

which he died on the spot and thereafter tying the neck with a 'Gamosa', dragged the dead body to a distance of about 100 meter away and left the body in the 'Doloni' (waterbodies) and on 03-08-2016 at around 6 a.m, the dead body was recovered.

2. Based on the above FIR received from Niranjan Borah (PW 3), the son of the deceased on 03-08-2016, Sootea P.S. Case No. 128/16 u/s 302/34 of IPC was registered and the Officer-in-Charge SI Alimuddin Ahmed (PW12) himself took up the investigation of the case. In course of investigation, the Investigating Officer visited the place of occurrence, seized one umbrella, a dao and one Gamosa from the place of occurrence, recorded the statement of the witnesses, arrested the accused Girish Das and on completion of investigation laid chargesheet against the accused Girish Das u/s 302 of the IPC. After filing charge sheet, perusing the materials available in the case record and the case diary, the Ld. Judicial Magistrate 1st Class, Tezpur took cognizance of the offence u/s 302/201/34 IPC against accused Girish Das, Sum Das and Bimala Das and issued summons accordingly.

3. On appearance of all the accused persons, the learned Judicial Magistrate, 1st class, Tezpur furnishing necessary copies as required under section 207 Cr.P.C., committed the case to the Court of Session being the offence u/s 302/201 IPC exclusively triable by the court of Session. On committal, after going through the police report and hearing both sides, charge u/s 302/34 of the IPC was framed against the accused persons Girish Das, Bimala Das and Sum Das and particulars of the charge on being read over and explained to the accused persons, they pleaded not guilty and demanded to stand for trial.

4. During trial, in order to bring home the charge leveled against the accused persons, prosecution examined 12 witnesses. In the statements recorded u/s 313 Cr.P.C, the accused persons denied all the allegations made against them. Defence pleaded innocence and declined to adduce evidence.

5. I have heard the argument of the learned counsel of both sides and also have gone through the evidence on record.

6. Point for determination :

(i) Whether accused Girish Das, Bimala Das and Sum Das, in furtherance of common intention, on 02-08-2016, at about 9/9.30 AM in the morning, at Balibhuri Chapori, under Sootea PS, committed murder intentionally causing the death of Dimbeswar Borah and thereby committed an offence punishable u/s 302/34 of the IPC ?

7. Mr. Baruah, learned Public Prosecutor referring to the evidence on record and the extra judicial confession of accused Girish Das before PW 3, PW 7, PW 8 and PW 11 submitted that their corroborative evidence leaves no room for any doubt that the accused persons with common intention caused the death of the deceased and as such prosecution has successfully proved the case.

8. Refuting the argument, learned counsel Mr. Sethi appearing for the accused persons submits that the circumstances relied by the prosecution have not been established and admittedly there being no eye witness and none seen the deceased with the accused persons on the day of incident, the accused persons cannot be held as perpetrators of the crime. Mr. Sethi further submits that the post mortem report (Ext.1) reveals that the injuries sustained by the deceased were 6-7 days old with peeling of skin all over the body and as such the prosecution case that on previous day of recovery of the dead body, the deceased was missing is not believable. Moreover, withdrawal of material fact by Moon Borah (PW 10) in statement u/s 161 Cr.P.C. regarding extra judicial confession that in his presence the accused before police admitted his guilt makes his version doubtful and therefore these circumstances also remain unestablished.

9. In order to appreciate the counter submissions made by the learned counsel appearing for the parties I deem it appropriate to take note the medical evidence on record at first.

10. The Medical Officer PW 1 Dr. Ranjan Kr. Das, who conducted the post mortem examination on the dead body of Dimbeswar Borah on 03-08-2016, in

reference to Sootea PS Case No. 128/16 u/s 302/34 of the IPC found the followings injuries :

1. sharp cut injury to the right side of the neck (on the middle part) size 6 cm x 4 cm x 4 cm,
2. sharp cut injury to the mouth (left side) size 8 cm x 6 cm x 6 cm,
3. sharp cut injury to the shoulder (size 4 cm x 3 cm x 3 cm) left and
4. sharp cut injury to the right hand size 4 cm x 3 cm x 2 cm.

He stated that the injuries are 6/7 days old, peeling of skin all over the body and all great vessels on the left side of the neck were cut by sharp weapon. All the injuries were antemortem in nature.

Doctor opined that the death was due to shock and haemorrhage as a result of injuries sustained which were sufficient to cause the death of a person in ordinary course of nature. He proved the post mortem report as Ext.1.

During cross, he admitted that from the injuries sustained by the deceased, it can not be ascertained whether death was caused by same weapon or different weapons.

11. Bearing in mind the injuries sustained by the deceased, we may now turn to the evidence of other witnesses which is described herein below.

12. PW 2 Tapan Borah, the friend of deceased's son Niranjana Borah @Bubai, testified that on 02-08-2016 in the afternoon he went to the house of Dimbeswar Borah and knowing from Niranjana Borah, the youngest son of the deceased that Dimbeswar Borah did not return home since he went to his bamboo bari situated at Balibhuri Chapori, he and Niranjana Borah informed the matter to police and went to the place of occurrence with police personnel in search of the deceased. During search they noticed a dao with blood stain, the umbrella of Dimbeswar Borah and one bamboo stained with blood. He noticed pool of blood upon the ground and mark of scratching. They also noticed the marks of dragging a person towards Ghorialmara 'HOLA'. There they came to know that Girish Das @ Bhomola Das sustained injury and was taken to Biswanath Chariali Civil hospital for treatment. Hearing this, they along with police went to the house of Girish Das @ Bhomola Das and from his mother

came to know that Girish Das went to Biswanath Chariali Hospital. Next day, they again went to Balibhuri Chapori and during search found the dead body of Dimbeswar Borah in the 'Hola' tied with a 'Gamosa'. He further stated that on earlier occasions also Girish Das @ Bhomola had stolen bamboo from the bamboo plantation of Dimbeswar Borah and in some occasions, the deceased had filed cases against Girish Das alleging theft of bamboo. So, they thought that Girish Das and others caused the death of the deceased. Police seized the 'Gamosa' by which the dead body was tied and the umbrella of the deceased from the place of occurrence, vide seizure list Ext. 2. Police also seized one dao from the place of occurrence.

During cross, he stated that the house of the accused is situated at an audible distance from his house. He stated that on 02-08-2016 at 4 PM when he went to the house of the deceased, came to know that Dimbeswar Borah was missing. At that time Niranjana Borah, the son of Dimbeswar Borah also returned home from Balibhuri 'Chapori' and thereafter they went to the police station which is about 3 km away from their village and informed the matter verbally. The bamboo plantation of the deceased is situated at a distance of about 5½ km away from the police station. He stated that police collected mud containing blood stain.

13. PW 3 Niranjana Borah, the son of the deceased, stated that on 02-08-2016, at around 9.30 a.m. his deceased father went to their bamboo bari situated at Balibhuri Chapori and seeing the accused stealing his bamboo, when he prevented the accused, an altercation took place between accused Girish Das and his deceased father. Then accused Girish Das hacked his father. When his father did not return home in time, he proceeded in search of his father and noticed blood stain in the place of occurrence. He also found the umbrella of his father and one dao lying there. He searched for his father but did not find. Then he returned home at around 12.30 p.m. and informed police verbally. Accordingly police along with him and villagers went to the place of occurrence and searched for his father. But due to Sun set, they returned back and on next day morning, at around 6 AM they along with police personnel again went to the place of occurrence. During search, found the dead body of

his father lying in 'Borhola' tied with a 'Gamosa' around his neck. He noticed cut injury over neck, cheek, arm and hand on the dead body in one side. Thereafter, he lodged the FIR, Ext.3 on 03-08-2016. He further deposed that police seized one 'kopidao' with bamboo handle (Material Ext.1), size 18" wrapped with plastic vide seizure list Ext. 4. Police also seized one Umbrella and one 'Gamosa' vide seizure list Ext. 2. He proved the seized Umbrella and 'Gamosa' as Material Ext. 2. He stated that the accused Girish Das himself surrendered before police and confessed his guilt before police in his presence.

In cross examination he stated that their bamboo groves (Mer) is at a distance of 2½ km away from their house. He stated that his deceased father always used to go to the 'Mer' at around 9/9.30 AM to tether cattle and returned home at around 11 AM and whenever his father proceeded towards 'Mer', used to carry one Umbrella, one dao and one Gamosa with him. On the day of incident when his father did not return till 11.30 AM, he went to the said 'Mer' in search of his father. To reach 'Mer', a 'hola' is to be crossed and during flood season the said 'hola' remains full of water. He informed the matter to his elder brother Prafulla Borah (PW 4) who at that time was in Jakhalabandha. He stated that he suspected that Girish Das killed his father. He admitted that in the FIR, he mentioned that when his father witnessed the accused Girish Das stealing bamboo, an altercation took place between them and then hearing hulla, other accused persons arrived there and had assaulted his father and dragged the dead body towards the waterbodies (dolony). He further stated that he knew well that the accused persons had their own bamboo grooves. He stated that the seized dao, umbrella and gamosa belonged to his deceased father. He further stated that the dead body was found at a distance of about 100 meter away from the 'Mer'. He admitted that there was no eye witness to the occurrence. He denied the suggestion that his deceased father was missing from 27-07-2016 and the injuries found on the dead body was 6-7 days old since the date of recovery i.e. 03-08-2016.

14. PW 4 Prafulla Borah another son of the deceased stated that on 02-08-2016, at around 12 noon, his wife Rumi Borah informed him over telephone that his father did not return home since he went to 'Mer'. Then he went to his house and came to know from his family members that his father went to

Chapori where they had bamboo groves but till then did not return. In the evening time, they along with the villagers and police went to the 'Mer' in search of his father but did not find him. Due to Sunset they came back. On the next morning, he along with his brother Niranjan Borah, brother-in-law Beauty Borah, some villagers including Ranjit Bormudoj and police personnel went to the place of occurrence and during search found the dead body of his father lying in a 'Hola' under water-hyacinth. They found the dead body tied with a 'gamosa' around the neck. He noticed cut injury on the back side of neck, cheek, arm and hands. He also noticed marks of dragging of somebody in the mud towards the 'Hola'. Police seized the 'kopi dao' (Material Ext.1) from the place of occurrence vide seizure list Ext. 4. Police also seized one yellowish khaki colour umbrella and one 'gamosa' vide seizure list Ext. 2. During cross, he stated that police seized the materials in the evening of 02-08-2016.

15. PW 5 Sri Ranjit Bormudoj, the co-villager, testified that on 02-08-2016, at around 9 AM, the deceased went to his bamboo groves situated at Balibhuri Chapori and seeing the accused persons cutting bamboo from his bamboo groves, when the deceased prevented them, an altercation took place amongst them. The local people heard said hulla. At around 2 PM he went to the house of the deceased and found the family members of the deceased being worried for missing of their father. Thereafter he along with the villagers went to the place of occurrence and noticed mark of dragging of somebody towards Hola but as it became dark, hence they returned back. In the next morning he along with Niranjan Borah, Prafulla Borah, some villagers and police went to the aforesaid bamboo groves and during search recovered the dead body of the deceased lying in a 'hola' under water-hyacinth at a distance of 50 meter away from the bamboo groves. The dead body was found tied with a Gamosa around the neck. He noticed cut injury on the back side of neck, cheek, arm and hand. Police seized one 'kopidao' (Material Ext. 1) from the place of occurrence vide seizure list Ext. 4.

During cross he stated that knowing about the missing of the deceased, he along with Niranjan Borah and others went to the police station at about 2/3 PM and thereafter along with police went to the place of occurrence.

16. PW 6 Sri Beauti Doloi Borah deposed that on 02-08-2016, at around 12 noon on being informed by Niranjan Borah that his father Dimbeswar Borah was missing, he along with Niranjan Borah and some villagers searched for Dimbeswar Borah and not finding him, informed police. On the next day morning after 6 AM police along with the villagers and family members of Dimbeswar Borah again went to the place of occurrence and recovered the dead body of the deceased in a 'hola' under water-hyacinth at a distance of 50 meter away from the bamboo groves. On 03-08-2016 after recovery of the dead body, he rushed to the place of occurrence and saw the dead body tied with a Gamosa around the neck. He noticed cut injury on the back side of neck, cheek, arm and hand. He proved his signature Ext. 5(1) in the inquest report Ext. 5 conducted by Circle Officer. During cross he stated that he signed in Ext. 5 at the police station.

17. PW 7 Sri Dwijen Hazarika, the neighbour of the deceased, who turned hostile, stated that on 02-08-2016 Dimbeswar Borah went to tether his cattle in his own land situated at Balibhuri Chapori. He stated that usually the deceased went to tether cattle in the said chapori at around 9.30 AM and used to return home to take lunch at around 12/12.30 PM. But, on the day of incident since the deceased went to tether his cattle in his own land at Balibhuri Chapori, he did not return, hence, he along with villagers searched for the deceased but did not find him on that day. On the said day, when the youngest son of the deceased namely, Bubai went to search for his father, noticed some blood stain near a small hut (boha). Bubai informed the matter at Sootea Police station and along with police again went to the said place but due to darkness they could not search and returned back. Next day morning at around 8 AM he along with family members of the deceased, police personnel and villagers went to the said place and noticed pool of blood near the said hut. When they proceeded towards that place, found the dead body of the deceased lying in a 'Hola'. They had seen cut mark on the mouth and neck of the dead body. He further stated that on that day, at around 12 noon, they heard in the village that somebody had cut accused Girish Das. They also heard that accused Girish Das had cut bamboo from the bamboo groves of Dimbeswar Borah. Then police arrested Girish Das and in their presence

accused Girish Das confessed before police that he killed Dimbeswar Borah followed by a quarrel in between them. At this stage the witness was declared hostile.

In cross examination by defence, he stated that on 02-08-2016, he had seen the deceased when he went to tether his cattle in his own land at Balibhuri Chapori and in the evening he came to know that Dimbeswar Borah did not return from Balibhuri Chapori. He admitted that before police he did not state that they heard from the villagers that somebody had cut Girish Das. He further stated that after 2/3 days, accused was nabbed by police and he suspected that other two persons were also involved in the incident.

18. According to PW 8 Sri Dhiru Borah, the neighbour of the deceased, on the next day he heard that Dimbeswar Borah was murdered. He stated that like other days, on the day of incident also i.e. on 02-08-2016 Dimbeswar Borah went to Balibhuri chapori to tether his cattle but since then he did not return. Then he along with many villagers and police personnel went to search for Dimbeswar Borah but did not find him and on the next day morning the dead body was recovered in a 'Hola'. He noticed one cut mark over the neck of the deceased. The neck was tied with a Gamosa. Lateron he heard from the villagers that accused confessed before police that he had cut the deceased. He also heard that along with Girish Das, other two accused persons were also involved in murder of Dimbeswar Borah.

During cross by defence, he stated that on the day of incident in the evening time he came to know about the incident and then went out in search of the deceased. He admitted that he was not present when the accused confessed in the police station.

19. PW 9 Sri Shyamanta Bormudoi testified that on the day of incident since the deceased went to Chapori to tether his cattle, he did not return back. Hence, one son of the deceased went to the said Chapori in search of his father and noticing some blood stain in the chapori, he returned and informed the matter to the villagers. Hearing this, the son of the deceased and they the villagers informed the matter to police. In the evening along with police they went to the Chapori in search of Dimbeswar Bora but did not find him, however they noticed some blood stain near a 'hola' and also noticed mark of

dragging a person. They followed the marks but as it became dark, hence they returned back. Thereafter he went to the house of the accused persons. Police took accused Bimala Das to the police station. On the next day morning at around 5 AM some of the villagers along with police personnel including Circle Officer again went to the Chapori in search of the deceased and recovered the dead body from the said water bodies. He noticed 7 numbers of cut injuries over head, mouth and neck of the body of the deceased. He stated that the villagers suspected that the accused persons killed the deceased. He proved his signature Ext. 5(2) in the inquest report Ext. 5.

During cross by defence he stated that he did not know exactly who committed the crime.

20. PW 10 Sri Moon Borah deposed that on the day of incident at around 9.30 AM the deceased went to Balibhuri Chapori where he has bamboo groves and when he did not return till 12 noon, his son Niranjan Borah went to the Chapori in search of his father and noticing some cut bamboo and blood stain, he returned back and informed the matter to the villagers and police. In the evening time, they along with police personnel went to the said Chapori in search of Dimbeswar Borah and noticed mark of dragging at the side of the water bodies, but, as it became dark, hence they returned. In the next day morning, at around 5 AM, he along with some villagers, police and Circle Officer again went to the Charpori in search of the deceased and recovered the dead body from the water bodies. The family members of the deceased told them that the accused persons on earlier occasion also had stolen bamboo from their bamboo groves, so, the villagers suspected that the accused persons committed the murder.

In cross by defence, he stated that on the day of incident police recovered one umbrella of the deceased from the place of occurrence. He further stated that he cannot say whether the accused persons had bamboo groves of their own or not but they might have bamboo groves. He stated that as he had not witnessed the incident himself, hence cannot say with certainty how the incident occurred.

21. PW 11 Sri Sanjib Borah deposed that on the day of incident, at around 9.30 AM, the deceased went to Balibhuri Chapori and when he did not return till 12 noon, his son Niranjana Borah went there in search of his father. In the Chapori Niranjana Borah saw the umbrella of his deceased father lying in the mud and noticed some blood stain and some scratch mark of dragging. Then he informed the matter to the villagers and police. In the evening time, they along with police went there but did not find the deceased, however, they noticed some blood stain on the mud and also noticed some scratch mark of dragging a person from the said blood stain towards a 'hola'. Villagers suspected that the accused persons were involved in killing of the deceased. He further stated that after arrest, accused Girish Das confessed his guilt in presence of him at the police station that he committed the murder.

During cross by defence, he admitted that except an umbrella nothing was recovered in his presence from the place of occurrence in the said two days. He admitted that before police he did not state that after arrest, accused Girish Das confessed his guilt before police. He also admitted that the case was filed against the accused persons only on suspicion.

22. The Investigating Officer SI Alimuddin Ahmed, the then Officer-in-Charge of Sootea Police Station deposing as PW 12 stated that on 02-08-2016, at around 5.10 PM, on receipt of a verbal information from one Niranjana Borah of Koroti Chaporial gaon that his father Dimbeswar Borah did not return since he went to Chapori in the morning at around 9.30 AM, he entered the GD Entry No. 34 dated 02-08-2016 (Ext.6). Then he along with the family members of the deceased searched for the victim but did not find him. On the next day morning, he again visited the place of occurrence where the victim went and noticed some mark of blood stain at the beneath of bamboo groves and found the dead body of Dimbeswar Borah in a nearby "beel". He prepared the sketch map of the place of occurrence vide Ext. 7. After recovery of the dead body, inquest was conducted by Executive Magistrate. Thereafter, Niranjana Borah lodged the FIR (Ext.3) against the accused persons Girish Das, Bimala Das and Sumu Das. On receipt of the FIR, he registered the case being Sootea PS Case No. 128/16 u/s 302/201/34 IPC. During investigation, he seized one "Kopi dao" with bamboo handle vide seizure list Ext.4. He also

seized one Gamosa which was found wrapped around the neck of the dead body and one brown colour umbrella with green colour handle vide seizure list Ext. 2. He recorded the statement of witnesses, arrested the accused Girish Das, sent the dead body for post mortem examination and on closure of investigation, submitted the charge sheet against the accused Girish Das u/s 302/201 IPC vide Ext. 8. He confirmed the statement made by hostile witness Dwijen Hazarika (PW 7) made before him and proved the relevant portion of the statement as Ext. 9.

During cross, he stated that Ext. 6, the GDE No. 34 dated 02-08-2016 was entered on receipt of verbal information from Niranjana Borah that the deceased suspected that some unknown person might have cut his bamboo and taken away the same, went to the place of occurrence but since then he did not return back, hence, the informant suspected that some unknown person might have killed his father and concealed the dead body in some unknown place. He admitted that in the verbal information Niranjana Borah, son of the deceased, did not implicate any of the accused persons. He further stated that on the first day when he visited the place of occurrence he did not find the seized articles and in the next day found the dead body at around 6.10 AM. He further stated that before 02-08-2016 none complained at the police station that deceased Dimbeswar Borah was missing from his residence. He admitted that he did not send the dao to FSL to ascertain as to whether it contains human blood or not. He also did not send the dao to Finger Print Expert to ascertain as to whether the dao contains any mark of finger of any of the accused persons. He further stated that there is no residential house in the surrounding area of the place of occurrence except the 'Pam house' of Maheswar Borah. He stated that he did not know if the deceased was missing since 6/7 days prior to 02-08-2016. Before 02-08-2016 he was not aware about missing of the deceased. He admitted that though the accused Girish Das confessed his guilt before him, but he did not pray before Court for recording his confessional statement.

23. Now, in the back drop of above evidence, let me consider whether the above mentioned evidence is sufficient to rope the accused persons for committing an offence u/s 302/34 of the I.P.C.

24. The prosecution case is that the accused persons namely, Girish Das, Bimala Das and Sum Das committed murder of the deceased Dimbeswar Borah followed by a quarrel finding accused Girish Das cutting bamboo from the bamboo groves of the deceased. As per post mortem report (Ext.1), the deceased sustained sharp cut injury to the right side of the neck (on the middle part) size 6 cm x 4 cm x 4 cm, sharp cut injury to the mouth (left side) size 8 cm x 6 cm x 6 cm, sharp cut injury to the shoulder (size 4 cm x 3 cm x 3 cm) left and sharp cut injury to the right hand size 4 cm x 3 cm x 2 cm which are antemortem in nature and cause of death is due to injuries sustained by the deceased which are sufficient to cause death of a person in ordinary course of nature.

25. In the above, analysis of the evidence became necessary to arrive at findings as to whether the accused persons were the author of the crime.

26. In this case, nobody witnessed the occurrence. The prosecution in order to prove it's case relied upon the following circumstances to connect the accused persons with the crime:

i) on the day of incident, the deceased proceeded to his bamboo bari situated at Balibhuri Chapori and found the accused cutting his bamboo;

ii) on earlier occasions also, the accused had stolen the bamboo of the deceased from said bamboo bari;

iii) the deceased's body was recovered near the bamboo groves on the next day;

iv) when the family members of the deceased searched for the deceased, they came to know that on that day accused Girish Das sustained injury and went to hospital for treatment;

v) evidence of PW 5 the neighbour who stated that seeing the accused persons cutting bamboo from his bamboo groves, when the deceased prevented them, an altercation took place and the local people heard hulla;

vi) evidence of PW 3, PW 7, PW 8 and PW 11 regarding extra judicial confession made by accused Girish Das.

27. In a case based on circumstantial evidence, it is well-settled that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however, strong they may be, to take the place of proof.

28. The Apex Court in the case of **S.D. Soni Vs. State of Gujrat (1991)1 SCJ 175** observed that in a case in which the evidence is of circumstantial nature, the facts and circumstances from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and circumstances so established should not only be consistent with the guilt of the accused, but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence.

29. In this case none witnessed the occurrence. PW 3 Niranjan Borah the son of the deceased testified that on 02-08-2016 at around 9.30 AM his father went to their bamboo bari situated at Balibhuri Chapori and finding the accused stealing bamboo, when the deceased prevented the accused, an altercation took place between them and thereafter, accused Girish Das hacked his father. He stated that when the deceased did not return home till 12.30 PM, they searched for him and on the next day at around 6 AM recovered the dead body in a "Hola" about 100 meter away from the said bamboo groves. His evidence clearly indicates that he had not witnessed the incident. In cross-examination, he also admitted that there was no eye-witness to the occurrence. Another witness PW 5 Ranjit Bormudoi the co-villager of the deceased alleging involvement of all the accused persons stated that on 02-08-2016 at around 9 AM the deceased went to his bamboo groves situated at Balibhuri Chapori and

seeing the accused persons cutting bamboo from his groves when the deceased prevented them, an altercation took place amongst them and the local people heard halla but his cross-examination reveals that he heard about missing of deceased Dimbeswar Borah at 2/2.30 PM when he went to the house of the accused. So, apparently he is also not an eye-witness to the incident. Other witnesses mentioned about only the search part for the deceased and recovery of the dead body. Though PW 3 alleged of hacking the deceased by accused Girish Das followed by a quarrel for cutting bamboo of the deceased and PW 5 mentioned about an altercation amongst the deceased and the accused persons for cutting bamboo by the accused persons from the bamboo groves of the deceased, but their evidence show that they are not the eye witnesses to the occurrence. Moreover, as per evidence of PW 3, only accused Girish Das was involved in the incident whereas PW 5 implicated all the three accused persons. PW7 Dwijen Hazarika the neighbour of the deceased who turned hostile stated that on the day of incident when Dimbeswar Borah did not return home till 12/12.30 PM since he went to tether his cattle on his own land situated at Balibhuri Chapori, he along with the villagers searched for Dimbeswar Borah and noticed some blood stain near a small hut (boha) at the chapori and on next day morning along with police when all again went there, found the dead body of the deceased lying in a Hola in that place. He heard that Girish Das had cut bamboo from the bamboo groves of the deceased and some body had cut Girish Das but he did not state who had cut Girish Das. This part of evidence of PW 7 is also not corroborated by other witnesses. At the same time in cross-examination he admitted that before police he did not state that they heard from villagers that somebody had cut Girish Das. In the above evidence, even if Girish Das received some injury, in absence of evidence it cannot be accepted that in a fight between the accused and the deceased, he sustained injuries. Moreover, the evidence of PW 2, the friend of the deceased's son Niranjan Borah (PW 3) that on earlier occasions also accused Girish Das had stolen bamboo from the bamboo plantation of the deceased on which the deceased had filed cases against the accused Girish Das was not supported by the sons of the deceased i.e. PW 3 and PW 4. There is also no eye witness who found the accused cutting bamboo from the groves of the deceased.

30. Turning to the evidence of the Investigating Officer, it reflects that on 02-08-2016 at around 5.10 PM Niranjana Borah (PW3) the son of the deceased informed verbally that his father went to the bamboo bari as he suspected that some unknown person might have cut his bamboo and took away the same, and when he did not return, he suspected that some unknown person might have killed his father and concealed the dead body. On the basis of which GD Entry No. 34 dated 02-08-2016 (Ext. 6) was entered. The GDE (Ext. 6) disclosed that before recovery of the dead body the son of the deceased suspected that his father was murdered by somebody and concealed the dead body. The GDE was entered at 5.10 PM and the family members of the deceased started search at around 12.30 PM. During search they might have knowledge, if the deceased was attacked by Girish Das and other two accused persons but, he did not inform those facts before police. It is well settled that in a case of circumstantial evidence, there has to be some degree of certainty about the existence of the circumstance mere probabilities are not enough. In this case, the evidence discussed above clearly shows that there is no any eye witness to the occurrence and no any circumstance has been proved against the accused persons for roping them as perpetrators of the crime.

31. Furthermore, as per the post mortem report, the injuries sustained by the deceased were 6/7 days old and there was peeling of skin all over the body. The deceased was missing on 02.08.2016 and the dead body was recovered on next day morning at around 6 AM i.e. after less than 24 hours. The post mortem was conducted on the day of recovery of the dead body i.e. on 03.08.2016. So death due to 7/8 days old sharp cut injuries creates doubt about the prosecution version with regard to missing of the deceased on previous day.

32. That apart, the evidence of PW 2 is that on the very day when he along with PW 3 and police personnel went to the place of occurrence in search of the deceased, found a dao stained with blood. Except the evidence of PW 2, there is no evidence to show that said dao bore any blood stain nor was said dao subjected to serological test to ascertain if dao bore any stain of blood. The seizure list also does not disclose that the seized dao contains blood stain. The dao was not sent for forensic examination for establishing the involvement of

the accused persons. As such it is impossible to hold with certainty that said dao which belongs to the deceased was the incriminating weapon.

In the back drop of above evidence, I am of the considered opinion that the circumstances laid by the prosecution was not proved against the accused persons.

33. Another circumstance relied upon by the prosecution is the extra-judicial confession allegedly made by accused Girish Das. It is well settled that extra judicial confession is a weak type of evidence and requires appreciation with great deal of care and caution where an extra judicial confession is surrounded by suspicious circumstances, its credibility came doubtful and loses its importance. To make an extra judicial confession an admissible piece of evidence, the Apex Court in the case of **SAHADEVAN AND ANOTHER Vs. STATE OF TAMIL NADU, (2012) 6 SCC 403** laid down the following principles

- “(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.**
- (ii) It should be made voluntarily and should be truthful.**
- (iii) It should inspire confidence.**
- (iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.**
- (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.**
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.”**

34. Keeping in mind the above principles, we may now refer to the extra judicial confession allegedly made by accused Girish Das, in the case here. In that respect, PW 3 and PW 7 stated that accused Girish Das in their presence

before police confessed that he killed the deceased but this material particular was not stated before the Investigating Officer in statement u/s 161 Cr.P.C. An improved version of earlier statement cannot be relied upon. Moreover, if such confession was made before the Investigating Officer, why he did not pray for recording confessional statement. PW 8 Dhiru Borah negates his presence at the time of confession made by Girish Das before police. Another witness PW 11 Sanjib Borah testified that after arrest accused Girish Das confessed his guilt in presence of him at the police station that he committed the murder but this fact admittedly was not stated before police in statement u/s 161 Cr.P.C. which amounts to major contradiction. From the above evidence, it appears that the alleged extra judicial confession of accused Girish Das was made in police station after arrest. Section 25 of Evidence Act provides that no confession made to police officer shall be proved against a person accused of any offence. Section 26 provides that no confession made by a person while he is in the custody of a police officer shall be proved against such person unless the confession is made in presence of a Magistrate. In this case, the extra judicial confession, if any, made by an accused before police being hit by the provision of Section 25/26 of Indian Evidence Act cannot be accepted as evidence. As such the alleged statement made by accused Girish Das cannot be used against him and it cannot be said to be a link in the chain of proof implicating him beyond all reasonable doubt. The above factors bring out serious deficiencies in the veracity, credence and evidentiary value of alleged extra judicial confession and I unhesitatingly ruled out the same from consideration. Therefore, the making of extra judicial confession by accused Girish Das also having not been established and the inference of guilt is not supported by any evidence or circumstance.

35. A comparative study of the evidence of PWs reveals that there is corroborative evidence that on the day Dimbeswar Borah went out from home to tether his cattle, but, when he did not return till noon they searched for him. At first Niranjana Borah (PW 3) went in search for him and finding a dao with blood stain and umbrella of the deceased, returned back and informed the matter to the villagers and to police. Thereafter, again along with police they went to the place but as it became dark, they returned back and on next day

morning when they with police and Circle Officer went to the place, found the dead body tied with a gamocha in a 'hola'. PW 3 the son of the deceased also stated that whenever his deceased father used to proceed to the "Mer", he used to carry one umbrella, one dao and one gamocha with him. The said articles were seized by police which were belong to the deceased himself as per evidence of PW 3 the son of the deceased. Though the PWs alleged that accused Girish Das and other two accused persons had caused the death of the deceased but the evidence of PW 3, PW 7, PW 9, PW 10 and PW 11 reflects that they only suspected that the accused persons committed the murder. There is also no iota of evidence that anybody had seen the deceased in the company of any of the accused persons on that day. So in this case the theory of last seen together is also missing.

36. From the above discussed evidence, rendered by the prosecution witnesses, no incriminating material could be found against the accused persons. In the case though suspicion can be raised against the accused persons, but suspicion, how so ever high, cannot be substitute of legal and substantive evidence. In order to hold a person guilty of a charge, prosecution is required to establish the case beyond all reasonable doubt by adducing cogent and substantive evidence. In this case, I find that the prosecution failed to adduce the substantive and cogent evidence inspiring confidence to conclusively hold that the accused persons had caused the death of the deceased.

37. In the light of above discussion, I am constrained to hold that the circumstances relied by the prosecution in this case are neither established nor consistent with the hypothesis of the guilt of the accused persons and as such they cannot be held guilty.

38. In view of what has been discussed above, I am inclined to hold that the prosecution failed to prove the case beyond all reasonable doubt. Accordingly, accused persons Girish Das, Bimala Das and Sum Das are

acquitted from the charge u/s 302/34 IPC and set them at liberty forthwith. Their bail bonds shall extended till next six months in view of section 437 A of Cr.PC.

Destroy the seized articles in due course.

39. In this case, there is no dispute that the death of the deceased is homicidal. The case is recommended to the District Legal Services Authority, Sonitpur, Tezpur to enquire and to pay compensation to the dependents of the deceased, if any u/s 357 A of Cr.P.C.

40. Send back the GR case to the learned committal court.

41. Given under my Hand and Seal of this Court on this the **14th day of July, 2020.**

**(I. Barman)
SESSIONS JUDGE
SONITPUR : TEZPUR**

Dictated and corrected by me

**(I. Barman)
SESSIONS JUDGE,
SONITPUR :: TEZPUR.**

APPENDIX

Prosecution Witness

1.	Prosecution Witness No.1	:-	Dr. Ranjan Kr. Das, M.O.
2.	Prosecution Witness No.2	:-	Sri Tapan Borah,
3.	Prosecution Witness No.3	:-	Sri Niranjan Borah,
4.	Prosecution Witness No.4	:-	Sri Prafulla Bora
5.	Prosecution Witness No.5	:-	Sri Ranjit Bormudoi
6.	Prosecution Witness No.6	:-	Sri Beauti Dolo Borah
7.	Prosecution Witness No.7	:-	Sri Dwijen Hazarika,
8.	Prosecution Witness No.8	:-	Sri Dhiru Borah
9.	Prosecution Witness No.9	:-	Sri Shyamanta Bormudoi.
10.	Prosecution Witness No.10	:-	Sri Moon Borah
11.	Prosecution Witness No.11	:-	Sri Sanjib Borah
12.	Prosecution Witness No.12	:-	SI Alimuddin Ahmed, I.O.

EXHIBITS

1.	Exhibit No.1	:-	Post mortem report.
2.	Exhibit No.2	:-	Seizure list
3.	Exhibit No.3	:-	Ejahaar
4.	Exhibit No.4	:-	seizurelist
5.	Exhibit No. 5	:-	Inquest report
6.	Exhibit No. 6	:-	Extract copy GDE No.34/16 of Sootea PS
7.	Exhibit No. 7	:-	Sketch map
8.	Exhibit No. 8	:-	Charge sheet
9.	Exhibit No. 9	:-	Relevant portion of statement of witness Dwijen Hazarika.

Sketch n

Material Exhibits.

Material Exhibit 1	:-	One Kopi dao
Material Exhibit 2	:-	One Umbrella and one "Gamosa".

(I.Barman)
SESSIONS JUDGE
SONITPUR: TEZPUR