GAHC010169562019

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

Case No. : CRL.A(J)/53/2019

SRI RAJEN NAYAK

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY P.P. ASSAM

2:SMTI. SUKURMANI NAYAK
W/O-LATE PRAHALAD NAYAK
VILL-BARKATHIABARI
P.S. BEHALI
DIST. SONITPUR
ASSAM
PIN-78416

Advocate for the Petitioner : MR. B C DAS, LEGAL AID COUNSEL

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

Date : 23-02-2024

JUDGMENT AND ORDER

(*CAV*)

(K.R. Surana, J)

Heard Mr. B.C. Das, learned legal aid counsel appearing for the appellant. Also heard Ms. S. Jahan, learned Addl. P.P. appearing for the State.

2. This appeal from jail has been received from jail as per the provisions of section 383 Cr.P.C. This appeal under section 374 Cr.P.C. is directed against the judgment and sentence dated 17.12.2018, passed by the learned Additional Sessions Judge, FTC, Biswanath Chariali, Sonitpur in Sessions Case No. 168/2014, arising out of G.R. Case No.289/2013, corresponding to Behali P.S. Case No. 73/2013, by which the sole appellant was convicted for committing offence punishable under section 302 I.P.C. and was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for 1 (one) month.

3. In brief, the case of the prosecution is that on 25.04.2013, the complainant, namely, Smti. Sukurmoni Nayak had lodged an *ejahar* with the In-Charge of Bargang Outpost under Behali P.S. to the effect that on 24.04.2013, at about 5.00 PM, the appellant, namely, Rajen Nayak had killed her 26 year old son, namely, Nathu Nayak by hacking him with a *dao* over the a catapult and she had prayed to take necessary action against the appellant. The said *ejahar* was sent for registration to the Officer-in-Charge of Behali P.S. Accordingly, Behali P.S. Case No. 73/2013, under Section 302 IPC was registered and the investigation was entrusted to Rajib Gohain, I/C Bargang Outpost.

4. In course of investigation, the I/O had prepared the seizure list, collected the post-mortem report and on finding *prima facie* case made out against the appellant, charge-sheet was submitted on 30.06.2013. The learned

Sub-Divisional Judicial Magistrate (M), Biswanath Chariali, on finding that the offence was exclusively triable by the Court of Sessions, committed the case for trial before the Court of learned Additional Sessions Judge, FTC, Biswanath Chariali. After complying with the prescribed formalities, charges were read over and explained to the appellant on 29.08.2014, to which the appellant had pleaded not guilty and claimed to be tried.

5. During trial, the prosecution had examined 7 (seven) witnesses, namely, Smti. Sukurmoni Nayak (PW-1), Sri Puna Nayak (PW-2), Smti. Saraswati Nayak (PW-3), Sri Bhaben Mali (PW-4), Miss Nirmali Bhuyan (PW-5), Dr. Basanta Kr. Borah (PW-6), and Sri Rajib Gohain (I.O) (PW-7). The prosecution witnesses had exhibited the following documents, viz. post-mortem report (Ext-1), seizure list (Ext-2), Charge-sheet (Ext-3), and *dao* (M.Ext-1). The incriminating materials were brought to the notice of the appellant during his examination under Section 313 Cr.P.C., which was denied by the appellant claiming the allegation to be false. However, the appellant had declined to give any defence evidence.

6. The learned trial Court has formulated the point of determination as follows:-

> "*Whether the accused on the day of the alleged occurrence committed murder of Nathu Nayak by intentionally causing his death?"*

7. The learned Trial Court, upon appreciating the evidence on record, found the evidence of PW-4 intact as he had witnessed the accused-appellant striking the deceased with a dao on his back, which had supported the injury no. 2 as found by the PW-6. Moreover, as per PW-6, the injuries he found on the deceased resulted in his death. The inconsistent evidence of PW-7 with PW-4 as regard to the injuries sustained in the back of the deceased was not

held to be fatal to the case of the prosecution if otherwise, the evidence of PW-4, the sole eye witness is found to be reliable and dependable. It was also held that all the witnesses had testified against the appellant holding him to be responsible for the offence. Moreover, the evasive answers given by the appellant in course of his examination under section 313 Cr.P.C. was found sufficient to hold the appellant guilty of committing the offence by taking aid of the provisions of section 106 of the Evidence Act, 1872. It was held that even if the evidence of PW-1 was discarded, the unshaken testimony of PW-4 was sufficient to hold that the appellant had caused death of the victim by assaulting him with a *dao*. The learned Trial Court had placed reliance on the case of *Shambu Nath Mehra v. State of Ajmer, AIR 1956 SC 404* (para-9). Reliance was also placed on the evidence of PW-7 regarding seizure of the *dao* (M.Ext.1) from the place of occurrence, which was lying near the dead body. Accordingly, it was held that the prosecution had been able to establish charge against the appellant. Thus, the sole point of determination was answered in the affirmative and the appellant was held to be guilty of committing offence under section 302 IPC.

8. On the question of sentence, the learned Trial Court had considered the nature of offence and imposed minimum punishment of imprisonment for life for committing offence under section 302 IPC and accordingly, sentence as indicated above was passed against the appellant.

Submissions of the learned Legal Aid Counsel:

9. Assailing the impugned judgment, the learned legal aid counsel has meticulously read out the evidence of the PWs and had submitted that the prosecution witnesses can be classified into 3 (three) categories. The PW-1 and PW-4 were alleged eye witnesses, the PW nos. 2, 3 and 5 were hearsay

witnesses, and PW nos. 6 and 7 were official witnesses. The PW-6 was the Medical Officer who had conducted the post-mortem examination of the deceased and had prepared the report and PW-7 was the I.O. of the case.

10. It was submitted that PW-1 was the complainant in this case. However, her credibility as an eye-witness was discarded by the learned Trial Court because PW-2, who is the son of PW-1 and brother of the deceased, had clearly stated in his cross-examination that there were several houses in between the place of occurrence and the house of the deceased as such the place of occurrence was not visible from the house of the complainant. He has further submitted that the evidence of PW nos. 2, 3 and 5 were also discarded by the learned Trial Court as they were hearsay witnesses.

11. It was also submitted that the evidence of PW-4, Bhaben Mali was not at all reliable. In this regard, it was submitted that PW-4 had allegedly seen the appellant hitting the deceased on his back. However, as per the post-mortem report (Ext.1) prepared by the Dr. Basanta Kr. Borah (PW-6), there were two injuries on the dead body, viz., (i) cut injuries over the occipital region of the scalp of size 5 cm X 1 cm X full thickness of the scalp; and (ii) multiple cut injuries over the front and right side of the neck involving the thyroid cartilage and larynx. Accordingly, it was submitted that injuries of that kind was impossible if the deceased was attacked by the appellant from the back side and that cut injuries on the front and right side of the neck can only be inflicted if the deceased was attacked from the front. In this connection, the learned legal aid counsel had referred to the cross-examination of PW-4, wherein he had denied that he had not stated to the police that the appellant had hit the deceased on his back side with a *dao*. In contrast, he had referred to the cross-examination of the I.O. (PW-7), who had specifically stated that the witness

Bhaben Mali (PW-4) did not state to him that the appellant had assaulted the deceased on his back. Hence, it is submitted that the ocular evidence of PW-4 was at variance with the medical opinion of injuries that had caused death of the deceased.

12. It was submitted that the evidence of the Medical Officer (PW-6) was not sufficient to prove that the deceased had died because of the assault made by the appellant. By referring to the evidence of the I.O. (PW-7), it was submitted that the I.O. cannot be believed as he had tried to frame the appellant by collecting *dao,* which is suspected to be the weapon of assault from the place of occurrence and in the same statement, he has also stated that he has seized the sharp *dao* from the place of occurrence having found it lying near the dead body at the place of occurrence, but in the seizure list (Ext.2), the seizure is said to have been made from the possession of the appellant. Hence, it was submitted that the I.O. had manufactured evidence to implicate the appellant. It was also submitted that as per the evidence of PW-4, about 7-8 persons were with him when he saw the occurrence, but the I.O. had not examined any independent witnesses. Thus, it was submitted that the I.O. had recorded the statement of only interested witnesses to falsely implicate the appellant. It was submitted that the weapon of assault i.e. *dao* (M.Ext.1) was not sent for forensic examination and/or serological examination to ascertain if it contained traces of human blood. The I.O. had also not seized any blood stained clothes or articles from the place of occurrence. It was also submitted that in the sketch map prepared by the I.O., the house of PW-1 or the nursery of PW-4 were not shown and that the sketch-map was not exhibited and proved before the learned Trial Court. Hence, it was submitted that the learned Trial Court ought to have disbelieved the evidence of PW-7.

13. It may be stated that the learned legal aid counsel has brought to the notice of the Court that by order dated 25.03.2022, passed by this Court in I.A.(Crl.) No. 655/2019, arising out of the instant appeal, bail was granted to the appellant. It was submitted that as per his information, on behalf of the appellant bail bond could not be furnished and as such he is still serving his sentence despite being granted bail by this Court.

Submissions by the learned Addl. PP:

14. Per contra, the learned Addl. P.P. has submitted that the evidence of PW-4 cannot be discarded only on the ground that he had seen the appellant assaulting the deceased at the back. In this regard, it is submitted that the fact that PW-4 had seen the assault could not be disproved. It was also submitted that even by striking from behind, cut injuries of the description mentioned in the post-mortem report (Ext.1) could be ruled out inflicted. Moreover, it was submitted that as per the post-mortem report (Ext.1), the deceased had a cut injury in the occipital region of the head, which is at the hind side of the head. In this connection, it is submitted that from the case diary which is available with the LCR, it can be seen that the PW-4 had given a statement before the I.O. regarding the assault by the appellant on the deceased. Hence, it is submitted that the evidence of PW-4 was of sterling quality and can be relied as the sole evidence for convicting the appellant. Accordingly, the learned Addl. P.P. had submitted in support of the impugned judgment and sentence.

Evidence of PW-1:

15. The informant, who is the mother of the deceased, was examined as PW-1. In her examination-in-chief, she had stated that she knew the appellant and that about two years ago at about 5.00 PM she had seen the

appellant assaulting her son with a *dao* in a paddy field situated in front of her house as a result of which her son died at spot. She has also stated that the appellant had surrendered in police station and thereafter, the police came to the place of occurrence and took the dead body of her son for post- mortem examination. In her cross-examination, the PW-1 had stated that the house of Bhaya Praja is in front of her house. The place of occurrence was to the eastern side of her house and the house of Rajen Nayak was situated to the eastern side of her house and after the house of Rajen Nayak, the house of Suresh Nayak and Diwan Nayak are there. She had denied that she did not see the offence and she had also denied that the appellant had not surrendered before the Police station. She had also stated that at the hospital she was told that her son had sustained injury in his hand and neck. She had further stated that the place of occurrence was about half a mile away from her house.

Evidence of PW-2:

16. Sri Puna Nayak (PW-2) was not the eye witness to the incident. He is the son of PW-1 and moreover, the deceased Naku Nayak was his younger brother. He had stated in his examination-in-chief that he was informed by one villager that the appellant had cut down his brother with *dao* and accordingly, he came back home and took the dead body of his brother to Behali PHC along with police for post-mortem examination. In his cross examination, the PW-2 had stated that when he came back to his home, the complainant told him that the appellant had assaulted the deceased from his back side with dao. He had further stated that there are many houses between the place of occurrence and the house of the complainant and as such the place of occurrence was not visible from the house of the complainant.

Evidence of PW-3 and PW-5:

17. The PW nos. 3 and 5 are hearsay witness. They had both heard that the deceased was cut by the appellant. They had both not seen the occurrence.

Evidence of PW-4:

18. The PW-4, namely, Bhaben Mali had stated in his examination-in-chief that the appellant had altercated the deceased and then the appellant had assaulted the deceased on his back side with dao and as a result the appellant fell down and died on the spot and seen the same, he and other 7-8 people went there and he had informed the police about the occurrence and after some time the police came and took the dead body to Behali PS. In his cross-examination he had denied that he had not stated before the police that the appellant hit the deceased on his back side with dao. He had also stated that he did not state before the police that the appellant had chased them with dao when they tried to catch him. He had stated that he only saw injury on the backside of the deceased near the neck.

Evidence of PW-6 and nature of injuries found on the body of the deceased:

19. The Medical Officer (PW-6) had stated in his examination-in-chief that on examination of the dead body of the victim, he had found (i) cut injury over the occipital region of the scalp of size 5 cm x 1 cm x full thickness of the scalp; and (ii) multiple cut injuries over the front and the right side of the neck involving the thyroid cartilage and larynx. As per the post-mortem report (Ext.1), proved by PW-6 along with his signature, the cause of death of the deceased was due to hemorrhage and shock as a result of the injury sustained. In his cross-examination, he had stated that he had not mentioned the age of injury in Ext.1.

Evidence of the IO:

20. The I.O. of the case was examined as PW-7. He had stated in examination-in-chief that he had drawn the sketch map of the place of occurrence. However, it may be mentioned that though the said sketch map is made a part of the paper-book, but it was not exhibited by PW-7 during trial. From the examination-in-chief of I.O. (PW-7), it is seen that an inquest was held on the dead body. However, the inquest report was not exhibited by the I.O. In his examination-in-chief, the PW-7 had stated he had seized a sharp *dao* from the place of occurrence. He had exhibited the seizure list as Ext.2.

21. In his cross-examination, the PW-7 had stated that he had received the information of the incident at 5.10 PM on the day of occurrence and he reached the place of occurrence at 5.25 PM. About 50 persons had gathered there. He had recorded the statement of all the witnesses on the same day at the same time. The place of occurrence was a field and he had also stated that he did not mention in the sketch map at what distance the residence is located from that place. He had stated that he had recorded statement of people who live nearby and as Dewan Nayak and Surjya Bora were not present their statement could not be recorded. He had also stated that he found the *dao* lying near the dead body at the place of occurrence and that none of the witnesses showed him the *dao*. He had also stated that he did not make a prayer before the Court to record the confessional statement of the appellant. He had stated that witness Bhaben Mali (PW-4) did not tell him that the appellant had assaulted the deceased on his back. He had recorded the statement of the complainant on the next day.

Analysis of evidence of PWs:

22. The I.O. (PW-7) had stated in his examination-in-chief that he had seized a sharp *dao* from the place of occurrence. In his cross-examination, the PW-7 had stated that he found the *dao* lying near the dead body at the place of occurrence and that none of the witnesses showed him the *dao*. However, contrary to the said evidence, in the seizure list dated 24.04.2013, it is mentioned that the weapon described therein was seized from the possession of the appellant.

23. In view of the positive evidence of PW-2 that the place of occurrence was not visible from the house of the complainant (PW-1), his mother, the PW-1 cannot be considered to be an eye-witness to the incident. The PW-1 had stated in her cross examination that the place of occurrence was half a mile away from her house and therefore, notwithstanding that as per PW-2, the place of occurrence was not visible from the house of the complainant, it is highly doubtful that the PW-1 was able to identify the appellant from about 800 metres away from her house. Thus, the Court is unable to accept that the PW-1 was an eye witness to the alleged homicidal assault by the appellant.

24. As per the ocular evidence of PW-4, supported by the medical evidence of PW-6 and the post-mortem report (Ext.1), the deceased had suffered cut injury in the occipital region of the scalp and cut injury in the throat and larynx. However, the I.O. (PW-7) had not found and/or seized any blood stained clothes or articles from the place of occurrence.

25. If the PW-4 is to be believed, then he was along with 7-8 people who were purportedly the first persons to reach the place of occurrence, but the PW-4 has not stated in his evidence that he saw the weapon of assault lying besides the dead body. In this regard, while the I.O. had stated in his examination-in-chief that he had seized the weapon of assault i.e. *dao*, lying

near the dead body.

26. Thus, if the evidence of PW-1 and PW-4 are discarded, there are no eye witnesses to the alleged assault on the deceased by the appellant.

27. The alleged weapon of assault i.e. *dao* (M.Ext.1), which was seized by the I.O. vide Ext.2 was not sent for any forensic and/ or serological examination to ascertain as to whether it contains any stain of human blood. It may be mentioned that the I.O. (PW-7) has given three versions of seizure of *dao* (M.Ext.1). One version as per the seizure list (Ext.2) is that the I.O. had seized the *dao* (M.Ext.1) from the appellant. The second version which appears from his examination-in-chief is that the I.O. had seized the said weapon i.e. *dao* (M.Ext.1) from the place of occurrence. The third version appears from the cross-examination of I.O. (PW-7) is that he had found the *dao* (M.Ext.1) lying near the dead body at the place of occurrence. Thus, as per all the three versions, the *dao*, being seized within a short time of death of the deceased, should have trace of human blood.

28. As per the evidence of PW-1, the appellant had surrendered in the police station and thereafter, the police had come to the place of occurrence. If the said version is accepted, then the PW-4 had not seen the weapon of assault i.e. *dao* (M.Ext.1) at the place of occurrence and it is unlikely that PW-4 would miss a *dao* lying near the dead body and not show it to the I.O. It may be mentioned that the I.O. (PW-7) has stated in his cross-examination that he had found the *dao* lying near the dead body and that none of the witnesses showed him the seized dao. In his cross-examination, the I.O. (PW-7) had stated that when he had reached the place of occurrence at 5.25 PM, about 50 persons had gathered there and as per the entry made in the seizure list (Ext.2), the seizure was made at 6.40 PM.

29. The prosecution had failed to prove any memorandum regarding statement of the appellant leading to recovery of the weapon of assault i.e. *dao* (M.Ext.1). As per the form of FIR and the FIR which is available at page 9 and 10 of file A of GR Case No. 289/2013 corresponding to Behali PS Case No. 73/2013 (File no.3/4 of Trial Court Record), the incident occurred at 5:00 PM on 24.04.2013. The GD of Bargang OP is GD No. 381 at 8.30 AM dated 25.04.2013 and formation was received at Behali PS at 9:00 AM on 25.04.2013. As per the alleged inspection memo available at page 15 of file A of GR Case No. 289/2013 corresponding to Behali PS Case No. 73/2013 (File no.3/4 of Trial Court Record), the appellant was arrested at 10.30 AM on 25.04.2013. Therefore, the entries made in the seizure list (Ext.2) to the effect that the *dao* was seized from the appellant at 6.40 PM on 24.04.2013 is not acceptable as correct because if the PW-1 is to be believed then the appellant had surrendered before the police and thereafter, the police had came to the place of occurrence, but if the I.O.(PW-7) is to be believed, the appellant was brought to the Bargang Outpost on the previous date i.e. 24.04.2013 on the basis of GD Entry No. 381. However, in the form of FIR, GDE No. 381 was entered at 8.30 AM on 25.04.2013.

30. It is surprising to note that the complainant (PW-1) had not exhibited the *ejahar* (FIR) in her evidence. The said FIR was also not proved by the I.O. (PW-7). Therefore, in view of the discussions as made in the foregoing paragraphs, the Court is unable to accept the correctness of entries made in the seizure list (Ext.2) that the *dao* was seized from the appellant. The three versions of the PW-7 regarding seizure of the *dao* (M.Ext.1) has been referred hereinbefore.

31. It may also be mentioned that as per the contents of the seizure list (Ext.2), the *dao* (M.Ext.1) was seized at 6.40 PM on 24.04.2013 at

Borkathiabari village. There are three witnesses to the seizure of the said *dao*, namely, (i) Bhaya Praja, (ii) Mahesh Nayak and, (iii) Poona Nayak (name written as Puna Nayak by the learned Trial Court while recording his deposition). While Bhaya Praja and Mahesh Nayak were not examined as PWs, Puna Nayak, who was examined as PW-2 did not prove either the seizure list or his signature thereon.

32. Therefore, the entries made in the seizure list (Ext.2) to the effect that the *dao* was seized from the appellant at 6.40 PM on 24.04.2013 is questionable and inconsistent with evidence on record as discussed hereinbefore.

33. The I.O. (PW-7), in his examination-in-chief has stated that on reaching the place of occurrence, he had found the appellant and apprehended him. However, in his cross examination he had stated that at 5.10 PM, on the day of occurrence, he had received the information of the incident and reached the place of occurrence at 5.25 PM where about 50 persons were gathered and he had recorded the statement of the witnesses on the same day at the same time on the place of occurrence itself. He had found the *dao* (M.Ext.1) lying near the dead body at the place of occurrence and he had also stated that none of the witnesses showed the *dao*. He had stated that he did not find any blood stained clothes and article at the place of occurrence, which is surprising because as per the post mortem report there were (i) cut injury over the occipital region of the scalp; and (ii) multiple cut injuries over the front and right side of the neck involving the thyroid cartilage and larynx. In his cross-examination, the I.O. (PW-7) had stated that witness Bhaben Mali (PW-4) did not tell him that the appellant had assaulted the deceased on his back. Thus, a natural question would arise as to whether the deceased was killed elsewhere,

clothes were changed and his dead body was placed at the alleged place of occurrence? Surprisingly, the I.O. PW-7, in his examination-in-chief, has not mentioned that he had himself or through a Magistrate conducted an inquest over the dead body and also no such document was exhibited.

34. The PW-4, namely, Bhaben Mali had stated in his examination-in-chief that the appellant had altercated the deceased and then the appellant had assaulted the deceased on his back side with *dao* and as a result the appellant fell down and died on the spot and seen the same, he and other 7-8 people went there and he had informed the police about the occurrence and after some time the police came and took the dead body to Behali PS. In his cross-examination he had denied that he had not stated before the police that the appellant hit the deceased on his back side with dao, but as mentioned in the preceding paragraph, it has been mentioned that the I.O. (PW-7) had stated in his cross examination that Bhaben Mali (PW-4) did not tell him that the appellant had assaulted the deceased on his back side. None of the 7-8 people who had been with PW-4 were examined by the I.O.

35. The sketch map of place of occurrence was not proved. However, the said document is available at page 44-45 of the paper-book, but the house of the informant (PW-1) or the nursery of PW-4 from where he had allegedly seen the assault is not disclosed in the said sketch map.

36. The I.O. (PW-7) has not proved any document where he had recorded the name of person on whose phone call GDE No. 370 dated 24.04.2013 was made. Therefore, the presence of PW-4 as an eye witness does not inspire the confidence of the Court for five following reasons. Firstly, the I.O. did not recover any blood stained clothes or articles from the place of occurrence; secondly, the PW-4 was allegedly the first man to go to the place of

occurrence as he had allegedly seen the assault, yet he does not disclosed the presence of *dao* near the dead body to the police; thirdly, none of the witnesses examined by the I.O. (PW-7) disclose the presence of PW-4 when the I.O. came to the place of occurrence; and fourthly, although PW-4 was along with 7-8 people who had gone to the place of occurrence but they were not examined as witnesses and also the PW-4 had not stated that he had made any attempt to catch the appellant although he had seen him assaulting the deceased or that the appellant had threatened them with *dao* in his hand.

37. From the cross-examination of PW-2, it is seen that PW-2 had not only contradicted the evidence of the PW-1, but he has demolished the credibility of the mother of the deceased (PW-1) as an eye-witness to the alleged assault on the deceased by the appellant because as per the statement of PW-2 in his cross-examination was to the effect that the place of occurrence was not visible from the house of the complainant (PW-1).

Reasons and decision:

38. The prosecution has projected the PW-1 and PW-4 to be the eye-witnesses to the alleged assault by the appellant upon the deceased. As discussed herein before, their evidence is not all found reliable.

39. There are a number of lapses on part of the I.O. during investigation, which can be culled out from the fact that in the charge-sheet, it has not been mentioned that any inquest was done over the dead body and moreover, the *dao* (M.Ext.1) was not sent for forensic and/or serological examination to ascertain if it contained human blood and used as a weapon of assault or to ascertain if it contained any finger print of the appellant.

40. As mentioned herein before, the I.O. has given three sets of

statement regarding seizure of *dao* (M.Ext.1), which cannot stand together. The I.O. did not make any endeavour to investigate as to whether the seized *dao* (M.Ext.1) belonged to the appellant. The I.O. did not investigate existence of any motive for the appellant assaulting the deceased.

41. The learned Trial Court, in the impugned judgment had discarded the evidence of PW-1 regarding surrender of the appellant before the police station on the ground that her evidence was without any basis. We disagree with the said finding because it is the prosecution which had introduced two sets of evidence in this case. While PW-1, who was introduced as an eye-witness, had stated in her examination-in-chief that the appellant had surrendered before the police station, but in contradiction, the I.O. (PW-7) had stated in his examination-in-chief that he had arrived at the place of occurrence and found the appellant and arrested him. The I.O. was the last witness i.e. PW-7, yet the I.O. has not exhibited the arrest memo to prove that the version of the PW-1 was not correct. The two versions of arrest of the appellant, one by PW-1 stating that the appellant had surrendered before the police station, and second by I.O. that he went to the place of occurrence and found the appellant and arrested him are mutually destructive because the time of arrest and time of seizure of *dao* does not corroborate with each other, which has elaborately been discussed in the foregoing paragraphs and not reiterated again.

42. The PW-4 states that he saw the appellant assaulting the deceased at the back and he fell down and died on spot, but the I.O. did not find any blood-stained clothes or articles from the place of occurrence. No inquest over the dead body was conducted and thus, there is no evidence of any blood lying in the place of occurrence. The post-mortem report also does not indicate that blood had come out from the cut injuries and there is no

finding of existence of *ecchymosis* (medical term when blood pools under the skin). Thus, there is absence of evidence that there was any blood loss from the 2 (two) injuries found on the dead body by the Medical Officer (PW-6). It is not the case of the prosecution that the appellant had washed the *dao* (M.Ext.1) after the incident, but no evidence was led by the prosecution to show that the *dao* had human blood stains.

43. The learned Trial Court, while examining the appellant under Section 313 CrPC, had explained the circumstances appearing against the appellant from the evidence of PW-1 by explaining that he had gone to the police station after the incident and had surrendered himself. However, in the impugned judgment, the learned Trial Court had discarded the evidence of PW-1 that the appellant had surrendered before the police station. Thus, no presumption of guilt can be drawn from the purported act of the appellant surrendering before the police after committing the alleged offence. However, except for the I.O. (PW-7), none of the prosecution witnesses have said that they had apprehended the appellant and/or detained him at the place of occurrence or that they had seen the appellant standing at the place of occurrence till the police had arrived. In his evidence, the I.O. (PW-7) did not state that he came with any other policemen at the site of incident even after being informed that the appellant had cut the deceased with a *dao*. None of the witnesses examined by the prosecution had deposed that they had seen the *dao* (M.Ext.1) lying near the dead body. None of the three seizure witnesses had exhibited the seizure list or proved their signature on the seizure list. As per the contents of the seizure list (Ext.2), the *dao* (M. Ext.1) was seized from the possession of the appellant, which is a fact that neither it was proved by the prosecution nor the said circumstances were explained to the appellant when he

was examined under section 313 CrPC.

44. Though only the PW-1 and PW-4 were purportedly the eye-witness, the learned Trial Court, in para-19 of the impugned judgment, by referring to the evidence of PW-1, had held that "… *Even if we discard her evidence totally, the unshaken testimony of the eye witness PW4 supported by the incriminating evidence of other witnesses that the accused caused death of the victim by assaulting him with a dao and the evading answers to the queries put to the accused in his examination u/s 313 CrPC is sufficient to hold the accused guilty on the offence charged against him*." In this regard, there is no material to show that PW nos. 2, 3, 5, 6 and 7 were eye-witnesses to the incident and the PW nos. 2 and 3 were merely hearsay witness. The learned Trial Court also discarded the basic tenet of the criminal jurisprudence that the accused had a right to remain silent and this was not a case where the burden of proof would shift on the appellant by applying section 106 of the Evidence Act, 1872.

45. The prosecution has to prove the commission of offence by the appellant beyond all reasonable doubts. The appellant cannot be convicted on the basis of conjectures and surmises. From the analysis of evidence of the PW-4, for reasons already discussed herein before, we do not find his evidence trustworthy to accept him as an eye-witness. While examining the appellant under section 313 CrPC, the learned Trial Court did not state from which particular place the *dao* was seized by the I.O.

46. When the offence of murder was allegedly committed in day-light in the presence of witnesses, by applying the provisions of section 106 of the Evidence Act, 1872, the burden of proof cannot be put upon the appellant to disprove the allegations and explain the circumstances relating to death of

the deceased. Thus, the judgment of the learned Trial Court is found to be perverse.

47. The reliance of the learned Trial Court on PW nos. 2, 3, 5 and 6 of having proved incriminating evidence against the appellant is also found to be perverse and unsustainable on facts. In this regard, it is re-stated that the PW nos. 2, 3 and 5 are admittedly hearsay witnesses and had not seen the occurrence and PW-6 is the Medical Officer, who is also not an eye-witness and he has merely proved the contents of the post-mortem report without suggesting that the appellant was the culprit.

48. The Court is of the considered opinion that in this case, the two versions of arrest of the appellant, one by PW-1 and the other by PW-7 are discrepant with each other. Under such a situation where the prosecution leads two sets of evidence, each one contracting and striking at each other, both the versions become unreliable and accordingly, the Court is constrained to hold that there is no reliable or trustworthy evidence to connect the appellant with the offence.

49. We are conscious of the observations made by the Supreme Court of India in the case of *State of West Bengal v. Kailash Chandra Pandey, AIR 2005 SC 119: (2004) 0 Supreme (SC) 1299*, to the effect that the appellate Court should be slow in re-appreciating the evidence, and further observing that time and again it has been emphasized that the trial court has the occasion to see the demeanour of the witnesses and it is in a better position to appreciate it, the appellate court should not lightly brush aside except for cogent reason.

50. In this case, we find existence of cogent reasons to be available for the Court to interfere with the finding of facts of the learned Trial Court.

51. Thus, this appeal succeeds. The learned Legal Aid Counsel has been able to dispel the finding of guilt against the appellant by the learned Trial Court and he has successfully demonstrated that there is total absence of legal evidence to implicate the appellant, namely, Rajen Nayak of committing the offence of murder of the deceased Naku Nayak. The appellant is found entitled to benefit of doubt as the prosecution has failed to prove the case against the appellant beyond all reasonable doubt.

52. Therefore, this appeal is allowed. Resultantly, by giving the appellant the benefit of doubt, the appellant Rajen Nayak is acquitted of the charges of committing murder or homicidal death of the deceased Naku Nayak. The judgment and sentence dated 17.12.2018, passed by the learned Additional Sessions Judge, FTC, Biswanath Chariali, Sonitpur in Sessions Case No. 168/2014, arising out of G.R. Case No.289/2013, corresponding to Behali P.S. Case No. 73/2013. He is entitled to be set at liberty, if not wanted in any other case.

53. As a pre-condition for being released at liberty, the appellant is required to give an undertaking before the Superintendent of the concerned jail where he is currently lodged that he would surrender to undergo the sentence if so ordered in appeal, if any, against this judgment.

54. We record our appreciation towards the assistance given by the learned Legal Aid Counsel. He would be entitled to his usual honorarium/ fees.

JUDGE **JUDGE**.

Comparing Assistant