

HEADING OF JUDGMENT IN SESSION CASE

IN THE COURT OF ADDITIONAL SESSION JUDGE BILASIPARA

Present:- Smti S. Bhuyan, AJS

Additional Session Judge, Bilasipara

Session Case No-190 of 10

u/s 302/304(B) IPC

STATE

Versus

Anowar Hussain

Accused person

(Committed by Sri N.S. Deori, then Ld. SDJM (M) Bilasipara in GR (BLP) case No-09/03 u/s 498(A)/302 I.P.C.)

Advocate appeared:-

For the state:-Mr. T. Kr. Bhattacharya, Addl. P.P

For the accused:- Mr. Gias Uddin Ahmed,

Mrs. Minara Khatun, Advocate.

Date of institution of the case :- 13-01-03

Date of commitment :- 15-11-10

Date of Framing charge :- 07-04-11

Date of prosecution evidence :- 24-12-11, 19-04-12, 23-08-12,
04-07-13, 07-10-13, 24-02-14,
05-08-15.

Statement of accused recorded on :- 06-10-15

Date of defence evidence :- 07-10-16, 21-11-16, 06-01-17,
01-02-17.

Date of Argument :- 15-11-17, 08-12-17

Judgment delivered	:- 18-12-17
Hearing on sentence	:- 20-12-17
Sentenced pronounced	:- 20-12-17

JUDGMENT

Prosecution Case

1. Prosecution case as unfurled from ejahar is that about 7 years ago informant's daughter Jalema Khatun got married with accused Anowar Hussain by registering kabin-nama. After marriage on the instigation and ill advice of accused Monowar Hussain, accused Anowar Hussain started mental and physical torture on informant's daughter Jalema Khatun but bearing all those tortures Jalema Khatun lead conjugal life with accused Anowar Hussain and out of their wedlock three children were born. On 09-01-03 at about 07.00 pm accused Anowar asked Jalema to bring Rs. 10,000/- from informant but when Jalema refused to bring the same from the informant, accused Anowar Hussain in presence of accused Monowar Hussain gave a khukri blow on Jalema Khatun's neck and face with intent to kill her while she was standing in front of door of kitchen and caused grievous injury on her. Accused Anowar also assaulted Jalema by holding her hair and caused injury on her leg and waist. To this fact informant Jalaluddin lodge the ejahar before O/C Bilasipara and in his ejahar he stated that there was delay in lodging of ejahar due to treatment of victim Jalema Khatun.

Investigation

2. Officer-in-charge of Bilasipara police station on receiving the ejahar from Md. Jalaluddin registered a police case vide no Bilasipara police case No. 09/03 under Section 498(A)/109 I.P.C. and SI D. Saikia was entrusted to conduct the investigation of the case . After completion of the investigation IO submitted charge sheet against the accused person named herein above u/s 498(A)/302 I.P.C.

Committal

3. On receipt of the charge sheet, then learned SDJM (M) Bilasipara, took cognizance and after furnishing necessary copies to accused person committed the case before the Learned Sessions Judge, Dhubri for trial.

Charge

4. After hearing Id. Counsel for both sides and perusal of material on record Ld. Sessions Judge, Dhubri framed charge u/s 302/304(B) IPC against the accused Anowar Hussain and when charges read over and explained to the accused person he pleaded not guilty and claimed to be tried. After framing charges u/s 302/304(B) I.P.C. against accused Anowar Hussain, Ld. Sessions Judge, Dhubri transferred the case to the court of Ld. Addl. Sessions Judge, Dhubri for trial and finally Ld. Addl. Sessions Dhubri transferred and the case is made over to this court for trial.

Trial

5. In order to prove the prosecution charges against the accused persons, prosecution adduce evidence of all together 11 number of witnesses and exhibited 6 no of documents. PW- 1 Md. Jalauddin Sk., PW-2 Musstt. Ashma Bibi, PW-3 Md. Abdul Baten, PW-4 Hussain Ali, PW-5 Md. Nurul Hoque, PW-6 Md. Abu Bakkar Siddique, PW-7 Md. Joynal Abedin, PW-8 Pranab Kr. Sarma, PW-9 Wilburn S. Daimari, PW-10 Dipen Saikia, PW-11 Dr. Sashidhar Deka. Ext.1 Dying declaration, Ext.2 Inquest report, Ext.3 Seizure list, Ext.4 petition by IO for addition of section 302 I.P.C., Ext. 5- Charge sheet, Ext.6- PM report. After closure of the prosecution evidence, Statement of the accused person recorded u/s 313 Cr.P.C. Accused plea is denial and inclined to adduced defence evidence in support of the plea of denial at the time of recording his statement u/s 313 Cr.P.C and accordingly accused person adduced evidence of four defence witnesses DW-1 Arzufa Bibi; DW-2 Porman Ali Sk; DW-3 Haji Sanjab Ali, DW-4 Manowar Ali @ Hussain.

6. **POINTS FOR DETERMINATION:-**

- i) Whether accused on 09-01-03 at about 07.00 pm at village Majpara under Bilasipara PS subjected deceased Jalema Khatun physical and mental torture by demanding dowry and subsequently caused death by causing bodily injury on deceased Jalema Khatun with knife?
- ii) Whether accused on 09-01-03 at about 07.00 pm at village Majpara under Bilasipara PS committed murder by intentionally causing the death of deceased Jalema Khatun?

ARGUMENT

7. Ld. Addl. P.P made submission that dying declaration which is marked as Ext 1 is most vital and important piece of evidence and same is proved by the evidence of PW-8 and PW-1. He further contented that PW-6 who is declared hostile and who is relative of accused will generally not speak the truth and his plea is even not found any base in the defence evidence. He submitted though accused by adducing defence evidence tried to show that he was not present at place of occurrence but defence evidence itself shown that accused was not present at his grocery shop and defence evidence pointed accused was not in the company of defence witnesses at the time of incident. Rather defence witness pointed that he took false plea of alibi to save his skin. He pointed evidence of DW-4 revealed presence of sufficient light at place of occurrence to identify the accused and accused after committing the offence run away to give impression that he was not present at place of occurrence and prosecution by proving the dying declaration established the prosecution case against the accused and chain of circumstances shown only guilty of the accused that it is the accused who had committed murder of deceased Jalema and when dying declaration is voluntarily, truthful and unambiguous it can be accepted safely and dying declaration can be used as a sole evidence to convict the accused under the present facts and circumstances of the case.

8. Countering the same, Ld. defence counsel contented that dying declaration is not an acceptable piece of evidence and cross examination of the PW6 by the defence shown that elder sister of deceased stated something to magistrate PW-8 and PW-8 recorded the statement, it is not in a question answer form, doctor's certificate is on the bottom of the dying declaration, PW-8 not given certificate and it was not recorded in local dialect and injury sustained by the deceased victim is not possible to remain conscious for 10 to 15 minutes of sustaining injury, deceased was unconscious, opinion of doctor is not confronted with the dying declaration and there is suspicion, tutoring and therefore, dying declaration is not an acceptable piece of evidence. He further submitted that there is delay in filing ejahar which is not explained and in the ejahar fact of dying declaration is not mentioned. He further contented that evidence of PW-6 i.e hostile witness is not relevant and evidence of PW-1 to PW-7 does not carry any weight and accused Anowar was all alone present with his wife Jalema the deceased of the case to provide treatment to her and as victim died after 13 days of incident at her father's house, intention to

commit murder not founded and therefore, it is not intentional to cause death of deceased Jalema hence, penal provision of section 302 I.P.C is not attracted nor attract the penal provision of section 304 part I or Part II and as witnesses does not speak about the torture section 304-B is also not attracted. He submits IO failed to enlighten the prosecution case and evidence of DW1, DW-2, DW-3 and DW-4 shown that accused was present at his grocery shop and defence evidence must be treated at par with prosecution evidence and defence evidence thrown away the prosecution charges against the accused. In support of his submission Ld. defence counsel relied on decisions "Gopal Singh & Ors Vs. State of Madhya Pradesh (2010)3 Supreme Court Cases (Cri) 150"; "Suchand Pal Vs. Phani Pal and anr. In 2004 SCC (Cri)220" ; "T.K Reddy Vs State of A.P 2002(4) Crimes 24 (SC)"; "Sambhu Paul and anr vs State of Assam 2002 CRI. L.J 3359 GHH"; State of Haryana vs Ram Singh Rai Sahab and anr vs State of Haryana 2002 SCC (Cri) 350"; Subramaniam vs State of Tamil Nadu and Anr (2010)1 SCC (Cri) 1392"

PROSECUTION EVIDENCE

9. PW-1 Jalauddin Sk. deposed that he knows accused Anowar Hussain and he is his son in law and married his daughter Jalema Khatun 10 years back from the date of incident. On the day of incident at about 08.00 to 08.30 pm he got news that his daughter Jalema was serious and he rushed to the house of his son-in-law wherein he got information that his daughter was taken to Bilasipara Hospital for treatment. Accordingly he went there. Thereafter, doctor referred Jalema to Dhubri Civil Hospital. He deposed his daughter sustained injury on her neck and she was at Dhubri Civil Hospital for about 2/3 days. Thereafter, she was taken to Guwahati and finally he brought his daughter at his house and his daughter expired. He deposed he lodged ejahar and put his thumb impression on ejahar. He could not say how his daughter sustained injury. **In cross** he stated at the age of 18/19 years he gave his daughter in marriage with accused Anowar and she gave birth of 3 children. At the time of incident Arjufa, daughter of deceased was aged about 8/9 years old and other two children were aged about 6 and 2 years respectively. He stated incident night was dark. FIR was written by villager and his daughter did not speak when taken to Guwahati and after 17/18 days of incident his daughter died.

10. Evidence of PW-2 Musstt. Ashma Bibi is that accused is her brother in law and deceased Jalema was wife of accused. She deposed 9 years ago deceased Jalema died but for what reason deceased died she could not say.

She further deposed during their conjugal life accused and deceased were leading peaceful conjugal life. **In cross** she stated deceased had 16 years old daughter, 13/14 years son and one 9 years old daughter.

11. Evidence of PW-3 Md. Abdul Baten is that on the day of incident he went to market. After returning from market he heard cries and also found dead body of deceased Jalema around the road side. He deposed he did not notice any injury on deceased Jalema. He deposed he had one handcart along with him at the time of incident and at that handcart he carried deceased to hospital and thereafter he returned to his house. PW-3 was declared hostile by prosecution. **In cross** by prosecution he denied the fact that he told before the IO that he saw injuries on the deceased Jalema and on being asked deceased Jalema told him that on the day of incident deceased was talking with her brother in law Monowar, then on suspicion her husband accused Anowar injured her and also attempt to assault Monowar. **In cross** by defence he stated village Mashmara is 3 km away from Bilasipara and the incident was took place in the dark night.

12. Evidence PW-4 Hussain Ali is that deceased Jalema was wife of accused and she expired 8/9 years back. He deposed on the day of incident while he was returning home from his shop he heard cries in the house of accused. Hearing this when he rushed to the house of accused he saw some people were catching hold deceased Jalema. **In cross** he stated the area where incident was took place is a terrorist prone area and occurrence of number of offences were reported earlier.

13. Evidence of PW-5 Md. Nurul Hoque is that house of accused is half farlong away from his workplace i.e petrol pump. He deposed on the day of incident he heard cries from the house of accused but he did not go there. Later on he saw wife of accused being carried to the Bilasipara hospital and he heard that wife of accused sustained cut injuries. He deposed he did not hear who inflicted the cut injury on wife of accused. **In cross** he stated incident of dacoity took place at petrol pump where he works. He further stated the area where occurrence took place is criminal prone area.

14. Evidence of PW-6 Md. Abu Bakkar Siddique is that accused is from his village. He deposed on the day of incident when he was at his house he heard cries from the accused's house and hearing this when he rushed to the house of accused, wife of accused was already taken to hospital. He deposed he heard that someone entered into accused's house and committed the crime and deceased Jalema sustained cut injuries on her neck and back and later on

Jalema expired. PW-6 was declared hostile by prosecution. **In cross** by prosecution he denied the fact that during investigation he told before police that on 09-01-03 at about 07.30 pm his mother told him that his brother accused Anowar inflicted cut injuries on the body of deceased Jalema and hearing this when he went to the place of occurrence wife of accused was already been taken to Bilasipara hospital. He also denied that he told before the police that when he went to Bilasipara hospital, on being asked deceased Jalema told him that accused suspecting her having illicit relationship with his younger brother, accused caused injury on her. He also denied that during investigation he told before police that on 10-01-03 the dying declaration of deceased was recorded by magistrate under advice of attendant doctor in presence of him, father of deceased and he put signature on dying declaration Ext. 1. He stated ext-1(1) is his signature. **In cross** by defence he stated accused was present at the time when deceased was given treatment. He stated deceased was taken to her paternal house from Dhubri hospital and from there deceased was taken to Guwahati and from Guwahati after 3 days deceased was brought back again to her parental house and subsequently deceased died. He stated deceased Jalema was accompanied by her elder sister and her elder sister stated something before the magistrate and at that time he went to bring medicines and after returning from there he was asked to put signature in the statement and accordingly he put the same. He further stated the said statement was not read over, explained and interpreted to him.

15. Evidence of PW-7 Md. Joynal Abedin is that he knows accused and deceased was wife of accused. He deposed he does not know how deceased was died. PW-7 was declared hostile by prosecution. **In cross** by prosecution he denied that he stated before police that deceased was his niece and on 09-01-03 accused gave a dagger blow on deceased suspecting that deceased was having illicit relationship with his brother and as a result deceased sustain injuries and later deceased was shifted to Dhubri Civil Hospital and from there she was referred to G.M.C.H and at last deceased expired at her home. He also denied that Executive magistrate did inquest on the dead body of deceased Jalema and prepared inquest report vide Ext 2 wherein he put his signature vide Ext 2(1). He stated accused is his nephew in law and denied that due to relation and with a view to save accused he deposed falsely. **In cross** he stated he did not hear anything about the incident and he neither visited Dhubri Civil hospital nor G.M.C.H and police did not record his statement.

16. PW-8 Pranab Kumar Sarma, then Circle Officer Dhubri deposed that on 10-01-03 he recorded dying declaration of Jalema Bibi, W/O Anowar Hussain female, aged about 27 years vide Ext 1. He deposed he recorded the said dying declaration in presence of witness Jalauddin, Abul Bakkar Siddique. He deposed deceased Jalema also put her signature on Ext. 1 in presence of him and at that time deceased was fit to speak and to that effect doctor certified and he recorded the statement. **In cross** he stated he did not mention in his report that he recorded the dying declaration on being requisition by police and he also did not mention the name of the intruder or identifier of the deponent in his report. He stated he did not mention in his report whether deceased had sustained injury or not; whether deceased was able to speak or not, whether deceased had concealed in regard to illicit relation with the younger brother of husband or not. He stated he did not certify on dying declaration that he had recorded the statement of deceased bonafidely and correctly and he also did not certify that deceased spoke before me voluntarily and without having been exerted any pressure or influence. He denied the fact that Ext 1 is not the dying declaration of the deceased Jalema Bibi nor it was recorded as per the prescribed format of law of the land. He stated he did not mention the place of recording of the statement in his report.

17. Evidence of PW-9 W.S. Daimari, then Executive Officer, Bilasipara Sub Division deposed that on 31-01-03 he prepared inquest report of deceased Jalema Khatun and submitted the inquest report vide Ext.2 and he put his signature on Ext 2 vide Ext 2(2). **In cross** he stated he did not mentioned in Ext 2 who get the requisition for doing the inquest and who identified the dead body. He stated he had not mentioned the description of injuries sustained by deceased. He stated he did not find any fresh injury on the dead body of deceased and he had not referred the copy of the inquest report to the SDM or DM. He denied that he prepared inquest report just only at the request of police and informant.

18. PW-10 Dipen Saikia is IO of the case. His evidence is that on being endorsed by then O/C Bilasipara he investigated Bilasipara PS case no. 09/03 u/s 498(A)/109 I.P.C. During investigation he visited the place of occurrence, recorded the statement witnesses, seized one blood stained cloth, two pairs of Hawaii slipper of different sizes, one old white dirty mosquito net. He deposed after doing necessary investigation he found that accused had assaulted his wife on her neck by a dagger. He deposed victim was initially admitted in Bilasipara SHC and from there victim was shifted to Dhubri Civil Hospital and

again victim was shifted to G.M.C.H for further treatment but doctors of G.M.C.H returned victim saying that no chance left for victim's survival. He deposed after returning from G.M.C.H victim was again admitted in Dhubri Civil Hospital where on 10-01-03 victim made dying declaration before the Executive magistrate Sri P.K. Sarma. He deposed he had requisitioned the victim for dying declaration. He deposed Executive Magistrate W.S. Daimary made the inquest report of the victim on 31-01-03 in presence of him. He deposed victim succumbed to her injuries and after the death victim he sent dead body of victim for post mortem examination and also collected the post mortem report. He deposed when victim succumbed to her injuries he made prayer before SDJM (M) Bilasipara for adding section 302 I.P.C. vide Ext.4 and after completion of investigation he submitted the charge sheet against the accused u/s 498(A)/302 I.P.C. vide Ext 5. **In cross** he stated in chargesheet he had enclosed the seizure list, dying declaration, inquest report and post mortem examination report. He denied that seizure list is not relevant with the incident of the case. He stated inquest is made by the Magistrate and he had enclosed the requisition letter for making the inquest on C.D. He denied the fact that he did not seized anything in the place of occurrence.

19. PW-11 Dr. Sashidhar Deka is M.O of the case. His evidence is that he conducted Post mortem examination of one Jalema Khatun in connection with Bilasipara PS case no. 09/03 and on examination he found a female dead body of 20 years old, rigor mortis present, body of deceased was emaciated, a sharp cutting wound over left side of neck extending from nape of the neck to shoulder of the left side about 5 inches in length sutured with silk stitches, on exposure all deep muscles of neck are damaged- the wound can be trepanned up to cervical vertebrae, spinal cord at the level of 6&7 vertebrae is transected completely exudate in the area present which is not healed at all, a linear fracture over left side of 6 vertebrae present, another sharp cutting wound over right side of cheek size about 2 inches in length muscles deep. In his opinion deceased died due to cardio- respiratory failure as a result of injury sustained by deceased and all the injuries are anti-mortem in nature. **In cross** he stated from his findings it could be assumed that the injury was 24 hours old. He stated he did not mention the colour of the blood in his report and injuries found in the deceased were horizontal. He stated deceased did not die as a result of hemorrhage and he found gastric juice in the stomach of deceased. He stated he did not preserve the viscera as it was not necessary.

DEFENCE EVIDENCE

20. Evidence of DW-1 Arzufa Bibi is that accused is her father and deceased was her mother. She deposed on the day of incident she along with her deceased mother was cooking in the kitchen and while her mother went to the door to throw water some miscreants attacked on her mother and her mother fell down on the ground. Thereafter she made hue and cry and neighbouring people came to the place of occurrence and at that time her accused father was at grocery shop at about 2 farlong away in front of Indian Oil. She deposed on being called by one Parman Ali, her accused father came to the place of occurrence and her deceased mother was taken to Dhubri Civil Hospital. She deposed her deceased mother was sent to G.M.C.H for better treatment and later her deceased mother expired. She deposed her accused father and deceased mother were leading peaceful conjugal life. **In cross** by prosecution she stated at the time of incident she was 10 years old and she was two cubits away from her deceased mother while her deceased mother was cooking in the kitchen.

21. Evidence of DW-2 Parman Ali is that he knows deceased Jalema Khatun and she is daughter of his paternal uncle and also knows accused Anowar. He deposed incident was took place in the year 2003 at about 07.00 to 07.30 pm and at that time he was not driver. He deposed he went to the shop of Anowar and met him and Anowar was working in his shop. Someone called them and Anowar give his companion. He went to the house of Anowar and found elder daughter of Anowar was crying. On being asked she told him that her mother while working in the kitchen someone attacked her mother with knife. He went near to the injured Jalema and found her in injured condition. Thereafter he went to the shop house and informed Anowar and also informed the father of Jalema about the incident. After that they took Jalema to Bilasipara Hospital where from she was referred to Dhubri Civil Hospital. He deposed he along with father of injured, daughter of injured and accused Anowar took victim to Hospital. On 22-01-03 Jalema expired and she was taken to Guwahati accompanied by her father and her daughter. There was no quarrel took place in between deceased Jalema and accused Anowar Hussain. In cross by prosecution he stated at the time of incident he was 20 years old. There was quarrel took place in between husband and wife (Anowar and Jalema) in demand of dowry and he is not aware of the daily incident that took place in the house of accused. He denied prosecution suggestion that accused committed murder of his wife. He also denied that accused did not accompany

victim to the Hospital and he deposed falsely before court and he knows that deceased made dying declaration before her death.

22. Evidence of DW-3 Haji Sanjab Ali is that accused Anowar had a grocery shop near the petrol pump where he went on the day of incident at about 07.00 to 07.30 pm. to purchase articles and at that time Parman Ali was also present there and at that time he heard hue and cry at the house of accused. Hearing this he asked Parman Ali to figure out the reason of shouting and also asked Parman Ali to call Anowar. He deposed he along with them went to the house of accused Anowar and saw deceased Jalema lying on the door of their kitchen and also saw blood oozing out from her and at that time deceased was unable to speak and at that time daughter of deceased, Monowar and many other peoples were present at the place of occurrence. He deposed later deceased was taken to Bilasipara Hospital and from there she was taken to Dhubri Civil Hospital. **In cross** by prosecution he stated he had good relation with accused Anowar Hussain and accused Anowar Hussain was not present in his house at the time of occurrence.

23. Evidence of DW-4 Manowar Ali @ Hussain is that incident was took place in the month of January 2003 at about 06.30 PM when his sister in law deceased was cooking in the kitchen and he along with Arjufa was also present there. He deposed when deceased went out to throw water outside the kitchen then suddenly some miscreants hit deceased Jalema on her shoulder with khukri and he saw the face of those miscreants. He deposed miscreants were wearing jacket and long pant and they fled away after hitting her deceased sister in law. He deposed deceased Jalema fell down and blood was oozing from her injury and Jalema was taken to Bilasipara Hospital and from there Jalema was shifted to Dhubri Civil Hospital where she was accompanied by Anowar, Jalaluddin and Arjufa and others. He deposed at Dhubri civil Hospital Jalema was treated about 6 days and thereafter she was referred to Guwahati and later Jalema died. He deposed he saw the face of accused and it was not Anowar. He further deposed Jalema and Anowar were living peaceful conjugal life along with their three children. **In cross** by prosecution he stated incident took place on the day of incident at about 07.30 pm and except him no other male persons were present at the place of occurrence.

DISCUSSION, DECISION & REASON THERE OFF:-

ANALYSIS OF PROSECUTION EVIDENCE

24. On scrutiny of the evidence on record it is seen that PW-2, PW-5, PW-7 are relative of the accused. PW-3, PW-4 and PW-6 are co villager of accused. It is an admitted fact that informant was not present at place of occurrence at the time of incident. It is also an admitted fact as evident from evidence of PWs and DWs that it is a case of murder. Victim died due to injury sustained by her. Injury of victim was caused by khukri which is a sharp cutting weapon and it can be used for stabbing, cutting, chopping etc. According to PW-11 MO of the case, during post mortem examination of the dead body of deceased Jalema, he found sharp cutting wound over left side of neck extending from nap of the neck to shoulder at the left side about 5 inches in length. It is sutured with silk stitches and on exposure, all deep muscles of neck are damaged-the wound can be trepanned up to cervical vertebrae, spinal cord at the left of 6&7 vertebrae is transected completely exudate in the area present which is not healed at all, a linear fracture over left side of 6 vertebrae present, another sharp cutting wound over right side of cheek size about 2 inches in length muscles deep and according to his opinion deceased died due to cardio-respiratory failure as a result of injury sustained by deceased and all the injuries are anti-mortem in nature

25. The evidence of MO, PM report and evidence of PWs and DWs all shown that deceased Jalema died due to injury sustained by her on her neck and cheek and it is a case of culpable homicide amounting to murder. PW-5 is the brother of accused Anowar, PW-2 is the brother in law of accused and accused is nephew of PW-7. That means they are relative of accused. PW-3, PW-4 and PW-5 are co villager of the accused where accused stays. So it is quite natural that they will not speak against the accused. They stated they did not see the incident. But they stated that someone attacked Jalema and Jalema sustained cut injury on her neck and she died. Thus, their evidence also pointed that someone intentionally attacked deceased and caused bodily injury with intention that such bodily injury would cause death of deceased Jalema and this is a case falling under the penal provision of section 302 IPC. If we go to see the Ext 1, dying declaration, it is seen that PW-1 to PW-7 are not present at the place of occurrence and they are not eye witness. It is also evident from ext-1 that deceased was attacked by her accused husband with khukri on her neck and cheek and khukri is a sharp cutting weapon and injury found on deceased on her neck and cheek are sharp cut injury, ejahar pointed accused Anowar attacked deceased with khukri on her neck and other body parts. Thus,

shown that prosecution witnesses were not eye witness to the incident. Incident was took place in the house of accused Anowar, so burden lies on him to explain how the incident of attack was took place on his wife but he did not made any explanation who had attack his wife and only piece of evidence available in favour of the prosecution is Ext-1, the dying declaration, pointed that it is accused Anowar who attacked his wife Jalema with Khukri and she succumb to her injury.

26. Ld. Defence counsel argued that area is a terrorist prone area and deceased victim may be attacked by terrorist and it is not the accused Anowar Hussain and delay not being explained, prosecution case is fatal. He further pointed that PW-9 did not find fresh injury on the body of deceased at the time of inquest and post mortem report and inquest report are not similar.

27. I have perused the case record. Incident of attack on deceased victim was took place on 09-01-03. Her father lodged ejahar on 13-01-03. In the ejahar informant stated that due to the treatment of his daughter there was delay in filing ejahar. Victim was first taken to Bilasipara hospital, thereafter she was shifted to Dhubri Hospital and finally taken to Guwahati Medical College Hospital to provide her treatment and all along informant was accompanied victim Jalema (deceased). Thus, shown delay in filing ejahar was reasonable and adequately explained by the informant. It is seen from ejahar and from the evidence on record that incident was took place in the house of accused Anowar. It was not a case of defence that accused Anowar was not present at his home town or he was outside on the date of incident and he could not reach his village on account of terrorist activity in his area either on the day of incident or after the incident. Defence plea shown accused Anowar Hussain at the time of incident was present in his village. It was the further defence plea that accused visit Hospital with victim. But defence did not bring any point and not answered why husband of the victim i.e accused Anowar Hussain who was very much present at his village, has keen knowledge that his wife was attacked by terrorist, then why he did not inform the police either on the date of incident or on next date of incident about the incident of attack on his wife. None of the accused family member informed police about attack on deceased victim Jalema. Thus, conduct of the accused Anowar from the very onset of the incident shown that it is not a case of terrorist attack on deceased and conduct of the accused alone disprove his own plea of terrorist attack on deceased Jalema. Accordingly submission of the ld. defence counsel is rejected and found no place in this case.

28. On examination of evidence of PW-8, it is revealed that deceased made her statement on the next day of incident before him when she was undergoing treatment at Dhubri Civil Hospital. PW-8 stated at the time of recording statement of the victim, victim was fit to speak and doctor certified the same. Ext 1 is the dying declaration. Deceased prior to her death stated that her husband Anowar Hussain attacked her on her neck and cheek by khukri. Defence evidence also pointed that deceased Jalema was attacked by khukri and DW-4 seen khukri in the hand of assailants but he avoided in disclosing the name and identity of the assailants. The weapon of offence is khukri is established beyond all reasonable doubt from the evidence on record.

29. PW-9 W.S. Daimari did inquest on the dead body of deceased on 31-01-03. Ext 2 is the inquest report. On perusal of inquest report along with other piece of evidence, oral evidence of PWs and ejahar, it is seen that incident was took place on 09-01-03 and victim died on 31-03-03. Inquest report shown old cut injuries on the right cheek and on back side of the neck and are dressed with cotton bandage. Victim died after battling several days with her injury. So, fresh injury not found at the time of inquest but inquest report clearly pointed presence of cut injury on neck and cheek of deceased. Thus, cross of PW-9 on the point of not finding fresh injury is immaterial and that does not contaminate and or overrule the post mortem report of the deceased. Evidence of PW-9 and Ext 2 inquest report further pointed that to find out cause of death of Jalema dead body was sent for postmortem and PM report of deceased Jalema shown she died due to injury sustained on her neck and cheek and ext-2 inquest report and PM report are similar in context and contention. Hence, submission of Ld. Defence counsel is devoid of any merits. Now, let me examine the ext-1 dying declaration.

DYING DECLARATION

30. Section 32(1) Evidence Act. **Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.** – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

When it relates to cause of death – When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question. Illustration (a) of section 32 of the Evidence Act cover the present case. " The question is , whether A was murdered by B or A dies of injuries received in a transaction in the course of which she was ravished by B. Statement made by A as to the cause of his or her death, referring respectively to murder, the rape and the actionable wrong under consideration, are relevant facts".

31. Ld. defence counsel submitted that dying declaration is not an acceptable piece of evidence and is challenged on the point i) it is not recorded in compliance of due procedure of law; ii) not in question answer form; iii) certificate of doctor's that victim was fit to speak was not given on top of the statement; iv) that victim voluntarily made the statement without any undue pressure or dictation was not certified by the PW-8; v) dying declaration was not recorded in local dialect vi) elder sister of deceased victim speak something to PW-8 and he recorded statement. It is further submitted by learned defence counsel Ext 1 is statement of sister of the deceased victim and not of the deceased victim as at that time victim was unable to speak anything and under such circumstances statement of the deceased that is Ext 1 is not an acceptable piece of evidence.

32. Ext 1 is dying declaration. Place of dying declaration is O.T. Dhubri Civil Hospital. Time of recording dying declaration 01.10 PM. PW-8 P.K. Sarma Executive Magistrate Dhubri recorded dying declaration of victim Jalema Bibi. In Ext 1 Doctor given certificate that patient is fit to give dying declaration. Statement of deceased victim 'On Oath' is that (translated in exact words) "Yesterday (09-01-03) at about 07.30 PM I was talking with Monowar Hussain, younger brother of my husband. All of sudden my husband hit my neck with khukri. My husband Anowar Hussain suspect me of having illicit relation with his younger brother. I fell on ground immediately after getting injury and I made hue and cry. Later on, I was admitted in the Hospital."

33. I have scrutinized Ext 1 dying declaration; evidence of PW-8 that is recorder of dying declaration of the deceased; evidence of PW-1, informant, father of the deceased victim and also perused C.D. On perusal of the C.D. it is seen that IO of the case PW-10 Dipen Saikia made requisition to Superintendent of Civil Hospital to record dying declaration of the victim and her injury report who was undergoing treatment at Dhubri Civil Hospital and

same was allowed. Thereafter dying declaration of victim Jalema Bibi was recorded by PW-8.

34. Doctor's certificate on the Ext 1 showing victim was mentally fit to make her statement shown that she was medically fit to speak. Though Ext 1 is not in question answer type but it is narrative and deceased victim speak in a cogent manner about the manner of commission of the offence, weapon of offence, place of incident and identity of the culprit. None of the DWs state that elder sister of the deceased was present at the time of recording statement of the deceased victim and dictated the dying declaration of the deceased victim, even her presence at hospital was not stated by any of the defence witnesses. As such the possibility of any influence on victim from her elder sister or any other persons is also overruled and not comes to play. I do not find any suspicious nature in recording the statement of victim deceased. In the case in hand dying declaration is recorded by a magistrate. Narrative description of dying declaration means it is recorded as stated by victim. Statement was recorded on next day of incident, thereby prevents influence, tutoring. As claimed by defence, accused was all along present bedside of victim to provide treatment. This makes further clarity, honesty voluntariness, rationality, genuineness of the maker of the statement. It is also a most important fact to be noticed why a lady would tell lie against her husband that too when she know she may die. The maxim "Nemo moriturus Praesmitur mentire" is basis for "dying declaration" which means "A man will not meet his maker with a lie in his mouth". "A person who is about to die, would not lie, Truth sits on the lips of a person who is about to die." I do not find any ambiguity to disbelief ext-1 dying declaration, it is written in Assamese language and accused, his deceased wife, informant and their all children knows Assamese language and nothing brought on record that deceased victim do not understood Assamese language and PW-8 do not understood local dialect. Even defence did not specify what is the local dialect of the deceased and in absence of all the facts on record, I do not find any merit in the contention of learned defence counsel and I hold that ext-1 inspire full confidence and same is most acceptable and reliable piece of evidence

35. The deceased victim gave clear picture that she was attacked by her husband accused Anowar Hussain with khukri when she was talking with her brother in law Monowar Hussain, with whom her husband accused suspect her having illicit relation. Victim gave sufficient reason of her husband means-rea to attack her. The statement was recorded on next date of incident, when there

is less chance of manipulation, influence and tutoring. It is also seen from the case diary that IO has recorded the statement of victim u/s 161 Cr.P.C. and in her statement made u/s 161 Cr.P.C. she stated same facts. Thus, the contention of the Id. defence counsel that dying declaration of the deceased victim was not voluntarily and the statement of deceased has not get any space in this case is not accepted.

36. On scrutiny of the evidence of PW-1 it is seen that, though he put his thumb impression on Ext 1, defence did not cross examined him on dying declaration. Thus, PW-1 put his thumb impression on Ext 1, dying declaration after it was recorded by PW-8 as stated by the deceased victim remain unassailable.

37. Defence put stretch on the evidence of PW-6 who stated one elder sister of victim deceased made something to Executive Magistrate and Executive Magistrate written the same.

38. On scrutiny of the evidence of PW-6, I find prosecution declared him hostile. In his evidence in chief he deposed before his arrival at place of occurrence, Jalema was taken to Hospital. He denied in cross by prosecution that once he visit Bilasipara hospital and on being asked Jalema told him that accused suspected her having illicit relation with Monowar and that is why he inflicted on her person. PW-6 is the brother of accused Anowar Hussain. Ext 1 shown it was not recorded at Bilasipara Hospital. Ext 1 dying declaration was recorded by PW-8 at Dhubri Civil Hospital in O.T.

39. Again, on scanning of his cross examination by defence it is seen he took two plea. One plea is that he gone outside when PW-8 (E.M) was recording dying declaration of Jalema. His 2nd plea is that Jalema's sister told something to Executive Magistrate and Executive Magistrate, recorded dying declaration. His two pleas are contradictory. If he went outside to bring medicine how he could know what conversation took place in the O.T. room in between deceased victim Jalema and PW-8; in between PW-8 and elder sister of deceased victim Jalema. Thus, shown this man is telling lie from the very beginning and therefore, his none of the statement is reliable and can be taken into account. More so, he is the brother of accused, naturally his mind will inclined in favour of his brother even after all odds. Defence argument is that evidence of hostile witness is inadmissible. D.W's even not stated presence of elder sister of deceased at Hospital or elder sister accompanying with deceased either at Bilasipara Hospital or at Dhubri Civil Hospital. Thus, cross examination

of PW-6 not get any strength in favour of accused too. Therefore, the submission of the Id. defence counsel is not accepted

40. In the case in hand one executive magistrate has recorded the dying declaration and doctor certified that victim was fit to speak. The fact that doctor made certificate of fitness under the signature of recorder of dying declaration does not make it un-reliable when victim who was fit to speak as certified by doctor made only one statement on next day of incident and it gain weight and importance.

41. Incident was took place at the door steps of kitchen. According to DW1 at the time of incident victim was cooking dinner in the kitchen and she reached door steps and about to throw waste of kitchen and at that time incident was took place. DW-4 seen face of the culprit when he comes out. If DW-4 can see face of the culprit and he identified same as male and his wearing apparel then why not victim could identify the culprit when culprit attacked her both from front and back side. When cooking was being going on in the kitchen, kitchen was lighted with cooking fire, and other light to cook. Naturally this light will also lighten the surrounding of the kitchen along with door steps. According to deceased victim, her husband inflicted khukri injury on her neck and cheek. PM report and doctors evidence shown mark of injury on neck and cheek and both the injury are fatal and due to injury sustained by victim on her neck and cheek she died. She married to accused for long 9 years and she stays with her husband at his house and led conjugal life so it is not impossible on her part to identify him easily even on scanty light. Still today in several villages there is no electricity and in some villages even if there is electricity connection, there is heavy and frequent power cut resulting village people using earthen lamp, kerosene lamp and they are adopted to identify the object on moon light , on the light of cooking fire, earthen, kerosene lamp light by nature of their habit. Thus, when accused inflicted khukri injury on the cheek of victim she identified him on the light of cooking fire and light of the kitchen as incident was took place in the door step of kitchen.

42. A dying declaration is relevant and material evidence in the prosecution of offenders and if found reliable and truth full can be sole basis of conviction. Here magistrate recorded dying declaration on the next date of incident as evident from Ext 1. Though defence pointed that instant dying declaration is not in the form of question answer but reading of the Ext 1 shown and pointed that deceased given full picture of the incident and dying declaration also shown incident was took place in the kitchen. Defence plea is that incident took

place in the doorstep of kitchen when victim went to throw waste of kitchen. Thus, place of incident is undisputed. Defence stated there was cordial relationship between accused and deceased. If that is so, why she would tell lie when she was on her death bed. None of the DWs stated that deceased elder sister accompanying deceased to Hospital. According to them father, daughter of the deceased accompanied deceased to Hospital and accused too accompanied deceased to Hospital. PW-6 is hostile witness. In his cross by defence he take contradictory plea by saying that he went to bring medicine when PW-8 (Executive Magistrate) recorded dying declaration and again stated elder sister of deceased says something to Executive magistrate and he recorded and when he come back to OT room he was asked to put signature. But PW-1 who is the father and informant of the case and one of the witness of the dying declaration was not put any question by defence on dying declaration. Thus, I find PW-6 who is the own brother of accused not speak truth in the court and his piece of cross examination and his evidence as a whole is not trustworthy and same not acted upon. I find that dying declaration of the victim is her statement and it is truth full and there is no concoction and is credible and reliable piece of evidence.

43. I have perused the decision relied by defence in Sambhu Paul and Anr. Vs state of Assam 2002 Criminal Law journal 3359. In the case relied by defence the prosecution has not taken any attempt to prove the suicidal note Ext 1 but in the present case prosecution has produced the evidence of recorder of the dying declaration as PW-8 and he stated he had recorded dying declaration of the deceased and exhibited same as Ext 1. The present case is not of commission of suicide by the deceased victim. Thus apparently the decision relied by the Ld. defence counsel in Sambhu Paul and Anr. Vs state of Assam 2002 Criminal Law journal 3359 is not covered the present case

44. In Suchand Pal Vs Phani Pal & ors, 2004 SCC (Cri) 220, relied by the defence, answer were not given by the maker of the statement but by the husband of the maker of the statement. In the case in hand maker of the statement gave her own reply to the recorder of the statement that is to PW-8 and her statement is truthful and is the true account of the statement made by the maker of the statement. In the case in hand that victim was inflicted injury with khukri very and evidence on record both PW and DW s shown that deceased was attacked by a khukri. Thus this decision is no help for the defence evidence.

45. In Gopal Singh & ors vs STATE of Madhya Pradesh, (2010) 3 SCC(Cri) 150, relied by the defence, deceased could not have remained conscious for more than 10 or 15 minutes after sustaining injury as per evidence of doctor and dying declaration was recorded after 2 hour of the incident. In the instant case no such circumstances brought on record from the doctor that deceased was unconscious on next date of incident. Rather doctor certificate in the dying declaration shown that patient was medically fit to make her statement. Thus this decision is also no help for the defence side.

46. In the present case no two parallel or different views are coming from the evidence of the prosecution, thus decision relied by the defence in Subramaniam Vs Tamil Nadu (2010) 1 SCC (Cri) 1392 is not applicable.

47. In T.K Reddy vs State of A.P 2002(4) Crimes 27 SC relied by defence there was two dying declaration available one dying declaration was made before police and another was made before magistrate and court relied the dying declaration made to the magistrate. And there was time gap between the two statements. But in the case in hand deceased victim made one dying declaration and that was recorded by PW-8 and PW-8 proved that he had recorded the Ext 1. And deceased in her dying declaration Ext 1 stated deceased's husband accused Anowar inflicted injury on her neck and cheek which is corroborated by PM report which is conducted by PW-11

48. In K. Rama Chand vs Public Prosecutor, It was held that where an injured lodged an FIR and then died, it was held to be relevant as a dying declaration.

49. In Kaliya Vs State of MP Hon'ble Apex court held that "The law does not provide who can record a dying declaration, nor is there any prescribed form, formal, or procedure for the same. The recorder of the statement must satisfy that make of the statement in a fit state of mind and is capable of making such a statement.

50. In Anilkumar Ishwarlal Parmar vs State Of Gujarat, (1999) 2GLR 1469, Hon'ble Gujarat High court held that "Law of dying declaration is extensively explored and elaborately enunciated by number of judicial pronouncements. Dying declaration is substantive piece of evidence. It requires no corroboration if it is found voluntary, rational, truthful and dependable. Even conviction can be founded upon the sole dying declaration. No doubt, dying declaration is unsworn statement and the adversary or other side has ho occasion or opportunity to cross-examine the declarant. However, the dying declaration is made by a person under the apprehension of death or upon anticipating

approaching death which, accords sanctity as that of oath. General principles of oral evidence are to an extent diluted in incorporating specific provisions of Section 38 of the Evidence Act, 1872. Of course, the general rule is that oral evidence must be direct, in case, it refers to fact which could be seen, it must be the evidence of the witness who says he heard or saw it. Needless to mention that there is purpose and policy behind incorporating the provisions of Section 32 of the Evidence Act. Section 32(2) makes relevant what, in English law, are called 'dying declarations', i.e., statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are:- firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of his statement might defeat the ends of justice and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. It becomes clear that though a dying declaration as provided under Section 32(1) of the Evidence Act is not a direct evidence and is an unsworn statement, it can be acted upon and relied upon as a substantive piece of evidence and even conviction can be founded upon the sole evidence of dying declaration."

51. In *Bhayani Luhana Radhabai vs State of Gujarat* 1977 SCC (Cri.) 181 three judge constitution bench of the Hon'ble Apex court, following proposition have been succinctly propounded:

- i. A dying declaration stands on the same footing as any other evidence and it is to be judged in the surrounding circumstances and with reference to the principles governing the assessment of evidence.
- ii. If the deceased had several opportunities of making dying declarations, apart from the official record of it and whether the statements have been made at the earliest opportunity and was not the result of torturing by interested parties.

- iii. Tow court must, in order to rest the reliability of a dying declaration, keep in view the circumstances like the opportunity of the dying man for observation should also be considered.

52. After careful scrutiny of all the aforesaid decision it became crystal clear that dying declaration if found voluntary, rational, un-biased, not tutoring truthful, based and depicted true account of the incident, it can be safely relied upon and in the case in hand, Ext 1 stand and passed all the aforesaid characteristics and therefore, I have accepted Ext 1 dying declaration.

PLEA of ALIBI

53. Ld. defence counsel made submission that defence evidence be treated at par with prosecution evidence and placed on reliance decision of State of Haryana vs. Ram Singh and Rai Sahab and others vs State of Haryana. 2002 SCC (Cri)350. I have perused the same. It is held by Hon'ble Apex court "The evidence tendered by defence witness cannot always be termed to be a tainted one—the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution."

54. There is no dispute on the point that defence evidence will get equal treatment with that of prosecution evidence and it is a settled principle of law that defence evidence will get same treatment that of prosecution evidence. In case of defence evidence, it is the settled principle that defence evidence must rebut the prosecution evidence and established the plea of defence beyond all reasonable doubt.

55. Accused at the time of recording his statement u/s 313 Cr.P.C did not take plea of alibi. At that time his plea was one of the innocence and stated he is falsely implicated in this case and he did not committed any such offence. While adducing defence evidence he took plea of alibi that at the time of incident he was not present at his home and was present at his grocery shop. In this case accused at the time of adducing defence evidence took plea of alibi. So he is to prove his plea of alibi beyond all reasonable doubt against the prosecution allegation against him.

56. D.W.-1 is the daughter of accused and deceased victim. In chief she stated she was with her mother in the kitchen and her mother was cooking and while her mother went to threw water at the door of the kitchen miscreants attacked her mother and her mother fell down on the ground. In cross she

sated she was 2 cubits away from her mother and she heard hue and cry and her father was called by Parman Ali.

57. According to this Parman Ali who examined as DW-2 by defence, deposed he had gone to the shop house of Anowar, met Anowar at his shop, someone called them, he went to the house of Anowar and found elder daughter of Anowar making hue and cry and on asking she told him someone attacked her mother, then he went to call Anowar. His evidence pointed accused Anowar even after hearing hue and cry at his house did not visit his house immediately and this is not natural character of a human being. It is the natural character and instinct of a human being that when a person heard something befall on his family, said person tendency to visit the house to take stock of the situation. But in this case in hand accused Anowar remain in his shop as deposed by DW-2 and accused Anowar visit his house when he was again called by DW-2 which is against the natural instinct of the common person. Thus, his calm and quite nature at that time shown that he is fully aware of the facts of the incident that befall on his wife.

58. Again on scrutiny of DW-3 evidence, it is seen that when he visit the shop of accused Anowar he found Parman Ali and hearing hue and cry in the house of accused Anowar, he asked Parman to watch what happened there and to call Anowar as shouting was coming from the house of Anowar. DW-2 in his in chief stated he went along in the house of accused Anowar hearing hue and cry at his house. Thus conjoint reading and scanning of the evidence of DW-2 and DW-3 made it abundantly clear that when DW-2 and DW-3 went to the shop house of Anowar, they heard hue and cry coming from the house of accused Anowar. So they went there and at that time accused Anowar was not present at his grocery shop so, they are to call him at his house. Had accused Anowar was present at his grocery shop, he would have rushed to his house hearing hue and cry at his house not DW-2 rushed to his house and then DW-2 came again to call him and question of calling him at his shop house not comes to play if he was present in his shop. Thus, established that accused Anowar was not present at his grocery shop as pleaded by him.

59. DW-3's statement does not pointed when he visit accused shop he found him because he deposed when he visit accused shop, he found Parman and he did not state that accused was present at his shop. Therefore DW-3 asked DW-2 to go to the house of accused Anowar when he heard hue and cry in the house of accused Anowar at the time of his visit in the shop of accused.

This further make it clear that accused Anowar was not present at his shop when DW-2 and DW-3 visit his shop.

60. Cross examination of DW-2 shown that there was dispute in between accused husband with wife over demand of money. Thus, cross examination of DW-2 established prosecution allegation made in the ejahar that accused subjected torture on victim in demand of dowry and cross examination of DW-2 contradict the statement of DW-1 that both deceased and accused led happy marital life.

61. DW-4 is the relative of accused Anowar and according to him he seen the face of culprits. Defence took plea that due to darkness it is not possible to see the face of culprit. But defence witness deposed that he seen face of the culprit. Of-course DW-4 stated culprit was not accused Anowar. He given full description of the culprit, his wearing apparel and weapon of offence khukri and culprit was male person. His cross is that he did not follow the culprit. An incident of assault took place in his presence but he did not follow the culprit gives fishy smell in his evidence. His evidence brought on record that there was sufficient light to identify the accused. Thus defence plea that deceased victim could not identified culprit has no merits from the statement of defence evidence. Victim deceased identified the culprits as her husband in the light available in the place of occurrence when accused attacked her on her cheek. DW-3 Haji Sanjab Ali stated he with Parman came together but DW-4 stated Sanjab came after Parman. Thus, seen contradiction in their piece of evidence.

62. The evidence of DW-4 reveals that he was not present at grocery shop of accused Anowar. Nor he went to call accused Anowar from his grocery shop and he was not with the company of accused at the relevant point of time. Evidence of DW-2 and DW-3 shown that when they visit accused grocery shop they heard shouting in the house of accused Anowar and DW-3 asked DW-2 to call accused Anowar. Thus, shown accused Anowar was not present at his shop as claimed.

63. In this case DW-1 lost her mother at the early days of her childhood. Thereafter, she lived with the company of her father. Trial of the accused not conducted from the jail. When DW-1 has lived 13 years along with her father and lost her mother at early childhood, so naturally she was influenced by her father. Her evidence does not shown that she was with the company of her father at the time of incident or she had accompanying her father or present with her father at the relevant point of time in the grocery shop of her father when incident was took place at the door step of their kitchen. Thus her

evidence does not bring on record that at the relevant point of time accused was present at the grocery shop is not established beyond all reasonable doubt.

64. Thus, it is revealed from the defence evidence that defence evidence is not credible, truthiness and does not inspire confidence and their piece of evidence does not establish that accused Anowar was present at his grocery shop at the time of incident as claimed beyond all reasonable doubt and plea of alibi of accused is not proved.

CONCLUSION

65. Summation of the prosecution and defence evidence pointed that in this case victim Jalema succumb to her injury and death is due to the injury sustained by the deceased. Thus it becomes crystal clear that injury on the body of Jalema was caused with intention to cause her death. In this case ext-1 dying declaration does not pointed that deceased was tortured and injury was caused on her body in demand of dowry and therefore this is not a case falling u/s 304B I.P.C and no ingredients of section 304B transpires against the accused Anowar from the prosecution evidence and he is acquitted from the charge of section 304 B IPC. To attract the section 302 I.P.C Prosecution must prove that offender with intention to cause death of the person must cause his death, caused such bodily injury that in ordinary course said person would die if such bodily injury is caused.

66. Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly: if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly- If it done with the intention of causing bodily injury o any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or,

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Illustrations – *A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.*

67. On scanning of evidence on record (both prosecution and defence evidence) it is now established fact that there was sufficient light present to identify the assailants. Assailants was a male. Assailants attacked deceased

victim with khukri. Dead body of deceased bear two mark of injury. One on the back side of neck and other on the cheek. Both the injury are fatal and victim died due to the injury sustained on her neck and cheek. Deceased victim identified the assailants and it is none other than her husband accused Anowar. Weapon of offence stated by deceased is corroborated by the defence witness. Dying declaration is voluntarily and not made under influence and it is trustworthy and it is reliable, acceptable and credible piece of evidence and ext 1 dying declaration clearly pointed finger towards accused Anowar Hussain who inflicted injury on deceased with intention to cause her death. Evidence of DW-2 and dying declaration shown and established the mensrea of accused to attack her. Accused Anowar Hussain with an intention to end the life of his wife Jalema gave two khukri blow one on the neck and other on the cheek of the victim and both the blow are severe and he gave two blow on her shows his intention was to kill her. Accused Anowar with intention to cause death of the Jalema, his wife gave such a fatal blow on deceased using sharp cutting weapon on her vital parts of the body on the back side of her neck only established that it is a case falling within the penal provision of section 302 IPC. Thus, I find that prosecution beyond all reasonable doubt able to connect the chain of circumstance against the accused to prove his guilty and nothing else comes out in favour of the accused and established the charge u/s 302 I.P.C. against the accused Anowar Hussain.

68. In view of the aforesaid discussion I came to my judicious finding that prosecution beyond all reasonable doubt fairly able to bring home charges u/s 302 IPC against the accused Anowar and I hold him guilty u/s 302 I.P.C. Accordingly I convict accused Anowar u/s 302 IPC. His bail stands cancelled.

69. Considering the facts and nature of the offence, which accused Anowar has committed, this is not a case where accused entitled any benefit u/s 360 I.P.C or under the benevolent provision of Probation of Offender Act.

HEARING OF THE ACCUSED ON THE POINT OF SENTENCE

70. Accordingly convicted accused person Anowar Hussain is heard on the point of sentence and his plea of sentence is reduced into writing in a separate sheet and keep with case record. I heard his Id defence counsel as well Ld Addl PP for the state on the point of sentence. Accused pleaded mercy and prays for considering leniently. Ld. Addl P.P submits that considering the nature of the offence court may imposed the punishment according to law.

71. Ld. defence counsel submitted that the fact and circumstances and Ext 1 dying declaration does not shown that this case is falls in the category of rarest of rare and thus he prays to consider the accused leniently.

72. Accused pleaded mercy. But the offence committed by the accused is of serious in nature and therefore, there is no room left for leniency. After hearing Ld. Counsel for both sides and going through the case record, I find that the present case is not fall within the category of rarest of rare case and accordingly accused Anowar Hussain is sentenced to undergo rigorous life imprisonment and to pay fine of Rs.30,000/- i.d 6 month R.I.

ORDER

73. The convict accused Anowar Hussain is sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 30,000/- i/d 6 month R.I. The period of detention already undergone by the convict accused shall be set off against the period of imprisonment. The bail bonds if any stands discharged. Accused Anowar is acquitted from the charge of section 304(B) of I.P.C.

74. The convicted accused is told that he has right to appeal against the judgment and order of this court before Hon'ble High court through the jail authority or independently of his own. Convicted accused is further informed that he is entitled free legal aid to prefer appeal before the Hon'ble High court.

75. Let furnish free copy of Judgment to convicted accused.

76. Send copy of judgment to learned District Magistrate Dhubri u/s 365 Cr.P.C.

77. Send back the GR case record to the learned committal Court with a copy of the judgment.

78. Given under hand and seal of this Court on this 20th day of December 2017 at Bilasipara

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Dictated and Corrected by me,

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Typed by,
Swmkhwr Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

PW- 1 Md. Jalauddin Sk.,
PW-2 Musstt. Ashma Bibi,
PW-3 Md. Abdul Baten,
PW-4 Hussain Ali,
PW-5 Md. Nurul Hoque,
PW-6 Md. Abu Bakkar Siddique,
PW-7 Md. Joynal Abedin,
PW-8 Pranab Kr. Sarma,
PW-9 Wilburn S. Daimari,
PW-10 Dipen Saikia,
PW-11Dr.Sashidhar Deka.

PROSECUTION EXHIBIT:-

Ext.1 Dying declaration,
Ext.2 Inquest report,
Ext.3 Seizure list,
Ext.4 Petition by IO for addition of section 302 I.P.C.,
Ext.5 Charge sheet,
Ext.6 PM report.

DEFENCE WITNESS :-

DW-1 Arzufa Bibi.
DW-2 Porman Ali Sk.
DW-3 Haji Sanjab Ali,
DW-4 Manowar Ali @ Hussain.

DEFENCE EXHIBITS :- NIL

COURT EXHIBITS :- NIL

COURT WITNESS :- NIL

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara