

**(2020) 06 GAU CK 0008**  
**In the Gauhati High Court**  
**Case No : Criminal Appeal (J) No. 55 Of 2016**

Kalpana Baishya

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

**Date of Decision :** 26-06-2020

**Acts Referred:**

Indian Penal Code, 1860 — Section 302

Code Of Criminal Procedure, 1973 — Section 161, 164, 173, 207, 209, 228(1)(b), 313

**Citation :** (2020) 06 GAU CK 0008

**Hon'ble Judges :** Manash Ranjan Pathak, J; Manish Choudhury, J

**Bench :** Division Bench

**Advocate :** Soumitra Saikia, Shamima Jahan

**Final Decision :** Allowed

## Judgement

Manish Choudhury, J

1. The judgment and order dated 29.04.2016, passed by the learned Sessions Judge, Nalbari, Assam in Sessions Case No. 69/2013 (G.R. Case No.

100/2013(8)), convicting the accused-appellant under Section 302 of the Indian Penal Code (IPC, in short) and sentencing her to suffer imprisonment

for life and to pay a fine of Rs. 2,000/- (Rupees two thousand), in default, to suffer further imprisonment for a period of 2 (two) months, is the subject

matter of challenge in the instant jail appeal.

2. The prosecution was set in motion by an Ejahar (Exhibit-1) dated 28.03.2013, lodged by one Smti. Arati Baishya (PW.2), wife of Dilip Baishya,

resident of Adabari Kanimara Supa, Police Station-Mushalpur, District-Baksa (BTAD), Assam before the Officer-in-Charge, Mushalpur Police

Station alleging, inter-alia, that on 28.03.2013 at around 11:00 a.m., her covillager Kalpana Baishya strangled her husband Sada Baishya with a sari

and kept his body on a bed. In the said Ejahar, the informant had further mentioned Smti. Saraswati Baishya (PW.1), a resident of the same village, as an eye-witness.

3. On receipt of the aforesaid Ejahar on 28.03.2013, the Officer-in-Charge, Mushalpur Police Station registered a case being Mushalpur Police Station

Case No. 26/2013 under Section 302, IPC and the investigation in respect of the death of the deceased, Sada Baishya was started. A corresponding

G.R. Case was also registered being G.R. Case No.100/2013(8). In the course of investigation, the Investigating Officer (I.O., in short) arrested the accused on 29.03.2013.

4. During the course of investigation, the Investigating Officer visited the place of occurrence and drew sketch map of the place of occurrence

(Exhibit-6) and got the statements of the witnesses recorded under Section 161, Code of Criminal Procedure, 1973 (Cr.P.C., in short). The I.O. after

causing inquest over the dead body of the deceased, prepared the Inquest Report (Exhibit-5). Thereafter, the dead body was sent for Post-Mortem

Examination to the Swahid Mukunda Kakati (SMK) Civil Hospital, Nalbari and after the Post-Mortem Examination conducted on 29.03.2013, the

Post-Mortem Examination Report (Exhibit-3) was prepared. The statement of Smti. Saraswati Baishya (PW.1) was also recorded under Section 164

Cr.P.C. on 02.04.2013 before the Judicial Magistrate, First Class, Nalbari vide Exhibit-8. On completion of investigation, Charge Sheet No. 27/2013

dated 15.05.2013 (Exhibit-7) under Section 173 Cr.P.C. was submitted by the I.O. in said Mushalpur PS Case No. 26/2013 finding a prima facie case

under Section 302 IPC against the accused-appellant. At the time of filing of said Charge Sheet as the accused-appellant was in jail custody, she was

shown to be in custody in the Charge Sheet.

5. On appearance of the accused before the Additional Chief Judicial Magistrate, Nalbari by causing her production from custody, the copies under

Section 207 Cr.P.C. were furnished to the accused. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, therefore,

the Additional Chief Judicial Magistrate, Nalbari by an Order under Section 209 Cr.P.C. dated 25.06.2013 committed the case record of said G.R.

Case No. 100/2013(8) to the learned Court of Sessions, Nalbari.

6. On receipt of the case record of said G.R. Case on transfer, pursuant to said

commitment, it was renumbered in the Court of learned Sessions

Judge, Nalbari as Sessions Case No. 69/2013. Upon hearing the learned Public Prosecutor and the State defence counsel on the point of charge and

on perusal of the case records, the learned Sessions Judge, Nalbari on 16.07.2013 framed a charge under Section 302 of the IPC against the accused

in terms of Section 228(1)(b) of Cr.P.C. The charge on being read over and explained to the accused, she pleaded not guilty and claimed to be tried.

7. During the course of trial, 8 (eight) witnesses including the I.O. and the autopsy doctor, were examined by the prosecution side and also exhibited 8

(eight) Nos. of documents. The defence adduced no defence evidence. However, the defence cross examined the prosecution witnesses. The

accused was examined under Section 313 Cr.P.C. and in the said examination; the accused denied the prosecution case as false and claimed

innocence. Having found the charge framed under Section 302 IPC proved against the accused, the learned Trial Court convicted her accordingly and

passed the sentence mentioned hereinabove. Aggrieved by the aforesaid judgment and order, the accused preferred the instant appeal.

8. We have heard Mr. Soumitra Saikia, learned Amicus Curiae for the accused-appellant and Ms. Shamima Jahan, learned Addl. Public Prosecutor

for the State.

9. Mr. Saikia, learned Amicus Curiae, has submitted that there was no eye-witness to the actual incident of alleged murder of the deceased. The

evidence led by the prosecution do not prove that it was only the accused who had caused the death of her husband. If the injuries sustained by the

deceased are examined it cannot be said with certainty that the deceased died of homicidal manual strangulation. Even if it is assumed that the

deceased died of strangulation then also it is not proved that it was only the accused, none else, who was responsible for the death of her husband.

The testimony of PW.2 has suffered from embellishments and improvements and as such, her testimony is not believable. As the prosecution has

failed miserably to bring home the charge of murder against the accused beyond all reasonable doubt, it was not proper on the part of the learned Trial

Court to convict the accused under Section 302 IPC. In that view of the matter, the accused-appellant is entitled to be acquitted of the charge under

Section 302 IPC.

10. Ms. Jahan, learned Additional Public Prosecutor, on the other hand, has submitted that the prosecution has been able to bring home the charge of murder and the learned Trial Court has rightly convicted the accused for the charge of murder. It was the accused and the deceased, as evident from the testimony of PW.1, who were last seen together prior to the death of the deceased. She being the only person with the deceased at the time preceding, attending and subsequent to the time of death, her silence and non-explanation about the death of her husband makes it clear that she was the only person responsible for the murder of her husband. The medical evidence is clearly suggestive of strangulation. On a reading of the evidence on record, it is established that the judgment and order of conviction and sentence of the learned Trial Court does not require any interference at the stage of appeal.

11. We have considered the submissions made by the learned counsels for the parties and perused the record. In order to appreciate the submissions of the parties and before proceeding further, it is necessary to find out and discuss about the evidence brought on record.

12. PW.1, Saraswati Baishya deposed that she knew Arati Baishya (PW.2) and the accused, Kalpana Baishya. She also knew the deceased, Sada

Baishya. The accused was the wife of her husband's brother. Her house and that of the accused were adjacent to each other. There was a fence

made of betel-nut leaves between the two houses and the accused person's house was visible from her house. The incident took place at around 11-0

a.m. There was a quarrel between the deceased, Sada Baishya and his wife, Kalpana Baishya (the accused). At that time, she was sweeping their

courtyard and when she cast a look towards the house of the accused through the said fence made of betel-nut leaves she saw that the accused was

dragging her husband into their house by tying his neck with a sari. PW.1 further stated that the accused laid the deceased on a bed. The accused,

after cooking meal, took her meal and kept meal for the deceased. When their son called his father to take his meal, the accused asked her son not to

call the deceased then and said that the deceased would take his meal when he would wake up. After sometime when there was crying and wailing,

they could know that the deceased had died. Prior to that incident, the accused once tried to strangle her husband with a sari but he did not die then.

People came to the house of Sada Baishya and she too went there. She noticed injuries on the back, neck, hands and legs of the deceased.

Thereafter, the police came and took the dead body away. After the post-mortem examination, the dead body was handed over to the family and it

was cremated. She told that the Magistrate recorded her statement after about two weeks of the incident and the police too recorded her statement.

The police arrested the accused on the day of the incident. In her cross examination, PW.1 stated that they had no visiting term with the family of the

accused at the time of the incident. There were two houses including the kitchen, of the accused. Both the families had separate courtyards. At the

time of the incident, her husband went to work and her children too went to school. She was alone at home at that time. Near the house of the

accused, there was a house of a family of Bodo community but she did not know the name of the said family. The deceased was a daily wage earner.

Though she had talking terms with the deceased, she did not have talking terms with the accused. The deceased had a habit of taking liquor in small

quantity and sometimes, he used to raise hullah after consuming liquor. Though the courtyard of the accused was visible from their courtyard through

the fence, the interior part of the house was not visible from their courtyard. She denied the suggestion that she did not tell the police that at the time

of the incident, she was sweeping her courtyard. She also denied that she did not tell the police that the accused, after cooking meal, had taken her

meal and kept the meal for the deceased and that their son had called the deceased to take his meal. She further denied the fact that she did not tell

the police that the accused had asked her son not to call the deceased and said that the deceased would take his meal when he would wake up. She

denied the fact that she did not tell the police that prior to the alleged incident, the accused had once tried to strangle her husband with a sari. She

deposed that she did not go to the house of the accused to stop the quarrel and when the deceased was being strangled. She stated that at the time of

the incident, apart from the deceased and the accused, their son, aged about 6 (six) years, was also present at the house.

13. PW.2, Arati Baishya was a co-villager and the informant of the case. In her evidence, she deposed that the incident took place at around 11-00

a.m. about 7 (seven) months back in the house of the deceased and on that day, there was holi festival. PW.1, Saraswati Baishya called her and told

her about the incident that in the course of quarrel between the accused and her husband, the accused had dragged her husband into the house by tying his neck with a sari. After about 15 (fifteen) minutes in PW.1's house, when she heard crying and wailing in the house of the accused she sent a couple of Bodo women to the house of the accused to enquire into the matter. Returning from the house of the accused, the two Bodo women informed her that Sada Baishya had been killed and his dead body had been kept on a bed. Thereafter, PW.2, accompanied by PW.1, had gone to the Police Station and lodged the Ejahar (Exhibit-1). The police arrived at the place of occurrence and took away the accused under arrest. The police also recorded her statement. In her cross examination, PW.2 stated that at the time of the incident, she did not go to the house of the accused. She did not remember as to whether or not she sent a couple of Bodo women to the house of the accused to enquire into the matter. She denied the fact that she did not state before the police that she was informed that after Sada Baishya was killed, his dead body was kept on a bed. She also denied the fact that she did not state before police that PW.1 had called her and informed her about the incident. She admitted that she did not witness the incident. She also admitted that on being asked by PW.1, she lodged the Ejahar.

14. PW.3, Peon Boro was a co-villager and he knew the accused as well as the deceased. He deposed that his house and the house of the accused were in the same boundary. At the time of the incident, he was not in his house. When he returned from his place of work, he heard a commotion and crying and wailing in the house of the accused. Meanwhile, the police arrived there and took away the dead body. During his cross examination, PW.3 stated that he did not witness the incident but he was questioned by police on the date of the incident. He stated that the deceased, Sada Bhaishya used to consume liquor.

15. PW.4, Golak Baishya is the elder brother of the deceased, Sada Baishya. He deposed that the incident had happened about one year back. In the course of investigation, the police seized one sari from the house of the accused and in the seizure list, he signed as a witness. The house of the deceased was close to his house. In his cross-examination, PW.4 stated that he was not at his house at the time of his incident as he went to work.

The police obtained his signature on a blank paper in the Police Station showing

him a bundle of clothes. But he did not see the seized articles in the Court.

16. PW.5, Dr. Ramesh Chandra Bhattacharjee was working as the S.D.M. & H.O. at the S.M.K. Civil Hospital, Nalbari on 29.03.2013 when he

examined the dead body of Sada Baishya, a male of about 50 years and a resident of village-Adabari, Police Station-Mushalpur, District-Baksa who

was identified by UBC 61 Ananda Das, Ramani Baishya and Narayan Medhi in reference to Mushalpur PS Case No. 26/2013 registered under

Section 302, IPC. Upon examination, his observations were as under:-

(i) Abrasion of size 1 cm X 0.3 cm over left forehead, 4 cm above eyebrow & 4 cm away from midline.

(ii) Periodical bruise seen around left eye.

(iii) Contusion of size 0.5 X 0.5 cm over right forehead, 2 cm above eyebrow & 2.5 cm from midline.

(iv) Abrasion of size 0.5 X 0.5 cm on right side of neck, 1 cm away from midline and 2 cm below lower border of mandible.

(v) Abrasion of size 1.5 cm X 0.5 cm on right side of neck 5 cm from midline and 8 cm above right clavicle.

(vi) Abrasion of size 0.8 cm X 0.2 cm on right side of neck 4 cm from midline and 7 cm above right clavicle.

(vii) Abrasion of size 3 cm X 3 cm on right shoulder.

(viii) Abrasion of size 0.2 cm X 0.5 cm on left anterior chest wall 6 cm away from midline and 8 cm below left clavicle.

(ix) Lacerated injury of size 2 cm X 0.5 cm X skin deep on right palm over thinner eminence.

(x) Lacerated injury of size 2 cm x 1 cm x muscle deep on left big toe.

(xi) Multiple sketch abrasion of length from 6 cm x 2 cm over back of chest.

On dissection, contusion of size 8 cm X 8 cm on frontal scalp around midline joint above glabake. Skull and vertebrae are healthy. Subarachnoid

haemorrhage on both sides. Spinal cord not examined. Liver congested. Fatty changes seen on liver. Spleen congested. Pericardium congested.

Stomach and its contents empty. Small intestine and large intestine fully congested. Right lung, left lung, heart congested. Vessels congested. Pleurae congested.

The doctor on the basis of the above findings opined that the cause of death was due to asphyxia following homicidal manual strangulation. The Post-

Mortem Examination Report was exhibited as Exhibit-3. He also exhibited the dead body challan (Exhibit-4) and the Inquest Report (Exhibit-5). The defence declined to cross-examine the doctor.

17. PW.6, Uday Baishya knew the accused, the deceased and the informant (PW.2). When the incident took place about one year back, he was not

at his house. At about 3- 0 p.m., his wife informed him over phone that Sada Baishya had died. He did not know how Sada Baishya had died.

18. PW.7, Sri Pankaj Das is the Investigating Officer of the case. He testified that the Officer-in-Charge, Mushalpur Police Station after registering

Mushalpur Police Station Case No. 26/2013 on the basis of the Ejahar (Exhibit-1) lodged by PW.2, Arati Baishya, entrusted him to investigate the

case and on receipt of the charge of investigation, he immediately proceeded to the place of occurrence, which was the residence of the deceased,

Sada Baishya at village-Adabari, Kanimara Supa. He noticed the dead body of the deceased, Sada Baishya inside the house. He performed the

inquest over the dead body of Sada Baishya and prepared the Inquest Report (Exhibit- 5). He also proved the dead body challan as Exhibit-4. He also

prepared the sketch map (Exhibit-6). He stated that he seized two numbers of torn pieces of one sari in presence of witnesses and exhibited the

seizure list in connection with seizure of sari as Exhibit-2. The accused was arrested by him. He also got the statement of PW.1 Saraswati Baishya

recorded under Section 164, Cr.P.C. before the Magistrate. He collected the Post-Mortem Examination Report. He exhibited the Ejahar as Exhibit-1.

After completion of investigation, he submitted the charge sheet finding evidence of commission of an offence under Section 302 IPC against the

accused. During cross-examination, he deposed that PW.2, Arati Baishya did not state before him that Sarawati Baishya (PW.1) disclosed her about

the occurrence by calling her and that she sent two Bodo ladies to the house of the accused to collect information. He further stated that PW.2, Arati

Baishya did not state before him that she sent two Bodo ladies to the house of the accused to collect information. He stated that in Exhibit-2, Seizure

List he had not mentioned the measurement of the seized torn pieces of sari and those seized articles were not before the Court.

19. PW.8, Dimple Boro stated that on 02.04.2013, she was serving as the Judicial Magistrate, First Class, Nalbari. On that day, when police produced

Saraswati Baishya (PW.1) before her she recorded the statement of Saraswati Baishya (PW.2) under Section 164 Cr.P.C. as narrated by the

witness. She disclosed that after recording the statement of Saraswati Baishya (PW.1) her thumb impression was obtained. She exhibited the

statement of Saraswati Baishya (PW.1) as Exhibit-8.

20. From a perusal of the above testimonies of Peon Bodo (PW.3), Golak Baishya (PW.4) and Uday Baishya (PW.6), it is established that none of

these witnesses had seen the actual incident and their evidence is hearsay in that respect. What Peon Bodo (PW.3) was aware of being a neighbour,

was that the deceased used to consume liquor. On the other hand, though Golak Baishya (PW. 4), the brother of the deceased, was shown as a

seizure witness his signature was obtained on a blank paper in the Police Station showing a bundle of clothes which were not shown to him at the time

he deposed before the Court. Uday Baishya (PW.6) came to know about the death of the deceased when he was informed over phone by his wife at

about 3-00 p.m. i.e. much later than the time of death of Sada Baishya. The testimonies of these witnesses do not add anything in support of to the

prosecution case.

21. In respect of the testimony of PW.2, it appears that Saraswati Baishya (PW.1) called her and told her about the incident. PW.1 told PW.2 that in

the course of quarrel between the accused and her husband, the accused, Kalpana Baishya had dragged him into the house by tying his neck with a

sari. In so far as, this part of the evidence of PW.2 is concerned, the same is hearsay evidence and it cannot be relied upon. In her examination-in-

chief, this witness deposed that after spending about 15 minutes in the house of PW.1 she heard crying and wailing in the house of the accused. Then,

she sent a couple of Bodo women to the house of the accused to enquire into the matter and returning from the house of the accused, the Bodo

women told her that Sada Baishya had been killed and his dead body had been kept on a bed. But in her cross-examination, this witness stated that

she did not remember whether or not she sent a couple of Bodo women to the house of the accused to inquire into the matter. When the Investigating

Officer (PW.7) was asked in his cross-examination, the I.O. stated that PW.2,

Arati Baishya did not state to him that she sent two Bodo women to the house of the accused person to collect information. In such view of the matter, the testimony of PW.2 about her sending two Bodo women to the house of the accused to enquire into the matter is not trustworthy and cannot be accepted. Consequently, her testimony to the effect that returning from the house of the accused, the two Bodo women informed her that Sada Baishya had been killed and his dead body was kept on a bed has no value. In her testimony, PW.2 further stated that she, accompanied by Saraswati Baishya (PW.1), went to the Police Station and lodged the Ejahar (Exhibit-1) wherein she stated that at around 11-00 a.m. on 28.03.2013, her co-villager, Kalpana Baishya (the accused) strangled her husband with a sari and kept his body on a bed. Thus, it is clearly established that whatever she stated in Ejahar was not based on her personal knowledge but based on the information provided by PW.1. The said fact has been further established from the fact that, in her cross-examination, she stated that she did not witness the incident and it was only on being asked by PW.1, she lodged the Ejahar (Exhibit-1).

22. There is no witness to the commission of alleged crime. In the above fact situation, it was on the basis of the evidence of PW.1, the prosecution case appeared to have been based. As per the evidence of PW.1, there was a quarrel between the accused and her husband at around 11-00 a.m. on the date of the incident and at that time, she was sweeping her courtyard. On hearing the quarrel she looked towards the house of the accused through the fencing made of betel-nut leaves and saw the accused dragging her husband into the house by tying his neck with a sari. Thereafter, the accused laid her husband on a bed. But this witness, in her cross-examination, deposed that the interior of the house of the accused was not visible from her courtyard. In that view of the matter, her testimony to the effect that the accused laid the deceased on a bed could not be an eye-witness account of her and it appears to be either her conjecture or from knowledge gathered later by her. She did not explain as to how she came to know about the same.

23. Further, her testimony to the effect that the accused, after cooking meal, took her meal and kept meal for the deceased. The statement of PW.1 is also recorded under Section 164 Cr.P.C. Though such statement recorded under

Section 164 Cr.P.C. is not a substantive piece of evidence as per the Evidence Act, but such statement can be used for the purpose of contradiction or corroboration and to look for the reliability of the witness. PW.1, in her statement recorded under Section 164 Cr.P.C. on 02.04.2013 i.e. after 5 (five) days of the incident, stated, inter-alia, that the accused, after cooking meal, took her meal and asked her son to call her husband, Sada Baishya to take his meal. But when PW.1 deposed before the Court stated, in her examination-in-chief, that the accused, after cooking meal, took her meal and kept meal for her husband and when their son called his father, the accused told her son not to call him then and told her son that he would take his meal when he would wake up. It is not known as to whether any conversation that took place in the neighbouring house of the deceased and the accused could be heard from the house of this witness. On a comparison of the two versions of this witness about this conversation, it transpires that there is apparent inconsistency between the two versions and there is embellishment in the version of PW.1. There is another fact in the statement of PW.1 recorded under Section 164 Cr.P.C. which cannot be overlooked. PW.1, in her said statement, stated that when the son called his father, Sada Baishya and did not get any response from him, the accused, Kalpana Baishya then called the people of the village to have a look and arriving there, the people of the village saw Sada Baishya lying dead. This fact about calling the people of the village by the accused herself was not disclosed by PW.1 before the Court. There is inconsistency as regards the version PW.1 and PW.2 as to what they had done after they heard crying and wailing from the house of the accused. PW.1 had stated that she had gone to the house of the deceased and saw the dead body. But PW.2 had deposed that she, accompanied by PW.1, had gone to the Police Station to lodge the Ejahar. In her statement under Section 164 Cr.P.C., PW.1 made the opinion that it was the accused who killed Sada Baishya.

24. The prosecution, in the instant case, relied upon the circumstance of last seen together to prove the charge against the accused. The circumstance of last seen together does not by itself automatically lead to the inference that it was the accused who committed the crime. There is no eye-witness account to the occurrence of death of Sada Baishya but only the account available is the account of PW.1, Saraswati Baishya who claimed to have

seen a quarrel between the two and dragging of the deceased husband by the accused by tying his neck by a sari. But there was no account as to what had happened thereafter and at what time the deceased was found dead inside the house. PW.4, Golak Baishya and the deceased, Sada Baishya were brothers. PW.4, Golak Baishya is also the husband of PW.1, Saraswati Baishya. PW.1, Saraswati Baishya and the accused, Kalpana Baishya are the sister-in-laws. The deceased, Sada Baishya was the husband of the accused. PW.1 in her evidence stated that her family had no visiting terms with the family of the deceased and the accused, though their houses were adjacent to each other. PW.1 stated that she had talking terms with the deceased but she was not in talking terms with the accused. Despite being close relations and close neighbours, when two persons are not in talking terms, in such a case, the existence of some kind of animosity between them cannot be ruled out. Normally, the testimony of an inimical witness has to be considered with caution and if the witness is true and reliable his or her testimony should not be disbelieved but the same is required to be carefully scrutinized and appreciated before any conclusion is arrived upon it.

25. PW.1, in her testimony, also deposed that apart from the deceased and the accused, their 6 (six) years old son was also at the house at that time of the incident and conspicuously, the son of the deceased and the accused, who was supposed to be a vital witness, was not examined by the prosecution. It is not the law that the evidence of a child witness is to be rejected at the threshold but the same is to be evaluated more carefully because there remains a possibility of the child of being tutored and influenced. But in the instant case, those possibilities are not under examination since the child itself was not examined. Had the child been examined then the testimony of the child would have been required to be tested on those parameters. It is settled law that the court can and may act on the testimony of a single witness provided he or she is wholly reliable. There is no bar in finding an accused guilty on the sole testimony of a single witness. But if there are doubts about the testimony of such an witness, the court has to look for corroborations. Even if it is assumed that PW.1 is not an inimical witness and she did not have any kind of animosity with the accused and she is an independent witness, in view of the embellishments and inconsistencies found in the testimony of PW.1, as has been indicated above, the version

projected by her cannot be wholly relied upon unless there are corroborations in material particulars and the testimony of this witness does not inspire much confidence. Similarly, in the absence of any corroboration from any other source the testimony of this witness that the accused once tried earlier to strangle her husband with a sari but he did not die at that time, does not deserve any credence. Such view is also fortified in view of her previous contrary statement under Section 164 Cr.P.C. wherein she stated that the accused had on some earlier occasion also, had dragged her husband by tying a rope around his neck. In respect of the theory of last seen together, one of the most vital facts to be established is that in between the time when the deceased was last seen together with the accused and when the time when the dead body of the deceased was found there must not be any possibility of any presence of a third person. But in the instant case, the son of the deceased and the accused was very much present in the house in between the times. There is no explanation why the son of the deceased and the accused was not examined. Nonexamination of the minor son would have been justified and would not have mattered if the witnesses examined by the prosecution fully unfolded the prosecution case. But in the instant case, the witnesses examined did not unfold the prosecution case fully and many circumstances appear to be not fully explained. In such view of the matter, the non-examination of the son of the deceased and the accused is a vital omission on the part of the prosecution to unearth the actual incident of death. In the Anjan Kumar Sharma and others Vs. State of Assam, reported in (2017) 14 SCC 359, the Honâ??ble Apex Court has observed that in a case where the other circumstances have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be the basis of conviction. In that situation, the last seen together theory cannot be taken resort to by the prosecution as the sole basis of finding the accused guilty in the absence of other established facts and in view of failure to examine the son who was present at the time of the alleged incident of death, to bring home the charge of murder against the accused.

26. PW.4, in his evidence, stated that though he was a seizure witness in respect of the Seizure List (Exhibit-2) as regards seizure of a sari from the house of the accused, he, in his cross-examination, stated that police showed him a bundle of clothes in the police station and took his signature on a blank paper. He was not shown the sari in the Court. The I.O. (P.W.7) stated that he seized two numbers of torn pieces of one sari in presence of witnesses vice Exhibit-2. But he did not exhibit the sari in the trial Court. PW.1 stated that the accused dragged the deceased by tying his neck with a sari. No evidence was brought to the fore that the deceased had died of strangulation by a sari and it was the same sari which was used in strangulating him. It is common knowledge that saris are found in every household and the burden of the prosecution was to prove that it was the seized sari which was used to cause the death of the deceased. In the absence of the sari, the evidence regarding seizure of the sari needs no further deliberation.

27. The failure of the accused to offer any explanation in her examination under Section 313 Cr.P.C. alone cannot be considered to be sufficient to establish the charge of murder against the accused. Presumption of guilt cannot be inferred from absence of any satisfactory explanation by the accused. Mere non-explanation on the part of the accused by itself cannot be held to be the sole basis of conviction. But in her examination under Section 313 Cr.P.C., when the evidence regarding the injuries found on the body of the deceased were put to the accused she replied that she knew nothing about the injuries sustained by the deceased. She stated that at the time of the incident, Sada Baishya came in heavily drunken state and fell into a log of jack fruit tree lying on the courtyard and he died on the spot. They lifted him and kept the body on a bed. She stated that false evidence had been given against her. Once an explanation is given by the accused it is for the trial court to decide as to whether such an explanation is a plausible explanation or the explanation is entirely a false one.

28. The doctor, PW.7, who conducted the post-mortem examination of the deceased, had opined that the death was due to asphyxia following homicidal manual strangulation and he found a number of injuries in the nature of abrasions, bruises, contusions and lacerations on the person of the deceased. In respect of the examination under Section 313 Cr.P.C., the

fundamental approach is that as the presumption of innocence is in favour of the accused till the last, even when the accused is not in a position to prove the truth of the story, his/her version should not be discarded if there is reasonable probability in such explanation unless the prosecution can prove beyond reasonable doubt that it is false. When the accused has put forth a reasonable explanation which might have been true and if the Court finds that there is no reason to reject it as false, the Court must accept the explanation and give the accused the benefit of doubt and acquit him. In the instant case, it has come out from the prosecution evidence of PW.1 and PW.3 that the deceased had the habit of taking liquor. It was the further evidence of PW.1 that occasionally after consuming liquor, the deceased used to make noise. Out of the 11 injuries mentioned by the doctor, seven were abrasion injuries, which can also happen when one falls, skids or brushes forcefully against a rough, hard surface, causing a grinding or rubbing away of the upper layers of the epidermis. Abrasion injuries were seen also on the sides of the neck. There was one periobital bruise seen around the left eye. A contusion injury can result from blunt force trauma, and certain types of contusions are simply called bruises. In common parlance, lacerations can also be caused when an object strikes the skin and causes a wound to open. Depending on a variety of characteristics (angle, force, depth, object), some lacerations can be more serious than others, reaching as far as deep tissue and leading to serious bleeding. In such situations, it is not implausible for the deceased to have sustained such injuries due to fall in the manner mentioned by the accused. Though there was no questioning of the doctor in that respect, it is also true that a mere opinion without indicating the real reasons for which he arrived at an opinion of homicidal manual strangulation may not be readily acceptable. If strangulation is caused by hands by applying force directly to the neck, it is manual strangulation. Referring to the Post-Mortem Examination Report (Exhibit-3) and the chapter on ""Deaths from Asphyxia"" from the Modi's Medical Jurisprudence and Toxicology, both parties have made submissions. Referring to the age of the deceased, 50 years, and absence of fracture of the hyoid bone, the learned Amicus Curiae has submitted that in a strangulation case, there has to be fracture of the larynx bone trachea and hyoid bone, more particularly, when the person dead is aged about 50 years as it is ossified at about

or after 40 years becoming hard and inelastic. On the other hand, learned additional Public Prosecutor has submitted, referring to the fracture of

thyroid cartilage and other injuries reflected therein, that the cause of death of the deceased was due to manual strangulation. In Modi's Medical

Jurisprudence and Toxicology, it is found mentioned that in a case of strangulation, there are usually ligature marks - horizontal or transverse

continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish and fracture of the larynx

trachea and hyoid bone apart from the signs. From the above submissions, considering the signs of strangulations mentioned in the above authority and

in the absence of recording of reasons for arriving at the opinion of homicidal manual strangulation by the doctor cannot be conclusively accepted. To

accept such an opinion, there has to be other cogent and reliable ocular evidence.

29. As regards the matter of medical evidence vis-a-vis ocular evidence, the Honâ??ble Supreme Court in case of Abdul Sayeed Vs. State of

Madhya Pradesh, reported in (2010) 10 SCC 259, has observed as under:-

Medical Evidence versus Ocular Evidence

32. In Ram Narain Singh Vs. State of Punjab, AIR 1975 SC 172 this Court held that where the evidence of the witnesses for the prosecution is totally

inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecutionâ??s case and

unless reasonably explained it is sufficient to discredit the entire case.

33. In State of Haryana Vs. Bhagirath and Others, (1999) 5 SCC 9 it was held as follows:-

The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft

of logic or objectivity, the court is not obliged to go by the opinion. After all opinion is what is formed in the mind of a person regarding a fact situation.

If one doctor forms one opinion and another doctor form a different opinion on the same facts it is open to the Judge to adopt the view which is more

objective or probable. Similarly if the opinion g i v e n by one doctor is not consistent with probability t h e court has no liability to go by that opinion

merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.

(Emphasis added)

34. Drawing on Bhagiraths's case (supra), this Court has held that where the medical evidence is at variance with ocular evidence/

it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses'

account which had to be tested independently and not treated as the ""variable"" keeping the medical evidence as the ""constant"".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as

conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, requires a careful independent

assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence,

as the sole touchstone for the test of such credibility.

21. ...The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other

witnesses held to be creditworthy; consistency with the undisputed facts, the ""credit"" of the witnesses; their performance in the witness box; the

power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

(Vide Thaman Kumar Vs . State of Union Territory of Chandigarh, (2003) 6 SCC 380; and Krihsnan Vs. State, (2003) 7 SCC 56).

36. In Solanki Chimanbhai Ukabhai Vs. State of Gujarat, AIR 1982 SC 484, this Court observed,

Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing

more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner

alleged and thereby discredit the eye-witness. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities

whatsoever of injuries taking place in the manner alleged by eyewitness, the testimony of the eye-witnesses cannot be thrown out on the ground of

alleged inconsistency between it and the medical evidence.""(Emphasis ended)

30. In Madan Gopal Kakkad Vs. Naval Dubey and Others, reported in (1992) 3 SCC 204, it was held :-

"34. A medical witness called in as an expert to assist the Court is not a witness

of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

35. Nariman, J. in R Vs. Ahmed Ali 11 WR Cr. 25 while expressing his view on medical evidence has observed as follows:

The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.

31. In the light of the explanation offered by the accused in her examination which cannot be considered to be implausible, the medical evidence alone cannot be the lone basis of the conviction as the ocular evidence cannot be accepted to be wholly reliable. Independent of medical evidence, the question to be considered is as to whether the ocular version inspires confidence or not, which, in our considered opinion, is in the negative. The golden principle of criminal jurisprudence is if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. In a case relating to circumstantial evidence, motive is a relevant fact and it becomes an additional link with the chain of other circumstances. But in the instant case, it cannot be inferred from the evidence brought on record that the accused had any kind of motive to kill her husband. It is also settled that suspicion cannot take the place of legal proof and at times, it can be a case of ""may be true"". The distance between ""may be true"" and ""must be true"" cannot be travelled through surmises and conjectures. The evidence brought on record by the prosecution has not been able to travel the said distance with cogent and reliable evidence.

32. In view of above discussion, we are of the considered opinion that the Trial Court while appreciating and appraising the evidence available on

record has not properly considered every factual aspect of the case vis-a-vis necessary circumstances.

33. Considering the entire factual background and the legal positions stated above, we find that the prosecution has failed to prove the case against the accused-appellant beyond all reasonable doubt to bring home the guilt to the accused by unerringly proving that the accused-appellant had committed the crime. Therefore, the accused-appellant is entitled to the benefit of doubt. As a result, the impugned judgment of conviction and the order of sentence dated 29.04.2016, passed by the learned Sessions Judge, Nalbari, Assam in Sessions Case No. 69/2013 (G.R. Case No. 100/2013(8)) arising out of Mushalpur Police Station Case No. 26/2013, for the offence under Section 302 IPC against the appellant is set aside by allowing the instant jail appeal. The present accused/ appellant Smti. Kalpana Baishya stands acquittal of the charge under Section 302 IPC.

34. It is stated that at the bar that pursuant to an order dated 04.06.2018 passed in the interlocutory application, I.A. (Crl) No. 283/2018 the execution of sentence passed against the accused-appellant by the impugned judgment of conviction and the order of sentence dated 29.04.2016, passed by the learned Sessions Judge, Nalbari, Assam in Sessions Case No. 69/2013 arising out of Mushalpur Police Station Case No. 26/2013 was suspended and she was granted bail. The Bail Bond stands discharged.

35. We mention our appreciation for the services rendered by Mr. Soumitra Saikia, learned Amicus Curie and direct that an amount of Rs. 7,500/- be paid to him as remuneration by the Assam State Legal Services Authority, Guwahati.

36. Registry shall return the records of the Trial Court to the Court of learned Sessions Judge, Nalbari with a copy of this Judgment.