

(2007) 04 GAU CK 0007
In the Gauhati High Court

State of Tripura

APPELLANT

Vs

Nikhilesh @ Nikhil Chandra Esh and Others

RESPONDENT

Date of Decision : 05-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2007) 3 GLT 608

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.B. Misra, J.—Heard Mr. D. Sarkar, learned Public Prosecutor assisted by Mr. A. Ghosh, learned Counsel for the State/Appellant and Mr. D. Chakraborty, learned Counsel assisted by Mr. P. Chakraborty, learned Counsel for the respondents.

2. The present criminal appeal has been preferred by the State of Tripura u/s 378 of Cr.P.C. against the judgment and order dated 19.09.2001 passed by the learned Additional Judge, North Tripura, Dharmanagar in Case No. S.T. 11 (NT/D)/1999 acquitting the respondents/accused-persons from the offences and charges framed u/s 302 read with Section 34 of IPC.

3. The prosecution case as noted by the learned Additional Sessions Judge is that the accused-persons/respondents, namely, Nikhil Esh, Nitesh Esh and Monoranjan Paul on 14.12.1996 at about 2 p.m. at Ichailalcherra under the Churaibari Police Station in furtherance of their common intention committed the murder of Ratan Ghosh alias Gope while he had protested against the illegal felling of tree in the place of occurrence.

According to the F.I.R. and the charge-sheet, the victim Ratan, after reaching the place of occurrence, had found that the accused-persons/respondents had been felling a tree in a disputed land for which he had protested against their illegal act. At that very moment the accused/respondent Monoranjan Paul directed the

co-accused/co-respondent Nikhil to strike the husband of the informant and thereafter Nikhil had thrown his "Chulp" (spear) towards her husband and it had penetrated the lower portion of the abdomen of Ratan Ghosh.

4. The charge was framed u/s 302 read with Section 34 of IPC and the prosecution examined as many as 14 witnesses in all and has also proved some documents including one article (Chulpi) whereas defence produced none. However, from the trend of cross-examination of the witnesses and further from the examination of the accused-persons/respondents u/s 313 of Cr.P.C. it was revealed that the defence case was of total denial. According to the defence one Nityananda Das along with others had committed murder of Ratan Ghosh and they thereafter had lodged the instant case against the accused-persons/respondents with sinister motive because they had a long standing enmity with them.

5. Following three points were kept for determination of the case:

- (a) Whether Ratan Ghosh died on 14.12.96 and if so, whether his death was homicidal in nature?
- (b) Whether such death had been caused by the act of the accused persons in furtherance of their common intention?
- (c) Whether the accused persons' act was done for the cause of death of the victim Ratan Ghosh?

6. Accused Nitesh Kumar Esh was acquitted at the time of hearing u/s 232 of Cr.P.C. as there was no incriminating evidence against him. However, learned Additional Sessions Judge analyzed all the prosecution witnesses, materials on record and the points for giving benefit of doubt and for the purpose of acquitting the accused-persons as below:

(i) The informant who was the wife of the victim failed to state anything regarding the weapons which the accused-persons had been carrying in the place of occurrence. She totally kept mum over the point. Other witnesses also could not state anything regarding the weapons of this accused-persons.

(ii) It also appears from the case record that the informant rushed to the place of occurrence on hearing a hue and cry and according to the witness (P.W. 5) she had gone to the place of occurrence following her husband Ratan Ghosh. It means that she had not seen the incident right from the beginning. One Archana Nama whom the prosecution failed to produce before the Court as a witness had seen the incident. The informant failed to state as to why she had gone to the place of occurrence along with her husband. This also cast doubt in the mind of the Court.

(iii) It is also fact that there was a dispute for the land is question on which the incident had occurred. It appears from the statement of the P.W. 3 that the accused Nikhil had been possessing the land in question on which they had been

falling the tree and or the incident had occurred.

(iv) It is also an admitted fact that there was a civil suit between the parties to the case for which Nityananda, Nikhil and Monoranjan were contesting against each other. It is also not clear from the submission of the learned Addl. P.P. as to why the victim along with witness (P.W. 5) Nityananda had gone to the land which was in the possession of the accused Nikhil.

(v) The investigating Officer did not produce any documentary proof to prove regarding ownership of the land in question on which the incident had occurred. It further transpires from the statement of the P.W. 5 that he had stayed over the place of occurrence near about half an hour after the incident had occurred. But the P.Ws 2 and 3 did not state that they had found the witness Nityananda at the place of occurrence after reaching there. Even they had not found the P.W. 6 Sefali Das at the place of occurrence though she had claimed that she was present at the place of occurrence. Sefali Das had stated before the Court that she had found Archana Nama, Nitai Das in the place of occurrence.

(vi) The contradictory statements of the eye witnesses lead me to cost doubt regarding the involvement of the accused persons in the commission of murder of the victim.

7. In view of the above analysis the conclusion was arrived at, by the learned Additional Sessions Judge giving benefit of doubt and acquitting the accused-persons/respondents from the involvement of the offence u/s 302 read with Section 34 of IPC.

8. The learned Counsel for the State/Appellant has invited the attention of this Court towards the decision of the Supreme Court in Ajit Savant Majagavi Vs. State of Karnataka, where the broad guideline has been given while dealing the criminal appeal under Sections 378 and 386 in the matter of the acquittal. The Hon"ble Supreme Court has observed as below:

The principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial Court may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possess while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the

trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(5) If the High Court, on a fresh scrutiny and re-appraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanor or witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

9. Mr. A. Ghosh, learned Counsel for the State/Appellant has referred to a decision of the Supreme Court in *Narinder Singh and Another Vs. State of Punjab*, wherein the Supreme Court (in paragraph 12) has held as below:

The High Court while considering the appeal against acquittal is not exercising any extraordinary jurisdiction. Its power to consider and decide the appeal against the judgment of acquittal is same as against the judgment of conviction. However, there are certain guidelines. One is that if there are two views on evidence which are reasonably possible one supporting acquittal and the other indicating conviction, the High Court in an appeal against judgment of acquittal should not interfere merely because it feels that it would as a trial Court have taken a different view. The High Court will certainly interfere if it finds that the judgment of acquittal is manifestly erroneous and that the trial Court has acted with irregularity or its appreciation of evidence lacks coherence or it has made assumptions which are unwarranted or its evaluation of evidence is such as to shock the sense of justice and which has led to a miscarriage of justice or its reasoning is unintelligible or defies logic or its conclusions are against the weight of the evidence.

10. According to Mr. A. Ghosh, learned Counsel for the State Appellant, High Court in an appeal u/s 378 has full power to review at large the evidence on which the order of acquittal was based and to reach the conclusion that upon the evidence on record the order of acquittal should be reversed. Mr. Ghosh submitted that the Supreme Court has laid down the scope of criminal, appeal and the practice and considerations thereof are restated in (1979) 4 SCC 371 *Ganesh Bhavan Patel and Another Vs. State of Maharashtra*, : The appellate Court should always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the

presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witness and High Court must not only know the fundamental principles of law but also apply them correctly. According to Mr. Ghosh that the High Court would certainly interfere if it finds that the judgment is manifestly erroneous and that the trial court has acted with material irregularity or its appreciation of evidence lacks coherence or it has made assumptions which are unwarranted or its evaluation of evidence is such as to shock the sense of justice, etc. and in appeal against acquittal the paramount consideration of the Court would be to avoid miscarriage of justice. In an appeal before High Court against acquittal recorded by the trial court, the High Court can re-appreciate the evidence to find out mis-appreciation of evidence by trial Court, if any. But where there was proper appreciation of evidence by the trial court, re-appreciation by the High Court was not warranted.

11. In order to deal with the present appeal against acquittal, it is necessary to give the details of the FIR which was lodged by P.W. 1 i.e., the wife of the deceased:

On 14.12.1996 at about 2 O'Clock the informant had been working with paddy in his house. Her husband Ratan Ghosh was working in the field. Then Nitai Das S/o Lt. Guru Dayal Das of village Gabindapur came and asked who was cutting trees. Her husband told that Nikhilesh and others were cutting trees. Then Nitai Das had approached to the spot, where, the trees were being cut and she Heard altercation was going on over there. Her husband had gone over there followed by her behind her husband. On going over there she found that three persons namely Nikhilesh Esh S/o Late Nagendra Esh, Nitesh Esh @ Fulu (Nick name) S/o Shri Nikhilesh Esh and Monoranjan Paul S/o Late Chandi Charan Paul were cutting the trees together. As dispute was going on for the last few days over cutting of trees. Her husband Ratan Ghosh told since a dispute is going on regarding this land therefore, the trees are to be cut only after an appropriate settlement was made. No sooner had this word been uttered these three persons namely Nikhilesh Esh, his son Nitish Esh and Monoranjan Paul had attempted to deal with blows upon her husband together being armed with dao, lathi, axe and Chulpi (ballam) etc. When her husband had tried to save his life out of fear then Monoranjan Paul told the Nikhil to throw pierce his "chulpi" to her husband. Just after hearing this word her husband casted at them, then and there Nikhilesh Esh and heavily dealt blows with "Chulpi" (spear) that was in his hand on the frontal portion of the persons of her husband. Her husband immediately cried out saying he was being killed and so saying he had fallen on the ground with bleeding injury. Nikhilesh Esh, his son Nitesh Esh and Monoranj an Paul fled away running leaving their weapons in their hands. Neighbouring people came with the raising of alarm and they had taken her husband Ratan Ghosh to Dharmanagar Hospital. She also accompanied him. Just after arrival at hospital doctor had

declared her husband (Ratan Ghosh) dead. Thereafter, she returned to Kadamtala.

12. The charge sheet was framed for the offence u/s 302 read with Section 34 of IPC. and P.W. 1 Smti. Shipra Ghosh in her testimony has divulged that she was the informant of the instant case. The victim was her husband. She stated that the incident occurred long 3 years back on 28th Agrahayana at about 2/2.30 p.m. at Ichailalcherra. At that time she was in her house. On hearing hue and cry, she rushed to the place of occurrence. Prior to that she found that her husband had been going towards the place of occurrence. After reaching to the place of occurrence she heard that the accused Monoranjan Paul had instructed the co-accused Nikhil to strike her husband thereafter the accused Nikhil had thrown his "chulpi" towards her husband and it had penetrated in the lower portion of the abdomen of her husband. Her husband had fallen in the ground with bleeding injuries. She also raised hue and cry. The accused persons thereafter fled away from the place of occurrence. Other people rushed to the place of occurrence on hearing her hue and cry and thereafter she shifted her husband to Dharmanagar hospital. Her husband died one and half hour later in Dharmanagar hospital. She went to the Kadamtala Out Post and lodged a oral Ejahar to the police officer against the accused-persons. The police officer recorded her statement as Ejahar and after completion of writing he read over and explained the contents of the same to her and thereafter she put her signature on it admitting it to be correctly written. After reaching to the place of occurrence she found three accused-persons namely, Monoranjan Paul, Nikhil Esh, Nitesh Esh besides them Nitai Das was also present there. After hearing her hue and cry Subhas Das, Dilip Nama, Himangshu Das and others came to the place of occurrence. They asked her about the incidence and on their query she narrated the entire story to them. Her husband was also known as Ratan Gope in the locality. She had inimical relation with the accused persons for a land dispute. Her house was situated near about 40/50 cubits in the southern side away from the place of occurrence.

13. In the cross-examination P.W. 1, the wife of the deceased reiterated the prosecution version except at one place she indicated that she did not state to Investigating Officer (I.O.) that she heard that accused Monoranjan had told the co-accused to strike her husband (Dhukaide). P.W. 2 Himangshu Das in his testimony, has stated that he knew the informant and also knew the victim. According to him the incident took place 3 years back and at relevant time he was in his residence and on hearing a hue and cry he rushed to the place of occurrence and found that the victim Ratan Ghosh was lying on the ground with bleeding injuries and the wife of the victim, informant along with others were available on the spot. On query it was divulged from the informant herself that the deceased was killed by accused Nikhil by a "chulpi". The chulpi was seized in his presence. As such he is the witness of the seizure who put his signature in the seizure list, Ext., "P"-2/I. He identified the "chulpi", Ext. M. 0.1. Investigating Officer also seized some blood stained soil from the place of occurrence. In cross-

examination P.W. 2 has reiterated that he heard from the informant that accused Nikhil Esh had caused injury to the victim by a "chulpi" and the Investigating Officer had seized "chulpi" on the date of incidence and had shown it at his house and obtained his signature

14. P.W. 3 Dilip Kumar Nama in his testimony has stated that he knew the informant and the deceased husband of the informant who was murdered in the year 1996 and at the relevant day he was in his shop and on receiving the information from Santosh Das he rushed to the place of occurrence where he noticed that Ratan Ghosh was lying on the ground with some bleeding injuries and on query from the informant he came to know that Nikhil Esh had killed her husband and the victim was taken to Dharmanagar hospital where he died and one "chulpi"/spear/ballam was seized by the Investigating Officer in his presence which was identified and testified by him. In cross-examination it was also indicated that the Investigating Officer brought the ballam to the Himangshu and prepared the seizure list there. According to P.W. 2 and P.W. 3, they are the eye witnesses of " seizure of "chulpi/spear/ballam.

15. P.W. 4 Subhas Chandra Das has stated in nis testimony that he knew the informant and her husband Ratan Ghosh who was murdered 3 (three) years back and at that time he was not in his house. When he returned to his house, he came to know about the incidence and thereafter rushed to Dharmanagar hospital where he found that the victim Ratan Ghosh had expired. He was told by the informant that accused Nikhil Esh had killed her husband by a "chulpi"/ ballam at the direction of accused Monoranjan Paul. In cross-examination P.W. 4 has also reiterated that the informant at about 330/4 p.m. went to his house and thereafter both went to the hospital where the informant narrated the story to him in his house.

16. P.W. 5 Nityananda Das is a chance and independent witness who had seen the incident. Therefore, it is necessary to give description of his P.W.5 stated that when he was returning home from market, the incident occurred. At that time he found that victim had been watering his potato cultivation. The accused-persons at that time had been felling a tree there. On seeing that he went to the place of occurrence and protested against the act of the accused-persons. He told them as there was a civil suit with the land in-question, they should not fell the tree. After a few minutes later the victim Ratan had come there. At that time the accused Nikhil Eash tried to assault Ratan by a "chulpi". He threatened the accused Nikhil not to do so. Nikhil stopped a while. Accused Monoranj an Paul thereafter directed Nikhil to give a blow with the spear. Nikhil thereafter threw the spear towards Ratan and it penetrated in the lower portion of his abdomen. Besides himself the wife of the victim was also present at the place of occurrence and she saw the incidence. He raised a hue and cry along with the informant. On hearing his hue and cry Dilip Nama, Himangshu Das, Sefali Das and many others had come to the place of occurrence but the accused-persons fled away before they could reach the place of occurrence. Dilip Nama and Himangshu Das shifted

the victim to Dharmanagar hospital for treatment of injury. The victim died in the hospital. The victim Ratan sustained serious bleeding injury on the spot

17. In the cross-examination P.W. 5 admitted that the wife of the victim lodged a complaint against him and others for the death of Ratan Ghosh. She alleged that (P.W. 5) I had killed Ratan by a "chulpi". (P.W.5) further stated that he was enlarged on bail from the Court, he did not discuss anything after reaching to the place of occurrence, he stayed in total half an hour at the place of occurrence, he along protested against the act of the accused persons as they had been felling a tree there. Ratan was not present there but he was coming towards the place of occurrence. The accused Nikhil did not tell me anything. There was no altercation with the Ratan. When the accused dealt the blow with the spear to the victim he was present on the spot and his wife followed him and she came one minute later. Potato field of Ratan was not a lunga class in nature. The tree was situated slight above the potato land of the Ratan. House of the victim was situated about 50 cubits away from the place of occurrence. There was a tilla class of land of accused Nikhil in between the house of the victim and the place of occurrence. The boundary of the place of occurrence is on the north-land of Prabir Chowdhury, on the south-victim Ratan Ghosh, on the east-accused Nikhil Esh and on the west-Subhas Das. The residence of the accused Nikhil, victim Ratan and Subhas are adjacent to the place of occurrence. There was no house in the northern side of Subhas Das. He did not tell to the Investigating Officer that he himself and Ratan had an altercation with the accused Nikhil and the latter had told him that Nikhil had felled the trees from his own land. At the very first instance he found that the accused Nitesh was standing at the place of occurrence with an axe and the accused Nikhil with a dao. He did not mark what was in the hand of Monoranjan. Ratan wore one lungi, one napkin and one shirt. He also did not tell to the Investigating Officer that Ratan had drawn his attention to the act of the accused persons and stated to him that we both should lodge protest against the act of the accused. He (P.W.5) has stated to the Investigating Officer that the informant was present when the incident had occurred. It is denied by him that the informant lodged the instant case against the accused-persons as per his instruction. It is also denied by him that the instant case was lodged to save himself and to depose falsely. It is admitted by him that there was civil suit in between himself and others against the accused Monoranjan Paul and others. It is denied by him that he deposed falsely against the accused Monoranjan.

18. On appraisal it appears that P.W. 5 is an independent and chance witness has very categorically divulged that besides himself, the wife of the victim was also present at the place of occurrence and had seen the incidence (P.W.5) has also supported the prosecution version by stating that he had reached at the spot little earlier and a few minutes later the victim Ratan had reached followed by his wife P.W. 1. At that time accused Nikhil Esh tried to assault Ratan by a chulpi. Nityananda Das threatened accused Nikhil not to do so. He had stopped for a while. However, at the direction of Monoranjan Paul accused Nikhil had given a spear blow by throwing it towards Ratan Ghosh which penetrated in the lower

portion of his abdomen. As such the prosecution version as revealed by P.W. 1, the informant wife was fully corroborated so far her present at the spot and witnessing the occurrence.

19. P.W. 6 Smti. Sefali Das in his testimony has informed that she knew the informant and her husband who came to know about the death of her husband after returning home and she was also informed by the informant that accused Nikhil has killed her husband. In cross-examination he also reiterated his earlier version.

20. P.W.7 Smti. Jali Esh is the younger sister of the informant P.W. 1 who on the relevant day was staying in the house of the informant and on hearing a hue and cry came out from the house and at that time Archana Nama had intimated her that her uncle Nikhil Esh had killed her brother-in-law Ratan. When she rushed to the spot, she noticed that her brother-in-law Ratan had been lying on the ground with bleeding injuries. Nitai Das, Subhas Das, Sefali Das, Himangshu Das and others were present. According to P.W. 7 Ratan has expired in Dharmanagar Hospital. P.W. 7 has reiterated her statement/testimony, even in the cross-examination without any contradiction.

21. P.W. 8 Dr. Keshab Sen Laskar, the Medical Officer who made Post-Mortem Examination is an independent and relevant witness. He deposed that he found the following injuries over the victim as follows:

22. The wound over the left inguinal region on exploration, found to be of size 2 1/2" x 1 1/2" x 1 1/2". The femoral artery and the femoral vein of left side were found to be completely torn (cut). The femoral nerve is also completely found to be cut. There was blood clot.

23. In his opinion the deceased died of shock and haemorrhage due to injury to the femoral vessels (Lt.) which was homicidal and ante mortem in nature. Age of injury-The patient expired on 14.12.96 at 4.30 p.m. The witness identified the Post Mortem Report (Ext. P/3) and his signature on the same (Ext. P-3/

24. According to the doctor death of the deceased was due to injury to the femoral vessels (Lt.). The injury was sufficient to cause a death and injury was homicidal and ante mortem. Injury was caused by a sharp cutting weapon. After seeing Ext. M.O.I the witness confirmed that injury of the victim was caused by the same. He did not mention in his report when the injury was caused on the victim. In cross-examination he stated that he gave entry of the result of P.M. Examination in the hospital record firstly on the same date and submitted the P.M. Examination report to the police on 18.8.1997. He admitted that he prepared the report Ext. P. 3 on 18.8.1997 after perusing the detailed report which was written in the hospital record. The P.M. Examination Report was duly countersigned by the Chief Medical Officer (C.M.O.) It was denied by him that he has no authority to submit the P.M. Examination Report without countersigning the same by the CMO. He stated that as senior Medical Officer he was competent authority to submit the P.M. Examination Report. According to the witness the length and

depth of the injury was not corresponding and length and depth of the injuries were not tallying with the P.M. Examination Report. He admitted that he obtained, the permission of the Magistrate before conducting the P.M. Examination and the I.O. did not produce the Ext. M.O.1 before him. It is denied by him that he did not record the P.M. Examination Report properly compiling the hospital record. According to him, the injuries were inflicted by the "chulpi" and the "chulpi" with blood stained was shown to him.

25. P.W. 9 Subhas Ghosh, the witness of inquest report has stated that the I.O. of the instant case examined the dead body of Ratan Gope alias Ratan Ghosh in his presence.

P.W. 10 Sri Subodh Chandra Ghosh has stated that the I.O. examined the dead body in his present.

P.W. 11 Krishnapada Ghosh has stated that the I.O. of the instant case examined the deadbody of Ratan Gope alias Ratan Ghosh in his presence.

P.W. 12 Rabindra Ghosh being a constable posted on 15.12.1996 at Dharmanagar Police Station escorted the dead body to Dharmanagar Hospital till the Post Mortem Examination was over.

P.W. 13 Bidhu Das, S.I. of Police at Churaibari Police Station at the relevant time has made an investigation of the case who, after investigation, has submitted charge-sheet in respect of the case in-question. In his cross-examination he had, fairly, divulged that he had not re-examined any witness who were already examined earlier. He has also not examined the accused-persons. He did not send the weapons of offence, wearing apparels of the victim for chemical examination. However, such procedural lapse would not be fatal to the prosecution case.

P.W. 14 Gopesh Nath was posted as S.I. of police at Dharmanagar Police Station who prepared the inquest report in presence of the witnesses and has also supported the prosecution case.

26. The chulpi seized on 14.12.1996 was found to give reflection of some blood stained and fixed with barrack bamboo measuring about 4 cubits in length with bamboo Steel portion is about 8 (eight) inches stained with soil and frontal portion is about 3 (three) inches stained with blood.

27. The statements of the accused u/s 313 of Cr.P.C. as indicated are completely denial of the prosecution case. From their statement nothing was divulged regarding any defence story as none of the accused has put any defence on any count.

From the testimony of P.W. 1 Smti. Sipra Ghosh, the wife of deceased Ratan Ghosh it is clear that she found 3 (three) accused-persons, namely, Nikhil, Monoranjan and Nitesh on the spot who were cutting the disputed tree and they were having dao and axe in their hands. However, it could not be said by the

defence who was holding the chulpi and nothing could definitely be said what was in the hand of accused Monoranjana. However, P.W. 1 present on the spot at the time of incidence has stated that at the direction of Monoranjana, Nikhil threw a chulpi towards her husband which penetrated in the lower portion of his abdomen, whereupon, he had fallen on the ground thereby creating bleeding injuries. The presence of P.W. 1 was also fortified by another independent and chance witness, namely, P.W. 5 Nityananda Das. P.W. 1 Smt. Sipra Ghosh, the wife of the deceased had later given more details of the background in the FIR and has summarized the entire episode in her testimony and as such she has not given any contradictory version. P.W. 5 in his testimony had completely supported the prosecution version and the testimony of P.W. 1 by saying that a civil dispute was going on in respect of the land where the tree was standing and Nityananda who came little earlier on the spot had made an enquiry from the accused-persons regarding felling of tree and a few minutes later the victim Ratan Ghosh had come at the spot followed by P.W. 1, From the testimony of P.W. 5 it is also divulged that the accused Nitesh was having an axe and accused Nikhil was having a dao and he could not notice what is in the hand of Monoranjana. However, in respect of killing by Nikhil by throwing "chulpi" to the abdomen of victim Ratan Ghosh at the direction of Monoranjana is corroborated with the testimony of P.W. 1. Undisputedly, P.W. 1 and P.W. 5, an independent eye witness were present on the spot and both have witnessed the occurrence and have also corroborated each other and have jointly observed that at the direction of accused Monoranjana chulpi was thrown by Nikhil to the victim which penetrated the lower portion of his abdomen. P.W. 1 has also heard the direction of Monoranjana directing Nikhil to strike the victim. The injuries inflicted on the body of the victim by Nikhil was corroborated by P.W. 8, the medical officer who did authposy and post mortem examination on the person of the deceased. As such the weapon used for and injury caused by it is corroborative to the medical report.

28. The points of giving benefit of doubt dealt with in para 6(i) to 6 (vi) by learned trial Court are not relevant. Even if P.W. 1 the informant, wife of deceased whose presence on the spot i.e. at the place of incidence was undisputed might not has particularly spotted about the specific weapons carried by particular accused, however, she (P.W. 1) very categorically has stated that at the direction of Monoranjana Paul the accused Nikhilesh Esh has sustained injury in the abdomen of the deceased by throwing "chulpi". She (P.W. 5) has also very clearly stated in her testimony as corroborated by P.W. 5 that she was present at the spot and had seen the incidence as she had followed her husband. The prosecution itself has indicated that dispute of land and litigation was going on and tree being cut was the cause of controversy as such the merits and legality of the dispute of land and question of possession thereof and litigation or civil suit mentioning by the prosecution witnesses was not so important as referred unnecessarily by the trial Court. The I.O. was not under legal obligation to prove the ownership and possession of land in question and the standing tree on it.

Non-mentioning of the presence of P.W. 5 and P.W.6 at the spot by P.W. 2 and P.W. 3 cannot be fatal as they learned about the incidence through P.W. 1 on their arrival at the spot. However, any discrepancy or contradiction in respect of the evidence P.W. 1 and P.W. 5 and the weapon alleged to have been used by the accused and the injuries likely to be inflicted or not has not been dealt with by the trial Court while giving benefit of doubt to the accused-persons.

29. According to Mr. Ghosh, learned Counsel for the appellant/State submitted that all along irrelevant points were considered by the trial Court and on conjecture and surmise the benefit of doubt was given to the accused.

30. Mr. Ghosh, learned Counsel for the Appellant/State has referred to a decision of the Supreme Court in *Kamaljit Singh Vs. State of Punjab*, wherein the Supreme Court has observed as follows:

It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eye-witness cannot be thrown out *Solanki Chimanbhai Ukabhai Vs. State of Gujarat*, . The position was illuminating and exhaustively reiterated in *State of U.P. Vs. Krishna Gopal and Another*, . When the acquittal by the trial Court was found to be on the basis of unwarranted assumptions and manifestly erroneous appreciation of evidence by ignoring valuable and credible evidence resulting in serious and substantial miscarriage of justice, the High Court cannot in this case be found fault with for its well merited interference.

In *Allarakha K. Mansuri Vs. State of Gujarat*, in the case of *Allarakha K. Mansuri v. State of Gujarat* it was held that defective investigation by itself cannot be made a ground for acquittal of an accused. It was also held that paramount consideration of Court would be to avoid miscarriage of justice arising from acquittal of guilty is no less than from convicting an innocent and the acquittal based on conjectures/imagination and hypothesis are to be rejected.

31. After analyzing the records, testimony or prosecution witnesses and evidences as well as medical report, Post Mortem examination report I am of considered view that trial Court has not made proper appraisal of the evidences. P.W. 1, the informant was present at the spot along with P.W. 5, an, independent witness who has corroborated each other as well as to the prosecution version as both had witnessed the incidence. Both have corroborated regarding inflicting of injury by accused Nikhilesh alias Nikhil Chandra Esh through "chulpi" at the instance and direction of accused Monoranjan. The medical report by P.W. 8, the medical officer as well as the Post Mortem examination report are corroborating the injury by weapon/"chulpi" used. The minor contradiction in the statement of P.W. 1 regarding the type of weapon carried by the accused shall not make the prosecution story fatal. Even testimony of P.W. 1 alone inspires confidence and is trustworthy, however the testimony of P.W. 1 is; corroborated by P.W. 5. Both the

accused had common intention of killing the victim and with that intention accused Monoranjan directed the accused Nikhilesh alias Nikhil Chandra Esh to kill the victim by spear blow, which later did, therefore, in my considered view the prosecution has successfully proved its case beyond reasonable doubt and both Monoranjan Paul and Nikhilesh alias Nikhil Chandra Esh are held guilty of offence u/s 302 IPC read with Section 34 of IPC.

32. In the facts and circumstances both the accused Monoranjan Paul and Nikhilesh alias Nikhil Chandra Esh are convicted and sentenced to undergo rigorous imprisonment for life u/s 302 IPC with a fine of Rs.2000/-(two thousand) each, in default of payment of fine, they are to suffer further imprisonment for 6 (six) months. The accused/respondents herein are to be arrested after cancellation of their bail bond and they are to be sent to jail to serve out the remaining period of sentence in view of the observations mentioned above and the observations or comments of the learned Additional Sessions Judge, North Tripura, Dharmanagar in Case No. S.T. 11 (NT/D)/1999 against Shri Partha Sarathi Paul, I.O. of the instant case are hereby being expunged. The direction given by the learned Additional Sessions Judge, North Tripura, Dharmanagar for deducting Rs. 1,000/- per month from the pay and allowances of Shri Paratha Sarathi Paul, I.O. of the case is set aside.

The Criminal Appeal is accordingly allowed in view of the above observations.