (CrPC) — Section 162, 293, 294
Penal Code, 1860 — Section 302, 326
Penal Code, 1860 (IPC) — Section 302, 326

Citation : (1996) 2 GLJ 102 : (1996) 2 GLT 254

Hon'ble Judges : N.G.Das, J and A.Deb, J

Bench : Division Bench

Advocate : S.Majumdar, S.Das, S.Adhikari, M.Kar Bhowmik, Advocates
appearing for Parties

Judgement

N.G.Das, J.—The appellant No.1 Shri Bhusan Lal Das stands convicted under section 302 IPC and sentenced to imprisonment for life. His other companions, namely appellant Nos.2,3 and 4 who were charged similarly with the aid of section 109 of IPC were also convicted under section 302/109, IPC and sentenced to imprisonment for life by the judgment dated 31st may, 1990 passed by the learned Sessions Judge, South, Tripura in the case of ST No.29 (ST/A)/89. Through this appeal the appellants challenged the judgment and order of conviction of the learned Sessions Judge, South Tripura.

2. Adumbrated in brief, the facts of the prosecution case are that on the date of occurrence i.e. 26.11.87 a video show was being exhibited in front of Rangamati Cooperative premises which is opposite to the house of Bibhisan Das, the father of the appellant No.1 intervened by Amarpur Bampur Road. At about 9/9.30 PM deceased Krishnanayan Das was going to witness the video show along that road. But no sooner had he reached in front of the house of Bidhisan Das then all the accusedappellants, it was alleged, came out of the house of Bibhisan Das With lethal weapons in their hands and attacked the deceased on account of

some previous enmity which cropped up a few months prior to the date of occurrence in connection with kindling of a bidi from the house of Bibhisan Das. It was further alleged that while the appellant Nos.2, 3 and 4 caught hold of the deceased, the appellant No. 1 struck blows on the neck of the deceased by means of a sharp cutting weapon causing severe bleeding injuries. The father of the deceased viz Kishore Das (PW 1) was at that time having walk in front of his house which is at a short distance from the house of Bibhisan Das. The father of the deceased having seen the occurrence, at once rushed to the scene of occurrence but within a few minutes of his arrival at the scene of occurrence deceased died. A few persons, however, rushed to the place of occurrence on hearing the cries but by that time all the appellants fled away with the incriminating weapons towards North.

3. However, one of those persons named Balai Das informed ASI Shri Gopal Sarkar (PW17), the Duty Officer of Birganj PS that one dead body with bleeding injuries was lying at AmarpurBampur Road near Rangamati Cooperative premises. ASI Shri Sarkar entered the gist of the information in the GD Book which was signed by the OC, Shri Bijoy Kumar Nag and on the basis of this GD Entry (No.936, dated 26.11.87, Ext.P/9), OC, Shri Nag (PW 18) along with his staff went to the place of occurrence at about 11 PM and found the dead body of the deceased Krishnanayan Das lying on the road with bleeding injuries. There he also got Kishore Das (PW 1) who lodged the ejahar to him. OC recorded the ejahar and thereafter prepared the inquest report in presence of the witnesses. OC, also seized the wearing apparels found on the person of the deceased, sent the dead body to Amarpur Hospital for post mortem examination and recorded the statements of a few witnesses. Thereafter, the OC, returned to the PS and registered Birganj PS Case No.3 (11)/87 under section 302/34 of IPC.

4. On the following day the OC arrested the accusedappellants and consequent upon their statements he recovered one blood stained axe and some clothes from the houses of the accusedappellants at their instance and got those chemically examined. He also obtained post mortem examination report which showed that the deceased died because of the injuries found on him. In course of his investigation, OC also prepared a hand ketch map of the place of occurrence, recorded the statements of a few more witnesses and thus after completing the investigation chargesheeted all the accusedappellants for their prosecution under section 302 read with section 34 of IPC.

5. The case being exclusively triable by the Court of Sessions, the learned SDJM, Amarpur committed the case to the Court of learned Sessions Judge, who after perusal of the materials framed a charge under section 302 of IPC against the accusedappellant Shri Bhusan Lal Das for commission of the offence of murder by intentionally causing the death of Krishnanayan Das on the night of 26.11.87 at about 9.30 PM. The learned Sessions Judge also framed a charge under section 302 read with section 109 of IPC against the accusedappellant Nos.2,3 and 4 for their having abetted commission of the offence of murder of

Krishnanayan Das on the said date and time. The charges were read over and explained in Bengali to the accusedappellants who pleaded not guilty and claimed to be tried.

6. In order to bring home the charges, the prosecution examined 18 witnesses in all and also exhibited the documentary evidence, viz inquest report, hand sketch map, forensic report etc. The accused persons led no evidence in support of their defence. However, their defence as would appear from the cross examination as well as the statements they gave at the time of their examination under section 313 of CrPC was that about 6/7 months back they had a quarrel with the deceased and due to that quarrel a false case was foisted against them. The learned Sessions Judge, however, after appreciating the evidence of the eye witness (PW 1) and the circumstantial evidence held the accusedappellants guilty for commission of the offence of murder as stated above.

7. Before entering into the rival contentions it may be stated here that learned counsel Mr. Kar Bhowmik appearing on behalf of the appellants did not raise any controversy as to the death of Krishnanayan Das on the night of occurrence due to the injuries he sustained on his person. OC, PW 18 deposed on the basis of the GD Entry No.936 he along with his staff went to the place of occurrence and on seeing the dead body of Krishnanayan Das lying on the road he after recording the ejahar given by the PW 1 prepared the inquest report Ext.P2/2 in presence of the witnesses. This inquest report shows that the OC found a long cut mark measuring 4" x 3" extending from jaw bone to the neck. The OC, also deposed that he sent the dead body to the Amarpur Hospital for post mortem examination.

8. PW 16, Dr. Ashesh Paul, who conducted the autopsy on the dead body of deceased Krishnanayan Das deposed that during his examination he found one incised wound measuring 4" x 3" x 1 "/21" on the left side of the neck and another incised wound at the level of nape of neck measuring 3" x 2" x depth upto vertebra. The doctor deposed that the injuries were caused by heavy sharp cutting weapon like sword, axe, takkle dao etc. He also opined that no person can speak after receiving such injury and that one can hardly live for 5 to >10 minutes after receiving such injuries. Doctor also opined that the deceased died due to excessive haemorrhage and shock caused by the incised wound on the left side of the neck leading to circulatory failure.

9. PWs 1, 3, 5, 6, 8, 9, 12 and 15 who rushed to the place of occurrence soon after the incident deposed that on going over there they found the deceased lying on the road dead with bleeding injuries on his neck. So, in view of the evidence discussed above, we find that it has been established that on the night of occurrence at the time and place mentioned in the charge the deceased Krishnanayan Das died on account of the injuries he sustained on his person.

10. Now, the question is whether the accusedappellants can be held responsible for the death of the deceased Krishnanayan Das. It may be stated here that it is

not disputed that a few months prior to the date of occurrence a quarrel ensued between the deceased and Birchandra Das (PW 8) on one hand and accusedappellant Bhusanlal Das and Surat lal Das on the other in connection with kindling of a bidi from the house of the father of the appellant No. 1.

11. PW 1 Kishore Das who lodged the FIR stated in his ejahar that few months prior to the date of occurrence his son had a quarrel with the accusedappellants over kindling of a bidi and at that time the accusedappellants threatened his son to finish him when he would be found alone. In his evidence before the Court this PW 1, the informant also deposed that a few months prior to the date of occurrence on one night his son Krishnanayan Das sent Maran Das (PW 7) to the house Bibhisan Das, the father of the accusedappellant No. 1 to get fire for kindling a bidi. According to him this gave rise to some trouble and a fight took place between his son and Birchandra Das (PW 8) on oneside and accusedappellant Bhusan Lal and Suratlal on the other. He deposed that other who came there stopped the fight but at that time accusedappellants Bhusan Lal, Shovan Lal and Braja Lal threatened his son to finish him.

12. PW 7, Maran Das deposed that on being asked by Krishnanayan and Birchandra in front of the house of Bibhisan Das he entered into the house of Bibhisan Das for lighting a bidi, but while he was returning from the house of Bibhisan Das accusedappellant Surat Lal took away the bidi from him and broke it. He also deposed that Surat Lal slapped him on his check and as he came out of the house Bhusanlal and Suratlal followed him and in front of the house of Bibhisan Das a fight took place between Bhusanlal and Suratlal on one side and Krishnanayan Das and Birchandra on the other. According to him the neighbours who came there appeased them. The witness has crossexamined but nothing material could be elicited from him to discredit his version in respect of this incident.

13. PWs 8, 9 and 10 also supported the version of PW 7. Apart from this, accusedappellant Bhusal Lal during his examination under section 313 of CrPC also admitted that a few months prior to the date of occurrence he had a quarrel with the deceased. So, in view of the evidence of the witnesses as discussed above we find that this part of the prosecution story that the accusedappellants had some enmity with the deceased has been established.

14. In this case only eye witness is PW 1 who is the father of deceased. Mr. Kar Bhowmik, the learned counsel appearing on behalf of the appellants has submitted that although this PW 1 deposed to the effect that he had seen the act of beating his son by the accusedappellants from a distance of about 20 cubits, the evidence of this PW 1 should be discarded in view of the fact that other persons who were with him at that time did not support his version. Mr. Kar Bhowmik has drawn our attention to the ejahar and submitted that this ejahar will show that PW 1 was standing near the AmarapurBampur Road along with his brother Amalendu Das and uncle Akhil Das, but none of those witnesses supported his version as the prosecution rendered them without examining. The

contention of Mr. Kar Bhowmik is that even though the enmity has been established it cannot go against the appellants only as such enmity cuts both ways. It is argued by Mr. Kar Bhowmik that tendering of the witness amounts to giving up of the witness by the prosecution. In support of his contention Mr. Kar Bhowmik has placed reliance upon a decision of the Supreme Court rendered in the case of Sukhwant Singh vs. State of Punjab reported in (1995) 3 SCC 367 where it has been held by the Apex Court that tendering of a witness for cross examination without their being any examination in chief is not permissible as it amounts to giving up of the witness by the prosecution.

15. But Mr. S. Das, the learned Public Prosecutor has contended that the evidence of PW 1 cannot be rejected even though Akhil Das (PW 4) and Amal Kumar Das (PW 14) were tendered for cross examination without their being examined in chief. It is submitted by Mr. Das, that the evidence on record will not show that either of these two witnesses could see when the deceased was beaten. Apart from this, it has also been argued by Mr. Das that the evidence of P W 1 has been well corroborated by the circumstantial evidence, viz the witnesses who rushed to the scene of occurrence on hearing the alarm raised by PW 1 and recovery of incriminating blood stained weapon and blood stained clothes from the house of the accused appellants at their instance.

16. The evidence of PW 1 therefore, needs a careful scrutiny. It has to be ascertained whether non examination of the aforesaid two witnesses affected the prosecution case in any manner. PW 1 deposed that at the time of occurrence he was moving about in front of his house and that his house is situate at a distance of about 20 cubits from the house of Bibhisan Das, father of appellant No.1 . According to prosecution" the occurrence had taken place on Amarpur Bampur Road in front of the house of Bibhisan Das. Although it has not been disputed by the learned counsel for the appellants that the dead body of Krishnanayan Das was found on the road in front of the house of Bibhisan Das, we feel it necessary to ascertain whether the dead body was actually found in that place.

17. PW 18 the Investigating Officer deposed that after arrival at the place of occurrence he found the dead body of Krishnanayan Das lying on the road in front of the house of Bibhisan Das and at that time he also got the PW 1 in that place. So, after recording the ejahar given by the PW 1 he during his investigation prepared a hands sketch map of the place of occurrence along with Index. The hands sketch map and Index were exhibited and marked as Ext.P/12 and P/13 respectively. This hands sketch map shows that the dead body was found lying on Amarpur Bampur Road at the point shown under latter "T". It further discloses that some houses are situated just opposite to the place where the dead body was found lying. So far as this hands sketch map is concerned the defence did not challenge the correctness of it by cross examining the Investigating Officer. We, therefore, see no reason why this should not be accepted as true.

18. Now according to PW 1 while he was in front of his house he saw the

assailants beating his son. The contention of Mr. Kar Bhowmik is that this statement of PW 1 is not acceptable as it would appear from the ejahar which,, was lodged without any practicable loss of time that at that time Aktiil Das and Amalendra Das were with PW 1. The statement which PW 1 made in his ejahar reads:

"I was standing near the Amarpur Bampur Road side along with my brother Amalendra Das any my paternal uncle Akhil Das. At that time a video show was going on in the Rangamati Cooperative ground. My son was watching the video in the site of occurrence. He came home from that place. Coming home he took one "pitha" (cake) from his mother and again went out from the house towards the cooperative."

19. In the deposition before the Court this PW 1 stated that he was moving about in front of his house and when his son was going back to the cooperative ground to witness the video show he was attacked by the assailants in front of the house of Bibhisan Das. His statement thus does not indicate that Akhil Das and Amalendra Das were with him at the time when his son was going back to witness the video show. During crossexamination he also specifically stated that no one was with him at the time when he was moving in front of his house. We have also perused the evidence of other witnesses but the evidence of other witnesses do not show that Akhil Das and Amalendra Das were in front of house of PW 1 at the time of occurrence. If these two witnesses were actually present in front of the house of PW 1 at the time when the occurrence had taken place the defence could at ease examine the witnesses hi respect of this fact. But it does not appear from the evidence on record that those witnesses made any such statement even to the Investigating Officer also. We are, therefore, of opinion that these two witnesses cannot be regarded to be material witnesses and thus by tendering them for crossexamination the prosecution case has not been shattered.

20. PW 1 deposed that his house is situate at a distance of about 20 cubits from the house of Bibhisan Das. During crossexamination it was suggested to this witness that the distance between his house and that of Bibhisan Das was about 500 yards. This suggestion clearly indicates that the house of PW 1 and that of Bibhisan Das are near the place of occurrence. Now as regards the distance between the two houses, PW 6 during his crossexamination stated that house of Kishore Das and Bibhisan Das are situate on the side of Amarpur Bampur Road and distance between the two houses will be about 100 cubits. So, in view of the evidence we are of the view that the distance between the two houses will not be more than 100 cubits.

21. Now according to PW 1 as soon as his son reached in front of the house of Bibhisan Das all the accusedappellants in a body attacked him with lethal weapons in their hands and when the appellant Nos.2,3 and 4 caught hold of his son the appellant No. 1 hacked his son by means of a sharp cutting weapon and that he could identify the accusedappellants in the light of electric lamp which

was burning. Mr. Kar Bhowmik has argued that although PW 1 claimed to have identified the accused appellants in the light of electric lamp which was burning it will appear from the evidence on record that there was no electric post in front of the house of Bibhisan Das. Mr. Kar Bhowmik has, drawn our attention to the site plan and submitted that this site plan does not indicate that there was street light in that area at that time.

22. But according to prosecution at the relevant time a video show was being exhibited in the cooperative ground which is situate opposite to the house of Bibhisan Das. PW 3 Khagendra Das, who rushed to the scene of occurrence on hearing the cries deposed that at the time of occurrence an electric lamp was burning in the place where a video show was being exhibited. PW 8 Birchandra Das deposed that on that night at the relevant time he was enjoying video show which was being exhibited in the premises of Rangamati Cooperative. PW 12 Ekendra Das deposed that on hearing the cries he rushed to the scene of occurrence and he could identify the dead body in the light of the electric bulb burning in the video house. Similarly, PW 15 Nibedan Das also deposed that he could recognise the persons who were fleeing away from the place of occurrence in the light of the electric lamp burning in the place where video show was being exhibited. PW 2 Biswanath Saha also deposed that the Investigating Officer seized his video. Therefore from the evidence discussed above it is clear that at the time of occurrence a video show was being exhibited in the Rangamati Cooperative ground which is situate opposite to the house of Bibhisan Das. Mr. Kar Bhowmik has, however, argued that it will appear from the crossexamination of PW 6 that there was no street light in that area and when he went to the place of occurrence he found a lady coming from the house of Kishore Das with a kerosene lamp. According to Mr. Kar Bhowmik these facts clearly indicate that there was no light. It may be a fact that there is no evidence on record to show that there was street light at the time of occurrence but from the evidence we have discussed above it has been clearly established that a video show has been exhibited in the cooperative ground situate opposite to the house of Bibhisan Das and that electric lamp was burning at that time.

23. It may also be noted here that it is not the prosecution case that the assailants were identified in the street light. The definite case of the prosecution is that a video show was being exhibited at the time of occurrence in the cooperative ground which is situate opposite to the house of Bibhisan Das at a short distance and an electric lamp was burning in that ground and in the light of that lamp the assailants were identified. PW 6 in his crossexamination also deposed that cooperative building will be at a distance of 100/150 cubits from the house of Bibhisan Das.

24. PW 3 Khagendra Das in his deposition stated that video show was being exhibited at a distance of about 50 cubits from the place where Krishnanayan Das was found lying. This version has not been challenged during crossexamination. PW 9 Arun Chandra Das also deposed that the cooperative

premises was very near to the house of Bibhisan Das and the dead body of Krishnanayan was lying on the road near the house of Bibhisan Das.

25. In view of the evidence discussed above, we find that on the date and time of occurrence a video show was being exhibited in the Rangamati Cooperative ground which is situate opposite to the house of Bibhisan Das at a short distance and some electric bulb was burning there at that time.

26. Now as regard the factual part of the occurrence PW 1 deposed that his son Krishnanayan Das was witnessing the video show and to take the meal he came back to the house. But as the meal was not prepared by that time he on taking a pitha (cake) started for the video show. He deposed that no sooner had his son reached in front of the house of Bibhisan Das then all the accusedappellants came out of the house of Bibhisan Das with lethal weapons in their hands and while the accusedappellant Nos.2, 3 and 4 caught hold of him the accusedappellant No.1 Bhusan Das struck blows on his son by means of a sharp cutting weapons. This PW 1 also deposed that as soon as the accusedappellants attacked his son he raised alarm and rushed to the spot and he also disclosed the names of the assailants to the persons who rushed to the place of occurrence on hearing the alarm he raised.

27. PW 3 Shri Khagendra Das deposed that on the date of occurrence at about 9.30 PM he was walking about inside of his house and on hearing the cries raised by Kishore Das he immediately came out of his house and as soon as he came out of his house he found the accusedappellants fleeing away towards North. He also quite categorically stated that he could identify the accused appellants in the light of the electric lamp that was burning in the place where the video show was being exhibited. The witness has been crossexamined but nothing material could be elicited from him to this regard his version. A few suggestions were however, given to him but those appeared to be gratuitous.

28. PW 15 Shri Nibedan Das deposed that on the night of occurrence at the relevant time he was witnessing the video show and at about 9.30 PM when he was returning to his house he heard the cries and as he looked towards that direction he found accusedappellants Bhusanlal Das, Suratlal Das, Shovanlal Das and Bhajalal Das fleeing towards North. He also stated that he could identify the said assailants in the light of the electric lamp that was burning in the place where the video show was exhibited. He further stated that he at once rushed to the place of occurrence and found Krishnanayan Das lying dead in front of the house of Bibhisan Das.

29. Mr. Kar Bhowmik has argued that during crossexamination this witness stated that after his arrival the parents of the deceased came. So, if his this version is accepted then the statement of PW 1 cannot be accepted as true. But it will also be found in his examinationinchief that he stated that when he rushed to the direction where from the cries were coming he found some persons crying in front of the house of Bibhisan Das. He specifically stated that parents of

Krishnanayan Das were crying. Moreover, it is quite clear from his version that he found accusedappellant Bhusanlal, Suratlal, Shovanlal and Brajalal fleeing away towards North. We, therefore, see no reason to reject the evidence of this witness as it does not appear from the evidence that he had any sort of enmity with the accusedappellants. Moreover, if he had any sort of enmity like that he could also include the name of Kishanlal.

30. PW.5 Nagendra Das who is also a resident of the same locality deposed that on hearing the cries he rushed to the place of occurrence and found the dead body of Krishnanayan Das lying in front of the house of Bibhisan Das at a distance of about 8/10 cubits. He deposed that on going over there he found PW 1 who told him that accusedappellants and Kishanlal murdered his son. PW 8 who also rushed to the scene of occurrence on hearing the cries also deposed that on his arrival to the scene of occurrence he found PW 1 there and from PW 1 he came to know the names of the accusedappellants. He further deposed that at that time he found no house inmates of the house of Bibhisan Das. PW 12 Ekendra Das who is also a resident of the same locality deposed that on hearing the cries he rushed to the scene of occurrence and found the dead body of Krishnanayan Das lying on the road in front of the house of Bibhisan Das near Rangamati Cooperative and at that time Kishore Das (PW 1) and others told him that accusedappellants murdered Krishnanayan.

31. It would, therefore, be seen from all the evidence of PWs discussed above that PWs 3 and 15 rushed to the scene of occurrence on hearing the cries and while going to the place of occurrence they found accusedappellants fleeing away towards North. The evidence of PWs. 5, 8 and 12 further shows that as soon as they came to the place of occurrence PW 1 and others told them that accusedappellants murdered Krishnanayan Das.

32. Now as regard other circumstantial evidence it will be found from the evidence on record that blood stained incriminating weapon and some stained clothes were recovered from the house of the accusedappellants on the following day at their instance. The Investigating Officer PW 18 deposed that he interrogated the accusedappellants after their arrest on the following day and as per their statements he along with them went to their houses and recovered one blood stained ganjee and one blood stained lungi from the house of accused Bhusan Lal at his instance had he seized those by means of a seizure list in presence of the witnesses. The Investigating Officer also deposed that he recovered one blood stained lungi and one blood stained axe with wooden handle from the house of accused Brajalal Das and that he seized those under seizure list in presence of the witnesses. The Investigating Officer also deposed that he seized one blood stained long pant and one blood stained shirt from the house of accused Suratlal and seized those in presence of the witnesses. The Investigating Officer also deposed that he recovered one towel from the house of Brajalal and seized that under a seizure list in presence of the witnesses. The seizure lists have been marked as Exts.P4/1, P5/4, P6/1, P7/1 and P/8. These seizure lists

show that the aforesaid materials were seized in presence of the witnesses, namely, Kishore Das. Parimal Debnath and Biswanath Saha.

33. PW 2 Biswanath Saha, who is a disinterested witness deposed that on 28.11.87 at about 10 AM he went to Birganj PS as his video was seized. He deposed that the Investigating Officer took him and Parimal Debnath along with accused persons to the house of accused persons. According to him while he was standing outside the house, the Investigating Officer along with the accused persons entered into a room and thereafter came out with a lungi and axe. According to him, the Investigating Officer seized those by means of a seizure list and he put his signature on the seizure list. He further deposed that after this seizure the Investigating Officer took him along with the accused persons to another house and came out with a chocolate coloured ganjee and one lungi and seized those under a seizure list and he put his signature as witness. He has also identified the chocolate coloured vest Ext MO 7 and lungi Ext. MO 8. He also identified full pant Ext. MO 9 and shirt Ext. MO 10. He further deposed that the Investigating Officer also seized one towel from the house of one of the accused persons under a seizure list and he put his signature on that seizure list. According to his identification the towel so recovered was marked as Ext. MO 11.

34. PW 6 Parimal Debnath who is other seizure list witness deposed that on the following day of the occurrence Biswanath Saha came to his shop and informed him that his video was seized in the previous night by police and requested him to accompany him to the Police Station. He deposed that on being requested by Biswanath he along with Biswanath went to the PS and as they went there they found OC of the PS examining the accused persons, namely, Bhusanlal, Brajalal and Suratlal Das. According to him OC informed them that accused persons told him that they would bring out the wearing apparels and the other things and on being requested by the OC they accompanied OC to the house of Bhusan Lai Das. He further deposed that while they were waiting in the court yard of the house, the Investigating Officer along with Bhusanlal entered into the room and after some time came back with a lungi and a ganjee and those, were seized by the Investigating Officer in his presence under a seizure list. According to him thereafter the Investigating Officer went to the house of accused Brajalal Das and recovered one full pant and a shirt and seized those under a seizure list where he also put his signature as witness. He further deposed that the Investigating Officer also recovered one blood stained axe from one of the house of the accused persons and seized that blood stained axe and lungi under a seizure list where he put his signature as witness. The witness also identified the seized material viz coloured vest, lungi, full pant, shirt and towel marked as Ext. MO 7, MO 8, MO 9, MO 10 and MO 11 respectively.

35. The Investigating Officer PW 18 also deposed that he seized those materials in presence of the witnesses after recovery of those from the houses of the accused appellants. The Investigating Officer also deposed that he seized one blood stained lungi and one blood stained axe which were produced by the

accusedappellant Brajalal from his house and by means of seizure list Ext.P6/ 2 he seized those in presence of the witnesses.

36. PW 18 further deposed that on 21.12.87 he sent those materials for chemical examination and received the expert's report on 28.7.1988. According to his identification the expert's report was marked as Ext.P/15 series. Ext.P/15 series are the reports of the Central Forensic Science Laboratory, Government of India. These report were received from the DirectorcumChemical Examiner to the Government of India, Central Forensic Science Laboratory, Calcutta. These reports show that the DirectorcumChemical Examiner received one packed marked "A" containing one full shirt bearing large areas of reddish brown stains. One packed marked " B1, B2" containing one lungi bearing small areas of reddish brown stains at places, one packet marked "C1, C2" contained one axe with wooden handle which bore small areas of dark brown stains the handle portion as well as on the iron portion and one packet marked "D" containing one cash memo (No.418 for Rs.160/) bearing small areas of reddish brown stains distributed mostly on the borders. The reports show that those seized materials were stained with blood and that shirt cuttings and cash memo (item Nos.5 and 8) were stained with human blood. Lungi cutting (item No.6) and axe with handle (item No.7) were stained with blood but those being disintegrated their origin could not be determined.

37. Now the question is whether the report of the Serologist is acceptable. Learned Sessions Judge did not accept the Ext.P/15 report as the articles which were seized and sent to Serologist were not produced. It is also found that no statement of the accused leading to the discovery of the materials was recorded. But it is found from the evidence of PW 18 the Investigating Officer and seizure list witnesses PW 2 and PW 6 that those materials were seized from the houses of the accusedappellants. Moreover, the aforesaid 3 witnesses also identified the Ext.MO 7 coloured vest, MO 8 lungi, MO 9 full pant, Ext.MO 10 shirt, and Ext.MO 11 towel. The report of Serologist Ext.P/15 series show that the above articles which were identified by the witnesses were sent for Serological examination. In the case of Md. Abdul Matlib vs. State of Assam reported in 1990 Cr| LJ 2393 [1990 (1) GLJ 79, it was held by this Court that "The provision of section 293 of the Code provides for reading in evidence certain documents which purport to be report under the hand of a Government scientific expert as enumerated in subsection (4) which include Chemical Examiner or Assistant Examiner to Government. The provisions of section are intended to save time and avoid needless examination experts mentioned therein, unless, of course the Court found it necessary to examine the expert or when the accused requested for examination of the expert. If the Court does not find it necessary to examine the Chemical Examiner or any other expert mentioned in subsection (4) of section 293 and the accused also does not make any prayer to summon and examine the expert the report can be used in evidence without examination of the expert, the Chemical Examiner in the instant case."

38. In the instant case this Ext.P/15 reports of the Serologist were exhibited and marked as Ext.P/15 series. The Investigating Officer has been crossexamined but the genuineness of these report were not disputed. So, in view of the facts and the decision of this Court referred to above, we are to the view that the opinion of the Serologist can be accepted. But as regards recovery of those materials including the incriminating weapon viz axe it can only be said that accused had the knowledge where those were kept.

39. PW 18 deposed that on the night of occurrence after his arrival at the spot he seized the wearing apparels of the deceased and also some blood stained earth. The wearing apparels which were found on the person of the deceased were also identified by PW 1 and PW 1 also deposed that those were seized in his presence. But as regards seizure of blood stained earth it is found that blood stained earth was not sent for chemical examination. But nonsending of blood stained earth for chemical examination will not have any adverse effect as in view of the evidence discussed above it has been abundantly established that occurrence took place in front of the house of Bibhisan Das and the deceased fell on the road at a distance of about 8/10 cubits from the house of Bibhisan Das. So, nonsending of blood stained earth or for nonexhibiting the blood stained earth will not have any adverse effect. In the case of Raghunandan vs. State of UP reported in AIR 1974 SC 463 at p 468 (1974 CrI LJ 453 at p.458 (para 17) the Supreme Court has observed :

"We think that a failure of the police to sent the blood for chemical examination in a serious case of murder, such as the one before us, is to be deprecated. In such case, the place of occurrence is often disputed. In the instant case, it was actually disputed. However, such an omission need not jeopardise the success of the prosecution case where there is other reliable evidence to fix the scene of occurrence."

40. Our discussion of evidence made above will show that it has been abundantly proved that the occurrence had taken place in front of the house of Bibhisan Das.

41. The learned counsel for the appellants has argued that the ejahar lodged by PW 1 is hit by section 162 of CrPC as the GD Entry Ext.P/9 will show that prior to recording of this ejahar one Balai Das informed ASI Shri Gopal Sarkar (PW 17) that a person was lying dead with profuse bleeding in front of the Rangamati Cooperative. The GD Entry Ext.P/9 discloses commission of a cognizable offence and as such the ejahar lodged by PW 1 appears to have Been hit by section 162 of CrPC. But it will not be of any assistance to the appellants as on the basis of that GD Entry the Investigating Officer started investigation and without any practicable loss of time the ejahar Ext.P/1 was recorded. In this regard the Supreme Court in the case of Ranbir Yadav vs. State of Bihar reported in AIR 1995 SC 1219 held after quoting the observation of the Privy Council made in the case of Zahiruddin (AIR 1947 PC 75) held under para 40 as follows:

"In our considered view the above quoted passage is of no assistance to the

appellant herein for in the instant case after PC PW 1 testified about the incident, prosecution got the statement of PC PW 1 exhibited Ext. 10/1 as according to it Ext. 10/1 was the FIR. Such a course was legally permissible to the prosecution to corroborate the witness in view of section 157 of the Evidence Act. Of course in a given case as in the present one the Court may on the basis of subsequent materials hold that the statement so recorded could not be treated as the FIR and exclude the same from its consideration as a piece of corroborative evidence in view of section 162 of the Code but then on that score alone the evidence of a witness cannot be held to be inadmissible. The case of Zahiruddin (AIR 1947 SC 75) (supra) turned on its own, facts, particularly the fact that during his examination in chief the witness was allowed to refresh his memory from the statement recorded under section 161, Criminal Procedure Code, unlike the present one where the statement was admitted in evidence after PC PW 1 had testified about the facts from his own memory."

42. So, on analysis of all the evidence, circumstances and probabilities discussed above we are of the view that on the date and time as mentioned in the charge while the accused appellant Nos. 2, 3 and 4 caught hold of the deceased, the accused appellant No. 1 Bhusan Das gave him stab injuries on the neck of Krishnanayan Das and as a consequence of that violent beating he died within a few minutes. The doctor (PW 16) has fully corroborated the evidence of eye witness (PW 1).

43. As already discussed above the evidence on record discloses that there was some previous trouble between the deceased and appellant Bhusanlal Das and Suratlal Das. Therefore, the question is whether the appellant Nos. 2, 3 and 4 had the intention to do away with the deceased. The evidence on record does not indicate clearly whether the appellant Nos. 2, 3 and 4 continued to hold the deceased even after accused appellant No. 1 struck the first blow. It is of course, found from the evidence on record that the appellant Nos. 2, 3 and 4 by their act aided the appellant No. 1. But even though it has been proved that these appellant Nos. 2, 3 and 4 caught hold of the deceased and this facilitated the stabbing by appellant No. 1 Bhusanlal Das, there is nothing whatever to indicate that they knew that the appellant No. 1 would cause fatal injuries to the deceased though they must have anticipated that he would cause grievous injuries. Under the circumstances, the benefit of any such doubt must go to the accused.

44. In the circumstances, we conclude that common intention of the accused has not been established beyond reasonable doubt. But it certainly was to cause grievous injuries to the deceased. The conviction of appellant No. 2 Suratlal Das, appellant No. 3 Braj Lal Das and appellant No. 4 Shobhanlal Das under section 302 read with section 109 IPC and the sentence of life imprisonment are therefore, set aside and instead they are convicted under section 326 read with section 109 of IPC and sentenced to suffer rigorous imprisonment for a period of 5 (five) years each.

45. So far as accusedappellant No. 1 Bhusanlal Das is concerned the two injuries inflicted by him are sufficient in the ordinary course of nature to cause the death. His conviction and sentence are, therefore affirmed. But the learned Sessions Judge did not award any fine. Section 302 read: "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine". So, when convicting for murder the only discretion which is left to the Court is to determine which of the two punishments prescribed should be awarded. If the accused is sentenced to undergo imprisonment for life then he is also required to be fined. Consequently while affirming the conviction and sentence of appellant No. 1 Bhusanlal Das we also sentence him to pay a fine of Rs.500/ (Rupees five hundred only), in default of which he is to undergo imprisonment for a further period of 2 months. Fine money, if realised, be paid to the parents of deceased Krishnanayan Das. The period already undergone by all the appellants during investigation, enquiry and trial shall, however, be set off. The appellants are on bail. They are, therefore, directed to surrender before the Court of learned Sessions Judge within a period of 7 (seven) days to serve out the period of imprisonment. In the event of their failure to appear before the Court of learned Sessions Judge, the learned Sessions Judge shall pass necessary order to secure their attendance and send them to jail.

46. The appeal is dismissed with the modification of sentence as indicated above. Send down the case records to the trial Court immediately.