

(2023) 03 GAU CK 0058
In the Gauhati High Court
Case No : Criminal Appeal No. 124 Of 2021

Prabin Rajbongshi And 2 Ors.

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 31-03-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304, 304I, 304II, 325, 326
Code Of Criminal Procedure, 1973 — Section 222, 313, 374(2)
Evidence Act, 1872 — Section 60

Citation : (2023) 03 GAU CK 0058

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : Manas Sarania, Saif Uddin Ahmed, Neha Rai, Bankim Sarma

Judgement

1. Heard Mr. M. Sarania, learned counsel for the appellants. Also heard Mr. Bankim Sarma, learned APP appearing for the State. Although notice of this appeal is duly served on respondent no.2, none appears on call for the respondent no.2.

2. This appeal under section 374(2) Cr.P.C. is directed against the judgment and sentence dated 12.04.2021 passed by the learned Sessions Judge, Udalguri in Sessions Case No. 89(DU)/2017, thereby convicting the appellants under section 304 Part-I IPC and sentencing them to undergo rigorous imprisonment for 10 (ten) years and to pay fine of Rs.2000/- each in default the appellants were further ordered to undergo rigorous imprisonment for a period of 6 (six) months.

3. In this order, the informant, who is also the deceased victim is referred to as "victim". The accused persons are referred to as the "appellants".

4. The prosecution case in brief is that Boga Rajbongshi (victim), then injured and since deceased, had lodged an FIR on 12.07.2017, which was registered as Khairabari P.S. Case No. 27/2017 under sections 325/326/34 IPC with added section 302 IPC. In the FIR, it was stated that on 10.07.2017, at about 9.30 PM,

while he was going to his residence after working as daily wage labourer, on reaching the gateway of Prabin Rajbongshi (appellant no.1), the appellants attacked him from behind by means of dao and lathi and he had sustained serious injury and fell down on ground and that Hitesh Rajbongshi (PW-2) saw the incident and brought him to his residence. Thereafter, on 11.07.2017, in the evening, two boys of his village brought him to the police station and with the help of police, he was brought to Khairabari PHC and thereafter, he was referred to GMCH for better treatment and during treatment, he succumbed to his injuries.

5. Thereafter, postmortem was done on the dead body at GMCH and after conducting formalities including inquest. The case was investigated and the appellants, on surrendering before the Court, were sent to jail. Charge-sheet was submitted against the appellants under section 302/304 IPC. The charges were explained to the appellants, to which the appellants pleaded not guilty and claimed to be tried. Accordingly, charges were framed under section 302 IPC.

6. In course of trial, the prosecution had examined 10 (ten) prosecution witnesses (PWs for short), viz., Prakash Rajbongshi (PW-1), Hiteswar Rajbongshi (PW-2), Anjan Rajbongshi (PW-3), Golapi Rajbongshi (PW-4), Paresh Rajbongshi (PW-5), Dr. Pankaj Ch. Baishya (PW-6), Dr. Mitrajit Sarma (PW-7), Dr. Rituraj Chaliha (PW-9), Ganesh Basumatary (PW-9), and Mukul Ch. Sarma (PW-10). The prosecution had proved 7 (seven) exhibits, viz., Inquest Report (Ext.1), Medical Prescription of Khairabari PHC (Ext.2), Medical Certificate of Death (Ext.3), Postmortem Report (Ext.4), FIR (Ext.5), Sketch Map (Ext.6), and Charge-sheet (Ext.7).

7. On conclusion of the examination of the PWs, the appellants were examined under section 313 Cr.P.C. The appellants denied the charges against them and declined to examine any defence witness. The learned Sessions Judge, Udalguri had framed the following point for determination - "Whether the accused committed the murder of victim by intentionally causing his death?"

8. The learned trial Court, relying on the discussions and evidence of PW-6, PW-7, PW-8 and PW-9, held that the deceased had sustained grievous injuries before his death and such injury was sufficient in ordinary course of nature to cause the death of a person and it was held that the ante-mortem injury suffered by the victim by blunt force impact was sufficient to cause death in ordinary course of nature.

9. The learned trial Court by relying on the evidence of PW-2, PW-3, PW-4, PW-5, PW-8 and PW-10, held that PW-2 was the eye witness, who had described the assault made by the appellants and arrived at a conclusion that the appellants had caused injuries on the vital regions of the body, which are sufficient to cause death of a person. It was also held that there was no contradiction of the evidence of the PWs and it was held that the prosecution had discharged the burden of proving the case beyond all reasonable doubt. The plea of the defence counsel that the victim had actually sustained injury due to falling on the road as

he was in drunken state and that the FIR was lodged out of grudge were rejected and it was held that the appellants were guilty of causing blow by stick on the backside of the head of the victim. Accordingly, in view of the provisions of section 222 Cr.P.C., all the three appellants were convicted of committing the offence under section 304 Part-I IPC. Accordingly, the appellants were convicted and they were sentenced to undergo imprisonment for 10 years, as already indicated hereinbefore.

10. The learned counsel for the appellants has taken pains to refer to the case records and had submitted that if the evidence of PW-1 is to be believed, PW-2 could not have been an eye witness. It was submitted that the evidence against the appellant was not direct and therefore, the acceptance of evidence was contrary to the provision of section 60 of the Evidence Act, 1872. It was also submitted that the knowledge of the PW-5 was based on the information given to him by the PW-2 and accordingly, it is submitted that the evidence of PW-5, being hearsay, ought to be discarded. It is also submitted that the PW-2 did not give any evidence about use of any weapon of assault by the appellants and accordingly, it is submitted that the specific act committed by the individual appellants of committing murder of the deceased was not proved. It is submitted that there is an unexpected delay of 2 (two) days in lodging of the FIR by the victim and accordingly, it is submitted that the victim got sufficient time to frame the appellants because of previous enmity between the victim and the appellant no. 2 as the appellant no. 2 had enticed away the wife of the victim for which the victim and his family members including PW nos.1 to 5 had a grudge against the appellants.

11. Referring to the evidence of PW-3, the learned counsel for the appellants has submitted that the PW-2 had taken the victim to the Police Station, then sent him to PHC, from where he was sent to GMCH, where he was admitted on 12.07.2017 and he died on 14.07.2017. In the said context, it is submitted that on the date of alleged incident, i.e. on 10.07.2017, no GD Entry was made and that the PW-8 examined by the prosecution also did not refer to any GD Entry. Moreover, the PW-1 had stated in his evidence that the deceased victim was taken to his own house and though the victim was allegedly assaulted on 10.07.2017, he was admitted in GMCH only on 12.07.2017 and accordingly, it is submitted that the delay in taking medical help had actually caused death and that assault, if any, was not the proximate cause of death of the victim.

12. It was further submitted that PW-1 to PW-5 were all closely related to the victim for which their evidence was not believable and required more close scrutiny. It was submitted that the PW-1 and PW-5 were the elder brothers of the deceased, PW-2 was the nephew of the deceased, PW-3 was the relative of the deceased, and PW-4 is the sister-in-law of the deceased, i.e. wife of PW-1. Hence, it is submitted that the learned trial Court had relied on the testimony of the interested or partisan witnesses. Accordingly, it is submitted that the prosecution has not been able to establish any case against the appellants.

13. In support of his submissions, the learned counsel for the appellants has cited the following cases, viz., In support of his submissions, the learned counsel for the appellants had cited the following judgments: (1) Md. Ajmot Ali v. The State of Assam, AIR 2022 SC 5420, (2) Sardul Singh v. State of Haryana, (2002) 8 SCC 372, (3) Sri Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233, (4) Vadivelu Thevar v. State of Madras, AIR 1957 SC 614, (5) Nachhattar Singh & Ors. v. The State of Punjab, (1976) 1 SCC 750, (6) Kailash Gour & Ors. v. State of Assam, (2012) 2 SCC 34, (7) Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808, (8) State of Uttar Pradesh v. Wasif Haider & Ors., (2019) 2 SCC 303, (9) Dilawar Singh v. State of Delhi, (2007) 12 SCC 641, (10) State of Madhya Pradesh v. Ratan Singh & Ors., (2020) 12 SCC 630, (11) Luku Desari & Ors. v. State of Assam, (2013) 3 NEJ 82: (2012) 0 Supreme(Gau) 1268, (12) Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, (13) Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr., (2011) 2 SCC 532, (14) Vidender v. State of Delhi, (1997) 6 SCC 171, and (15) Jarnail Singh & Ors. v. State of Punjab, (2009) 9 SCC 719.

14. Per contra, the learned APP had submitted that the reading of evidence of all the PWs lead to an only conclusion that the appellants were the only persons who had been seen assaulting the deceased by means of lathi as well as dao, which was corroborated by the evidence of the Medical Officer (PW-8), who had stated to the effect that the injury sustained by the deceased was sufficient to cause death in ordinary course of nature and that the deceased had suffered blunt force impact. It is also submitted that PW5 had categorically stated that he deceased was assaulted with lathi which is stated to have been matching with the postmortem report, wherein the medical opinion was that the deceased had suffered blunt force impact. It is submitted that even in the FIR, the victim had himself referred to the use of dao and lathi to by the appellants to assault him. It is also submitted that there was no independent witness who had seen the assault, which was made in the night at about 9.00- 9.30 pm., and as per the evidence of the PW-4, by that time, she was already sleeping and the place of occurrence was near the gateway of the house of the appellants. Hence, it is submitted that the prosecution has been able to prove the case beyond any reasonable doubt. Accordingly, the learned Addl. P.P. prays that the appeal be dismissed.

15. Considered the submissions made by the learned counsel for the appellant including cases cited by him. Also considered the submissions made by the learned Addl. P.P. and perused the LCR.

16. The victim, Boga Rajbongshi, who was then in an injured condition, had lodged the FIR on 12.07.2017, wherein it was stated that the appellant no.1, who is the father and the appellant nos. 2 and 3, who are the sons of the appellant no. 1, had attacked him by dao and lathi from behind at about 9.30 pm while he was coming from Amrakona after doing labour work, as a result of which he had suffered grievous injuries and fell down on the ground. Hiteswar

Rajbongshi (PW-2), who saw him lying on ground, brought the injured victim to his (i.e. victim's) house. After that, on 11.07.2017, in the evening two boys of his village took him to police station. With the help of Khairabari P.S., his medical examination was done at P.H.C. and from there he was referred to GMCH.

17. As per the prosecution case, the victim was taken to GMCH on 12.07.2017, and in course of his treatment, he died there on 14.07.2017. Thereafter, his post-mortem examination was conducted.

18. The gist of examination and cross-examination of the PWs, is as follows:-

a. PW-1, Prakash Rajbongshi: In his evidence-in-chief, the PW-1 had stated that the victim who had expired on 14.07.2017 as a result of head injury, was his brother. At about 9.30 pm on the date of occurrence, he was informed by Hiteswar Rajbongshi (PW-2) of his village that his brother Boga Rajbongshi was badly assaulted by the appellants and left him front of his house. He went to the place of occurrence and his brother, who was in a position to speak, informed him that the appellants had assaulted him. With the help of his son, he brought the victim to his (i.e. victim's) house. First aid was provided to the victim and on the next day, when the condition of victim did not improve, he was taken to Khairabari Civil Hospital, from where his brother was referred to GMCH for better treatment. In the said regard, Boga had lodged the FIR with police on 12.07.2017 and after collecting necessary medical expenses, they went to GMCH. On 14.07.2017, his brother Boga had succumbed to his injuries at GMCH. He was present at the time of conducting inquest over the dead body. He proved the inquest report (Ext.1), and his signature Ext.1(1). During his cross-examination, PW-1 had stated that four years before the incident, the wife of victim had eloped with Jayanta (appellant no.2) and was staying with him illegally as his wife. In the said regard, a village meeting was held and the people had asked the victim to take back his wife, but he refused as she had eloped. He saw fracture injury on the head of victim and he also suffered lacerated injuries in his back, and he also had injuries on his legs as he could not walk and had to be dragged upto his house. PW-1 had denied that the victim had lodged a false FIR as Jayanta (appellant no.2) had eloped with his wife. It was denied that on the date of occurrence, the victim was going home from work in a drunken condition and he stumbled and fell down on ground and sustained injuries on his head, which resulted in his death.

b. PW-2, Hiteswar Rajbongshi: PW-2 is the eye witness to the assault made by the appellants. In his examination-in- chief, he had stated that on 10.07.2017, at about 9.00 - 9.30 pm, when he came out of the house in front of his main door to close the main gate of his garage he saw Prabin Rajbongshi (appellant no.1), Jayanta Rajbongshi (appellant no. 2) and one other person assaulting the victim in front of the gate of his house and the said victim fell down in the ground and blood was oozing out of his head. Then he asked the assailants why they were assaulting the victim, they responded by saying "let him die". Thereafter, the PW-2 informed the PW-1 about the incident, whereupon PW-1 came with him to

the place of occurrence and found victim lying seriously injured on the ground and also saw the "accused persons" standing there. In the meanwhile many people gathered at the place of occurrence. Later on, victim was taken to his brother's house for treatment and on the next day, the injured victim was taken to the Khairabari PHC and thereafter, he was shifted to GMCH for better treatment, where he succumbed to his injury on 14.07.2017. He had stated that when victim was lying injured, he was in a position to speak. In his cross-examination, he had stated that victim was his related uncle. He had also stated that he could not identify the third accused, who had fled away after seeing him. He had also stated that Jayanta (appellant no.2), after abducting the wife of victim, had married her and that even after abducting victim's wife, victim had cordial relation with appellant no.2. He had stated that in the village meeting penalty was imposed on appellant no. 2. It was stated that at the time of commission of offence, village people had gathered at the place of occurrence, so the "accused" could not escape. He had also stated that before the police, he had stated that the appellant nos. 1 and 2 and one other person were assaulting the victim. He denied that on the date of occurrence, victim was coming home from his place of work in a drunken condition and as it was raining heavily, he slipped and fell down on ground and sustained injuries. He denied that because appellant no. 2 had abducted the wife of victim and married her, a false case was lodged out of grudge.

c. PW-3, Anjan Rajbongshi: In his examination-in- chief, the PW-3 had stated that he did not see the assault, but had seen that the victim had suffered injuries on the back of his head and blood was dripping out. He brought medicine from a nearby pharmacy to treat the injury on the back of victim's head. He had taken the victim to the police station, where he had lodged an FIR and had narrated the incident. The victim was taken to Khairabari PHC on the next day for his treatment and when his condition did not improve, he was taken to GMCH for better treatment, where he had succumbed to his injuries. He had proved the inquest report (Ext.1), and his signature [Ext.1(2)]. In his cross-examination, PW-3 had stated that he did not witness the incident. However, he had stated that when he had gone to the house of Boga, he saw the head injury in the back side and blood was dropping from there and that he did not go to the place of occurrence.

d. PW-4, Golapi Rajbongshi: In her examination-in-chief, PW-4 had stated that she knew the victim as well as the accused persons. The occurrence took place in the month of July, 2017. While she and her family were sleeping at their house, at around 9.30 pm, PW-2 came to their house and informed that the victim, who is her brother-in-law, was assaulted by the accused and they were asked to visit the place of occurrence. She along with husband, son and daughter went and saw the victim lying on the ground in a pool of blood. After she saw the victim in that condition, she was about to faint so she returned home and after 2 (two) days, she heard that that the victim had succumbed to his injuries at hospital. In her cross-examination, she had stated that she did not witness the incident. She

had stated that Jayanta Rajbongshi (appellant no.2) had married the victim's wife after abducting her. She had stated that after abduction of his wife the relation between the victim and the appellants was not cordial. After the incident, she did not visit the house of the victim. She had denied that on the day of occurrence the victim fell while returning from work in a drunken state and sustained injuries and subsequently died at hospital. She had denied that as because the appellant no. 2 had abducted the wife of the victim, she had deposed falsely out of grudge that the appellants had assaulted the victim on the day of occurrence, which led to eventually death of the victim.

e. PW-5, Paresh Rajbongshi: In his examination-in-chief, PW-5 had stated that the informant (victim), who had died was his brother. He knows the accused. On 10.07.2017 at about 9.30 pm, he was not present at the spot when the occurrence took place. Next day his younger brother narrated the incident in the morning as how the victim was assaulted with stick by the accused. His brother told him that PW-2 had informed him that the accused persons were assaulting the victim in front of his home. On being informed, when his brother went to the place of occurrence, he saw the victim lying in front of his house and saw the head injury and blood oozing out of his head. On being asked, the victim had narrated that he was assaulted by the accused while he was returning back home in front gate of the house of PW-2, causing serious injury on head. PW-5 went to the pharmacy to bring medicines for giving first aid to the victim. The victim had filed the FIR and police sent him to Khairabari Civil Hospital for medical treatment and later on he was referred to GMCH where he died. In his cross-examination, he stated that he had not witnessed the incident. He had also stated that appellant no.2 had abducted wife of victim, who did not made any attempt to bring her back. He does not know about the relation between the victim and the accused after abduction.

f. PW-6, Dr. Pankaj Ch. Baishya: In his examination-in- chief, PW-6 had stated that he was posted as Medical Officer at Khairabari CHC and he had examined the victim and found head injury caused by physical assault and that he had referred him to GMCH. In his cross-examination, he had stated that he had examined the injury without any police reference case.

g. PW-7, Dr. Mitrajit Sarma: In his examination-in-chief, PW-7 had stated that on 12.07.2017, he was posted as PG Trainee at GMCH and he issued the death certificate of the victim. His cross-examination was declined.

h. PW-8, Dr. Rituraj Chaliha: In his examination-in- chief, PW-8 had stated that he had performed the post-mortem examination on the victim and he found that the death was due to coma as a result of injuries to the head. The injuries were ante mortem, caused by blunt force impact. In his cross-examination, he has stated that he had done the post-mortem examination and he had not mentioned about the weapon. He had stated that the injuries sustained by the deceased were sufficient to cause death in ordinary course of nature.

i. PW-9, SI Ganesh Basumatary: In his examination-in- Chief, the PW-9 had stated that on 17.07.2017, he was posted as the Officer-in-Charge of Bhangagarh P.S. and he had conducted the inquest on the dead body of the deceased in morgue of GMCH in presence of R. Chaliha, Professor and Head of the Department of Forensic Medicine, GMCH. In his cross-examination, he has stated that he did not investigate the case and he had only conducted the inquest on dead body of the victim.

j. PW-10, Mukul Ch. Sarma: PW-10 is the ASI of Police and was working in Tangla P.S. was deputed to depose in this case as the I.O. of the case, namely, Jagat Narzary, who had investigated the case and had submitted the charge-sheet had had expired by then. He had worked along with the said I.O. in Khairabari P.S. in the year 2017, he was acquainted with the handwriting and signature of the I.O. In his examination- in- chief, he had deposed regarding lodging of charge-sheet, registration of case and investigation by the I.O. including recording of statement of witnesses, conduct of inquest, preparation of sketch map of the place of occurrence, collecting the post-mortem report, and filing of charge-sheet against the appellants under section 302/34 IPC after completion of investigation. He had exhibited the FIR (Ext.5), signature of the then O/c. of Khairabari P.S. [Ext.5(1)]; sketch map of the place of occurrence (Ext.6); signature of the then O/c. of Khairabari P.S. [Ext.6(1)], Late Jagat Narzary, known to him; Charge-sheet (Ext.7), signature of the then O/c. of Khairabari P.S., Late Jagat Narzary [Ext.7(1)]. In his cross examination, PW-10 had stated that PW-5, Paresh Rajbongshi had stated before the I.O. that on 10.07.2017, at around 9.30-10 pm, his next door neighbour Hitesh Rajbongshi informed him that his younger brother Boga Boga Rajbongshi had been assaulted by Prabin Rajbongshi and his two sons Bhabesh and Jayanta Rajbongshi causing serious injuries on his person and threw the injured Boga Rajbongshi near the tempo garage of Hitesh Rajbongshi and at the time when Hitesh Rajbongshi came to see the tempo at that time he saw the accused persons were dragging the injured Boga Rajbongshi near his tempo and left him there.

19. From the evidence of the PWs, it appears that the PW-1, PW-4 and PW-5 are related to the victim. PW-2 is the eye-witness to the assault by the appellant nos.1 and 2 on the victim, but he could not identify the third accused person. PW nos. 1, 3, 4 and 5 were not eye-witnesses to the crime. Nonetheless, the PW nos. 1 to 5 had all seen the victim lying on the road with injury in the backside of his head and blood oozing out therefrom. When on the calling of the PW-2, the PW-1 came to the place of occurrence, he had seen the appellants. PW-2 had stated that as people of the village had gathered, the appellants could not escape. The description of injury caused at the back of head of the victim corresponds to the injury found during post mortem examination of the victim.

20. Insofar as the evidence regarding assault by the appellants is concerned, it is noted that in response to the question put by the learned counsel for the defence to PW-10, had elicited reply to the effect that PW-2 was an eye witness to the

assault made by the appellants. Therefore, minor discrepancy as to whether the appellants threw the victim, namely Boga Rajbongshi near the tempo of the PW-2 would not be so fatal that it would lead to discarding his evidence of having seen the appellants assaulting the victim, which caused his death.

21. In the FIR (Ext.5), it is mentioned by the victim that he was assaulted by the appellants by dao and lathi. But the PW-2, who was the eye-witness, did not state that the victim was assaulted with dao and lathi. In the said context, the Court is of the considered opinion that the lack of statement by the PW-2, who is the eye-witness, that the victim was assaulted by dao and lathi and the fact that the weapon of assault was not seized, would not be fatal because the victim-informant, in his FIR (Ext.5), had referred to the assault made by the appellants with dao and lathi. Nonetheless, the statement made by the PW-5 in his examination-in-chief that he was informed by the PW-1 that the appellants had assaulted the victim with lathi has to be discarded, being hearsay.

22. The learned counsel for the appellants had submitted that the place where the occurrence took place was differently stated by the prosecution witnesses. In the said context, it is seen that as per the evidence of PW-2, the victim was assaulted in the gateway to his house. As per the sketch map (Ext.4), the place of occurrence is shown on the road, which is in front of the house of the appellants and adjacent to the house and paddy field of the PW-2. The house of the appellants is opposite the house and paddy field of the PW-2, separated by the said road. The sketch-map (Ext.6) was prepared by the I.O. The PW-1 and PW-4 had seen the injured victim lying in the place of occurrence. However, the PW-5 had deposed that the victim was being assaulted in front of the house of PW-2. Thus, although it may appear that the PWs are referring to two different places of occurrences, but in fact, the place of occurrence is one. Nonetheless, minor discrepancy as to whether the appellants threw the victim, namely Boga Rajbongshi near the tempo of the PW-2 would not be so fatal that it would lead to discarding the evidence of PW-2, having seen the appellants assaulting the victim, which caused his death.

23. As per the evidence of PW-2, he had seen three persons assaulting the victim, being Prabin Rajbongshi (appellant no.1), Jayanta Rajbongshi (appellant no.2), but he could not see the third person assaulting the victim, who ran away after seeing PW-2. Nonetheless, the PW-1 saw the appellants when he had arrived at the place of occurrence and the said evidence could not be demolished during cross examination. Moreover, the victim, while alive, had named the appellants in his FIR. Therefore, the dispute raised by the learned counsel for the petitioner regarding the identity of the appellants, specifically of the appellant no.3, stands negated.

24. As per the evidence of PW-2, he had not only seen the assault by the appellant nos. 1 and 2 and a third person, but also seen the victim falling down and he had also seen blood oozing out of the victim's head. Moreover, during that same time, there was a brief conversation between the PW-2 and the accused

persons at the site of assault. Thereafter, the PW-2 called PW-1, namely Prakash Rajbongshi, who came and saw victim Boga lying in seriously injured condition and he had also seen the accused persons standing there. The PW-1 spoke to his brother and his victim brother told PW-1 that he had been assaulted by the accused persons. The injured Boga was taken to his own house and he was given first aid, but the condition of Boga did not improved and therefore, on 11.07.2017, he was taken to Khairabari Civil Hospital, where as per PW-6, he was given preliminary treatment and referred to GMCH for better treatment after administering one Tetanus Toxide, injectable analgesic and injectable antibiotics. As per evidence of PW-3, Anjan Rajbongshi, after hearing the incident from PW-1, he had gone to the house of PW-1 and saw that Boga was suffering from injuries on the back of his head and blood was oozing out. He went to the neighboring pharmacy, brought medicines to treat the injuries of Boga on the back of his head. PW-3 states that he had taken the injured Boga to Khairabari PHC for treatment, but as his condition did not improved, Boga was shifted to GMCH for better treatment. On the next day, PW-3 first took Boga to the police station where he lodged an FIR, then taken to Khairabari PHC and then he came with Boga to GMCH for his treatment, where in expired on 14.07.2017 and he was also present when inquest on the body of Boga was done. In course of his cross-examination, PW-5 has stated that he visited the house of Boga on the next morning of the incident and that Boga narrated to him about the incident that he deposed before the Court.

25. The PW-2, who is admittedly the eye witness, has seen three persons assaulting Boga. As per his statement made in examination-in-chief, he had brother of Boga with him to the place of occurrence and the brother of Boga saw Boga in injured condition and the accused persons were standing there. PW-1 states that he received information from PW-2 about the incident and PW-1 had deposed in his evidence-in-chief that on asking, his injured brother informed that he was assaulted by the accused persons. As per examination-in-chief of PW-4 she has stated that PW-2 had come to their home and they were informed that her brother-in-law Boga was assaulted by Prabin and Jayanta. As per examination-in-chief of PW-5, he has stated that PW-1 had informed him that all the three appellants herein had assaulted Boga with lathi. However, in the FIR, the injured Boga has stated that he was assaulted from behind by the appellants herein with dao and lathi and he fell down. Therefore there is no dispute with regard to the identity of the appellants and persons who has assaulted Boga.

26. As per the medical evidence, the PW-6 found head injury caused to Boga as a result of physical assault. PW-8, who conducted the post mortem over the dead body as reported a lacerated wound over the right lower occipital region 4 X 0.5 X 0.25 cm he has also found contused scalp over right eye occipital region, which is consistent with assault caused by blunt weapon. The PW-9 has also cited in the inquest report that there was injury on the back side of head of the dead body. Thus, from a conjoint reading of evidence of PW-6, 7 and 8, the victim had sustained grievous injury on the back side of the head by blunt force impact. The

PW-1, 2 and 3, 4 and 5 all saw blood oozing out of the head of Boga, therefore, the injury was sufficient in ordinary course of nature to cause the death of a person.

27. The learned counsel for the appellants had strenuously argued that when the victim was in an injured condition on 10.07.2017, he was not taken to any health centre or hospital and on 11.07.2017, he was first taken to police station and thereafter, sent to Khairabari PHC, but without any police requisition and then he was referred to GMCH for better treatment and on 12.07.2017, the victim came to the police station to lodge an FIR and then he was admitted to GMCH on 12.07.2017 and he had died on 14.07.2017. Hence, it is submitted that there is every possibility of negligence in giving prompt treatment, which might have resulted in the death of Boga and the injury was not a proximate cause of death, because the death occurred on the fifth day of assault.

28. There are two circumstances, which appears from the evidence of PW-1 and 2. Firstly, the appellants were armed with lathi and dao. The victim had fallen down after receiving head injury at the back of the head. The PW-2, who was the eye witness left the injured person on same condition on the road and went to the house of PW-1 to come with him to the place of occurrence. As per PW-2, when PW-1 came with him to the place of occurrence, the accused persons were present. Therefore, it appears that during the interregnum, when the PW-2 had gone to PW-1 and brought him to the place of occurrence, the appellants had not inflicted any further injury to the victim. Although blood was oozing out from the lower occipital region, no one deemed it appropriate to take the victim to hospital on 10.07.2017. Although on 11.07.2017, Khairabari PHC had referred the victim to get better treatment at GMCH, no one showed any urgency to get better medical treatment for the victim. On 12.07.2017, the victim had gone to the police station to lodge the FIR and then he came to GMCH for treatment and he died on 14.07.2017. Thus, it is apparent that no one had thought that the victim had suffered grievous injury, and was likely to cause his death. Moreover, as indicated above, although the appellants apparently had an opportunity to murder the victim, they kept standing at the place of occurrence as per the evidence of PW-2 till PW-1 came to the place of occurrence with PW-2. Hence, it can be culled out that although the victim died of blunt force impact resulting from head injury in the lower occipital region, but the appellants had no intention to kill the victim as only one lacerated injury was found on the back of the head of the victim and the lacerated wound of 4 X 0.5 X 0.25 cm, but for the death of the victim would not fall within the category of grievous injury. If there was any intention of the appellants to cause death of the victim, they would have inflicted assault by dao or by lathi at other vital parts of the body.

29. The cases cited by the learned counsel for the appellant is now examined as under:-

i. In the case of Md. Jabbar Ali (supra), the learned counsel for the appellant had referred to para-48 and 49, where credibility of the witness was discussed as the

victim had suffered simple injury. In the present case in hand, the injury caused to the victim was grievous because the PW-6 had found head injury caused by physical assault and that he had referred him to GMCH for better treatment. Moreover, the PW-8, the doctor who had conducted post-mortem examination on the victim had given evidence to the effect that death was due to coma as a result of injuries to the head, which were ante mortem, caused by blunt force impact and was sufficient to cause death. Therefore, the said case does not help the appellants.

ii. The learned counsel for the appellants had referred to para 8, 13 and 14 of the case of Sardul Singh (supra) also does not help the appellants because in this case, the un-impeached evidence of the PW-2 was to the effect that he had asked why they were assaulting the victim to which they responded by stating that "let him die". Therefore, it cannot be said that the appellants had no intention to kill the victim.

iii. The learned counsel for the appellants had referred to para 17 of the case of Nachhatar Sing (supra), it was cautioned that the prosecution case can never be "may be true" and that it must be covered by legal, reliable and un-impeachable evidence. The said case does not help the appellants because the evidence by PW-2, eye witness is supported by post-mortem report. Moreover, the FIR where assault by the appellants was reported, was lodged by the victim, who had subsequently died.

iv. The learned counsel for the appellants had referred to para 39, 40, 44 and 45 of the case of Kailash Gour (supra), and it was submitted that in this case the prosecution was unable to prove the motive of crime. In this case, the defence, while cross examining the PW nos. 1 to 5 has brought out that there was discord between the victim and appellant no.2 after the appellant no.2 had enticed away the wife of the victim. Therefore, in this case the motive was supplied by the appellants.

v. The learned counsel for the appellants had referred to para 23, 24 and 25 of the case of Wasif Haider (supra), to show that prosecution case was dismissed because of lapses in investigation. However, in this case, the lapses, if any, could not be culled out in course of cross-examination of PWs and could not also be demonstrated from facts and circumstances of the case.

vi. The learned counsel for the appellants had referred to para 9 of the case of Dilwar Singh (supra), and para 5 and 6 of the case of Ratan Singh (supra), where the delay in lodging the FIR was held to be fatal. The said cases do not help the appellants because in this case, on 10.07.2017, when the victim was assaulted, he was in a seriously injured condition. On 11.07.2017, he was taken to Khairabari PHC for treatment, from where he was referred to GHCH for better treatment. However, on the next day, i.e. on 12.07.2017, before going to GMCH, the victim himself had lodged the FIR. Therefore, in the considered opinion of the Court, the delay, if any, was properly explained.

vii. The learned counsel for the appellants had referred to para 151 to 154 of the case of Sharad Birdhichand Sarda (supra), to bring home the point that the circumstantial evidence should be established with all the facts and hypothesis of the guilt of the accused. The said case also has no application in this case because the PW-2 was an eye-witness and his evidence of having seen the appellant assaulting the victim is direct evidence and the ocular evidence tallies with the medical opinion expressed in the post-mortem report regarding injuries and cause of death. Therefore, the Court is unable to agree with the learned counsel for the appellants that the appellants were convicted on the basis of circumstantial evidence.

viii. The learned counsel for the appellants had referred to para 21, 22 and 23 of the case of Jarnail Singh (supra), to impress upon the Court that the chance witnesses must be closely scrutinized. The said case also does not help the appellants because in this case, the PW-2 was a natural witness as he is the neighbour of the appellants and that his house, paddy field and tempo garage is just adjacently opposite to the house of the appellants, and the said position is proved by the sketch map (Ext.6).

30. Thus, in this case the prosecution has been able to prove that the appellants had a reason to assault the victim because of the fact that the appellant no.2, Jayanta Rajbongshi had enticed away the wife of the victim, who started to live with him as his wife, and as per the contents of FIR, the victim has stated that the appellants were wanting to assault him for quite some time.

31. In view of the discussion above, the Court finds that the learned trial Court had rightly held that the appellants had assaulted the victim, and that they were jointly responsible for causing grievous injury on the victim, who later on succumbed to his injuries. Nonetheless, notwithstanding that the appellants had told the PW-2 that "let him die", yet it cannot said that that the appellants had assaulted the victim on any vital parts of the body with an intention to cause death. As per the statement made by the eye-witness, i.e. PW-2, he had left the place of occurrence to call the PW-1 and therefore, the appellants had enough time and scope to kill the victim and even when the PW-2 returned with PW-1, the victim, though lying on ground was in a position to speak. Although the PW had stated in his cross-examination that at the time of commission of offence, village people had gathered at the place of occurrence, so that "accused" could not escape. But no such villagers, who were eye-witness to the assault were examined as witness. Therefore, that part of evidence will not weigh over the fact that the assault by appellants did not continue after the victim had fallen down. Thus, although the appellants had assaulted the victim, which ultimately caused his death, but they had no intention to instantaneously kill the victim. The PW nos. 1 to 5, who had seen the injured victim, did not find his condition so grievous that he required immediate hospitalization on 10.07.2017. Although on 11.07.2017, Khairabari PHC had referred the victim to GMCH for better treatment, no one including the victim deemed it necessary to take the victim to

hospital for immediate treatment and till 12.07.2017, the petitioner was in a position to go to Khairabari P.S. and lodge the FIR. Therefore, till that time, no one had suspected the life of the victim to be in imminent danger. Therefore, the conduct of the appellants of not perpetrating assault on the victim after he had fell down and was reportedly alone is sufficient for the Court to hold that the appellants had no intention to kill the victim.

32. Hence, in view of the discussions above, the court is of the considered opinion that the conviction of the appellants is liable to be altered from section 304 Part-I IPC to be conviction under section 304 Part-II of the Indian Penal Code.

33. Resultantly, the sentence on the appellants is reduced from 10 years to 5 years each and they are also liable to pay fine of Rs.10,000/- each in default they will suffer rigorous imprisonment for another 6 months for offence committed under section 304 Part-II IPC.

34. Send back the LCR together with a copy of this judgment and order.

35. The Registry shall transmit a free copy of this judgment and order to the concerned jail where the appellants are lodged.