

(2020) 06 GAU CK 0005
In the Gauhati High Court
Case No : Criminal Appeal No. 321 Of 2014

Noider Ali And 2 Ors

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 26-06-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 147, 148, 149, 299, 300, 302, 304, 342
Code Of Criminal Procedure, 1973 — Section 161, 173, 207, 313

Citation : (2020) 06 GAU CK 0005

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

Bench : Division Bench

Advocate : S Nazneen

Final Decision : Partly Allowed

Judgement

Manish Choudhury, J

1. This Criminal Appeal is preferred by three accused appellants, namely, (i) Noider Ali, (ii) Safer Ali and (iii) Nowsad Ali, against the judgment and

order dated 16.08.2014 passed by the learned Sessions Judge, Dhubri in Sessions Case No. 155/2010, arising out of G.R. Case No. (FKJ) 78/2009,

corresponding to South Salmara Police Station Case No. 186/2008, whereby they have been convicted under Sections 302/342/34 of the Indian Penal

Code (IPC, in short) and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/- each, in default, to suffer simple

imprisonment for 3 (three) months each for the offence under Section 302 IPC and further sentenced to pay a fine of Rs. 1,000/- each, in default, to

suffer simple imprisonment of 15 days each for the offence under Section 342 IPC.

2. The prosecution case, in brief, is that on 13.06.2008, one Md. Jahan Uddin

(P.W. 5) lodged an ejahar before the In-Charge of Bondihana Police

Out Post under South Salmara Police Station against 7 (seven) numbers of accused persons, namely, (i) Md. Safer Ali, (ii) Md. Nowsad Ali, (iii) Taser

Ali, (iv) Noidar Ali, (v) Md. Hayet Ali, (vi) Md. Hashem Ali and (vii) Md. Sanesh Ali, where the Accused Nos. (i), (ii) and (iii) are the sons of

accused No. (iv) Noidar Ali and accused Nos. (v), (vi) and (vii) are the sons of one Late Raham Ali. In the ejahar, the informant (P.W. 5) alleged that

on 12.06.2008 at around 7.30 p.m., while his cousin (son of his uncle), Majam Ali was sitting in his own house, at that time, the accused persons, Safer

Ali and Nowsad Ali, came to the house of said Majam Ali and having entered in to a conspiracy, called Majam Ali to the house of Safer Ali, wherein

he was kept confined by locking the door. It was further alleged that all the 7 (seven) accused persons started assaulting Majam Ali with bamboo

lathis (sticks) inside the house of Safer Ali and on being so beaten, said Majem Ali raised hue and cry. Hearing that, some of the neighbours though

reached there, but the accused persons did not open the door. The informant stated that later when he came to know about the occurrence, he came

to the place of occurrence and saw his cousin brother, Majam Ali lying dead on the floor inside the house of Safer Ali.

3. On receipt of the aforesaid ejahar on 13.06.2008, the In-Charge of Bondihana Out Post under South Salmara Police Station registered the General

Diary Entry No. 147 dated 13.06.2008 at 8.30 a.m. and took up the investigation. He further forwarded the ejahar to the Officer In-Charge of South

Salmara Police Station for registering a case. The Officer In-Charge, South Salmara Police Station received the said ejahar vide General Diary Entry

No. 212 dated 14.06.2008 and registered the said ejahar as South Salmara Police Station Case No. 186/2008 under Sections 302/342/34 IPC (Exhibit-

4). Later on, South Salmara Police Station Case No. 186/2008 stood transferred to Fokirganj Police Station and on 05.05.2009 the same stood

renumbered as Fokirganj Police Station Case No. 78/2009 under Sections 302/342/34 IPC, corresponding G.R. Case (FKJ) No. 78 of 2009.

4. During the course of investigation, the Investigating Officer visited the place of occurrence and drew the sketch map (Exhibit-5). He also recorded

the statements of the witnesses under Section 161, Code of Criminal Procedure, 1973 (Cr.P.C., in short). Inquest of the dead body of the deceased,

Majam Ali was done by an Executive Magistrate on 13.06.2008 and the Inquest Report (Exhibit-1) was prepared. After the inquest, by preparing the

Dead Body Challan (Exhibit-2) the body of the said of the deceased was sent for post-mortem examination on 13.06.2008 to Dhubri Civil Hospital,

Dhubri, wherein the post-mortem examination of the deceased, Majam Ali was done on 13.06.2008 by Dr. Soumitra Pal (P.W. 2). On completion of

the investigation and on obtaining the postmortem examination report of said Majam Ali (Exhibit-3), finding a prima facie case, the concerned

Investigating Officer on 18.08.2009 submitted the charge-sheet under Section 173 Cr.P.C in Fokirganj Police Station Case No. 78/2009 vide Charge-

Sheet No. 15/2009 (Exhibit-7) under Sections 147/148/149/ 342/302 IPC against the 7 (seven) accused persons named in the ejahar.

5. Appearances of all the above mentioned 7 (seven) accused persons were secured before the Judicial Magistrate, 1st Class, Dhubri and the copies

under Section 207 Cr.P.C. were furnished to the accused persons. As the offences alleged under Sections 147/148/149/342/302, IPC were exclusively

triable by the Court of Sessions, the JMFC, Dhubri by an order dated 20.01.2010 committed the case record of said G.R. Case (FKJ) No. 78/2009 to

the Court of learned Sessions Judge, Dhubri and on receipt of the same, the said G.R. Case was registered as Sessions Case No. 155/2010 in the

Court of learned Sessions Judge, Dhubri. Thereafter, the learned Sessions Judge, Dhubri after hearing the learned counsel for the parties and on

perusal of the case records, framed 2 (two) charges against the 7 (seven) Nos. of charge-sheeted accused persons, one under Section 342 IPC for

wrongfully confining Majam Ali in the house of Safer Ali in furtherance of their common intention and under Section 302/34 IPC for committing

murder by intentionally causing the death of Majam Ali in furtherance of their common intention.

6. The charges so framed were read over and explained to the accused persons and they pleaded not guilty and claimed to be tried. During the course

of the trial, 11 (eleven) witnesses including the Investigating Officer and the Medical Officer, who conducted the post mortem examination of the

deceased Majam Ali, were examined by the prosecution. The defence did not adduce any evidence. However, the defence cross examined the

prosecution witnesses. During their examinations under Section 313, Cr.P.C. all the accused persons pleaded themselves as innocent.

7. After the conclusion of trial, the learned Sessions Judge, Dhubri by the impugned judgment and order dated 16.08.2014 passed in Sessions Case No.

155/2010 found the accused persons, appellants herein, namely, Safer Ali, Nowsad Ali and Noidar Ali, guilty of the charges under Section 342, IPC as

well as under Section 302/34, IPC and they have been sentenced as above. However, the learned Sessions Judge, Dhubri by the said judgment and

order dated 16.08.2014 had acquitted the remaining accused persons, namely, Taser Ali, Hayet Ali, Hashem Ali and Md. Sanesh Ali on benefit of

doubt due to insufficiency of evidence against them.

8. We have heard Mr. Ziaul Alam, learned counsel for the appellants, Mr. Hrishikesh Sarma, learned Additional Public Prosecutor, Assam for the

State and Mr. Abdus Sabur Choudhury, learned counsel for the respondent No.2/ informant.

9. Mr. Alam, learned counsel for the appellants has submitted that there are inconsistencies in the evidence of the witnesses and the prosecution has

failed to prove the offence of murder against the accused-appellants beyond all reasonable doubt. Mr. Alam has further submitted that the some of the

prosecution witnesses had improved their versions before the learned Trial Court. There is doubt about the presence of the informant (P.W.2) at the

place of occurrence at the relevant point of time where the alleged incident took place. There are also doubts about the place of recovery of the body

of the deceased. A scrutiny of the evidence on record goes to show that the injuries sustained by Majam Ali were the result of blunt instrument and no

sharp cutting weapons were used. The prosecution has failed to bring any motive or intention on the part of the accused persons to cause the injuries

on the deceased and that there was no animosity between the accused persons and the deceased.

10. Per contra, Mr. Sarma, learned Additional Public Prosecutor, Assam, has submitted that the prosecution has been able to prove the case beyond

the reasonable doubt against the accused-appellants. He has further submitted that the versions of the prosecution witnesses were consistent and

there is not an iota of doubt as regards the place of recovery of the body of Majam Ali. It is stated by Mr. Sarma that there was wrongful

confinement of Majam Ali by the accused persons and by inflicting blows to him, their intention had been clearly reflected of committing murder of

Majam Ali, for which the accused appellants have been accordingly convicted and sentenced. Therefore, Mr. Sarma submits that the impugned

judgment and order of the learned of Trial Court does not call for any interference.

11. In order to appreciate the rival contentions of the parties, it would be apposite to peruse the evidence on record and on perusal, it is found that the

deceased died on 12.06.2008 due to injuries sustained by him. After recovery of the dead body, the inquest was done upon it vide Exhibit-1 and

thereafter, the body was sent for post-mortem examination. P.W.2, Dr. Soumitra Pal, who was working as S.D.M.O. at the Civil Hospital, Dhubri

conducted the post mortem examination on the dead body of Majam Ali, a Male of 27 years, pursuant to the dead body challan (Exhibit-2) dated

13.06.2008 in reference to Bondihana Out Post G.D. Entry No. 147 dated 13.06.2008. Upon his examination said autopsy doctor, P.W.2 found the

following injuries over the dead body of said Majam Ali:

1. One bruise near the right shoulder joint.
2. Bruise near the left eyebrow.
3. Haematoma over the lower part of left elbow joint
4. Left radius & ulna fracture.
5. Haematoma in the upper part of left knee joint.
6. Fracture femur at the same place.

Said autopsy doctor P.W.2 had opined that the injuries were ante-mortem in nature and the death was due to shock and haemorrhage as a result of

the injuries sustained by the deceased. He proved the post-mortem examination report (Exhibit-3) and also proved his signature Exhibit-3(1) as well as

the signature of the then Joint Director of Health Services, Dhubri Exhibit-3(2) on it. In his cross-examination, the P.W.2 stated that amongst the

injuries, the fracture on femur of the deceased Majam Ali could be regarded as a fatal injury.

12. P.W.1, Kismat Ali, was the brother of the deceased. He stated that he knew the accused persons as they were co-villagers. The occurrence took

place about 2/3 years ago. On the day of occurrence, he had gone to the market where he was informed by a person that a commotion had taken

place towards his house. Then, P.W. 1 along with Fulchand, Nidan Ali and Jafar Ali

came to his house. He heard that the accused persons Safer Ali, Noidar Ali, Nowsad Ali, Tafer Ali and Hayad Ali, etc called his brother Majam Ali from his house to the house of the accused, Noidar Ali and therein, his brother was assaulted. He then went to the house of Noidar Ali, saw many people reaching there and found that his brother was being assaulted behind the closed door at Noidar Ali's house. Hearing commotion, he went there and saw his brother, Majam Ali lying there in a serious condition. He deposed that Majam Ali sustained injuries on his whole body and that Safer Ali, Noidar Ali, Nowsad Ali, Tafer Ali and Hayad Ali and some others fled from there through the window. Thereafter, he informed the matter over phone to the police and his brother, Jahan Uddin (P.W. 5) who lodged an ejahar. Subsequently, police came and Magistrate conducted inquest of the dead body of Majam Ali and he put his signature on the Inquest Report (Exhibit-1).

During cross-examination, the P.W. 1 stated that the house of Taher Ali, Azibor Rahman, Moksed Ali @ Kakchur, Islam Uddin, Safer Uddin, Sanowar Ali, Md. Master were situated nearby to the place of occurrence. Before his arrival at the place of occurrence, 50/60 persons arrived there and due to the darkness he could not identify all the persons except the aforesaid persons and stated that he was informed about the incident by one Somesh Ali.

13. P.W. 3, Jamila Khatoon, deposed that she knew the accused persons as they were hailing from the same village and the deceased Majam Ali was her related brother. In the evening at about 6 p.m. on the date of the incident, Majam Ali came to her shop which was situated in her house to purchase Bidi and after such purchase, Majam Ali left for his house. After sometime of leaving her shop, on hearing cries from the house of the accused Noidar Ali, she went to the house of Noidar Ali, but she was not allowed to enter inside and only in the next day morning she heard that Majam Ali died in the house of Noidar Ali.

In her cross-examination, she denied the suggestion that she did not go to the house of Noidar Ali and she was not allowed to enter the house of Noidar Ali. She found some people at the house of Noidar Ali but due to darkness she could not identify them.

14. P.W. 4, Esub Ali, stated that the accused hailed from his village and the

deceased was his related brother. On the date of the incident, at about 7 p.m., he was at his house and he heard cries from the house of the accused, Noidar Ali. Hearing cries he went to the house of Noidar Ali and he found the doors of Noidar Ali's house closed. He found the accused, Noidar Ali, in front of his house but Noidar Ali did not allow him to enter into the house. He stayed nearby the place then and within a short time, a number of people assembled at the place and they asked Noidar Ali to open the doors. The doors were then opened and they entered into the house of Noidar Ali. They found Majam Ali lying on the ground in a serious condition. It was found that there were fractures on the leg and hand of Majam Ali and there were injuries also by the side of his chest. After his entry into the house of Noidar Ali, he found Safer Ali and Nowsad Ali there and thereafter, they left the scene. It was in the next morning only, he came to know that Majam Ali expired. Hearing the aforesaid news, he went to the house of Noidar Ali and found the dead body of Majam Ali there.

During his cross-examination, P.W. 4 stated that the houses of the persons, namely, Taher Ali, Hussain Ali, Ajibor Ali, Sabor Ali, Eklas Ali, Md.

Master, Sanowar Hussain were situated in and around the house of Noidar Ali. He stated that the accused Safer Ali and his father, Noidar Ali resided

separately within the same compound. He denied the suggestion that he did not tell before the police that he found Majam Ali in an injured state,

having fractures on his leg and hand and also found injuries by the side of his chest. When this part of the statement of P.W.4 was brought to the

notice of the Investigating Officer, P.W. 10, during his cross-examination he stated that P.W. 4, Esab Ali did not tell him that he found Majem Ali in

an injured state having fractures on the leg and hand and injuries by the side of the chest. P.W. 4 further deposed that before his arrival at the scene

no one had arrived there. It was only after his arrival at the scene, a crowd of about 20-30 people arrived there. All these persons asked Noidar Ali to

open the doors of the house. He was not able to tell who asked Noidar Ali to open the doors as because at that time it was dark. He stated that he

could not say who assaulted Majam Ali.

15. P.W. 5, Md. Jahan Uddin, was the informant of the case. He stated that the deceased Majam Ali was his cousin. At about 7/7.30 p.m. on the date

of the incident, he went to the house of Majam Ali. When he was having a talk

with Majam Ali and his family members, Safer Ali and Nowsad Ali came to the house of Majam Ali and called Majam Ali to their house stating that there was something to talk. After sometime, he heard cries from the house of Noidar Ali and hearing the cries; he along with some people went to the house of Noidar Ali and found the doors of the house closed. By that time, people started to gather at the scene and a commotion ensued. Then the accused persons opened the doors of the house and fled away. After entering inside the house, he and others found Majam Ali lying on the floor. He stated that Majam Ali suffered fractures in his hand and leg and also injuries on various parts of the body. He stated that accused persons, namely, Noidar Ali, Safer Ali, Nowsad Ali, Taher Ali, Sanesh Ali, Hashem Ali and Hayat Ali fled away from the scene having lathis in their hands. He proved the ejahar as Exhibit-4 as well as his signature therein. In his cross-examination, P.W.5 stated that the houses of Taher Ali, Hussain Ali, Ajibor Ali, Saber Ali, Ekrass Ali and Sanowar Ali were situated near the place of occurrence. About 50/60 people gathered at the scene before his arrival at the place of occurrence but he could not identify as the incident had taken place at night. He also could not say the circumstances under which Majam Ali was assaulted. It was in the morning of the next day he lodged the ejahar at the Bondihana Out Post. He further stated that the incident was not informed to the police station on the night of the incident. He denied the suggestion that during investigation, he did not state before the police that on the date of the incident and at about 7/7.30 p.m. he went to the house of the deceased Majam Ali and started to talk with Majam Ali and his wife and thereafter, Nowsad Ali and Safer Ali came to the house of Majam Ali and called Majam Ali to their houses. When this part of the cross-examination was brought before the Investigating Officer, P.W.10, during his cross-examination he stated that P.W.5 did not tell him during the investigation that on the date of the incident P.W.5 went to the house of his cousin brother Majam Ali and was having a talk with Majam Ali and his wife and thereafter, Nowsad Ali and Safer Ali came to the house of Majam Ali and called Majam Ali to their house.

16. P.W. 6, Safia Khatoon was the wife of the deceased, Majam Ali. She stated that she knew the accused persons. On the date of the incident at about 7 p.m. she and her husband were having a talk with Jahan Uddin (P.W.5).

At that time the accused persons, Safer Ali and Nowsad Ali came to their house and called her husband Majam Ali to their house. After 30 minutes, she heard cries from the house of the accused persons and hearing the cries, she, Jahan Uddin (P.W.5) and other persons went to the house of the accused persons. There she found that the doors of the house were closed. By that time, people from the neighbourhood gathered at the scene and there was a commotion. Thereafter, the doors of the house were opened and the accused persons in the dark fled away carrying lathis and falah in their hands. Inside the house, they found her husband lying on the floor. At that time, he was dead and they found injuries in his person. Thereafter, the ejahar was lodged; the police came and took the dead body of her husband. Her statement was recorded by the police.

During her cross-examination, she stated that she did not see the assailants of her husband. She further stated that Safer Ali and Nowsad Ali used to reside in the same compound but in different houses. Though a number of persons gathered at the said place but she could not identify all of them due to darkness. She denied the suggestion that during investigation, she did not state before the police that accused persons fled away from the scene carrying lathis and falah in their hands. This witness stated that she did not visit the place of occurrence during the night. This part of the cross-examination was brought to the notice of the investigating officer, P.W.10, during his cross-examination and P.W.10 stated that P.W.6 did not say that she with Jahan Uddin went to the house of the accused persons and accused persons fled away from the scene carrying lathis and falah in their hands.

17. P.W.7, Kalimuddin Ahmed, in his examination-in-chief stated that he knew the deceased Majam Ali and also the accused persons. The incident had taken place on 12.06.2008 at about 7/8 p.m. At that time, on hearing the cries from the house of Noidar Ali he went there and after his arrival at the said house, he found that Noidar Ali, Nowsad Ali and Kafer Ali were leaving the house. He further found that Majam Ali was lying on the floor in an injured state and he was not in a position to speak. He left the scene thereafter and returned to his house. The house wherein Majam Ali was found belonged to Noidar Ali.

During his cross-examination, P.W.7 stated that there was darkness in the area.

Though a number of persons gathered at the scene, he could not identify them due to darkness. He also stated that Safer Ali and Noidar Ali used to reside in the same house but in different rooms. He found Majam Ali inside the house of Noidar Ali. He denied the suggestion that after his arrival at the house of Noidar Ali, he did not find Noidar Ali, Nowsad Ali and Safer Ali were leaving in the house.

18. P.W.8, Moksed Ali, in his examination-in-chief stated that he knew the accused persons as well as the deceased. He did not see the incident.

After the incident he visited the place of occurrence which was the house of Noidar Ali and therein, he found Majam Ali in an injured state having injuries on his leg and hand. At that time, Majam Ali was not in a proper sense and uttered the word 'fatherâ?? and â??motherâ??. He found a number of people who gathered at the house of Noidar Ali but he did not ask anybody about the incident.

In his cross-examination, P.W.8 stated that Majam Ali did not reply to any of his questions when he asked him as Majam Ali was not in a position to speak. He heard from the people that the dead body of Majam Ali was found in the bank of the river.

19. P.W. 9, Tilok Ram Verma, the In-Charge of Bondihana Police Out Post at the relevant point of time stated that on 12.11.2008, he was entrusted with the investigation of the case and on being so entrusted, he perused the case diary and came to know that the previous Investigating Officer visited the place of occurrence and recorded the statements of the witnesses. But some of the accused persons were not arrested till then. He took steps to apprehend those accused persons and out of them, he could arrest the accused Somesh Ali. On being transferred, he handed over the case diary to the then officer In-Charge of South Salmara Police Station.

20. P.W.10, Aditya Kalita, deposed that on 13.06.2008, he was posted at Bondihana Police Out Post in the capacity of In-Charge. Having received one written ejahar from Jahan Uddin, he recorded the same in a General Diary Entry vide G.D. Entry No. 147 dated 13.06.2008. By sending it to South Salmara Police Station for registration of a case, he started the investigation by proceeding to the place of occurrence. There, he prepared the sketch map (Exhibit-5). He also proved the extract copy of the G.D. Entry as Exhibit-6. He examined the witnesses and done the inquest of the dead

body. After inquest, the dead body was sent for the post-mortem examination. Thereafter, on being transferred he handed over the case diary to the

Officer InCharge of South Salmara Police Station.

During his cross-examination, P.W.10 stated that he did not obtain the signatures of the persons in and around the place of occurrence on the sketch

map. The inquest was conducted in Dhubri Civil hospital. He further stated that P.W.1, Md. Kismat Ali, during investigation did not tell him that he

saw the injuries on the body of the deceased Majam Ali. P.W.1 during investigation did not tell him that accused persons, Safer Ali, Noidar Ali and

Nowsad Ali were present and he did not see them. P.W.1 did not tell him that some persons left through the window of the house. This part was put

to P.W.1 during his cross-examination earlier by way of suggestions by the defence which P.W. 1 had denied.

21. P.W.11, Bhabesh Chandra Biswas, stated that he was posted at Bandihana Police Out Post on 13.08.2009 in the capacity of In-Charge and he

was entrusted in the investigation of the case on that date. During investigation he collected the post-mortem examination report and on completion of

the investigation, he submitted the charge-sheet which he exhibited as Exhibit-7.

22. On an analysis of the above evidence brought by the prosecution on record, it can be seen that nobody had witnessed the actual assault on Majam

Ali at the hand of any of the three accused persons. It was only after hearing a commotion from the house of the accused Noidar Ali, P.W.1, P.W.3,

P.W.5, P.W.6 and P.W.7 had gone near the house of Noidar Ali. As per the version of P.W.4, he was the first to arrive at the scene and nobody else

had come to the scene at that point of time. It was only after his arrival the people started gathering at the spot. He stated to have gone to the house

of Noidar Ali after hearing cries from the house of Noidar Ali. P.W.1 stated that while he was in the market he was informed of the commotion at

their house and on being so informed of the commotion, he went to Noidar Ali's house and by that time, lots of people had already gathered there.

Similarly, P.W.3 appeared to have arrived in the house of Noidar Ali when some people were already there. Before the arrival of P.W.5 at the place

of occurrence, there were as many as 50/60 people at the scene. P.W.6 stated to have gone to the place of occurrence along with P.W.5. P.W.7

arrived at the scene when there were a number of persons already there. P.W. 4

who was the first to arrive at the scene found Noidar Ali in front of his house and when he was not allowed to enter into the house, he stated to have stayed near the place. Subsequently, when a number of people assembled at the scene, Noidar Ali was asked to open the door. P.W. 3 though went to the house of Noidar Ali on hearing commotion did not state what happened thereafter and she stated that she heard about the death of Majam Ali at the house of Noidar Ali in the next morning only. In such view of the matter, the evidence of P.W. 3 cannot be relied upon for corroboration.

23. On examination of the injuries sustained by Majam Ali, it appears that he sustained one bruise injury near the right shoulder joint, one bruise injury near the left eye-brow. There was haematoma in the upper part of the left knee joint and the femur was fractured in the same place. There was haematoma over the lower part of left elbow joint. Fractures were also seen on left radius and ulna. All these injuries were ante-mortem in nature and Majam Ali died due to shock and hemorrhage as a result of injuries sustained by the deceased.

26. But such minor inconsistencies and discrepancies as well as contradictions notwithstanding, it is the evidence of P.W.6 which cannot be said to be discredited. She being the wife of the deceased, Majam Ali was the most natural witness to be present in the house of the deceased at the relevant point of time. Her evidence to the effect that on the date of incident at about 7-00 p.m. when she and her husband were having a talk with Jahan Uddin (P.W.5) the accused persons, Safer Ali and Nowsad Ali came to their house and called her husband, Majam Ali to their house cannot be said to be not cogent, unreliable and untrustworthy.

That part of the evidence of P.W.6 stood the test of cross-examination. Merely because there was some contradiction in the evidence of P.W. 5 in that respect that does not mean that the evidence of P.W. 6 also stood contradicted as a consequence in certain part in the absence of any examination by the defence. What is found that to the extent that the accused persons, Safer Ali and Nowsad Ali came to their house and called her husband, Majam Ali to their house remained unshaken.

27. The circumstances thereafter, as discernible from the evidence on record, indicate that hearing hue and cry from the accused persons, a crowd gathered near the house of accused persons and included amongst them were

P.W. 1, P.W. 3, P.W. 4, P.W. 5 and P.W. 7. The witnesses, P.W. 1, P.W. 3, P.W. 4 and P.W. 5 were also consistent in saying that initially, they found the doors of the house of the accused persons closed and they were not allowed to enter into the house. P.W. 4 who was the first to arrive at the spot had found accused Noidar Ali outside the house initially. On persistent demands of the crowd gathered therein, the doors of the house of the accused persons were opened. It is evident that after the doors being opened the accused-appellants were seen leaving the place where the deceased was found lying in an injured condition i.e. the house of Noidar Ali with lathis, etc. In the circumstances as indicated above, there remains no room for doubt that the accused persons, Safer Ali and Nowsad Ali came to the house of the deceased and called Majam Ali to their house and in their house, these two accused persons with the knowledge of their father, Noidar Ali attacked Majam Ali with lathis, etc. and inflicted blows on the person of Majam Ali by closing the doors of the house and when on hearing cries, a crowd gathered outside their house, they fled away from the house. Thereafter, the crowd gathered outside entered inside the house of the accused and found Majam Ali in a seriously injured condition sustaining injuries on various parts of the body. P.W. 5 specifically stated that he found Majam Ali with fractures in leg and hand and other parts of his body. This part of the evidence of P.W. 5 was not discredited though the evidence of P.W. 4 in that respect was challenged by the defence during the trial. In the face of these evidence, there can be no reason to doubt that all the three accused had acted in furtherance of their 'common intention', the 'common intention' being to inflict injuries to Majam Ali as there was element of participation of all the accused appellants in the doing of the criminal act.

28. The injuries allegedly received by Majam Ali were on the lower part of his body. As per the post mortem examination report of the deceased Majam Ali (Exhibit-3), the total number of injuries found on his person was six and out of those, two were bruise injuries. The other injuries were hematoma on left elbow joint and in the upper part of left knee joint. There were fractures of left radius & ulna as well as of femur in the upper part of the left knee joint. There was no grievous injury found on the upper part of the body. The cause of death has been shown to be shock and hemorrhage as a result of the injuries sustained by the deceased and as per the

evidence of the doctor (P.W. 2), only the fracture on femur i.e. the long bone between the hip and the knee, on the dead body of the femur could be regarded as a fatal injury. Hematoma is not an independent injury but is a consequence of another injury caused to a person. In that view of the matter, hematoma referred to as injury No. 3 and injury No. 5, are nothing but results of other injuries. The same are not regarded as fatal injuries, as per the evidence of the doctor (P.W. 2). On the other hand, the bruise injuries i.e. injury Nos. 1 and 2 were also not regarded as fatal, as per the evidence of the autopsy doctor (P.W. 2). In the availability of the above evidence on record, it can be found that it was the fracture of femur which had resulted in the death of the deceased, Majam Ali.

29. The vital issue for consideration is as to what offence the accused persons had committed and whether the case is covered under Section 302

IPC. The act of the accused is culpable homicide amounting to murder, as per the opinion of the learned Trial Court. From the definitions of culpable

homicide and murder, as provided in Section 299 and 300 of the Indian Penal Code respectively, it is clear that there is distinction between culpable

homicide and murder in the sense that a culpable homicide to be a murder, any one of the four situations mentioned in Section 300 of that Code must

be present. To sustain the charge of murder, the prosecution is required under the law to bring the case under any of the four clauses of Section 300,

even when none of the exceptions are pleaded. If the prosecution fails to discharge the onus in establishing any of those four clauses, the charge of

murder would not be made out and it can at best come under Section 299, Indian Penal Code. In the case of *S ubhash Shamrao Pachunde Vs. State of*

Maharashtra, reported in (2006) 1 SCC 384, it is observed by the Honâ??ble Supreme Court that the distinction between the offences of culpable

homicide and murder is the presence of special mensrea which consists of four mental attitudes in the presence of any of which the lesser offence

becomes greater. These attitudes are stated in Section 300 IPC as distinguishing murder from culpable homicide not amounting to murder.

30. In the case in hand it is the consistent evidence of the prosecution witnesses that it was the accused appellants who were inside the house with the

doors locked from inside and the house where the deceased was found belonged to one of the accused-appellant, Noidar Ali and the other two

accused viz. Safer Ali and Nowsad Ali were the sons of Noidar Ali. Thus, all the three accused-appellants only had the access to the house where the body of the deceased in an injured condition was found. It has also been evident that they used to reside in the same compound. Thus, there is no difficulty in coming to reach the conclusion that the accused appellants were the persons who had inflicted the injuries found in the body of the person of the deceased, Majam Ali after wrongfully confining him within their own house. Since the offence had been committed inside their house, the accused being the inmates of the house cannot get away by simply keeping quiet and offering no explanation in their examination under Section 313 Code of Criminal Procedure.

31. The blows appeared to have been delivered with lathis and in the lower part of the body of the deceased. It is not established from the evidence that any sharp weapon was used in inflicting the injuries on the deceased. The injuries sustained by the deceased were consistent with the blows of lathis. The accused persons after confining the deceased in their own house, had ample time and opportunity to attack on the vital parts of the body of the deceased including his head and upper part of the body with weapons or instruments of their choice yet they inflicted the blows in the lower part of the body which resulted in fractures of left radius and ulna as well as of femur in the upper part of the left knee joint and it was only fracture of the femur which was regarded as a fatal injury.

32. In order to convict the accused appellants of the offence of murder under Section 300 IPC, it has to be found that they had the intention of causing such severe injury on the femur of the deceased so as to cause shock and hemorrhage and also that they had the knowledge that such injury which they intended to inflict was likely to cause death. In the background of the case, considering nature of weapon used to inflict the injuries, the parts of the body where the injuries were noticed by the Doctor and the place where the injuries were inflicted, it is hard to suppose that they intended to cause such injury on the femur of the deceased by their beating which was likely to cause shock and hemorrhage leading to the death of the deceased.

33. Considering the evidences available on record, as noted above, we are of the view that the blows were not aimed to cause the death of the

deceased Majam Ali or with any positive intention to make it fatal for the said victim and, therefore, the case would also not fall under clause ""thirdly

of Section 300 IPC and consequently, Section 302 of the IPC has no application in the present case.

34. We, accordingly, alter the conviction of the three appellants from Section 302 IPC to Section 304 Part II read with Section 34 of the IPC. In that

view of the matter, we deem it appropriate to convert the impugned conviction under Section 302 IPC one under Section 304 Part II IPC, thereby,

allowing the appeal in part.

35. Considering the aforesaid facts and circumstances of the case, we are of the view that the interest of justice would be served if the sentence is

converted to rigorous imprisonment of 8 (eight) years each and to pay a fine of Rs. 5,000/- each, in default, to suffer further simple imprisonment for a

period of 3 (three) months each. In the light of the evidence on record, the conviction and sentence under Section 342 IPC upon the accused appellant

is maintained.

36. In terms of the impugned judgment and order dated 16.08.2014 passed by the learned Sessions Judge, Dhubri in Sessions Case No. 155/2010,

arising out of G.R. Case No. (FKJ) 78/2009, the fine to be realised from the accused appellants shall be paid to the family of the deceased Majam Ali.

Further, as per the observation and direction of the Trial Court dated 16.08.2014 passed in said Sessions Case No. 155/2010, the District Legal

Service Authority, Dhubri or the State Legal Service Authority, Assam shall award the adequate compensation to family of the deceased Majam Ali

for their rehabilitation, if not already paid.

37. With the above observation and direction this appeal is partly allowed to the extent above.

38. Registry shall furnish free copies of this Judgment to the accused appellants through the Superintendent of District Jail, Dhubri, Assam for their

necessary use.

39. Registry shall return the records of the trial Court to the Court of learned Sessions Judge, Dhubri with a copy of this Judgment.