

GAHC010240022024



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

Case No. : Crl.A./247/2025

ABUL BASFAR
S/O - MD ABDUL KHALEQ
R/O - VILL - KACHARI GAON
P.O. - KALIDHINGA
P.S. - JURIA
DIST. - NAGAON, ASSAM
PIN - 782124

VERSUS

THE STATE OF ASSAM AND 6 ORS
REPRESENTED BY PP,ASSAM

2:MD AINUL HAQUE
S/O - FAZAR ALI

3:MUSTT. ASHIYA KHATOON
W/O - FAZAR ALI

4:MD NAZRUL ISLAM
S/O - MD IDRISH ALI

5:MD JAMALUDDIN
S/O - MD AMIRUDDIN

6:GULZAR HUSSAIN
S/O - LT ABUBAKKAR SIDDIKI

7:SAIBUR HAQUE @ SABIRUL ISLAM
S/O - LT ABUBAKKAR SIDDIKI

ALL ARE RESIDENT OF VILLAGE - KACHAMARI
P.O. - PANPUR

P.S. - JAMUGURI
DIST - SONITPUR
ASSA

Linked Case : CrI.A./30/2024

MD. FAZAR ALI
S/O LATE KURJAT ALI

R/O KACHOMARI UNDER JAMUGURI POLICE STATION
IN THE DISTRICT OF SONITPUR
PIN- 784280
ASSAM.

VERSUS

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

2:MD. ABDUL BASAR
S/O MD. ABDUL KHALEQ

R/O PANPUR
KAOMARI
UNDER JAMUGURI POLICE STATION
IN THE DISTRICT OF SONITPUR
PIN- 784280
ASSAM.

Advocate for the appellant : Mr. Monzur K. Choudhury, Adv.
(CrI.A. 247/2025)

Mr. P.K. Deka, Adv. (CrI.A. 30/2024)

Advocate for the respondents : Ms. S.H. Bora, APP, Assam.

Mr. M.K. Choudhury, Adv.(R/2)

Mr. P.K. Deka, Adv. (R. 2 & 3)

Mr. M. Khan, Adv. (R. 4, 6 & 7)

:::BEFORE:::

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI**

Date on which judgment is reserved : 06/04/2026

Date of pronouncement of judgment : 20/04/2026

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

Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. M. K. Choudhury, learned counsel for the appellant in CrI. A. 247/2025 and Mr. P. K. Deka, learned counsel for the respondent Nos. 2 & 3. Also heard Mr. M. Khan, learned counsel for the respondent Nos. 4, 6 & 7 and Ms. S. H. Borah, learned Addl. PP for the State. Mr. P. K. Deka, learned counsel appears for the appellant in CrI. A. 30/2024 and Mr. M. K. Choudhury, learned counsel appears for the respondent No. 2.

2. CrI. A. 247/2025 and CrI. A. 30/2024 have both put a challenge to the impugned judgment dated 22.12.2023 passed by the Court of the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 105/2023. In CrI. A. 30/2024 the appellant Fazar Ali has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs.15,000/-, in default simple imprisonment for three months. On the other hand, 6 co-accused have been acquitted of the charge under Sections 302/149 IPC and also under Sections 148/325/326 IPC by the same impugned judgement. CrI. A. 247/2025 has been filed by the informant, who has put to challenge the acquittal of the 6 co-accused by the learned Trial Court, while the appellant in CrI. A. 30/2024 has challenged his conviction under Section 302 IPC.

3. As the challenge in both the appeals relate to the same impugned judgment dated 22/12/2023, the appeals are being decided by this common judgement and order.

4. The facts of the case, in brief, is that prosecution witness-3, (PW-3), who is the younger brother of the deceased Musa Alam, submitted an FIR dated 18/04/2007 to the Officer-in-Charge Jamuguri Police Station, stating that while the deceased and his brother-in-law (Mainul Haque), were ploughing the land that they had taken on lease for 2 years from Bhimlal Sharma and Khargalal Sharma, the accused persons, viz, 1) Najrul Haque, S/o. Unknown, (2) Fazar Ali, S/o. Unknown, (3) Asiya (Achiya) Begum, W/o. Fazar Ali, (4) Ainul Haque, S/o. Md. Fazar Ali, (5) Gulzar Hussain, S/o. Unknown, (6) Chabirul Haque, S/o. Unknown, (7) Sirajul Haque, S/o. Unknown and (8) Jamaluddin S/o. Unknown, residents of Kasomari, P.S. Jamuguri, attacked the deceased Musa Ali and one Mainul Haque with *lathis* and *dao*. They both sustained grievous injuries and Musa Ali passed away around 7.30 a.m, while being taken to Dholaihbhil Hospital. Pursuant to the FIR, Jamuguri P.S. Case No. 42/2007, under Section 147/148/149/325/326/302 IPC was registered.

5. The case was entrusted to PW-16, who was the First Investigating Officer. Thereafter, on the transfer of PW-16, the case diary was handed over to PW-15, who submitted the charge sheet, wherein, a *prima facie* case under section 147/148/149/325/326/302 IPC was found established against 1) Md. Fazar Ali, S/o: Lt. Kurjat Ali, 2) Md. Ainul Haque, S/o: Md. Fazar Ali, 3) Md. Gulzar Hussain S/o: Abubakkar Siddique, 4) Smti. Achiya Khatun, W/o: Md. Fazar Ali, 5) Md. Chabirul Haque, S/o: Lt. Abubakkar Siddique, 6) Md. Nazrul Haque Islam, S/o: Md. Idris Ali, all are residents of Kasomari, P.S. Jamuguri, 7) Md. Jamaluddin, S/o: Lt. Amiruddin, R/o: Laltapu, 8) Md. Sirajul Islam, S/o: Md. Idris Ali, R/o: Tengaguri, P.S. Laharighat.

6. The learned Trial Court thereafter framed 5 (five) charges against seven co-accused, viz. (1) Md. Fazar Ali, (2) Md. Ainul Haque, (3) Md. Gulzar Hussain, (4) Smt. Achiya Khatun, (5) Md. Chabirul Haque, (6) Jamaluddin and (7) Nazrul Islam, under sections 148, 325/149, 326/149, 302/149 and 149 IPC, to which the accused pleaded not guilty and claimed to be tried. The eighth co-accused namely, Md. Sirajul Islam was absconding and as such, charges were not framed against him.

7. The learned Trial Court thereafter examined 16 Prosecution witnesses, 1 Defense witness and 2 Court witnesses. The accused persons were also examined under section 313 Cr. P.C. except for the accused Md. Sirajul Islam, who was still absconding. Thereafter, the learned Trial Court came to a finding that the accused Fazar Ali was guilty of the offence of having committed the offence of culpable homicide not amounting to murder and convicted him under section 304 Part-II IPC. On the other hand, all the other co-accused, except for Md. Sirajul Islam, were acquitted of the charges framed against them by the learned Trial Court, vide the impugned judgment dated 28-11-2018 passed by the learned Sessions Judge, Sonitpur, Tezpur, in Sessions case number 105/2012. It may be stated herein that due to the death of one of the co-accused Jamaluddin during the Appeal proceedings, only 6 (six) co-accused remain, out of which, Md. Sirajul Islam is still absconding.

8. The PW-3, who was the informant, being aggrieved with the acquittal of the 6 co-accused from the charges framed against them, challenged the impugned judgment dated 28/11/2018 passed in Sessions Case No. 105/2012 by the learned Sessions Judge, Sonitpur, Tezpur vide Criminal Appeal 384/2018 before a Single Bench of this Court. The appeal before the learned Single Judge of the Court vide Criminal Appeal No.384/2018 also put to challenge the conviction of Fazar Ali under section 304 Part-II IPC, where a prayer was made for the conviction of Fazar Ali under section 302 IPC.

9. The learned Single Judge, vide judgment in order dated 23/04/2021 disposed of Criminal Appeal 384/2018, by holding that the evidence of PW-3, P-6, PW-10, PW-12 and PW-13, who were related and had witnessed the crime in question, had consistently implicated all the accused persons with the commission of the alleged offences. Further, the 5 Prosecution Witnesses, mentioned above, had firmly withstood the test of cross-examination. The learned Single Judge also observed that despite the best efforts of the learned Trial Court, the injured Mainul Haque, whose name was mentioned in the FIR, was not cited as a witness in the charge sheet and as such, he was not examined. The learned Single Judge also observed that the said Mainul Haque could not be examined as a Court witness from 15-09-2017 to 15-09-2018, as he failed to appear as a Court witness, despite summons being duly served upon him. The learned Single Judge thus held that the injured Mainul Haque should be examined by the learned Trial

Court, so that he could shed some light on the case, as on the same set of evidence, the accused Fazar Ali had been convicted while all the others had been acquitted. It thus held that when the accused persons were having deadly weapons and one of them had inflicted the fatal blow on the deceased, it would be appropriate to interfere with the acquittal of the co-accused and the conviction of Fazar Ali under section 304 Part-II IPC on grounds of private defence.

10. The judgement dated 28-11-2018 passed by the learned Sessions Court in Sessions case 105/2012 was accordingly set aside and the case was remanded back to the learned Trial Court, with a direction to examine the injured Mainul Haque as a Court witness, subject to cross-examination by the defence and additional defence evidence etc, if any. The learned Single Judge also held that the Trial Court should confine itself only to the evidence of Mainul Haque and deliver a fresh judgement in accordance with law. Para 18, 20, 21 & 22 of the judgement and order dated 23/04/42021 passed by the learned Single Judge in Criminal Appeal 384/2018 is reproduced herein below as follows :

“(18). However, it is noticed that despite best efforts being made by the learned Trial Court of Sessions Judge, Sonitpur from 15.09.2017 to 15.09.2018, the F.I.R. named injured Mainul Hoque, who was not cited as a witness in the charge-sheet could not be examined as a Court Witness as his evidence appeared to be material in the case despite summon was duly served on him. Thus, the injured Mainul Hoque was kept out of the witness box. This Court therefore, finds that had he been examined, the backdrop facts and circumstances leading to the incident would have certainly come to light which might have an impact on the ultimate logical inference in the case, where the accused Fazar Ali was convicted while all his co-accused persons were acquitted on the same set of evidence. The impugned judgment and order thus significantly manifests material contradictions in reasonings resulting in clear miscarriage of justice to both sides.

(20). Thus, when the eyewitnesses deposed to have seen the accused persons equipped with deadly weapons, one of them inflicting fatal blow on the head of the deceased and another causing injuries on the person of Mainul Hoque, conjectures and surmises cannot have place therein and as such, this Court finds it appropriate to interfere in the order of acquittal of the accused persons and in the conviction of the appellant Fazar Ali under Section 304, Part II of the IPC on the ground of his exercise of the right of defence of person and property. .

(21) For the above stated reasons, the impugned judgment and order is set aside and the case is remanded back to the learned Trial Court for the compelling exceptional reasons, discussed above, with

direction to examine Mainul Hoque as a Court Witness subject to cross-examination by the defence and additional defence evidence etc. if any, confining to his evidence only and deliver a fresh judgment in accordance with law.

(22) It is hereby made clear that no observation made in course of this judgment and order shall have a bearing in the fresh judgment and order to be passed by the learned Trial Court in due course.”

11. Subsequent to the judgement and order dated 23/04/2021 passed by the learned Single Judge in Criminal Appeal 384/2018, the learned Trial Court issued notices/summons to the injured Mainul Haque for appearance, to give evidence as a Court witness. The order sheet of the Trial Court records show that numerous summons were issued to the injured Mainul Haque. However, he never appeared before the learned Trial Court and the reason for non-appearance of Mainul Haque was later found to be due to the fact that he had shifted his residence from his earlier village to another village and his new residence could not be traced by the authorities. The fact that the residence of Mainul Haque could not be traced out, was thereafter, recorded by the learned Trial Court in the form of evidence adduced by CW-1 and CW-2.

12. The learned Trial Court thereafter passed the impugned judgment dated 22/12/2023 without taking any additional evidence with regard to the killing of the brother of PW-3 and the alleged injury caused to Mainul Haque by holding that once the acquitted persons have been given the benefit of the doubt and set them at liberty, it was not desirable to find them guilty on re-appreciation of evidence on record by the same Court in pursuance to the judgment and order dated 23/04/2021 passed by a Single Bench of this Court in Criminal Appeal 384/2018. This was due to the fact that the learned Trial Court was not sitting as an appellate Court and as such, could not express two different opinions/findings on the basis of the same evidence and materials available on record. On the other hand, the learned Trial Court by the impugned judgment held that on re-appreciation of the evidence on record, it was found that the act of the accused Fazar Ali did not fall within the purview of section 304 Part-II IPC, as there was no evidence to show that Fazar Ali attacked the deceased by way of private defence, inasmuch as, there was no evidence to show that the deceased was the aggressor. It thus held that the accused Fazar Ali was guilty and liable to punishment under section 302 IPC. Para 43 to 48 of

the impugned judgement dated 22/12/2023 passed by the learned Trial Court is reproduced herein below as follows :-

“43. In this regard, it also cannot escape the notice of this Court that once these accused persons have been given the benefit of doubt and set them at liberty forthwith, it is not desirable to find them guilty on re-appreciation of the evidence on record by the same Court in terms of order of the Hon'ble High Court because this Court is not sitting as an appellate Court and cannot express two different opinion on the basis of the same evidence and materials available on record and justification has been clearly given in the foregoing paragraphs.

44. Therefore, the unerring conclusion arrived at by this Court is that the accused Ainul Haque, Md. Guljar Hussain, Md. Sabirul Haque, Md. Jamaluddin, Najrul Islam and Achiya cannot be convicted u/s 302 IPC by roping them u/s 149 IPC consequent upon which they are acquitted from the charges.

45. In the same vain, this Court after considering the evidence of prosecution witnesses comes to firm view that the offence u/s 148/325/326 r/w Section 149 are also not established against the aforesaid accused persons as there is no credible, corroborative and substantive material on record that these accused persons had committed offence u/s 148/325/326 r/w Section 149 IPC.

46. As discussed above threadbare, the logical conclusions that have arrived at by this Court after re-appreciation of the evidence and documents on record is that it is only accused Fazar Ali who had committed the ghastly crime of murder of Musa with a dao and therefore, he is singularly held guilty for commission of the offence u/s 302 IPC. However, accused Fazar Ali is acquitted from the offences under Section 148/325/326 r/w Section 149 IPC forthwith.

47. In this context, it is noteworthy that in the earlier judgment, this Court took the view that the act of the accused Fazar Ali falls within the purview of Section 304 Part II IPC which on re-appreciation of the evidence on record found to be not correct as there is no such evidence on record to show that accused Fazar Ali attacked Musa as a defence or there is anything on record to show that prosecution party is the aggressor. The act of the accused Fazar Ali therefore, clearly fall within the purview of Section 300 and punishable u/s 302 IPC.

48. *Consequently, he is found guilty u/s 302 IPC and convict him accordingly.”*

13. PW-3, who is the informant and brother of the deceased has now filed Criminal Appeal No. 247/2025 against the acquittal of the accused, stating that the evidence adduced in the learned Trial Court clearly proved that that the acquitted persons were members of an unlawful assembly along with the convicted Fazar Ali, having the common object to kill the deceased. As such, when the prosecution witnesses have given evidence to the effect that the acquitted persons had also been involved in the assault on the deceased person, they should also be convicted under section 302 IPC.

14. The convicted Fazar Ali being aggrieved with the impugned judgement 22/12/2023 has also put a challenge to the same, vide Criminal Appeal No. 30/2024, wherein the challenge is made on the ground that when there is no additional evidence recorded by the learned Trial Court pursuant to the direction of the Hon’ble Single Judge in the impugned judgment dated 22.12.2023, the learned Trial Court could not have convicted Fazar Ali under Section 302 IPC. Further, re-appreciation of the evidence by the same Court on two different occasions, can only lead to the same result and not two different results. Further, there can be no review of the earlier judgement of the learned Trial Court when there is no additional evidence adduced.

15. The learned Counsel for the informant, who has filed Criminal Appeal 247/2025, submits that the acquittal of the 6 co-accused by the learned Trial Court was not justified, inasmuch as, the evidence adduced by the Prosecution Witnesses had proven beyond all reasonable doubt that all the co-accused were part of one group, which included the convicted Fazar Ali, who had assaulted the deceased leading to his death. As such, when Fazar Ali had been convicted under section 302 IPC, there was no justification for acquittal of the other co-accused persons.

16. The counsel for the appellant Fazar Ali in Criminal Appeal No. 30/2024, submits that the evidence adduced by the Prosecution Witnesses do not prove that a case of 302 IPC has been made out. The evidence of the witnesses show that there was a land dispute between the parties and that Fazar Ali was also assaulted by the deceased, Mainul Haque and others. Even the wife of Fazar Ali i.e. Achiya Khatun (Asiya) had sustained severe injuries and had been

admitted to the hospital for a number of days. Their son Ainul had also been hospitalized. Thus, there is no question of convicting the appellant Fazar Ali under section 302 IPC, when the deceased and his companions had encroached upon the land of Fazar Ali and illegally tried to take possession of the land, which was being looked-after by Fazar Ali. He, accordingly submits that Fazar Ali had acted in private defence, on being assaulted by the deceased and his companions. As such, Fazar Ali should be acquitted of the charge under section 302 IPC.

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

18. The evidence of PW-1, who is a doctor in Kanaklata Civil Hospital, is to the effect that Fazar Ali's wife Achiya (Asiya) Khatun was admitted to the hospital on 18/04/2007 at 4.40 pm and was discharged on 24/04/2007. PW-1 further stated that as per the injuries of Achiya Khatun, which were described by Dr. Amarjeet Kaur (PW-2), the injuries of Achiya Khatun were grievous in nature. PW-1 further stated that Fazar Ali was admitted to the hospital on 18-04-2007 and discharged on 19-04-2007. He further stated that Fazar Ali did not sustain any injury. The injuries sustained by Ainul Haque, who was the son of Fazar Ali, was simple in nature and that he was admitted on 18-04-2007 and discharged on 19-04-2007.

19. The evidence of Dr. Amarjeet Kaur (PW-2) is to the effect that she examined Achiya Khatun, Fazar Ali and Ainul Haque. The following were found on the above 3 persons by PW-2 on examination, which are as follows :-

“(i) In respect of Ashia Begum multiple injuries were seen at the time of examination and she was admitted to Female Surgical Ward of KCH and referred to surgeon on call.

(ii) In respect of Fazar Ali : no injury was seen at the time of examination. He was admitted in Male Surgical Ward of KCH and referred to surgeon on call.

(iii) In respect of Ainul Haque, multiple injury was seen at the time of examination. He was admitted in Male Surgical Ward of KCH and referred to surgeon on call.”

20. The evidence of PW-3, who is the younger brother of the deceased, is to the effect that Bhimlal Sharma and Khargalal Sharma (Tharklal Sharma) had given their land to the deceased and to him on annual lease for cultivation. His deceased brother and Mainul Haque were

cultivating land at around 6 a.m on 07/04/2007. On hearing loud voices coming from the field he went there and saw all the co-accused persons, except for Jamaluddin, beating up his deceased brother and Mainul Haque with *dao* and *khukri*. However, in his cross examination, PW-3 stated that he did not know whether the land of Khargalal Sharma had been given to the wife of Fazar Ali (convict). He also stated that when he reached the place of occurrence, he saw his deceased brother and Mainul Haque were lying in an injured condition. He also stated that he did not know if Fazar Ali, his wife Achiya and son Ainul suffered injuries. He also denied the suggestion that Achiya Khatun, wife of Fazar Ali, had purchased the land of Khargalal and were cultivating the land or that they were protecting their life and property when the deceased tried to stop them from cultivating their land.

21. The evidence of PW-4, who is another doctor of Kanatlata Civil Hospital, is to the effect that he conducted post-mortem examination on the body of the deceased and found that the injuries sustained by the deceased were anti-mortem in nature and that the cause of death was due to a coma, as a result of head injury sustained by the deceased. The injuries on the deceased, as per the post-mortem report, were as follows :-

“(1) Cut wound on the right parietal region, longitudinal, Sizw 4"x3"x2"

(2) right parietal bone is cut.

(3)Brain matter comes out from the cut wound.

(4) Cut wound on the ventral aspect of wrist of left hand, size: 3"x3"x1"

(5) Cut wound on the middle finger of right hand, size ½ inch x ½ inch x ½ inch.

All the injuries are anti-mortem in nature.”

22. The evidence of PW-5 is that he did not know anything about the occurrence of the crime.

23. The evidence of PW-6 is to the effect that he knew all the accused persons and the deceased person. PW-6 stated that when the accused persons went to the land in question, the deceased told them that he would plough the land since the same was his land. Thereafter,

Fazar Ali hacked the deceased with a *dao* on his head. He also stated that Achiya cut Mainul Haque with a *dao*.

In his cross examination, PW-6 denied the suggestion that when the deceased tried to forcibly cultivate the land where Fazar Ali was cultivating, the deceased was injured. He also denied the suggestion that the accused persons were also previously injured in the incident. He also denied the suggestion that the accused persons tried to protect the land under their possession from the deceased and due to which the incident occurred. He also denied the suggestion that Khargalal did not give the land to the deceased and others for cultivation.

24. The evidence of PW-7 is to the effect that there were nine bighas of land, out of which 4½ bighas belonged to the elder brother of PW-7 i.e. Khargalal (Tharklal) Sharma. The remaining 4½ bighas of land belonged to PW-7 and 3 other persons. The 9 Bighas of land was then given to one Munshi for cultivation. Thereafter, he heard that there was a quarrel among Fazar Ali and others. PW-7 further stated that he had given his share of the land to the deceased. However, he could not say as to which brother of Munshi, had Khargalal given his land for cultivation. He also denied the suggestion that his brother Khargalal had not given his land to Munshi's brother.

25. The evidence of PW-8 is to the effect that he knew the accused person and the deceased. On hearing a commotion, he went out and he saw that the deceased was lying on the ground. He also saw Mainul Haque in an injured condition. He also saw Fazar Ali's wife, who had fallen to the ground. He also saw a *dao* in the hand of Fazar Ali and a *lathi* in the hand of Aftabuddin @ Atabuddin (PW-6).

In his cross-examination, PW-8 stated that he saw a *dao* in the hand of Fazar Ali.

26. The evidence of PW-9 is to the effect that he knew the accused persons and the deceased. He saw that the deceased was injured on his head and hand. He had carried the injured Musa (deceased) and took him to Jamuguri Police Station and thereafter to the Dholaihbhil Hospital, where the deceased died. He also stated that there had been a quarrel between the deceased and Fazar Ali with regard to land, which belonged to a Nepali.

In his cross-examination, PW-9 stated that he did not know who had injured the deceased. He also stated that he told the I/O that the land dispute between the deceased and Fazar Ali was regarding land belonging to Bhimlal and Khargalal. He also stated that he did not know which portion of the land was in possession of the deceased and which portion was in the possession of Fazar Ali. He also stated that there was a long standing quarrel between the deceased and Fazar Ali regarding land.

27. The evidence of PW-10 is to the effect that he saw the deceased and Musa and Mainul reach the land of Bhimlal Sharma. Thereafter Fazar Ali, Ainul (son of Fazar Ali) and Fazar Ali's wife came running to where Musa and Mainul were cultivating the land. Fazar Ali then gave a blow with a dao on the head of Musa. Then Fazar Ali ran to his house. Atabuddin, the brother of the deceased came to the spot and a quarrel ensued, which culminated with assault by lathis.

In his cross-examination, PW-10 did not deny the suggestion that he did not know whose land the deceased was cultivating. He also stated that he saw Atabuddin (PW-6) come to the place of occurrence with a lathi in his hand. He did not see Abdul Basar (PW-3) at the place of occurrence. He also stated that he did not see anyone assaulting anybody, except Fazar Ali giving a blow on the head of the deceased. He also did not see Nazrul assaulting anyone. He also stated that he could not say whether the deceased and others went to forcibly oust Fazar Ali and others from the land.

28. The evidence of PW-11, who is Khargalal (Kharkalal), is to the effect that he gave his portion of the land to Fazar Ali for cultivation, while his brother Bhimlal (PW-9) gave his share of the land for cultivation to the deceased.

In his cross-examination, PW-11 stated that Fazar Ali was cultivating the land given by him for about 9 to 10 years ago. He also did not deny the suggestion that the deceased had earlier asked him to give him his land. However, PW-11 did not give his land to the deceased. PW-11 further stated that he sold his portion of the land to Fazar Ali's wife.

29. The evidence of PW-12, who is the wife of the deceased, is to the effect that while the

deceased was cultivating the land he had taken from Bhimlal, Fazar Ali, his wife Achiya and Ainul Hoque came and started a quarrel. The deceased was then hit by Fazar Ali.

30. The evidence of PW-13, who is the nephew of the deceased is to the effect that while the deceased was cultivating his land, Nazrul Haque, Fazar Ali, Achiya, Ainul Haque and others came and started assaulting the deceased.

In his cross-examination, he stated that he saw Nazarul, Fazar Ali, Achiya and Ainul first arguing with the deceased, before assaulting him.

31. The evidence of PW-14 is basically hearsay evidence. However, he stated that there was a dispute between Fazar Ali and Musa in respect of land. Further, he did not deny the suggestion that the quarrel between them was in relation to the land of Khargalal.

32. The evidence of PW-15 is to the effect that he was a Sub-Inspector posted at Jamuguri Police Station and that the Case Diary had been received by him from the O/C of Jamuguri Police Station. The Case Diary was given to him as the earlier Investigating Officer had been transferred. He also stated that he did not record the statement of any witness.

33. The evidence of PW-16, who was the first Investigating Officer, is to the effect that he was present in the Jamuguri Police Station when the FIR was filed and the case was registered. He started the investigation and on his transfer, he handed over the Case Diary to the O/C of the Jamuguri Police Station. He also stated that he had not seized any weapon of offence in connection with the case.

34. The evidence of DW-1, is to the effect that Khargalal Sharma had given his land for cultivation to Fazar Ali and his wife. The land of Bhimlal Sharma was given to the deceased for cultivation. He also stated that Fazar Ali and his wife had been occupying and cultivating Khargalal's land for 15 to 16 years. Around 10 years back, he heard a hue and cry at around 6:00 to 6:30 a.m. and when he went to the place of occurrence, he saw the accused Fazar Ali, accused Achiya and their son Ainul all lying in an injured condition. The incident took place over the land occupied by Fazar Ali. The land was occupied by Fazar Ali and that the dispute

took place when the deceased came to occupy Fazar Ali's land.

35. The evidence of CW-1 & CW-2, is to the effect that Mainul Haque had earlier been temporarily residing in the Village-Panpur Hokama and they could not trace him.

36. The examination of the convicted Fazar Ali under Section 313 Cr.P.C shows that when he was told that the evidence proved that he had killed the deceased by striking him on his head with a dao, he stated that he was a 65 year old ailing person and that the incident had happened accidentally when he went to save his landed property. The examination of all the other co-accused under Section 313 Cr.P.C is to the effect that the evidence adduced against them were false.

37. As can be seen from the evidence of the witnesses, there was a dispute with regard to land. The land of two brothers, i.e. Bhimlal Sharma (PW-7) and Khargalal Sharma (PW-11) had been given to Fazar Ali and the deceased. While Khargalal Sharma had given his land to Fazar Ali for cultivation, Bhimlal Sharma had given his share of the land to the deceased Musa. The evidence of witnesses are contradictory in nature, inasmuch as, while some witnesses have said that the incident had occurred on the land given to the deceased, some others have said that the incident had occurred on the land given to Fazar Ali. Suffice to say that the entire dispute is with regard to occupation of cultivable land.

38. The next fact that has come to our notice is that, not only was the deceased assaulted by Fazar Ali with a dao, which has not been denied by Fazar Ali in his examination under Section 313 Cr.P.C, where he said that the incident had happened accidentally, the hospitalization of Fazar Ali's wife Achiya, coupled with the evidence of PW-1 and PW-2, with regard to the nature of injuries found on Achiya and Ainul Haque, shows that there was not only an assault made on the deceased, but there was also an assault made on the wife of Fazar Ali and his son Ainul. What can be gathered from the above is that there was assault against each other by two groups of people. This is clear from the fact that PW-6 was also seen carrying a lathi and as quarrelling, with lathis in the frame.

39. Interestingly, while the informant (PW-3) has stated that he saw co-accused of Fazar Ali

beating the deceased and Mainul Haque, there is nothing stated by him to the effect that Fazar Ali was one of the assaulters of the deceased. Further, PW-10 stated that he did not see the informant (PW-3) at the place of occurrence. PW-10 also stated that he had seen PW-6 at the place of occurrence with a lathi. PW-10 had also heard that wife and child of the convicted Fazar Ali had been injured and taken to hospital.

40. The evidence of PW-13 only speaks of Nazrul Haque, Fazar Ali, Achiya and Ainul Haque assaulting the deceased, though PW-10 in his evidence stated that he did not see Nazrul assaulting anyone.

41. What can be gathered from the evidence of the witnesses is that there is material contradiction and discrepancy in their evidence. The only consistent evidence of the witnesses is to the fact that Fazar Ali had dealt a blow on the deceased with a dao, though some Prosecution Witnesses had not seen the said incident. In view of the consistent evidence that Fazar Ali had hit the deceased on the head with a dao, we do not find any infirmity in the evidence of the learned Trial Court that Fazar Ali had caused grievous injury with a dao on the deceased, which led to his death.

42. The next question that has to be decided is whether the act of the appellant would attract Section 302 IPC or whether the same would come under any of the Exceptions provided under Section 300 IPC, i.e. the act was culpable homicide not amounting to murder. In the case of *Gurmail Singh & Another vs. State of Uttar Pradesh & Another*, reported in (2022) 10 SCC 684, the Supreme Court has held that in order to make culpable homicide as murder, the act by which death is caused should fall not only under any one or more of the Clauses firstly to fourthly under [Section 300](#) IPC, but they should also not fall under any of the five Exceptions to [Section 300](#), IPC.

43. In the case of *Nandalal Vs. State of Maharashtra*, reported in (2019) 5 SCC 224, the Supreme Court has held that even in an unpremeditated and sudden fight, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken undue advantage of the deceased, the accused cannot be protected under Exception-IV to Section 300 IPC. In the present case, the deceased was apparently ploughing land, which may have been the

land of the deceased or the land of Fazar Ali. In this respect, the answer given by Fazar Ali's wife in her examination under Section 313 Cr.P.C should also be looked into, inasmuch as, it is not clear as to who was in possession of the land in which the incident had taken place. Her explanation to the said question during her examination under Section 313 Cr.P.C, is reproduced herein below as follows :-

“ My husband Md. Fazar Ali has been occupying and cultivating the 4½ bighas of land belonging to Sri Khargalal Sharma alias 'Koirala' in Kasomari village of Silabandha Mouza under Jamuguri Police Station for many years prior to the date of this incident. Later he sold the land to me. Deceased Musa Ali and his brothers came from Nagaon and tried to forcibly occupy the land we had been occupying but they were unsuccessful. On the day of the incident, deceased Musa Ali, accompanied by his brothers and nephews, armed with weapons and sticks, illegally entered the land of Khargalal's share, which was in our possession and started ploughing. In order to protect our property, when my husband tried to stop them, they assaulted him. Seeing the incident, my minor son, Md. Ainul Haque, and I ran there to protect my husband and tried to stop Musa, his brothers, and nephews from assaulting him. However, they also assaulted my son and me, leaving both of us seriously injured. As we all shouted to save our lives, people from nearby came and stopped Musa, his brothers and nephews from committing the illegal act, which led to a clash. We later learnt that Musa Ali sustained injury as a result of that.

We cannot say how and who attacked Musa Ali, as we were lying in an injured state. Later, the police took us to the hospital in a critical condition and provided us treatment. After that, deceased Musa's brother filed this case on false grounds to harass all the members of our family.

That's all I have to say.”

44. What can be gathered from the evidence recorded in the learned Trial Court and from the above, is that a quarrel ensued between the two parties over land, which resulted in a fight. The same led to the death of the deceased Musa Ali and hospitalization of the wife of Fazar Ali and her child, besides Fazar Ali. On considering all the above, it cannot be ascertained that the fight occurred only due to the fault of Fazar Ali or the deceased. The blame for the incident would have to be seen from all angles. We have to also keep in mind the fact that the deceased at the relevant point of time was with one Mainul Haque. Interestingly there is no injury report of

Mainul Haque, while the evidence shows that PW-6 was also with a lathi. It is also not known why Mainul Haque was not made a prosecution witness. The family of Fazar Ali had also been hospitalized after the incident. It would be thus unfair if the entire blame for the incident is laid only at the door of Fazar Ali and his family. There being a quarrel and a subsequent fight regarding cultivable land, we are of the view that Exception-IV to Section 300 IPC is attracted and as such, we hold that the act of Fazar Ali, in causing the death of the deceased amounts to culpable homicide not amounting to murder.

45. In view of our finding we hold the conviction and sentence of the appellant Fazar Ali under Section 302 IPC is erroneous and that Section 304 Part-I would be attracted, keeping in view the injuries sustained by the deceased. The appellant appeared to have the intention to kill the deceased and as a dao had been used on the head of the deceased, we convict the appellant Fazar Ali under Section 304 Part-I. Accordingly, we alter the charge from Section 302 IPC to Section 304 Part-I IPC. The appellant Fazar Ali is accordingly sentenced to undergo rigorous imprisonment for period of 10 (ten) years with fine of Rs.10,000/-, in default simple imprisonment for 3 (three) months.

46. The next issue to be decided is whether there was any infirmity in the learned Trial Court having acquitted the other co-accused from the liability of the charges framed against them. As can be seen from the evidence, it appears that there were only two persons who were injured, one being the deceased and the other being one Mainul Haque. There is no proof that Mainul Haque has been injured and as to the nature of injuries allegedly sustained by him, in view of the fact that neither has he appeared as a witness, nor is there any medical report to prove that he had been injured in the alleged assault made by the co-accused. The evidence of the witnesses show that it was basically Fazar Ali who had assaulted the deceased with a dao. The involvement of the other co-accused in the assault of the deceased has only been made by the informant (PW-3). However, the very presence of PW-3, who is the younger of the deceased, is questionable, as PW-10 has stated in his affidavit that PW-3 was not there at the place of occurrence. Further, there is nothing to show that the co-accused and the appellant shared a common object for killing the deceased. In fact, Fazar Ali himself has stated during his examination under Section 313 Cr.P.C that it was an accident and the evidence adduced goes to

show that there was only one strike made by Fazar Ali with a dao on the deceased. The evidence also shows that it was only Fazar Ali, his wife and son, who had gone to the land being ploughed and had an altercation with the deceased. The appearance of the co-accused persons at the scene of the crime, appears to be at a later stage.

47. In the case of *Zainul Vs. The State of Bihar, Criminal Appeal No.1187/2014*, which was decided on 07.10.2025, the Hon'ble Supreme Court has held that mere presence at the scene of the crime does not *ipso facto* render a person a member of the unlawful assembly, unless it is established that such an accused also shared its common object. A mere bystander, to whom no specific role is attributed, would not fall within the ambit of Section 149 IPC.

48. In the case of *Nitya Nand Vs. State of U.P. & Anr., Criminal Appeal No.1348/2014*, which was decided on 04.09.2024, the Hon'ble Supreme Court by referring to another of its judgments, i.e., *Vinubhai Ranchhodbhai Patel Vs. Rajivbhai Dudabhai Patel*, reported in *(2018) 7 SCC 743*, has held that under Section 149 IPC, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient.

49. In the case of *Haribhau @Bhauasaheb Dinkar Kharuse & Anr. Vs. The State of Maharashtra*, reported in *2025 LiveLaw (SC) 1043*, the Hon'ble Supreme Court has held that Section 149 IPC unequivocally provides that every member of an unlawful assembly is guilty of an offence, committed in prosecution of the common object or of one which such members knew to be likely to be committed in furtherance thereof. Thus, it is not necessary for each member of the unlawful assembly to have committed a specific overt act. Once participation and sharing of the common object are proved, every member becomes vicariously liable for offences committed in prosecution of that object. Similar is the view of the Supreme Court in the case of *Sitaram Kuchhbedia Vs. Vimal Rana & Ors.*, reported in *2026 LiveLaw (SC) 189*.

50. With regard to the acquittal of the six co-accused persons, one of whom died during the

proceedings of this appeal, we do not find any grounds to interfere with their acquittal from the charges framed against them, as their involvement in the death of the deceased has not been proved beyond all reasonable doubt. There was no reason for them to be involved in the land dispute and the evidence against them is sketchy. Though the assault on the deceased by the co-accused appears in the evidence of PW-3, the same is not supported by other witnesses, especially the evidence of PW-10. Further, there are material inconsistencies in the evidence of the Prosecution Witnesses. Also, there is nothing established/proved that the co-accused persons had shared a common object with Fazar Ali to kill the deceased. There is no connection made by the prosecution with regard to the co-accused having any knowledge of the likelihood of the deceased going to be killed by Fazar Ali. The incident appears to have been caused due to a sudden altercation, though the dispute regarding land between Fazar Ali and the deceased Musa Ali had apparently been simmering for a long time. We do not find any evidence of there being any premeditation on the part of Fazar Ali to kill the deceased on that particular day. The attack appears to be sudden, which had erupted from a quarrel that had ensued between them on the early morning of the said date of the incident.

51. With regard to what points should be considered by the Appellate Court for reversing a decision of acquittal of the learned Trial Court, it would be profitable to refer to the decision of the Hon'ble Supreme Court in the case of *Constable 907 Surendra Singh & Anr. Vs. State of Uttarakhand, Criminal Appeal No.355/2013*, wherein it held on 28.01.2025, that interference with the finding of acquittal recorded by the learned Trial Judge would be warranted by the High Court, only if the judgment suffers from patent perversity and that no two reasonable views were possible and only the view consistent with the guilt of the accused was possible from the evidence available on record.

52. Further, in the case of *H.D. Sundara & Ors. Vs. State of Karnataka*, reported in (2023) 9 SCC 581, the Hon'ble Supreme Court held that an Appellate Court exercises appellate jurisdiction to find out whether the verdict under challenge is correct or incorrect in law and on facts and whether the decision under challenge is legal or illegal. But while dealing with an appeal against acquittal, the appellate court cannot examine the impugned judgment only to

find out whether the view taken was correct or incorrect. It further held that appellate court cannot overturn an acquittal, only on the ground that after reappreciating evidence, it is of the view that the guilt of the accused was established beyond a reasonable doubt. The court must see whether the view taken by the trial court while acquitting an accused can be reasonably taken. If the view taken by the trial court is a possible view, the appellate court cannot interfere with the order of acquittal.

53. Though we are aware that a witness cannot be expected to possess a photographic memory and to recall past details of an incident, we find that there are major discrepancies in the evidence of the prosecution witnesses, besides the fact that the injured Mainul Haque was never made a prosecution witness and there was nothing to prove that he had been injured due to an alleged assault made by the co-accused persons. We are also aware that while appreciating the evidence of a witness, the Trial Court would have the best opportunity to form an opinion about the general tenor of evidence given by a witness. The Supreme Court in the case of *Rajesh Yadav Vs. State of U.P.*, reported in *2022 SCC OnLine SC 150*, observed in para 30 as follows:-

“30. Once again, we reiterate with a word of caution, the trial court is the best court to decide on the aforesaid aspect as no mathematical calculation or straightjacket formula can be made on the assessment of a witness, as the journey towards the truth can be seen better through the eyes of the trial judge. In fact, this is the real objective behind the enactment itself which extends the maximum discretion to the court.”

Keeping in view the above and in view of the decisions of the Hon’ble Supreme Court in the case of *Constable 907 Surendra Singh (supra)* and *H.D. Sundara (supra)*, we are of the view that the evidence does not point towards the co-accused persons having assaulted the deceased or Mainul Haque.

54. We are accordingly of the view that the appellant (informant) in Criminal Appeal

No.247/2025 has not made out a case for interfering with the learned Trial Court's decision to acquit the co-accused persons from the charges framed against them. Accordingly, we hold that while the acquittal of the co-accused by the learned Trial Court needs no interference, the conviction and sentence of the appellant Fazar Ali in Criminal Appeal 30/2024 is not sustainable, as Section 302 IPC is not attracted in his case. Fazar Ali is accordingly convicted under Section 304 Part-I IPC and sentenced to undergo rigorous imprisonment for 10 years with a fine of Rs.10,000/-, in default, to undergo simple imprisonment for 3 months. The impugned Judgment dated 22/12/2023, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No.105/2012 is accordingly modified to the extent indicated above.

55. The appeals are accordingly disposed of.

56. Send back the TCR.

JUDGE

JUDGE

Comparing Assistant

Kuntal
Datta Digitally signed
by Kuntal Datta
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