GAHC010199542021

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/42/2021

ALBISH BANDA @ LAKRA
BAKSA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

2:SRI UDAY EKKA
S/O-LT. MADI EKKA
R/O-UTTAR DIRINGAPUR
P.O.-JOOPADONG
P.S.-BORBORI
DISTRICT-BAKSA
ASSA

Advocate for the Petitioner : DR. B N GOGOI, AMICUS CURIAE,

Advocate for the Respondent : PP, ASSAM, MR J DAS,MR S H MAHMUD, AMICUS CURIAE (R-2)

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 19.09.2024

Date of Judgment & Order : 26.09.2024

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

Heard Dr. B. N. Gogoi, learned Amicus Curiae for the appellant. Also heard Ms. B. Bhuyan, learned Senior Counsel and learned Additional Public Prosecutor for the State respondent and Mr. S. H. Mahmud, learned Amicus Curiae for the respondent No. 2/informant.

2. This jail appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is preferred against the judgment & order dated 24.02.2021, passed by the learned Sessions Judge, Baksa, Mushalpur, BTAD, Assam, in Sessions Case No. 114/2019, under Section 302 of the Indian Penal Code, whereby the accused/appellant has been sentenced to undergo imprisonment for life with a fine of Rs. 10,000/- (Rupees ten thousand) only and in default, to undergo further rigorous imprisonment for 1 (one) year for the offence under Section 302 IPC.

3. The prosecution case, in brief, is that on 05.03.2019, one Uday Ekka, Village- Uttar Diringapur, lodged an F.I.R. before the Officer-In-Charge of Barbari

Police Station alleging that on the same day, at around 2.30 p.m., while his minor son- Rajen Ekka, aged about 7 (seven) years, was playing in his nearby homestead gate after returning from school, the accused-Albish Banda of the same village all of a sudden came and hacked him to death with a dao. Upon receipt of the said F.I.R., the Officer-In-Charge, Barbari Police Station registered a case, being Barbari P.S. Case No. 14/2019, under Section 302 IPC, and endorsed S.I. Samiran Das to take up the investigation.

4. During investigation, the I.O. visited the place of occurrence, drawn the sketch map, recorded the statement of the witnesses and also arrested the accused/appellant. The accused was also produced before the learned Magistrate for recording his statement under Section 164 Cr.P.C., wherein he confessed his guilt.

5. Thereafter, on completion of investigation, the I.O. laid Charge-Sheet against the present accused/appellant under Sections 302 IPC, vide Charge-Sheet No. 16/2019, dated 30.04.2019, before the Court of learned Additional Chief Judicial Magistrate, Baksa, Mushalpur and the learned Magistrate accordingly took cognizance of the offence and committed the case before the Court of learned Sessions Judge, Baksa, Mushalpur being the charged penal Section 302 IPC exclusively triable by the Court of Session. Accordingly, learned Sessions Judge, Baksa, after considering the materials available on record and also finding *prima facie* case, framed charge against the present accused/appellant under the aforesaid Section. The charges were read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried.

6. During the trial of the case, the prosecution examined as many as 6 (six) numbers of witnesses including the I.O. and the Medical Officer, who conducted the post-mortem examination on the deceased. The learned Magistrate, who recorded the confessional statement of the accused/appellant, was also examined as court witness/CW-1. The accused was also examined under Section 313 Cr.P.C. Thereafter, the learned Sessions Judge, Baksa, after hearing the parties and on perusal of the materials available on records, vide judgment & order dated 24.02.2021, in Sessions Case No. 114/2019, convicted the accused/appellant under Section 302 of the Indian Penal Code and sentenced him, as aforesaid.

7. On being aggrieved and dissatisfied with the aforesaid impugned judgment & order dated 24.02.2021, passed by the learned Sessions Judge, Baksa, Mushalpur, BTAD, Assam, in Sessions Case No. 114/2019, under Section 302 of the Indian Penal Code, the present appeal has been preferred by the accused/appellant from jail.

8. Mr. Gogoi, learned Amicus Curiae for the appellant, submitted that though, on the day of incident, the appellant went to the place of occurrence carrying a dao, but he went there only with a view to collect some sour fruit (tenga). And, when the deceased, along with some others, started taunting him, he got angry with such kind of provocation and accordingly he gave a blow with his dao to the deceased for which he died. There was no predetermined mind by the appellant to attack the minor child and to commit murder, but due to such situation and circumstances only, he gave a blow to the deceased for which he

sustained injury and died. However, Mr. Gogoi admitted that there are 2 (two) eye witnesses to the occurrence, i.e. PWs- 3 & 4, and the accused/appellant also gave his confessional statement regarding the murder of minor child of 7 (seven) years. But the entire incident had happened only due to sudden provocation. He was carrying a dao with him to collect sour fruit and when he got angry as taunted by the deceased along with others, he gave a blow with his dao and committed the murder of the deceased. Thus, it may be a case under Exception 4 of Section 300 IPC and the accused, at best, may be convicted under Section 304 Part I IPC as the incident had happened only due to sudden provocation without any pre-determined of mind.

9. In that context, Mr. Gogoi also relied on a decision of Hon'ble Apex Court in the case of **Sridhar Bhuyan Vs. State of Orissa [(2004) 11 SCC 395]** and emphasized on paragraph Nos. 8 & 9 of the judgment, wherein the Hon'ble Apex Court had discussed under what circumstances a case can come under Exception IV of Section 300 IPC. Paragraph Nos. 8 & 9 of the said judgment reads as under:

> "*8. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men s sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A sudden fight implies mutual provocation and*

blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender s having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the fight occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression undue advantage as used in the provision means unfair advantage .

9. Considering the factual scenario, in the background of legal principles set out above, the inevitable conclusion is that the case is not covered under Section 302 IPC. The ingredients necessary to bring in application of Exception 4 to Section 300 IPC are present. The conviction is altered to Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice."

10. Ms. Bhuyan, learned Senior Counsel and Additional Public Prosecutor for the State respondent, submitted that it is a case wherein there are 2 (two) eye witnesses, i.e. PWs- 3 & 4, who saw the incident and were also playing with the deceased at the relevant time of incident. She further submitted that the accused also gave his voluntary confessional statement under Section 164 Cr.P.C. admitting that he killed the deceased by assaulting him with a dao on his

neck. She further submitted that from the statement under Section 313 Cr.P.C., it is seen that necessary cautions were given by the learned Magistrate before recording the statement of the accused/appellant under Section 164 Cr.P.C. and after his satisfaction only, the learned Magistrate recorded the statement of the accused/appellant, though he stated that he did not make any statement as written by the learned Magistrate. But there is no denial from his part regarding voluntariness of the confessional statement recorded under Section 164 Cr.P.C. More so, she submitted that on the day of incident, both the PWs-3 & 4 were also present with the deceased at the place of occurrence and were playing and eating tamarind after coming from school when they saw the accused/appellant inflicting injury on the neck of the deceased and for which he died instantly. Accordingly, she submitted that the statement of these PWs- 3 & 4, who are the eye witnesses of the prosecution, cannot be disbelieved as their statements are consistent, believable and trustworthy. She further submitted that teasing by some children including the deceased cannot be considered as a sudden provocation to give dao blow that too in the vital part of the body of the deceased who was only 7 (seven) years of age at the relevant time of incident.

11. Ms. Bhuyan further relied on a decision of the Hon'ble Supreme Court in **Bhimappa Chandappa Hosamani & Ors. Vs. State of Karnataka,** reported in **(2006) 11 SCC 323**, wherein, the Apex Court has expressed the view that "…*in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convincing, failure to prove the motive is not fatal to the case of the*

prosecution. The law on this aspect is well settled."

12. Mr. S. H. Mahmud, learned Amicus Curiae for the respondent No. 2/informant, also submitted in this regard that the accused/appellant committed the murder of the 7 (seven) year old boy by inflicting injury with a dao on his vital part, i.e. neck of the child, and since there are eye witnesses to the prosecution case, the motive is not relevant. Accordingly, Mr. Mahmud relied on a decision of the Hon'ble Apex Court passed in the case of **Chandan Vs. The State (Delhi Admn.) [Criminal Appeal No. 788/2012]**, wherein the Apex has expressed the view that when the ocular testimony inspires confidence, the prosecution is not required to establish the motive. Thus, the motive is irrelevant when there is eye witness to the prosecution case who is believable and trustworthy. He basically relied on paragraph Nos. 5 & 6 of the judgment, which reads as under:

> "*5. The argument of the defence that the prosecution has not been able to establish any motive on the accused for committing this dastardly act is in fact true, but since this is a case of eye- witness where there is nothing to discredit the eye-witness, the motive itself is of little relevance. It would be necessary to mention some of the leading cases on this aspect which are as under:*
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> *In Shivaji Genu Mohite v. State of Maharashtra, AIR 1973 SC 55, it was held that it is a well-settled principle in criminal jurisprudence that when ocular testimony inspires the confidence of the court, the prosecution is not required to establish motive. Mere absence of motive would not impinge on the testimony of a reliable eye-witness. Motive is an important factor for consideration in a case of circumstantial evidence. But when there is direct eye witness, motive is not significant. This is what was held:*
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> > "*In case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not*

be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy" The principle that the lack or absence of motive is inconsequential when direct evidence establishes the crime has been reiterated by this Court in Bikau Pandey v. State of Bihar, (2003) 12 SCC 616; Rajagopal v. Muthupandi, (2017) 11 SCC 120; Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195.

6. In view of above, we see no reason to interfere with the orders of the Trial Court and that of the High Court, accordingly the appeal is dismissed. Interim order dated 09.05.2012 granting bail to the appellant stands vacated. Appellant, who is presently on bail, is directed to surrender before the Trial Court within a period of four weeks from today. A copy of this judgment shall be sent to the Trial Court to ensure that the appellant undergoes the remaining part of his sentence."

13. He further submitted that the medical evidence also supports the ocular evidence in respect of injury sustained by the deceased. In this context, he also relied on a decision of this Court passed in **Md Jaynal Uddin lascar @ Joynal Abedin Vs. the State of Assam [Crl. A(J) No. 93/2014]**. Accordingly, Mr. Mahmud, learned Amicus Curiae for the respondent No. 2/informant, submitted that there is a clear evidence of murder against the accused/appellant and the entire incident had happened before 2 (two) eye witness, i.e. PWs- 3 & 4, and thus, there cannot be any reason to disbelieve these 2 (two) eye witnesses who were playing along with the deceased at the relevant time of incident. He accordingly submitted that the learned Sessions Judge has rightly passed the judgment and order after assessing the evidence on record and also on hearing the arguments from both sides and thus, there cannot be any reason to make interference in the judgment and order passed by the learned Sessions Judge.

14. We have given our anxious consideration to the submissions made by the learned counsels appearing on behalf of the parties and also perused the

materials available on record.

15. Before analyzing the other prosecution witnesses or arriving at any decision, let us first scrutinize the medical evidence of the doctor.

16. As per the evidence of the doctor (PW-2), while he was conducting the post-mortem examination on the dead body of the deceased on 05.03.2019, he found the following injuries:

(i) Deep incised would over the neck which was 15 cm X 4 cm. The hyoid is injured with cut throat.

(ii) Deep incised would with avulsion over left face 20 cm X 5 cm extending from below 1/3 of left ear to the shaft of left mandible.

(iii) Incised wound on scalp over occipital region which was 15 cm X 3 cm. Cranium and spinal cord incised would on scalp over occipital region which was 15 cm X 3 cm.

17. Apart from above, the doctor also found incised injury to the sternocledomasetoied muscle and masseter muscle. As per him, all the injuries were ante-mortem in nature and the death was caused due to hemorrhagic shock with obstructive asphyxia. Accordingly he also exhibited the post-mortem report as Ext.-1, his signature as Ext.-1(1), inquest report as Ext.-2 and dead body challan as Ext.-3.

18. So, from the injury described by the doctor, it is seen that the death was homicidal in nature which was caused due to haemorrhage shock with obstructive asphyxia following ante mortem cut injuries on neck, face and occipital region and spinal cord and scalp. Thus it is seen that the deceased not only sustained one injury on his neck, but he also sustained 3-4 more injuries on his face, occipital region and even on spinal cord as well as scalp.

19. Now the question arises as to who caused the death of the deceased. It is the case of the prosecution that the accused/ appellant inflicted injury on the neck of the deceased with a dao which caused instantaneous death of the deceased.

20. Hence, let us scrutinized the other evidences of the witnesses who adduced evidence in favour of the prosecution case.

21. PW-1 is the informant of this case/father of the deceased and he deposed that on the fateful day, while his son/deceased was playing near his house on the road along with some of his friends, the accused came and inflicted injury on his neck by means of a dao. At that time, he was in his paddy field, but the other villagers came to the place of occurrence hearing hue and cry and the accused fled away from the place of occurrence. But, subsequently, the local public apprehended the accused. He saw the cut injury on the neck of his deceased son, who died instantly, and later on he informed the police, who conducted inquest on the body of his deceased son and sent the body for post-mortem examination. The police also recovered the murder weapon, i.e. the

dao.

22. In his cross-evidence, he stated that he did not remember the exact date of occurrence and the F.I.R. was written by some other person, but he know the contents of the F.I.R. From his cross-evidence, it is also seen that on the day of incident, his deceased son was playing along with his 2 (two) other children. He further testified that he never had any quarrel with the accused/appellant nor had any previous enmity with him.

23. PW-3 is one Ishak Lakra, who claim himself to be one of the eye witness of the prosecution case. As per him, on the day of incident, at about 2.30 p.m., he along with others, after coming from school, went near to tamarind tree, the accused suddenly came there and inflicted cut blow on the neck of the deceased by means of a dao. Out of fear, he fled from the place of occurrence and the accused also fled away from the crime scene. He then informed one Rimish Lakra about the occurrence.

24. From his cross-evidence, it is seen that Rimish Lakra first came to the spot and thereafter the other villagers also arrived.

25. PW-4 is also one of the eye witness who was also playing with the deceased along with other children at the relevant time of incident. He deposed that at the relevant time of incident, he was on the top of the tree and was plucking tamarind and when he saw some of his friends were fleeing away from the tamarind tree, he saw the accused inflicting injury on the deceased by means of a dao. He then raised hue and cry and accordingly several people

rushed to the place of occurrence. Thereafter he climbed down from the tree and saw the cut injury on the head and neck of the deceased. After sometime, his father also arrived at the place of occurrence. As per PW-4, the deceased died on the spot instantaneously after the cut blow given by the accused/ appellant.

26. From his cross-evidence, it is seen that at the relevant time of incident, since he was on the top of the tree, it was not easy for him to watch as to what had exactly happened. But, it is also seen from his cross-evidence that he came down from the tree after the accused fled away from the spot. He also denied when suggested that he did not witness the occurrence.

27. As per PW-5, Jahan Lakra, at the relevant time of incident, while he was coming to his home for taking lunch, he heard due and cry and accordingly he went there and saw the dead body of the deceased at the courtyard and he also saw the accused washing a dao at his courtyard. He deposed that the house of the accused, informant and his house are situated nearby to each other. He saw the accused throwing a dao at the nearby ditch and as per direction of the local people, he collected the said dao from the ditch by which the accused/appellant committed the murder of the deceased. Later on the police came and seized the dao.

28. He admitted in his cross-evidence that he has not seen the occurrence and he does not know as to why the accused was washing the dao. But he saw the accused while washing the dao and throwing the same in a ditch. He also admitted in his cross-evidence that he heard about the incident of committing murder of the deceased by the accused/appellant from the local people only.

29. PW-6 is the Investigating Officer of this case and he deposed that on the day of incident, the informant came to the police station and lodged the F.I.R. and on the basis of which, Barbari P.S. Case No. 14/2019 was registered under Section 302 IPC. He further deposed that before registration of the case, S.I. Pranab Baishya, the Officer-In-Charge of Barbari Police Outpost informed him over telephone that a murder has been committed at Uttar Dhingapur Village. Thereafter, the Officer-In-Charge and DSP Headquarter accompanied him and visited the place of occurrence and drawn the sketch map in presence of the witnesses, recorded the statements of the witnesses available at the place of occurrence and the inquest was done on the dead body of the deceased by the Circle Officer, Baganpara. Subsequently the dead body was sent for post-mortem examination. The offending dao was also found nearby the dead body at the place of occurrence and the father of the deceased also identified the offending dao. Accordingly, he seized the dao in presence of the witnesses at the place of occurrence by preparing seizure list. The said offending dao was also shown to the witnesses in the Court and the dao was accordingly exhibited as M. Ext.-1. The accused was apprehended by the villagers and thereafter he was arrested and forwarded to the Court for recording of his confessional statement. The learned Magistrate accordingly recorded the confessional statement of the accused. But, after his transfer, he handed over the Case Diary to Officer-In-Charge, Barbari Police Station and his successor Bijoy Das collected the post-mortem examination report of the deceased and accordingly submitted the Charge-Sheet against the present accused/appellant.

30. In his cross-evidence, he denied when suggested that without any

incriminating materials, the Charge-Sheet has been filed against the accused/appellant, who is innocent and no way connected in the alleged offence. He also denied when suggested that the villagers apprehended the accused/appellant due to previous enmity and made the real culprit to escape from the crime.

31. The learned Sessions Judge also examined the learned Magistrate who recorded the confessional statement of the accused/appellant under Section 164 Cr.P.C. as CW-1. Accordingly, the learned Magistrate/CW-1 deposed that he recorded the confessional statement of the accused/appellant, who was produced before him, after explaining all the provisions and giving necessary caution to the accused/appellant. It was also explained to the accused that he is not bound to make confession and if he does so, the same may be used as evidence against him during the trial. But, despite of such explanation and caution, the accused/appellant confessed his guilt and accordingly, he recorded the statement of the accused/appellant.

32. As per the Magistrate/CW-1, the accused/appellant made his statement as under:

> "*Last Tuesday, i.e., on 05.03.2019, the occurrence took place at noon at about 2.30 pm. I went to collect tenga (sour fruit) from a place of our village. At that place, some boys and girls were playing. A few of them started taunting me. I became angry. I stabbed on the neck of Ranjan Ekka with the dao in my hand. He instantly fell down. Later he died.*"

33. The learned Magistrate/CW-1 also denied when suggested that the accused/appellant did not make any confessional statement before him.

34. So, from the discussions of the above witnesses, it is seen that the PW-1/informant is the father of the deceased and the PWs-3 & 4 are the eye witnesses of the prosecution case who saw the incident of inflicting injury on the deceased by means of dao by the accused/appellant. The statements of the PWs-3 & 4 could not be rebutted by the defence and their statements are found to be consistent. It also seen that both the PWs-3 & 4, who are the eye witnesses to the prosecution case, were also playing with the deceased at the time of incident and they were busy in plucking and eating tamarind from the tree where the accused suddenly came there and give dao blow on the vital part of the deceased, i.e. neck and even on the skull and mandible region. It is also seen that the other villagers immediately came to the place of occurrence hearing hue and cry and then the accused fled away from the place of occurrence, but the villagers apprehended him and later on, he was handed over to the police.

35. It is also seen that the medical evidence of the doctor/PW-2 also completely corroborates the ocular evidence in regards to injury sustained by the deceased and it is also an admitted fact that the deceased died due to hemorrhagic shock and obstructive asphyxia as the deceased sustained cut injury on the entire throat areas including the other vital part, i.e. spinal cord, scalp as well as in mandible region.

36. Further it is seen that the PW-5 is the neighbor of the accused/appellant as well as the informant. Though he has not seen the occurrence, but he saw the injury marks on the dead body of the deceased. He also saw the accused while washing the dao, which is stated to be the murdered weapon, although he

could not say the reason as to why the accused was washing the dao. He also saw the accused throwing the dao in a ditch and he recovered the same on the instruction of the villagers.

37. Thus, it is a case wherein the prosecution could establish a case on the basis of the ocular evidence of PWs-3 & 4, who are the eye witnesses to the prosecution case. There is no reason to disbelieve these eye witnesses, i.e. PWs-3 & 4, who are the minor children at the relevant time of incident and was simply playing and eating tamarind with other children along with the deceased. It is not a case that out of any grudge or enmity these 2 (two) witnesses, i.e. PWs-3 & 4, will depose falsely against the accused/appellant.

38. Further it is seen that the accused/appellant also made his confessional statement before the learned Magistrate and from his statement recorded under Section 313 Cr.P.C. also, it is very much evident that the learned Magistrate gave him every possible caution and warning before recording his statement under Section 164 Cr.P.C. More so, it is seen that his confessional statement was recorded giving sufficient time for reflection. The accused/appellant was brought before the Magistrate on 06.03.2019 and he was placed under supervision of jail authority for reflection from 06.03.2019 to 08.03.2019 till 12.00 p.m. and thereafter only, he was brought before the chamber of the learned Magistrate on 08.03.2019 at about 3.00 p.m. and thereafter, again giving all the warnings to the accused/appellant before recording his statement under Section 164 Cr.P.C., his statement was recorded. Thus, it is seen that his statement was voluntary in nature and he was not in police custody since 06.03.2019 till he was brought before the learned Magistrate for recording confessional statement.

Therefore, it also cannot be considered that under the threat or influence of the police, the accused made his confession. More so, he also admitted that he was given sufficient time and caution by the learned Magistrate before recording his 164 statement, but he simply stated in his statement recorded under Section 313 Cr.P.C. that he did not make his confessional statement in the manner which is written by the learned Magistrate. But that will not help the case of the defence as he never tried to retract his confessional statement during the entire proceeding, rather it was admitted by him in his statement recorded under Section 313 Cr.P.C. that he was given sufficient time for reflection and cautions before recording his statement under Section 164 Cr.P.C. Thus, it is seen that the accused/appellant committed the murder of the 7 (seven) year old minor child giving 2-3 blows of dao on his vital part of the body which caused his death instantaneously. The parents of the minor also did not get any time even to take their minor son to hospital for treatment as he did on the spot. The prosecution also established the case on the basis of medical as well as ocular evidence and as stated above, the ocular evidence of the eye witnesses, i.e. PWs-3 & 4, goes unrebutted, which are believable and trustworthy.

39. Now the only plea of the defence is that the incident had happened only due to grave and sudden provocation which falls under the Exception 4 of Section 300 IPC. More so, there was no motive of the accused/appellant to commit murder of the minor child, who was 7 (seven) years old at the relevant time of incident, and the prosecution also could not establish any motive for the murder. But the incident had happened only with grave and sudden provocation as the deceased along with others who were teasing and taunting the accused/appellant who arrived at the place of occurrence for collecting some

sour fruits.

40. Exception 4 of Section 300 IPC read as under:

> "*Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.*"

41. To invoke Exception 4 of Section 300, 4 (four) requirements must be satisfied, namely; (i) it was a sudden fight, (ii) there was no premeditation, (iii) the act was done in a heat of passion, (iv) the assailant by not taken any undue advantage or acted in a cruel manner. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. But the offender must not have taken any undue advantage or acted in a cruel manner.

42. The Hon'ble Supreme Court in the Case of **Anil Kumar Vs. The State of Kerala (Criminal Appeal No. 2697 of 2023)** has held that "*the exception clearly in unequivocal term states that it would be applicable where culpable homicide is committed not only without premeditated mind in a sudden fight or quarrel but also without the offender taking "undue advantage" of the situation.*"

43. Here in the instant case, as from the materials available in the case record, it is evident that at the relevant time of incident, the deceased child along with

other children were playing and plucking tamarind when the accused arrived there carrying a dao and it is the case of the defence that the children started teasing him and for which he inflicted injury on the vital part of the deceased that is on the neck and the skull region with a dao. But simple teasing by some minor children cannot be considered as a grave and sudden provocation. More so, the accused acted in a very cruel manner and also took the undue advantage wherein the deceased was only 7 (seven) years old child. Thus, it can be held that the accused took the undue advantage of the age of the minor deceased and acted in a cruel manner by causing injury on his vital part which caused instantaneous death of the minor child.

44. It may be a fact that the accused may not have any premeditation of mind to kill the child as there is no such evidence of any previous grudge or enmity with the child or his family members, but the manner in which he attacked the child is very cruel in nature and in the same time, he took the undue advantage of the age of the deceased who was only 7 (seven) years old.

45. In the case of **K M Nanabati Vs. State of Maharashtra [1962 Supl 1 SCR 567]**, the Hon'ble Supreme Court has held that the conditions which have to be satisfied for exception to be invoked are (a) the deceased must have given provocation to the accused, (b) the provocation must be grave (c) the provocation must be sudden.

46. Here in the instant case, it is seen that accused/appellant not only gave one blow to the deceased child, but he gave 3-4 blows on the vital part of the body, i.e. on the neck, mandible region as well as scalp region, which caused

instantaneous death of the minor child. For teasing and taunting of a child/children, he could have chased the children or could have reacted in a manner by physically assaulting the child. But, the manner by which the accused inflicted injury on the vital part of the deceased that too with a dao, it can be held that the present case does not come under Exception 4 of Section 300 IPC.

47. In view of above, we are of the view that the prosecution has able to establish the case against the present accused/appellant beyond all reasonable doubt and hence, we find that the learned Sessions Judge has committed no error or mistake while convicting the accused/appellant under Section 302 of the Indian Penal Code and therefore, we do not find any reason to make any interference in the judgment & order dated 24.02.2021, passed by the learned Sessions Judge, Baksa, Mushalpur, BTAD, Assam, in Sessions Case No. 114/2019, under Section 302 of the Indian Penal Code, and accordingly the same stands upheld. Consequently, the appeal stands dismissed.

48. Before parting, we put on record the appreciation for the valuable assistance rendered by Dr. B. N. Gogoi, learned Amicus Curiae for the appellant as well as Mr. S. H. Mahmud, learned Amicus Curiae for the respondent No. 2/informant, and we recommend that they are entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

49. Send back the case record of the Trial Court along with a copy of this judgment and order.

50. In terms of above, this criminal appeal stands disposed of.

JUDGE **JUDGE**

Comparing Assistant