

**Sessions Case No. 110(D)/2009.**

U/S 302/201/34 IPC

State

Vs.

1. Khirendra Brahma,

2. Kumar Brahma

3. Puina Basumatary

.....Accused

***PRESENT : Smt. M. Nandi,  
Sessions Judge,  
Bongaigaon.***

*ADVOCATES APPEARED : Sri A. K. Nath, Public Prosecutor  
for the State.  
Sri H. Das, Advocate  
for the accused.*

Date of Argument : 04.08.2014,  
30.08.2014.

Date of Judgment : 03.09.2014.

**JUDGMENT AND ORDER**

1. The prosecution case, in brief, is that the informant Smt. Pramila Narzary lodged an ejahar before the O.C. Dhaligaon Police Station stating inter-alia that his daughter Bijuli Narzary got married to the accused Khiren Basumatary in the year 2002 by social custom of the marriage. After their marriage, they lived together as husband and wife and out of their conjugal relationship one child was born. On 20.08.2008 she came to know that her daughter was killed by her husband and his parents and threw her body on the river. With the help of local people on 22.08.2008 the dead body of her daughter was recovered from Kujiya river. It is pertinent to say here that she came to know from her daughter that she has been tortured by the accused persons both physically as well as mentally.

2. On receipt of the ejahar, police registered a case and after completion of investigation submitted charge sheet against the accused

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Kharendra Brahma, Kumar Brahma, Ramesh Basumatary and Puina Basumatary. During trial all the accused persons put their appearance before the court and they were enlarged on bail. Charge was framed U/S 302/201/34 IPC which was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. During trial accused Ramesh Basumatary died and on receipt of the report from the police of concerned P.S., the case against him was abated.

3. In this case, prosecution examined 15 witnesses and the defence examined none. The plea of the defence is the plea of denial.

4. **Points for determination:**

1. *Whether the accused persons in furtherance of their common intention on 20.08.2008 committed murder by causing the death of Bijuli Narzary and thereby committed an offence U/S 302/34 IPC !*

2. *Whether the accused on same date at night at South Kajalgaon under Dhaligaon P.S. in the district of Chirang after committing murder of Bijuli Narzary kept her dead body buried inside the sand of Kujiya river in order to cause disappearance of the dead body and thus disappear of the evidence for screening themselves from the legal punishment in furtherance of common intention of all and thereby committed an offence U/S 201/34 IPC !*

**DECISION AND REASONS THEREOF**

5. To arrive at just decision of the case, let me consider the evidence of the witnesses.

6. PW 1 is the informant Promila Narzary. She deposed in her evidence that her daughter Bijuli Narzary got married to the accused Khiren Brahma about eight years back. After their marriage, they led conjugal life and out of their conjugal relationship, one child was born. One Purandar

Singh informed her that the dead body of her daughter was recovered near Kujiya river. She along with her daughter Suleka Narzary went to the spot and found the dead body of her daughter without head. During her lifetime Bijuli disclosed that she was tortured by the accused persons. Khirendra Brahma and his family members i.e. Kumar Brahma, Ramesh Basumatary and Puina Basumatary killed his daughter Bijuli and the fact was confessed by the accused Khiren Brahma in front of the local people. Thereafter she lodged the ejahar vide Ext-1.

In her cross-examination, PW 1 replied that she could not recollect who wrote the ejahar. On 21.08.2008 on receipt of information that her daughter was missing from the house of the accused, she went there. She did not see any incident.

7. PW 2 is Dwmwilu Basumatary. He deposed in his evidence that the occurrence took place in the year 2008. During that period, there was flood and one female dead body without head was floating in the Kujiya river. He along with villagers went to the bank of the river. Police was also called there but none had identified the dead body. The news was published in the newspaper. After that the informant came and identified the dead body as her daughter.

In his cross-examination, PW 2 replied that when the dead body was identified by the informant he was not present there. He could not say from whom he came to know that the said body was identified by the informant as her daughter.

8. PW 3 is Kanaklal Basumatary. He deposed in his evidence that about four years back, the wife of the accused Khiren was killed. Her dead body was recovered in Kujiya river. He did not go there. He was not examined by police. He could not say who killed Bijuli.

9. PW 4 is Radhika Brahma. He also stated that about four years back accused Khiren and his family members killed one person. He came to know that police of Dhaligaon Police Station arrested Khiren and his

brother in connection with the said case.

10. PW 5 is Nityananda Basumatary. He deposed in his evidence that about three years back flood submerged in his village. During that period one dead body was recovered in Kujiya river. He also went there. The head was not found with the dead body. The people of the village stated that the wife of the accused Khiren was missing from his house and the dead body might be the wife of the accused Khiren. Later on Khiren was arrested by police. At that time, he was Gaon Bura of South Kajalgaon village.

11. The Investigating Officer examined this much of witnesses in the case. The relatives of the witnesses i.e. father and sister of the deceased and some other village people were not examined in the case though they were present during recovery of the dead body. Subsequently the Public Prosecutor filed a petition to examine some more witnesses for just decision of the case and accordingly some witnesses were examined in this case as Court Witness.

12. CW 1 is Probhat Narzary, who is the father of the deceased Bijuli. He deposed in his evidence that in the year 2002 his daughter Bijuli Narzary got married to the accused Khiren Brahma. After their marriage, they led conjugal life and out of their conjugal relationship one female child was born. After the death of Bijuli she is staying with him. Before marriage accused Khiren was staying alone at Dhaligaon by constructing a house. He loved his daughter Bijuli and their marriage was held. After two years their child was born. After that the parents of the accused Khiren started to visit their house. Since then some problem arose in the life of his daughter. They started to say that they belonged to Christian community and the accused were Hindus for which they started to torture his daughter. They used to beat her. When she visited their house, she expressed before them. The accused person also stated his daughter to bring money from her parental home. Once he purchased C.I. Sheets for Khiren when he was constructing his house and he also paid Rs. 30,000/- cash to Khiren. Khiren has some tenants in his house. They had also seen that his daughter was tortured by the accused

Khiren. Three months before the incident, his daughter Bijuli visited his house and she disclosed that once Khiren chased her with a sword and on receipt of information regarding such type of torture, he asked his daughter not to return back to the house of her husband. But his daughter did not pay heed to his requests. CW 1 further stated the people of their village stated that one female dead body was found floating in Kujiya river. On receipt of the information he along with his daughter and wife went there. The dead body was without head and his wife identified the dead body of his daughter. After recovery of the dead body he went to the house of the accused and asked about his daughter. Then Khiren replied that Bijuli went to Guwahati and she did not return back. At that time Khiren was working as driver in BRPL. As he suspected to the fact of death of his daughter, he called the local people and informed them about the incident and they also asked Khiren about his daughter Bijuli. Then Khiren disclosed that he killed his wife Bijuli and threw her dead body on the river. At that time Lasu Basumatary, Raju Brahma and others were also present. After that his wife lodged ejahar.

In his cross-examination, CW 1 replied that his daughter Bijuli and the accused Khiren had love affairs. After that their marriage was held. Their daughter was born in the years 2006. After that the relationship between them was deteriorated. He could not recollect the dates when Khiren demanded the money from his daughter and he paid money to the accused Khiren. He did not lodge any ejahar in the Police Station regarding demand of money and torture by the accused towards his daughter Bijuli.

13. CW 2 is Sulekha Narzary, who is the sister of the deceased. She deposed in her evidence that her elder sister Bijuli got married to the accused Khiren Brahma in the year 2002. After their marriage they lived together as husband and wife and out of their conjugal relationship one female child was born. She is now staying with them. After their marriage, at first their relationship was cordial. Later on, she came to know from her mother that her elder sister was being tortured by the accused. When his elder sister visited their house, she also told them that she was tortured by the accused both physically as well as mentally. On 22.08.2008 they came to

know that one dead body was recovered in Kujiya river and they went to the spot and found the dead body without head. They noticed some mark in the dead body and identified the said dead body of her elder sister. Two days before the recovery of the dead body, as they did not receive any information of her elder sister, they went to Kajalgaon in the house of father-in-law of her elder sister. On being asked, they replied that they did not know the whereabouts of Bijuli. Later on, her brother-in-law confessed before the people that Bijuli was killed by him.

14. CW 3 is Lasu Basumatary. He deposed in his evidence that the marriage between the daughter of the informant Bijuli and the accused Khiren Brahma was held and after their marriage, they led conjugal life and one female child was born to them but the relationship between the husband and the wife was not cordial. They used to quarrel each other. Bijuli was missing from the house of the accused. After two days one dead body was recovered in Kujiya river. Her mother and other family members identified the dead body of Bijuli. After that he along with father of Bijuli Probhat Narzary, Uday Islary, Sushanta Basumatary, Surajit Basumatary and others went to the house of accused Khiren. On being asked, he confessed that he killed Bijuli and threw her dead body in Kujiya river. Later on, they informed police.

In his cross-examination, CW 3 replied that the incident occurred in the year 2008. On that day he was in his house. Uday, Sushanta, Surajit belong to the same village. He came to know from his aunt Promila that Khiren used to quarrel with Bijuli and their relationship was not cordial. The dead body was found floating without head. His aunt Promila identified the dead body of Bijuli. When Khiren confessed his guilt, Uday, Sushanta, Surajit and father of Bijuli were also present.

15. CW 4 is Raju Basumatary. He deposed in his evidence that daughter of the informant Bijuli got married to the accused Khiren. Out of their wedlock one child was born but after the birth of the child, the relationship between Bijuli and Khiren started to deteriorate. Neighbouring

people also stated that Bijuli was assaulted by the accused Khiren and subsequently he killed his wife Bijuli. After 2/3 days of missing of Bijuli one dead body was found floating in Kujiya river. Parents and sister of Bijuli identified the dead body as Bijuli. Though they informed Khiren, but he did not come. When they asked Khiren about his wife, he admitted that he killed his wife Bijuli.

16. CW 5 Uday Islary, CW 6 Sushanta Basumatary and CW 7 Surajit Basumatary also supported the fact by stating that Bijuli got married to the accused Khiren Brahma. After their marriage, they lived together as husband and wife and out of their conjugal relationship one female child was born. After the death of Bijuli her daughter was staying with father of Bijuli. Bijuli died in the year 2008. As Bijuli was not found in the house of her husband, the mother of Bijuli went to the house of accused to enquire about her daughter and the accused replied that she went to the house of his relatives. After some days when mother of Bijuli again visited the house of accused and enquired about Bijuli, the accused replied that she did not return back. In the meantime, one female dead body without head was recovered in Kujiya river. They went to the spot and mother of Bijuli identified the dead body of her daughter by seeing mark on her breast. Subsequently the accused Khiren also confessed before them that he killed his wife Bijuli and threw the dead body to Kujiya river.

17. After going through the evidence of aforesaid witnesses, it is seen that there is no eyewitness to the incident but it is an admitted fact that Bijuli was missing from the house of her husband. After marriage of Bijuli with the accused Khiren, they led conjugal life for 4/5 years and one daughter was born to them. It also appears from the evidence on record that the relationship between Bijuli and the accused Khiren was not cordial. Her husband used to torture her both physically as well as mentally. Father of Bijuli i.e. CW 1 also stated that the accused Khiren also used to torture on demand of money which was informed by his daughter when she visited their house. Once he purchased some C.I. Sheets when the accused Khiren was constructing his house and he also gave Rs. 30,000/- cash to the accused

Khiren himself. It also appears from the evidence on record that after missing of Bijuli her mother visited the house of the accused to enquire about her daughter and the accused persons once replied that Bijuli went to visit the house of his relatives and did not return back. The witnesses also stated that subsequently the accused Khiren confessed before them that he killed his wife Bijuli and threw her dead body to Kujiya river.

18. It is seen that FIR was lodged only when the dead body of the victim was found by her parents. It is surprising that the husband of the deceased did not make any effort to search out his missing wife. Even if he made efforts, evidence of which is not available on record. But he did not file any missing report in the police station concerned that his wife was not traceable. The evidence on record does not disclose that the husband of the victim made any effort for searching out his missing wife. Nothing was brought on record to show the same. Also nothing was brought on record to show that he filed a missing report of his wife in the P.S. concerned. On being asked, the accused/husband and other inmates of his family stated that the victim went to visit the house of his relatives. His wife was missing from his house but nothing was stated by the accused in his statement U/S 313 CrPC in this respect. An accused is required to speak something when the law enjoins upon him to speak the same. Nowhere in his statement U/S 313 CrPC the accused explained as to why he did not make any effort to trace out his missing wife. Even if no specific question was asked to him in this respect, he ought to have said something in reply to last question which was asked to him U/S 313 CrPC. The accused has miserably failed to give account of his duty towards his wife.

19. Dr. Parboti Kumar Doley was examined in the case as PW 7. He deposed in his evidence that on 26.08.2008 he was posted at RNB Civil Hospital, Kokrajhar as Sr. Medical & Health Officer. On that day he had performed postmortem examination on the dead body of Bijuli Narzary, 23 years, female in connection with Dhaligaon P.S. Case No. 95/08 U/S 302/201/34 IPC identified by UBC 41 Sunilal Basumatary and found as follows:-

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The head was absent. Penetrating wound over both breasts and cut injury over vagina. Bruise injuries seen over both lower limbs.

CRANIUM AND SPINAL CANAL:

Scalp, skull, vertebrae – Scalp absent.

Membrane – Congested.

Brain and spinal cord – Congested.

THORAX:

Walls, ribs and cartilages – Intact.

Pleurae – congested.

Larynx and trachea, right lung, left lung, pericardium, heart and vessels are congested.

ABDOMEN:

Walls – Intact. Peritoneum, mouth, pharynx, oesophagus, stomach and its contents, small intestine and its contents, large intestine and its contents – All are congested.

Liver, spleen, kidneys, bladder, organs of generation are congested.

Muscles, Bones and Joints:

Injury – Cut injury over both breasts and vagina without head.

Fracture, dislocation – Nil.

Doctor opined that the cause of death was due to severe haemorrhage from cut injury and it was ante mortem in nature.

20. Before postmortem examination, the inquest was also done on the dead body by the then ADC, Kokrajhar Nipun Chakraborty who was examined in the case as PW 6. He deposed in his evidence that on 25.08.2008

he was posted at Kajalgaon (Chirang) as A.D.C., Chirang. On that day after receiving requisition from the Deputy Commissioner, Chirang, he went to Dakhin Kajalgaon for disinterment of dead body of Bijuli Narzary, W/O Khiren Brahma. The dead body was inside the pit. The dead body was identified by her mother Pramila Narzary, W/O Pravat Narzary. After pulling out from the ditch, the dead body was found swelling and she had not head at all. The body was intact except her head and breasts was injured. There were also some injury marks on vagina and cut marks on her breast. The body was lying on her arms. She was completely naked. From her body structure, it was appeared she was of 22/24 years old. The disinterment started at 1300 hours on 25<sup>th</sup> August, 2008 near the tributary of Kujia in the village Dakhin Kajalgaon in presence of witnesses.

21. So, from the inquest report as well as from the medical report, it is seen that the dead body of the deceased Bijuli Narzary was found without head and the dead body was intact and was identified before the A.D.C., Chirang at the time of inquest by her mother Promila Narzary. Medical Officer also nowhere stated that the body was found decomposed at the time of examination. So, the plea taken by the accused that the dead body which was found in the Kujia river is not the body of Bijuli Narzary cannot be accepted.

22. Learned counsel for the accused contended that there is no direct evidence that the dead body that was found is that of Bijuli. The accused did not get the opportunity to see the dead body nor even the photographs were shown to him. In fact, there is no direct evidence established connecting the accused persons with the murder of Bijuli.

23. In support of his submission, learned counsel placed reliance on some case laws:-

- (i) (2010) 6 SCC 525  
(Niranjan Panja Vs. State of West Bengal)
- (ii) AIR 2011 SC 2283

(Sk. Yusuf Vs. State of West Bengal)

(iii) 2012(1) GLT 611

(Nitya Kalita Vs. State of Assam)

(iv) 2013 (5) GLT 543

(Bikash Koiri Vs. State of Tripura)

24. On the other hand, learned Public Prosecutor contended that the motive as well as the commission of the offence by the accused has been established beyond all reasonable doubts by the prosecution. He has placed reliance on the oral evidence of the prosecution witnesses and also the medical evidence.

25. I have given my careful consideration to the material evidence available on record and heard the rival submissions advanced by the learned counsel of both sides.

26. From the medical evidence, the cause of death was due to severe haemorrhage from cut injury and it was ante mortem in nature. It transpires that the death is homicidal one. There was no submission on the part of the accused that the injury caused to the deceased was caused by any other person or she committed suicide. It was suggested that she was killed by Bodo militants.

27. The law on the circumstantial evidence is now well settled by the Apex Court in a number of judgments. In *Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*, the Apex Court has held that -

“While dealing with circumstantial evidence, the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea.”

28. In *Padala Veera Reddy v. State of Andhra Pradesh (1989 Supp (2) SCC 706)*, the Apex Court has laid down the following tests for consideration in a case of circumstantial evidence:

“(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

29. The above judgments were quoted with approval by the Apex Court in the judgment in *Manjunath Chennabasapa Mudali v. State of Karnataka (2007) 3 SCC (Crl.) 101*. That apart, the Apex Court has also held in *Sudama Pandey v. State of Bihar (2002 SCC (Crl.) 239* that the prosecution must establish its case without any missing link.

30. Keeping the above law laid down by the Apex Court in mind, we will have to analyse the circumstances put against the accused in the case in hand.

31. For every crime, there must be some motive and particularly when the case is based on circumstantial evidence, the motive aspects gets importance and the motive for the crime must be clearly established by the prosecution. Though there is no reference in the FIR as to the suspicion of fidelity of the deceased wife by the accused husband, PW 1 i.e. the informant Promila Narzary and CW 1 i.e. the father of the deceased have clearly deposed that there was frequent domestic quarrels between the accused Khiren and the deceased. He also used to torture his wife Bijuli both physically as well as mentally. He also demanded money from her and father of the deceased also paid Rs. 30,000/- cash to the accused. It also appears

from the evidence on record that deceased while visited the house of her parents also complained that the accused used to beat her. CW 1 i.e. father of the deceased also stated in his evidence that he came to know from his daughter that once the accused Khiren chased his wife i.e. Bijuli with a sword and he asked his daughter not to return back to the house of her husband. But she did not pay heed to his request. From the evidence of other witnesses i.e. CW 3, 4, 5 and 6, it reveals that the relation between the accused and the deceased were not cordial. It also appears from the evidence of the informant (PW 1) and other witnesses that after missing of the deceased from the house of the accused, they visited the house of the accused and when they asked accused Khiren about his wife, he replied that she went to visit his relatives' house and did not return back.

32. According to the accused, he is a driver by profession and he was not present at the time of incident in his house. But the accused has failed to produce any document or any oral evidence that he remained absent in his house during that period. But the witnesses i.e. CW 3, 4, 5 and 6 are independent witnesses. They deposed before the Court that after missing of Bijuli, they found the accused working in BRPL as Driver and he was doing his duty during that period. After recovery of the dead body of Bijuli, they found the accused Khiren Brahma in the gate of BRPL and on being asked, he confessed his guilt before them.

33. It is well settled law that mere explanation is not sufficient and it must be proved by preponderance of probabilities by leading evidence. Therefore, the defence of alibi has not been proved by the accused as the prosecution witnesses speak about the presence of the accused in his house at the time of occurrence. Further the accused did not make any attempt to examine any witness to support the defence of alibi except offering an explanation. Therefore, the explanation offered by the accused is found to be wrong, as the burden is still heavy on the accused to prove that he was not involved in the offence.

34. In the case of *Trimukh Maroti Kirkan v. State of*

*Maharashtra [(2007) 1 SCC (Crl.) 80]*, wherein it has been held by the Supreme Court that -

“If the accused fails to offer any cogent explanation or offers an explanation which is untrue, then it can be treated as an additional link in the chain of circumstances against the accused to make it complete.”

35. Again in *State of Rajasthan v. Kashi Ram [(2007) 1 SCC (Crl.) 688]*, the Supreme Court has held that -

“Failure of the accused to give satisfactory explanation to an incriminating circumstance which was within his special knowledge amounts to failure to discharge the onus which lies on the accused and that itself provides an additional link in the chain of circumstances proved against the accused.”

36. It is an admitted fact that the deceased victim Bijuli Narzary was missing from the house of the accused Khiren Brahma. After recovery of the dead body of the victim in Kujiya river, PW 1 i.e. mother of the deceased identified the body as that of her daughter Bijuli. In such circumstances it is for the accused to explain as to how the victim was missing from his house and her dead body was found floating in Kujiya river. Ordinarily, if the wife was found missing, the husband usually searched for her. In this case, the husband did not take any effort to search his wife or file a missing report in the concerned P.S.. Therefore, it is for the husband to offer explanation as to how the dead body of his wife was found in the Kujiya river. Lack of such explanation on the part of the accused itself would be a circumstantial evidence against him. Since no explanation being offered in this regard, it is a strong circumstance against the accused by drawing adverse inference against him and in favour of the prosecution case. Therefore, the total denial of the accused of his involvement in the commission of offence is not acceptable.

37. The learned counsel for the accused has vehemently

argued that the witnesses who were examined by the prosecution as Court witnesses were never examined during the investigation by the police and their examination on the later stage is seriously prejudiced the accused for he was not able to confront the witnesses with their earlier statements recorded, since there were no earlier statements. It has been submitted that the provisions of Section 162 CrPC which grant the right to the accused to confront the witnesses with their earlier statements made under Section 161 CrPC is a valuable right. As such, the evidence of the Court witnesses cannot be taken into consideration in the case.

38. It is seen from the record that after examination of the Investigating Officer, learned P.P. has filed a petition stating that some important witnesses were left out by the Investigating Officer for recording their statements U/S 161 CrPC and their evidence are required for just decision of the case. After hearing both sides, the prayer of the learned P.P. was allowed and accordingly, summons were issued to the witnesses. At that time, learned counsel for the accused did not make any objection for examination of such witnesses as Court witness.

39. In the case of *Dharampal v. State*, 1974 JK LR 314, it was held that:-

“The prosecution is not debarred from producing any witness or document at the inquiry or trial even if such document or witness is not mentioned in the list of witnesses and documents filed with the report under Section 173 CrPC provided that the additional document or witness is relevant and provided, further that a copy of the document or of the statement of the witness, if recorded by the police, is made available to the accused.”

40. In another case, which came up for consideration in Calcutta High Court in *State v. Jagdish Pandey* and therein it was held as follows:-

“Under Section 173(4) the prosecution is not prevented from

calling any witness at the trial who has not been examined by the police or whose statement has not been recorded by them under Section 161 CrPC of the Code, it was not the intention of the legislature to shut out relevant evidence by enacting Sub-section (4) of Section 173 of the Code. The purpose might have been to benefit the accused by giving him in advance, copies of the documents and statements referred to in the sub-section; but that could not possibly have the effect of preventing the prosecution from calling other competent evidence at the trial...”

41. In the case of *State v. Baikunthanath Mohanta AIR 1960 Cri 150*, wherein it was held that:-

“The provisions of Section 173(4) CrPC are only directory and even after the commencement of the trial, the prosecution may prove additional documents in usual way, provided the accused gets a full opportunity to cross-examine the prosecution witnesses in the light of those documents.”

42. In the case of *State v. Mohd. Sultan Sheikh (1977 CriLJ 1109)*, it was reproduced that:-

“The view expressed by the Calcutta High Court in AIR 1958 Cal 311 appears to be the correct view. It has been clearly laid down in the said authority that the prosecution is not debarred from examining a witness whose evidence is relevant even if he was not examined by the police during the investigation.”

43. In the light of the aforesaid legal proposition, it can be said that the question raised by the learned counsel for the accused has no basis.

44. Another contention argued by learned counsel for the accused is that the extra-judicial confession is a very weak piece of evidence and should not have been made basis for conviction. If the extra-judicial confession is accepted to be correct for the sake of argument, case under

Section 302 IPC is not made out.

45. In support of his submission, learned counsel cited some case laws -

(i) 2011 (3) Gauhati Law Journal 469  
(Ram Singh Das v. State of Assam)

(ii) 2012 (1) GLT 708  
(Suresh Rajbongshi & Anr. v. State of Assam)

46. The question regarding claim of extra-judicial confession, though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra-judicial confession, Court has to satisfy itself that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by the accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repose exact words and there may be many who are possessed of normal memory and do

so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied that confession was voluntary basing on such evidence, conviction can be founded.

47. The expression 'confession' is not defined in the Evidence Act. 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is “act of stating; that which is stated; a formal account, declaration of facts etc.” The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. This very question came up for consideration before the Hon'ble Supreme Court in *Sahoo v. State of Uttar Pradesh (AIR 1966 SC 40)*. In the said case, it was observed that communication is not a necessary ingredient to constitute confession. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by the witnesses who heard the admission or confession.

48. In the case of *Suresh Rajbongshi & Anr. v. State of Assam*, it was held that the said statement recorded by the Investigating Officer is hit by Section 25 of the Evidence Act. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved against the person accused of any offence. In the other case i.e. *Ram Singh Das v. State of Assam*, the accused had categorically stated that he had made the alleged confession due to beating by the police. But herein this case, accused Khiren Brahma, made the extra judicial confession before the witnesses who are known to him, not to the strangers. Though he denied making of any

confession while his statement was recorded U/S 313 CrPC, but the witnesses i.e. CW 3, 4, 5, 6 & 7, who are no way related to the victim or her family members clearly stated that after recovery of the dead body of Bijuli they went out in search of the accused Khiren. He was found in his working place at BRPL. On being asked, accused Khiren Brahma confessed that he killed his wife and threw her dead body in the Kujiya river. So, the extra judicial confession made before the villagers is believable and can be taken into consideration

49. Learned counsel for the accused has been urged that the delay in lodging the FIR and thereafter further delay in forwarding the same to the Magistrate concerned would lead to the conclusion that FIR has been recorded much later than one as shown in the document and as such, very genesis of the prosecution case belies and cannot be relied upon to convict the accused.

50. It appears from the record that the informant Promila Narzary, who is the mother of the deceased lodged ejahar on 24.08.2008 which was produced before the Magistrate on the next day i.e. on 25.08.2008. The dead body of deceased was recovered on 22.08.2008 from Kujiya river. It is true that there was one day delay for filing of the ejahar but the mental condition of the parents of the deceased and her family members also can be taken into consideration.

51. There cannot be any manner of doubt that Section 157 of CrPC requires sending of an FIR to the Magistrate forthwith which reaches promptly and without undue delay. The reason is obvious to avoid any possibility of improvement in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. At the same time, this lacuna on the part of the prosecution would not be sole basis for throwing out the entire prosecution case being fabricated if the prosecution had produced the reliable evidence to prove the guilt of the accused persons. The provisions of Section 157 CrPC are for the purpose of having a fair trial without there being any chance of fabrication or introduction of the fact at

subsequent stage of investigation. It is not permitted by any law that simply because there is delay in lodging the FIR or sending it to the Magistrate forthwith, the entire case of the prosecution has to be discarded.

52. After going through the material on record, I am of the view that the prosecution has led reliable evidence which is not dislodged by delay in recording of the FIR and delay in sending the same to the Magistrate in the facts and circumstances of the case. At best it can be taken to be an infirmity in investigation.

53. In view of the above discussion, I am of the opinion that the prosecution has considerably proved the case against the accused Khirendra Brahma U/S 302/201 IPC beyond all reasonable doubt. Hence, he is convicted thereunder. The case against the other accused Kumar Brahma and Puina Basumatary is not proved beyond reasonable doubt. Hence, they are acquitted.

54. The accused Khirendra Brahma is heard on the point of sentence. He has submitted before the Court that his family consists of his age old mother and brother who is unemployed. He is maintaining them by doing job here and there. If he is sent to Jail, they will face great hardship.

55. Learned counsel for the accused also submitted that this case does not fall in the category of rarest of rare cases. As such, prayed for leniency.

56. It is settled law that sentence of death should be reserved for rarest of rare cases where the sentence of imprisonment for life would be inadequate. In each case for finding out whether it is a rarest of rare cases, the Court has to balance the gravity and mitigating circumstances. Referring to the facts of this case, though this is a gruesome act on the part of the accused severed the head of the victim from the body but it would be difficult to term it as "rarest of rare cases". It cannot be said that he would be a menace to the society. There is no reason to believe that he cannot be reformed or rehabilitated and he is likely to continue criminal acts or violence as would

constitute a continuing threat to the society. He was working as driver in BRPL, Dhaligaon at the relevant time having no criminal antecedent. As such, sentence of imprisonment for life would meet the ends of justice.

**O R D E R**

I convict the accused Khirendra Brahma U/S 302/201 IPC and sentence him to R.I. for life and also to pay a fine of Rs. 2,000/- i/d, R.I. for one year U/S 302 IPC and also R.I. for two years and also to pay a fine of Rs. 1,000/- i/d, R.I. for six months for the offence U/S 201 IPC.

Both the sentence shall run concurrently.

The period which he detained in custody shall be set off from the period of imprisonment imposed on him.

The case against the other accused Kumar Brahma and Puina Basumatary is not proved beyond reasonable doubt. Hence, they are acquitted.

Let a free copy of the Judgment and Order be furnished to the accused-convict free of cost.

Copy of order be sent to the Deputy Commissioner, Bongaigaon as per provision U/S 365 CrPC.

LCR be transmitted back to the learned court below with a copy of this judgment and order.

Given under my hand and the seal of the court on this 3<sup>rd</sup> day of **September, 2014**.

*Dictated and corrected by me,*

*( M. Nandi )  
Sessions Judge,  
Bongaigaon.*

*( M. Nandi )  
Sessions Judge,  
Bongaigaon.*

Sessions 110(D)/2009

03.09.2014

Accused is produced from jail hazot.

Heard learned counsel for the accused on the point of sentence as well as heard learned Public Prosecutor.

Judgment is prepared in separate sheets of paper, delivered in the open Court and appended with the record.

I convict the accused Khirendra Brahma U/S 302/201 IPC and sentence him to R.I. for life and also to pay a fine of Rs. 2,000/- i/d, R.I. for one year U/S 302 IPC and also R.I. for two years and also to pay a fine of Rs. 1,000/- i/d, R.I. for six months for the offence U/S 201 IPC.

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Copy of order be sent to the Deputy Commissioner, Bongaigaon as per provision U/S 365 CrPC.

LCR be transmitted back to the learned court below with a copy of this judgment and order.

*As dictated,*