GAHC010237702019

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

Case No. : Crl.A./388/2019

SRI PRANJAL BHOWMIK @ PRANJAL DAS BHOWMIK
S/O- SRI SUKUMAR BHOWMIK @ HARADHAN BHOWMIK, R/O- VILL.- PATIDOIVERELA, P.S. MISSAMARI, DIST.- SONITPUR, ASSAM, PIN- 784506.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY P.P., ASSAM.

2:SRI MANTU KALITA
S/O- LATE KRISHNA KALITA
R/O- VILL.- PATIDOIVERELA
P.S. MISSAMARI
DIST.- SONITPUR
ASSAM
PIN- 784506

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE RAJESH MAZUMDAR

Advocates for the appellant : Mr. A. M. Bora, Sr. Adv.,
Mr. D. P. Mandal.

Advocates for the respondents : Mr. R. R. Kaushik, Addl. PP.,
Mr. Z. Alom (R-2)

Date on which judgment is reserved : **23/06/2026**

Date of pronouncement of judgment : **26/06/2026**

Whether the pronouncement is of the operative part of the judgment ? : No.

Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. A. M. Bora, learned senior counsel, assisted by Mr. D. P. Mandal, learned counsel for the appellant and Mr. R. R. Kaushik, learned Addl. PP, Assam as well as Mr. Z. Alam, learned counsel for the respondent No. 2 (informant).

2. This appeal has been preferred against the impugned Judgment dated 13/08/2019, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 304/2015, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for three months.

3. The issue pertains to the death of one Arup Kalita, who had gone missing from the night of 19/05/2010 and whose body had been found on 21/05/2010 at around 11 a.m. Due to the death of Arup Kalita and on completion of investigation, three brothers, namely, Chandan Bhowmik, Babul Bhowmik and Pranjal Das Bhowmik along with their father Haradhan Bhowmik and sister-in-law Sangita Bhowmik were charge sheeted under Sections 120B/302/201/34 IPC. However, charge under sections 120B/302/34 IPC was framed against all the above, except for Sangita Bhowmik, who was discharged. Vide the impugned Judgment dated 13/08/2019, the co-accused Chandan Bhowmik, Babul Bhowmik and Haradhan Bhowmik were acquitted of the charges framed against them, while the present appellant was

the only one amongst the four accused persons charged, who was convicted under Section 302 IPC.

4. The appellant's counsel submits that the entire case of the prosecution rests on the actions and evidence of PW-2, who is the informant and brother of the deceased. The initial GD Entry No. 486 dated 20/05/2010 and the FIR has been registered only on the basis of the written information provided by PW-2, who in turn had been provided information by PW-11. The Senior Counsel for the appellant submits that in terms of the evidence of PW-11, he had seen the appellant assaulting the deceased on his head with a wooden *batten* on 19/05/2010 at around 11.45 p.m, when he went out from his room to attend to the call of nature. At that time, he also saw the other co-accused persons, who were standing nearby doing nothing. When PW-11 tried to interfere, the appellant pushed him and told him not to interfere, stating that it was a domestic problem. He then went back to his room and on 20/05/2010 at about 11 a.m., PW-11 went to the house of PW-2 and told him about the incident that he had witnessed on the night of 19/05/2010. Despite PW-11 having informed PW-2 about the appellant assaulting the deceased with a weapon on 19/05/2010 at about 11.45 p.m., the GD Entry No. 486 dated 20/05/2010, which was registered by the Officer-in-Charge of the Missamari Police Station at 8.10 p.m. on 20/05/2010, on the basis of a written report submitted by PW-2, does not make a mention of the assault on the appellant. This could only be due to PW-2 not having made any mention that PW-11 had assaulted the deceased on 19/05/2010 in his written report, which further implies that PW-2 had not seen any assault made on the deceased and had thus not told PW-2 about the assault.

5. The Senior Counsel for the appellant further submits that after the body of the deceased had been recovered from a pond on 21/05/2010 at around 11 a.m. near the house of one of the co-accused, PW-2 had filed the FIR on 21/05/2010 at around 3.30 p.m. In the said FIR, the name of the present appellant was absent and instead the co-accused Chandan Bhowmik and Babul Bhowmik, who were the brothers of the appellant, were identified as the persons who had assaulted the deceased and had struck him on his head. The learned senior Counsel for the appellant further submits that as the name of the appellant does not appear in

the Missamari PS GDE No. 486 registered at 8.10 p.m. on 20/05/2010 and in the FIR dated 21/05/2010, the naming of the appellant as the person who had assaulted the deceased on 19/05/2010 in the testimony of PW-11, was an afterthought on the part of PW-11. It thus appears that PW-11 had never actually witnessed the appellant assaulting the deceased.

6. The learned Senior Counsel submits that the above facts creates a doubt as to whether the appellant had assaulted the deceased and when a doubt has been created on the basis of preponderance of probability by the defence against the prosecution case, the appellant could not be convicted, unless the doubt was cleared by the prosecution, which it has not done.

7. The alternative argument/submission of the learned Senior Counsel for the appellant is that, even if this Court is to hold that the prosecution had been able to prove that the death of the deceased had been occasioned by the assault made on the deceased by the appellant, there was no intention or knowledge on the part of the appellant to kill the deceased. The evidence of the Doctor is only to the effect that there was one injury in the head of the deceased. Further, only one blow had been given by the appellant on the head of the deceased, with the wooden *batam* used for the assault. The conviction of the appellant under Section 302 IPC was not sustainable, as the said act could only attract Section 304 Part-II IPC and not section 302 IPC, especially when the prosecution failed to establish any motive for the assault. He accordingly submits, that at best, the appellant could have been convicted only under Section 304 Part-II IPC.

8. Mr. R. R. Kaushik, learned Addl. PP, Assam as well as Mr. Z. Alam, learned counsel for the respondent No. 2 (informant) submit that the author of the FIR and the GDE No. 486 dated 20/05/2010 is PW-2 and not PW-11. As such, the non-mentioning of the appellant's name as the perpetrator of the assault committed on the victim by PW-2 in the FIR and GDE, can only discredit PW-2 as a witness and the same cannot be used to discredit the testimony given by PW-11. They also submit that the motive for killing the deceased is not required to be established by the prosecution, when there is an eye witness to the crime, which, in this case, is

PW-11. They also submit that the appellant had the knowledge and intention to kill the deceased, inasmuch as, after the assault on the deceased, the body of the deceased was thrown into the pond with his legs tied with a rope. The above was to make doubly sure that the victim died. As such, the knowledge and intention on the part of the appellant to kill the deceased was proved by the above act. They also submit that the police had seized one black colored full shirt having white print belonging to the deceased, from the house of Haradhan Bhowmik, who is the father of the appellant. They also submit that it was the duty of the appellant to explain as to how he had left the company of the deceased on the night he had assaulted the deceased. They submit that unless a satisfactory and probable explanation is given by the appellant in terms of Section 106 of the Evidence Act, the non-explanation could be used as an additional link in the chain of circumstantial evidence, pointing to the guilt of the appellant. They also submit that there was an issue regarding the brother of the appellant, Monoranjan Bhowmik, having borrowed Rs.40,000/- from the deceased, for the marriage of their brother, which could be a motive for the crime.

9. The learned Senior Counsel for the appellant, on the other hand, submits that the evidence of PW-3 is to the effect that the mother of Monoranjan Bhowmik had showed him a shirt and told him that the same had been left by the deceased in their house. Further, when Monoranjan came to his house on 21/05/2010, he had asked Monoranjan as to whether they had killed the deceased, as they had taken Rs.40,000/- from him. However, the same was denied by Monoranjan. He also submits that PW-11 was in love with Nitu Moni Kalita, the sister of the deceased and that there was a proposal for their marriage. As such, there was a motive on the part of PW-11 to help the brother of the deceased in ensuring that the appellant was convicted of the crime.

10. We have heard the learned counsels for the parties.

11. As can be seen from the submissions made by the learned counsels for the parties, the evidence of PW-2 and PW-11 are crucial to disposing of the present appeal. However, prior to

examining only the evidence of PW-2 and PW-11, we have to give a gist of the evidence given by the other Prosecution Witnesses.

12. The facts of the case in brief are as follows :-

(i) The Officer-in-Charge of the Missamari Police Station registered Missamari Police Station GDE no. 486 dated 20/05/2010 at 8.10 pm, stating that PW-2 had submitted a written report to the effect that his younger brother Shri Arup Kalita (deceased) had taken a meal in the house of Shri Nandakishore Bhagat (PW-12) on 19/05/2020 and after leaving the house of PW-12, the deceased did not return home. The GDE no. 486 dated 20/05/2010 only reflected the names of 3 persons, i.e, PW-2, the deceased and PW-12.

(ii) The body of the deceased was recovered from a pond behind the house of the accused Haradhan Bhowmik at around 11a.m., due to which an FIR dated 21/05/2010 was submitted by PW-2 to the Officer in Charge of the Missamari Police Station, stating that after the deceased had a meal in the house of PW-12, he had left for his house. However, the co-accused Chandan Bhowmik and Shri Babul Bhowmik, sons of Shri Haradhan Bhowmik had assaulted him and struck him on his head. The FIR also stated that they were abetted by one Suman Dey and that PW-11, who was a tenant of Haradhan Bhowmik, had witnessed the entire incident. Pursuant to the FIR dated 21/05/2010, Missamari PS case no. 29/2010 under Sections302/201/34IPC was registered.

13. After investigation was complete, charge sheet was filed against the following 5 co-accused persons, including the present appellant Pranjal Bhowmik @ Pranjal Das Bhowmik under Sections 120B/302/201/34 IPC. The name of the five co-accused are as follows :-

i)	Babul Das Bhowmik,	Sons of Haradhan Bhowmik
ii)	Chandan Das Bhowmik,	
iii)	Pranjal Das Bhowmik,	
iv)	Haradhan Bhowmik @ Sukumar Bhowmik.	
v)	Smti. Sangita Bhowmik	

14. The learned Trial Court there after framed charges under section 120B/302/34 IPC against all the 4 male co-accused persons, to which they pleaded not guilty and claimed to be tried. Accused Sangita Bhowmik was discharged by the learned Trial Court for want of evidence.

15. The learned Trial Court thereafter recorded the evidence of 22 Prosecution Witnesses and after examining the appellant and other co-accused persons under Section 313 Cr.P.C., it acquitted all the co-accused persons except the present appellant Pranjal Bhowmik @ Pranjal Das Bhowmik, who was convicted under Section 302 IPC.

16. The evidence of PW-1, who is the Senior Medical and Health Officer at Kanalata Civil Hospital, Tezpur, is to the effect that he conducted post-mortem examination on the body of the deceased on 21/05/2010 at around 2 pm. He found one incised injury in the occipital scalp in vertical direction of 10 cm length associated with skull bone fracture. Membrane and brain were lacerated and haemotoma was found in the brain. In the opinion of PW-1, the cause of death was due to head injury, which was ante-mortem in nature. PW-1 further held that the

injury was sufficient to cause the death of a person. He also stated that such an injury might be caused by a sharp weapon even if it was made of wood, but it must be sharp.

17. The evidence of PW-2, who is the younger brother of the deceased Arup Kalita, is to the effect that on 19/05/2010 at about 8.30 pm, Arup Kalita went to the house of PW-12 for dinner and for staying there for the night. He did not return to their house that night. On making an enquiry by phone, he was informed by PW-12 that Arup Kalita had dinner and left the house of PW-12 after receiving a phone call. A search did not come up with any result. At noon, PW-11 came to the house of PW-2 and informed him that he had seen the appellant and the co-accused Babul beating Arup Kalita in the night. PW-2 also stated that Haradhan Bhowmik and Chandran Bhowmik were also present and that they had threatened him not to tell anybody about the incident and to go to sleep. Later, PW-2 asked Monoranjan Bhowmik, who was a close friend of Arup Kalita, about the whereabouts of Arup Kalita. Monoranjan Bhowmik then told PW-2 that on going to the house of Haradhan Bhowmik last night, he had also been beaten. PW-2 stated that he informed the Missamari Police Station about his missing brother on 20/05/2010. On 21/05/2010, the dead body of his brother was found in the pond near the house of the accused persons. He then filed an FIR and the Police took the dead body from the pond and conducted an inquest over the same.

18. In his cross-examination, PW-2 denied the suggestion that he had not told the police about the deceased having dinner in the house of PW-12 or that PW-11 had not told him about seeing the deceased being beaten up or that the appellant had threatened him not to tell anybody about the incident.

19. The evidence of PW-3, who is the subject teacher of Missamari Junior College, is to the effect that the deceased was the Principal of the said college and that he came to learn that Arup Kalita was missing on 20/05/2010. On going to the house of Haradhan Bhowmik, Monoranjan Bhowmik informed him that Arup Kalita had come to their house last night. Monoranjan had also informed PW-3 that Pranjal and Babul had assaulted Arup Kalita and that Chandan and

Haradhan were also present. Then the mother of Monoranjan Bhowmik showed PW-3 a shirt which was left by Arup Kalita in their house. On 21/05/2010, Monoranjan came to the house of PW-3 and asked about the whereabouts of Arup Kalita. On PW-3 asking Monoranjan as to whether they had killed Arup Kalita as they had taken Rs.40,000/- from him, Monoranjan denied the same.

In his cross-examination PW-3 stated that the deceased was his close friend and was like his elder brother.

20. The evidence of PW-4 and PW-5 is to the effect that they had heard about the incident that had occurred on 21/05/2010 and that they had seen the body of the deceased.

21. The evidence of PWs 6 & 7 is to the effect that they saw the dead body being brought to the bank of the pond and that the legs of the dead body were tied with a rope. He also saw injury mark on the back of the dead body.

22. The evidence of PWs 8 and 9 is to the effect that they were seizure witnesses to the seizure of one black shirt with white print, one Nokia mobile without the back cover and battery and one *dao*.

23. The evidence of PW-10 is to the effect that he came to know about the dead body of Arup Kalita being found in the pond. Further, the police had seized one wooden batten.

24. The evidence of PW-11 is to the effect that he knew the accused persons. He also stated that he was residing in a rented house belonging to the accused Haradhan Bhowmik. On going out to attend to nature's call, he saw a quarrel taking place near his bathroom. He also saw the appellant assaulting the deceased on his head with a wooden batten. PW-11 also saw Babul Bhowmik and Haradhan Bhowmik standing near the place of occurrence with Haradhan holding something in his hand. They were not doing anything. When PW-11 tried to intervene

in their quarrel, the appellant pushed him back and told him that it was their domestic problem, in which he should not interfere. PW-11 then stated that he went to the house of the deceased the next day and saw many people gathered there. He told PW-2 about the incident he had seen on the night of 19/05/2010. PW-11 then stated that he came to know that the dead body of the deceased had been found on 21/05/2010 in a pond, located on the back side of the house of the accused Haradhan Bhowmik. He went and saw the body of the deceased and the injury on the back of the head of the deceased.

25. In his cross-examination, PW-11 stated that Haradhan Bhowmik had several tenants in his house. In his cross-examination, PW-11 stated that he had seen both the appellant and the deceased scuffling from a distance. He also said that other than the appellant, no one did anything to the deceased Arup Kalita.

26. The evidence of PW-12 is to the effect that he knew the accused persons and that the incident occurred on 19/05/2010 at about 11 p.m. On that day, the deceased Arup Kalita had come to his house at about 9.30 p.m and after dinner, he had received a phone call at about 11.00 p.m., due to which, Arup Kalita went away.

In his cross-examination, PW-12 stated that though there was some talk with regard to Arup Kalita spending the night in his house, Arup Kalita told him that he could not stay, because he had some business to attend to, after a phone call had been received by him. In his evidence, PW-12 also stated that Arup Kalita told him that Monoranjan Bhowmik had taken a loan of Rs.1 lakh from him.

27. The evidence of PW-13 is to the effect that the deceased Arup Kalita was his younger brother and that he knew the co-accused persons. He also stated that he was seizure witness to one black coloured T-shirt having white print, which was torn in the back and belonged to his deceased brother. He was also made the seizure witness to one mobile handset and a blood stained dao from the house of co-accused Haradhan Bhowmik.

28. The evidence of PW-14 is to the effect that he was a witness to the inquest report made on the dead body of the deceased Arup Kalita.

29. The evidence of PW-15 is to the effect that he had informed police about something that was in their pond, which was later found to be a dead body. He also stated that the hands and legs of the dead body were not tied up and that the Police had recovered the dead body in his presence.

30. The evidence of PW-16 is to the effect that she had seen something in their pond and she informed her elder brother about the same.

31. The evidence of PW-17 is to the effect that on 24/05/2010, while working as a Judicial Magistrate, First Class, Tezpur, she recorded the statement of PW-11 and PW-3 under Section 164 Cr.P.C.

32. The evidence of PW-18 is to the effect that on 31/05/2010, while working as a Munsiff-cum-Judicial Magistrate, 2nd Class, Tezpur, he recorded the Section 164 Cr.P.C. statement of PW-12.

33. The evidence of PW-19 is to the effect that he was a witness to the inquest report made over the body of the deceased and that he saw one cut injury mark over the parietal region of the dead body.

34. The evidence of PW-20 is to the effect that on 18/04/2011, he was posted as Circle Inspector of Dhekiajuli Circle and the S.P. Sonitpur, Tezpur had entrusted him to investigate Missamari P.S. Case No.29/2010. He was to record the statements of Dilip Sharma, Dibakar Bora, Pradip Ganguli and Hemanta Biswas. However, as he could not find them, he could not record their statements.

35. The evidence of PW-21 is to the effect that on 21/05/2010, he was posted as Sub-Inspector of Police at Missamari P.S. He received an FIR from PW-2 and being the In-charge of the Missamari P.S, he registered the same as Missamari P.S. Case No.29/2010 under Sections 302/201/34 IPC. He took up the investigation and after recording the statements of witnesses, conducting inquest, sending the dead body for post-mortem examination, he seized the following:-

> "*(i) one wooden batten, length 2 feet approximately, 3" x 4", one side damaged.*
>
> *(ii) Three nos. of bamboo sticks (kami), length 1 feet, 1 feet, 8 feet*
>
> *Ext.4 A is the said Seizure List and Ext.4 A(4) is my signature. Vide Ext.5 I have seized:*
>
> *(i) One black full shirt with white printed, back side torn;*
>
> *(ii) One 'beka' iron dao with wooden handle, 9" with blood stain;*
>
> *(iii) Nokia mobile handset with SIM."*

After having the statements of PW-3, 11 & 12 recorded under Section 164 Cr.P.C. and collecting the forensic reports and arresting the accused persons, he filed a charge-sheet against the accused-persons under Section 120(B)/302/201/34 IPC.

36. The evidence of PW-22 is to the effect that on 20/05/2010, he was posted at Missamari P.S. as Officer-in-Charge and that at around 8.10 p.m, PW-2 had given a missing report with regard to the deceased Arup Kalita. Accordingly, PW-22 stated that he made G.D. Entry No.486 dated 20/05/2010. On 21/05/2010, one Lakhiram Mushahary came to the police station and

verbally informed him that a dead body was floating in a pond near his house, on the basis of which, G.D. Entry No.502 dated 21/05/2010 was registered. The place where the body was found was visited thereafter.

37. The examination of the appellant under Section 313 Cr.P.C shows that the appellant had made a blanket denial with regard to all the evidence that had been adduced against him.

38. The statement made by PW-11 under Section 164 Cr.PC is to the effect that he was a tenant in the house of the co-accused Haradhan Bhowmik for 10 years. At about 11.45 p.m on 19.05.2010, he went outside his house to urinate before going to bed. As he stepped out of his house, he heard a commotion about 50 meters away and when he proceeded towards the same, he saw Haradhan Bhowmik's son, Babul Bhowmik holding Arup Kalita and Pranjal Das Bhowmik was assaulting Arup Kalita with a wooden *batten*. The assault caused bleeding on the back of Arup Kalita's head. Haradhan Bhowmik was there holding something in his hand which he could not see. PW-11 said that he knew Arup Kalita well, as he was the principal of Goru-Bondha College and used to address him as 'Dada'. On making some resistance against the assault, the appellant pushed him and told him to go to his room. On remaining there, their elder brother Chandan Bhowmik threatened PW-11 and told him not to tell anyone about the incident. Feeling helpless, PW-11 returned to his room. The following morning, PW-11 went to Arup Kalita's house, to enquire about him and came to know that he had not returned home. Then PW-11 told Arup Kalita's brothers PW-2 and PW-13 about the incident that he had witnessed. Arup Kalita did not return home even on that night. However, around 10.30-11.00 a.m. on Friday, Arup Kalita's dead body was recovered from a pond behind co-accused Haradhan Bhowmik's house. He also stated that he saw injury on the back of the head of the deceased.

39. As stated in the foregoing paragraphs, the learned Trial Court, on considering the evidence of the Prosecution Witnesses, held that the prosecution had been able to prove the charge under Section 302 IPC against the appellant beyond all reasonable doubt. However, the

learned Trial Court acquitted the other three co-accused persons, on the ground that the Prosecution had not been able to prove the charges framed against them.

40. The facts of the case thus show that the only eye-witness to the deceased being assaulted by the appellant on the night of 19/05/2010 was PW-11. A reading of the testimony of PW-11 and the cross-examination in particular, does not show that the evidence of PW-11 has been shaken by the defence. The only stand taken by the appellant with regard to the evidence of PW-11 blaming the appellant as the perpetrator of the crime is that it was an afterthought and that it had been made only due to the fact that PW-11 was in love with the sister of the deceased Arup Kalita.

41. We are of the view that though the absence of the name of the appellant in the GDE No. 486 and the FIR submitted by PW-2 is somewhat peculiar, we cannot throw out the evidence of PW-11 only because of the above reason. The absence of the name of the appellant in the above 2 documents may be due to inadvertence. However, we cannot speculate that the absence of the appellant's name implies that PW-11 had not seen the appellant assaulting the deceased. We cannot base our findings on speculations. The evidence of PW-11 implicating the appellant as the person who assaulted the deceased on 19/05/2010 cannot be taken to be an afterthought, in view of the fact that the statements made by PW-11 under Section 161 Cr.P.C. and Section 164 Cr.P.C. corroborate his testimony given before the learned Trial Court.

42. In the case of G***ovindaraju @ Govinda Vs. State by Sriramapuram P.S. & Anr,*** reported in ***(2012) 4 SCC 722***, the Hon'ble Supreme Court has held that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the Prosecution.

In the present case, the evidence of PW-11 fits into the chain of events that has occurred

after the deceased had left the house of PW-12 after dinner and as there is no reason for PW-11 to have made a false case against the appellant, there is no reason to question the truthfulness of the evidence of PW-11. Further, the trial proceedings before a Trial Court is not to be based on the quantity of evidence, but on the quality of evidence.

43. In the case of ***Alil Mollah And Anr. Vs. State of West Bengal [Crl. Appeal. 400/1987]*** the Supreme Court held that conviction can be based on the testimony of a single eye witness if he is a wholly reliable witness.

In the present case, PW-11 was the tenant of one of the co-accused, i.e, Haradhan Bhowmik and there is nothing in the evidence to show that he had any axe to grind with the appellant or the relatives of the appellant.

44. No doubt the submission of the learned Senior Counsel for the appellant seems attractive. However, the fact remains that just because the GDE No. 486 of 20/05/2010 and the FIR has not made a mention of the appellant as the person who assaulted the deceased, does not mean that the appellant was not the person who killed the deceased. There is no reason for this Court to disbelieve the testimony of PW-11, only because PW-2 did not make a mention of the assault on the deceased by the appellant, in the above 2 documents. Further, there is nothing to show that the evidence of PW-11 was a lie or made due to having any enmity with the appellant. The appellant being in love with the sister of the deceased does not prove anything. Why would PW-11 implicate the appellant, if he was innocent. Also, the appellant was the last person seen with the deceased and had assaulted the deceased.

45. In the case of ***Rajendra Alias Rajesh Alias Raju Vs. State (NCT of Delhi)*****,** reported in ***(2019) 10 SCC 623***, the Supreme Court held that when a victim is last seen alive with the accused in a secluded area, the burden shifts to the accused to explain what happened as they have special knowledge of the facts. Para 12.2.4 of the said judgment further held that when the last seen together theory is applied, the accused has to show how and when he parted company with the deceased. The reasonableness of the explanation offered by the accused would have a

direct bearing on the effect of the last seen in a case. He must furnish an explanation that appears to the Court to be probable and satisfactory. The Supreme Court also held that Section 106 of the Evidence Act only lays down the rule that when an accused does not throw any light upon facts which are especially within his/her knowledge and cannot support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances.

46. In the case of ***Mohd. Firoz Vs. State of Madhya Pradesh*** reported in **(2022) 3 SCC (Cri) 165,** the Supreme Court had held that once the theory of "last seen together" is established, the accused is expected to offer some explanation as to under which circumstance he had parted the company of the victim. Though the entire burden of proving the guilt of an accused rest on the prosecution, if the accused does not throw any light upon the facts which is proved to be within his special knowledge in view of section 106 of the Evidence Act, such failure on the part of the accused may also provide an additional link in the chain of circumstances against him. Though section 106 of the Evidence Act does not shift the burden of the prosecution on the accused, nor requires the accused to furnish an explanation with regard to the facts which are especially within his knowledge, nonetheless, furnishing or non-furnishing of the explanation by the accused would be a very crucial fact, when the theory of last seen together is proved against him, to know as to how and when the accused parted the company of the victim.

47. In the case of ***Satpal Vs. State of Haryana***, reported in ***(2018) 6 SCC 610***, the Supreme Court has held that normally the last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. Para 6 of the said judgement states as follows :-

"6. We have considered the respective submissions and the evidence on record.

There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

48. In the present case, the evidence of PW-11 shows that besides the appellant assaulting the deceased on his head with a wooden batten, the brother and father of the appellant were also present. However, none of them have made any attempt to stop the assault or explain as to how they parted company with the deceased and the manner in which they had parted company with him.

49. It was the duty of the appellant, his brother and father to offer a reasonable explanation as to how they had left the company of the deceased. In terms of section 106 of the Evidence Act, as the appellant has not offered any explanation or furnished any defence evidence, it can be said that a chain of circumstances forms, from the assault made on the deceased leading to his death and being found in a pond, which is incompatible with any other possible hypothesis

other than the guilt of the appellant. No explanation has been given by the appellant as to why he had assaulted the deceased or why he should be considered to be innocent, despite being the last person seen assaulting the deceased. There is also no evidence of the deceased being assaulted by any person, other than the appellant.

50. On a perusal of the Section 164 Cr.P.C statement made by PW-11, we find that the said statement corroborates the testimony of PW-11, which is to the effect that the appellant had assaulted the deceased. As such, we do not find any reason to doubt the truthfulness of the evidence of PW-11. The very fact that the doctor's evidence shows that the injury on the head of the deceased could have been the cause of death of the deceased and the fact that the appellant had hit the deceased with a wooden batten corroborates the Prosecution case, that the reason for the death of the deceased was due to the assault made on him by the appellant. Otherwise, the doctor could/would have given his opinion for the cause of death as drowning, instead of head injury.

51. With regard to the issue of the prosecution not having established the motive of the crime, we have to understand that motive is required to understand the context in which the crime was committed, especially in cases based on circumstantial evidence. Where eyewitness to the crime are available, motive loses much it it's significance. In the case of ***Sheo Shankar Singh Vs. State of Jharkhand*** reported in ***(2011) 3 SCC 654,*** the Supreme Court held that proof of motive, recedes into the background in cases where the Prosecution relies upon an eye-witness account of the occurrence. In this case, we find the evidence of PW-11 to be credible and as such, the non-establishment of the motive for the crime by the Prosecution does not weaken the prosecution case against the appellant.

52. With regard to the submission made by the learned counsel for the appellant that a doubt is created as to whether the appellant had killed the deceased, we do not find any doubt being created with regard to who killed the deceased.

53. The facts of the case show that the deceased Arup Kalita had left the house of PW-12 after dinner on 19/05/2010 at around 11 p.m. PW-11 then saw the appellant assaulting Arup Kalita on 19/05/2010 at around 11:45 p.m. The body of Arup Kalita was however recovered at around 11:00 a.m. on 21/05/2010. To connect the assault with the death of the deceased, we will have to see the evidence of PW-1 (Doctor), who stated that the stomach of the deceased was full of food materials. As the stomach empties its contents between 4 to 6 hours after the last meal and as the stomach of the deceased was still full of food on 21/05/2010, it is quite apparent that the death of the deceased had taken place within 4 to 6 hours of having his meal on 19/05/2010 in the house of PW-12. The learned Trial Court in this regard has referred to the "American Journal of Forensic Medicine & Pathology" by Dr. Howard Loomis, Jr. in paragraph 38 of the impugned judgement, which is as follows :

> "*According to Dr. Howard Loomis, Jr. in "American Journal of Forensic Medicine @ Pathology", various ingested food materials remain within the stomach for variable periods of time, depending on the nature and size of the meal and it has been determined through extensive research that under ordinary circumstances the stomach empties its contents 4 to 6 hours after the last meal. If the stomach is found to be filled with food and digestion of the contents not extensive then it is assumed that death followed shortly after the meal. If the stomach is entirely empty death probably took place at least 4-6 after last meal. If the small intestine is also empty the probability is that death took place at least 12 hours or more after last meal.*
>
> *According to Modi, physiological process of digestion of an average meal takes 2.5 to 6 hours in man."*

Further, there was rigor mortis on the body of the deceased when it was found. There is also nothing in the evidence of PW-1 to show that the deceased had died due to drowning. Also, in view of the single injury on the head of the deceased, which the doctor opined was the cause of death of the deceased, it is quite apparent that the appellant had killed the deceased. There is also nothing to show that the deceased was seen alive or having food after being assaulted by the appellant after 11.45 p.m. on 19/05/2010.

54. As we are of the view that there is no infirmity with the learned Trial Court, coming to a finding that the appellant's assault on the deceased was the cause of death of the deceased, the next question to be decided is whether there was any intention or knowledge on the part of the appellant to kill the deceased, so as to attract Section 304 Part-II IPC.

55. For Section 304 Part-I or Part-II IPC to come into play, it will have to be shown that the four conditions Firstly to Fourthly are not attracted to Section 300 IPC and that one of the Exceptions 1 to 5 are attracted to the case in hand.

56. In the case of ***Pulicherla Nagaraju vs. State of A.P***, reported in ***(2006) 11 SCC 444***, the Supreme Court held that it is for the Courts to ensure that cases of murder punishable under Section 302 IPC are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under 302 IPC. It further held that the intention to cause death can be gathered generally from a combination of a few or several of the following, among other circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury;(v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.

57. In the case of ***Mavila Thamban Nambiar vs. State of Kerala***, reported in ***(2009) 17***

SCC 441, the Supreme Court held that when the appellant had given one blow with a pair of scissors on the vital part of the body of the victim, it would be reasonable to infer that the appellant had knowledge that any injury with a pair of scissors on the vital part would cause death, though he may not have intended to commit the murder. It was in that context that the Supreme Court was of the view that the offence of the appellant would more appropriately fall under Section 304 Part-II of the IPC. However, in the case of ***Stalin vs. State***, reported in ***(2020) 9 SCC 524***, the Supreme Court has held that death caused by a single stab wound can also be considered murder if the requirements of Section 300 IPC are fulfilled.

58. The learned Trial Court in the impugned judgement has stated that a batten is a wooden plank with sharp edges, which is more like a cuboidal structure with edges and corners. Hence, the edge of the batten can cause an incised wound on the scalp of the deceased, which can be fatal. In the present case, the batten has been used to hit the head of the deceased, which is a vital part of the body. Not being satisfied with the assault, the body of the deceased was thrown into the pond with his feet tied, thus ensuring that the deceased never came out alive from the pond. The above facts, in our view, can only reinforce our view that there was intention on the part of the appellant to kill the deceased. It should also be remembered that this was not a sudden and grave provocation, inasmuch as, the deceased had left the house of PW-12 after having received a phone call and it was only a few moments later that the appellant was seen assaulting the deceased by PW-11. We thus find that none of the Explanations 1 to 5 are attracted to this case.

59. In the present case, not only had the appellant assaulted the head of the deceased with a wooden batten, which was the cause of his death, it was ensured that the deceased was not alive, by throwing his body in a pond with his legs tied. The body of the deceased had been fished out from a pond with the legs of the victim tied. This could only mean that the same had been done to ensure that there was no way that the body of the deceased came out from the pond alive and to ensure that he drowned, if he had survived the assault on his head.

60. On considering all the above facts, we are of the view that there was intention and knowledge to kill the deceased and as such, Section 304 Part-I/II IPC is not attracted to the facts of this case.

61. The appeal is accordingly dismissed.

JUDGE **JUDGE**

Comparing Assistant

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