

GAHC010000872020



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

Case No. : CrI.A./38/2020

1. Md. Amir Hasan@Amir Hasem, Aged 67 Years,
S/O Late Umed Ali.

2. Md. Idrish Ali, Aged 55 Years,
S/O Late Kasem Ali.

3. Md. Ruhul Amin, Aged 35 Years,
S/O Amir Hasen@Amir Hasem.

4. Md. Nazimuddin, Aged 27 Years,
S/O Amir Hasen@Amir Hasem.

5. Mustt. Rohima Khatun, Aged 65 Years,

W/O Amir Hasen@Amir Hasem. All are resident of Village-No.2 Sonapur, P.S.
Bihpuria, District-Lakhimpur, Assam.

.....Appellants.

-Versus-

1. The State of Assam.

2. Md. Abdul Kuddus,
S/O Late Amir Ali.
Village-No. 2 Sonapur,

P.S. Bihpuria,
District-Lakhimpur, Assam.
PIN-787054

.....**Respondents.**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the appellant(s) : 1. Ms. S.G. Baruah Advocate.
For the respondent(s) : 1. Ms. S. Jahan Additional PP,
Assam.
2. Mr. B.M. Choudhury...Advocate.

Date of hearing : 15.06.2023

Date of judgment : 28.06.2023

JUDGMENT AND ORDER (CAV)

(Mridul Kumar Kalita, J)

1. Heard Ms. S.G. Baruah, learned counsel for the appellants. Also heard Ms. S. Jahan, learned Additional Public Prosecutor appearing for the State respondent no. 1 as well as Mr. B.M. Choudhury, learned counsel for the respondent no. 2 (informant).

2. This criminal appeal has been preferred under section 374 of the Code of Criminal Procedure, 1973 by the appellants, namely, (i) Md. Amir Hasan @ Amir Hasem, (ii) Md. Idrish Ali, (iii) Md. Ruhul Amin (iv) Md. Nazimuddin and (v) Mustt. Rohima Khatun impugning the Judgment and Order dated 03.12.2019

passed by the Court of learned Additional Sessions Judge, (F.T.C.), Lakhimpur, North Lakhimpur in Sessions Case No. 05(NL)/2015, whereby, the present appellants were convicted under sections 302/149 of the Indian Penal Code and were sentenced to undergo imprisonment for life and also to pay a fine of Rs. 3,000/-, only each and in default of payment of fine to undergo rigorous imprisonment for another 6 (six) months each.

3. The facts relevant for adjudication of this appeal, in brief, are as follows: -

(i) On 15.08.2010, one Md. Abdul Kuddush lodged an FIR before the In-Charge of Bangalmora Police Outpost, *interalia*, stating that at around 6:00 AM on that day, i.e. on 15.08.2010, the accused persons, named in the FIR, namely, Md. Nazimuddin, Md. Amir Hasan, Md. Ruhul Amin, Md. Nur Mohammad and Md. Idrish Ali hacked the father of the first informant namely, Amir Ali and his brother namely, Malekastor to death with sharp weapon over dispute of land and property. It is also stated that the mother of the first informant Mustt. Rohima Khatun and the younger brother of the first informant Md. Seikh Forid were also grievously injured by the accused persons named in the FIR and at the time of lodging of the FIR the mother of the first informant was in a critical condition.

(ii) On receipt of the said FIR, the In-Charge of

Bangalmora Police Outpost made a G.D. Entry at the Bangalmora Police Outpost, namely, Bangalmora, O.P.G.D. Entry No. 226 dated 15.08.2010, at 8:30 AM, and forwarded the FIR to the Officer-in-Charge of Bihpuria Police Station for registration of a case and accordingly Bihpuria P.S. Case No. 270/2010 was registered under section 143/302/326 of the Indian Penal Code and the investigation was initiated. After completion of the investigation, the charge-sheet (charge-sheet no. 218/2013 dated 30.10.2013) against the present appellants under section 147/148/149/302/326 of the Indian Penal Code was submitted. One of the accused named in the FIR namely, Md. Nur Mahammad @ Nummat was found to be juvenile and his case was forwarded to the concerned Juvenile Justice Board.

(iii) The present appellants faced the trial remaining on bail. Considering the materials on record and after hearing both sides, learned Trial Court framed charges under section 148/149/302/326 of the Indian Penal Code against the present appellants. When the said charges were read over and explained to the present appellants they pleaded not guilty and claimed to be tried.

(iv) During trial, the prosecution side examined 9(nine) prosecution witnesses and exhibited 9(nine) documentary evidence. The present appellants were examined under section 313 of the Code of Criminal Procedure, 1973 during

which all of them denied the incriminating evidence adduced by prosecution witnesses against them and pleaded their innocence. They declined to adduce any evidence in defence. After completion of trial, learned Trial Court, by the Judgment impugned in this Appeal, convicted and sentenced the present appellants in the manner as already described in the paragraph no. 2 herein before.

(4) Before considering the rival submissions made by learned counsel for the both sides, let us go through the relevant evidence adduced by prosecution witnesses, during trial, which is available on record.

(5) P.W. 1, Md. Mahar Ali, has deposed that on the day of incident, at about 6:00 AM, during the month of Ramjan, when he was sleeping, he heard hue and cry outside his house and when he came out, he came to know that Amir Ali and Malekastur had been killed. He has further deposed that he went to see the deadbody of the deceased persons. He saw the body of Malekastur with cut injuries on his neck. He also saw Amir Ali was also lying in an injured condition in the field of appellant Amir Hasan. He has also stated that injured Amir was not in a position to speak and they took him to Bangalmora Hospital. However, he died in the hospital. He has also stated that during investigation, he also appeared before the Court for giving his statement.

During his cross examination, P.W. 1 has stated that he did

not hear any hue and cry raised by Rohima, wife of deceased Amir Ali and his son Seikh Karim. He has also stated that he saw injured Amir Ali sitting on the land of appellant Amir Hasan at a distance of about 10-12 feet away from the deadbody of Malekastur. He has also stated that he did not hear any quarrel between both the parties.

(6) P.W. 2, Md. Abdul Kuddush, who is the son of deceased Amir Ali, has deposed that the incident took place in the morning of 15.08.2010 and at that time he was in the courtyard of his house. P.W. 2 has further deposed that he saw Idrish Ali (appellant no. 2) was ploughing the land belonging to Amir Hasan (appellant no. 1) and rest of the appellants were sitting on the bank of the pond. Thereafter, P.W. 2 went to open his shop situated at Chariali. Thereafter, his younger daughter Tajmina came there running and informed him that a quarrel has started at the cultivation field of his uncle. P.W. 2 has further deposed that thereafter he saw that his step-mother Rohima Khatun (P.W. 4) was coming to his house holding her head which was bleeding. On being asked, she informed P.W. 2 that the appellants had killed his father and younger brother; P.W. 2 has further stated that he saw that his brother had already died but his father was alive and his another brother namely, Seikh Forid (P.W.3) was also lying in an injured condition. He has further deposed that he took his step mother Rohima Khatun (P.W. 4) his father (deceased Amir Ali) and his brother Seikh Forid (P.W.3) to Lakhimpur Civil Hospital along with

one Sahed Ali for treatment. P.W. 2 has further deposed that initially he informed the police verbally about the incident, whereupon, the police went to the place of occurrence and brought the deadbody of his brother to Bangalmora Police Station. Later on, he lodged a written FIR which is exhibited as Exhibit-1.

(7) During cross-examination, P.W. 2 has stated that he did not witness the fight. He has also stated that when he arrived at the place of occurrence, he saw the deadbody of his brother Malekastur was lying there and Mahar Ali (P.W.1)) was carrying his father to near the house of his step-mother Rohima. He has also stated that his shop is situated at a distance of about less than 1 k.m from the house of the accused persons. He has also stated that he found injured Seikh Forid (P.W. 3) on the road in front of their house and he came across his step- mother (P.W. 4) near the house of Abdul Jalil. He has also stated that he saw that her step-mother's cloths were stained with blood which was oozing out of her head. However, police did not seize her blood stained cloths. He has also stated that he did not notice injury on the body of his brother Seikh Forid (P.W.3). He has answered in negative to a suggestive question put to him by the defence side that his step-mother and her sons killed Malekastur and his father.

(8) P.W. 3, Md. Seikh Forid, has deposed that deceased Amir Ali was his father and deceased Malekastur was his elder brother. He has stated that at the time of incident he was ploughing his field

and his elder brother Malekastur (since deceased) was going to his house from town Chariali. He has stated that when Malekastur was coming through a road across the field, Md. Nur Mahammad (juvenile accused) hit him on his head with a stick from behind and as a result, his brother fell on the ground. He has stated that Nur Mahammad pressed the head of his brother and Rohima Khatun (appellant no. 5) grabbed his legs and thereafter, Md. Nazimuddin (appellant no. 4) hacked his head.

(8.1) P.W. 3 has further stated that having seen the incident his father (Amir Ali) came running from his house and at that time Amir Hasen (appellant no. 1) hit him, on his head, with a lathi. As a result of which his father (Amir Ali) fell on the ground. At that time Ruhul Amin (appellant no. 4) hacked on the buttocks of his father with a 'dao'. P.W. 3 has further deposed that on seeing the incident he also ran towards his father and at that time Amir Hasen (appellant no. 1) hit him on his head and he fell down there and became senseless.

(8.2) P.W.3 has further deposed that after 10-15 minutes, he regained his senses and he saw his elder brother Kuddush was coming from the house. He also saw his mother (P.W.4) bleeding from head and she informed him that Ruhul Amin appellant no. 3 had assaulted her with a dao.

(8.3) P.W.3 has further deposed that later on his brother Kuddush

took his mother took him along with his mother and father to Bangalmora Police Station and his father died on the way. He also deposed that thereafter his brother took him and his mother to Lakhimpur Hospital for treatment.

(8.4) During cross examination he has answered in negative to the suggestion put to him by defence side that he did not state before Investigating Officer what he has deposed before the Court as P.W. 3. He has also stated that the distance between places where his elder brother and his father were lying might be around 20 feet. He has also stated after regaining his senses, he saw Mahar Ali (P.W. 1) lifting his father to the house. He denied the suggestion that he along with his mother had killed his father and his brother Malekastur.

(9) P.W. 4, Mustt. Rohima Khatun, has deposed that deceased Amir Ali was her husband and deceased Malekastur was her son and the accused persons (appellants) are related to her husband. In her testimony, she gave vivid description of the incident which happened on that day. She has stated that the incident took place on a road across the field when her son Malekastur asked the accused Idrish (appellant no. 2) as to why he had ploughed their land. At that time Nur Mahammad (juvenile accused) hit him on the head with a lathi. As a result of which Malekastur fell down on the ground. Nur Mahammad then grabbed the head of Malekastur and Rohima (appellant no. 5) grabbed his legs and thereafter, Md.

Nazimuddin (appellant no. 4) hacked his neck with a knife. She has further stated that thereafter her husband Amir Ali (deceased) arrived there and accused Amir Hasen (appellant no. 1) hit him on his legs and accused Ruhul Amin (appellant no. 3) hacked her husband on his head and waist. She has further stated that in the meanwhile her son Seikh Forid (P.W. 3) arrived there and he was hit on his leg by accused Ruhul Amin (appellant no. 3) with a lathi. P.W. 4 has further deposed that having seen the incident when she reached there accused Ruhul Amin appellant no. 3 hacked her on her head with a dao and she became senseless. She has deposed that later on she regained her senses at Bangalmora Police Station. She has also stated that she along with her son Seikh Forid went to Lakhimpur Civil Hospital for treatment on a police vehicle. However, her husband was kept in the police station as he had died. She has also stated that during the course of investigation her statement was recorded before the Court wherein, she had put her thumb impression.

(9.1) During cross examination, P.W.4 has stated that the incident occurred on the road of their land. She has also denied the suggestion given to her by the defence side that earlier while giving statement to police, she has stated that the place of occurrence was within the campus of their house.

(9.2) Though, on perusal of the translated version of the testimony of P.W.4 at page 21 of the paper book prepared by the

Registry, it appears that P.W.4 has admitted that she had not stated before the Magistrate and Police that Nur Mohammad hit Malekastur on his head as a result of which he fell down on the ground and that she admitted that she did not state that Rohima grabbed his legs and accused Md. Nazimuddin hacked his neck with a knife, however, on perusal of original testimony of P.W.4 , in vernacular, available in the case record of Sessions Case No. 05(NL)/2015 it appears that P.W.4 had in fact answered in negative to suggestions put to her that she had not stated so before the police and Magistrate.

(9.2) P.W. 4 has also answered in negative to the suggestion put to her that she did not state before the Magistrate and the police that her husband Amir Ali arrived there and accused Amir Hasan hit him on his legs and accused Ruhul Amin hacked her husband on his head and waist and that accused Ruhul Amin hacked her on his head with a dao. She has also stated that she did not state about the incident to Kuddush. She has denied the suggestion put to her by defence side that she had tied Malekastur when she was sleeping and also tied her husband and threw them in the field owned by accused.

(10) P.W. 5, Md. Hatem Hazi Ali has deposed that he does not know anything about the incident.

(11) P.W. 6 Dr. Prabin Mili who conducted the post-mortem

examination of both the deceased persons on 15.08.2010 has deposed that he performed post-mortem examination over the deadbody of Amir Ali who was brought and identified by UBC/44-Rofiqul Islam, Abdul Kuddus, Sahed Ali and Abdul Rahim and on examination he found following:

”Built-thin, height-5 ft. 3 inches, complexion-swarthy, eyes & mouth-semi-open. Rigor mortis present all over the body.

(1) sharp cut injury measuring- 7X1X1 cm over right parietal bone with associated underlying bone fracture.

(2) sharp cut injury measuring 5X1X1 cm over left parietal bone with associated bone(horizontally)

(3) sharp cut injury of 2X1x’1 cm over left temporal region (bone depth, obliquely)

(4) laceration wound of about 2X1X1 cm with blood stain in the back nape of neck noted.

(5) sharp cut injuries, 2 in numbers lying vertically over the sacrum just above the anal canal of 5X2X2 cm each with associated fracture of sacral bone.

(6) Extra-dural haematoma of about 100 ml noted both side of parietal region.”

In his opinion the cause of death of deceased Amir Ali was due to shock and haemorrhage as a result of injury sustained which are ante-mortem in nature and at the time of death was estimated to be within 6 hours before the post-mortem examination.

(11.1) P.W. 6 has further stated that on the same day, he also performed post-mortem examination over deadbody of Malekastur, male 20 years of age which was brought and identified by UBC/44-

Rofiqul Islam, Abdul Kuddus, Sahed Ali and Abdul Rahim and on examination he found the following:-

“Built-average, complexion-swarthy, height-5ft. 2 inches, eyes & mouth-semi-open. Rigor mortis present all over the body.

Sharp cut injury with complete transaction of larynx oesophagus and major vessels of neck involving anterior half of neck below chin (measuring about 10X5X5 cm).

Cut injury of left mandibular region of obliquely lying of about 5X3X2 cm with associated mandibular bone fracture.

Sharp cut injury with complete transaction of upper half of left ear with extended cut mark over left temporal region measuring about 4X1X1 cm(bone depth).

Abrasion of 1x0’5X0’5 cm over left Dorsal of head.”

In the opinion of P.W. 6 the cause of death of Malekastur was due to asphyxia and haemorrhage as a result of injuries sustained which were ante-mortem in nature and at the time of death within 6 hours before the post-mortem examination.

During cross-examination P.W. 6 has stated that he has not specifically mentioned about the type of weapon which were used for causing the injuries found on the deadbody. He has also stated that he found no punctured injury on the deadbody of Amir Ali as well as Malekastur.

(12) P.W. 7 Shri Gokul Chutia, S.I. of Police, has deposed that on 25.10.2013, he was working as In-charge of Bangalmora Police Outpost and on that day, the Officer-in-Charge of Bihpuria Police

Station entrusted him to complete the investigation of this case. After taking charge of investigation and perusing the case diary, P.W. 7 found that the investigation was almost complete except the collection of medical records of the injured which could not be collected as the concerned Medical Officer was transferred. Therefore, as per instructions of his senior officer he submitted charge-sheet against the accused persons under section 147/148/149/302/326 of the Indian Penal Code. The said charge-sheet has been exhibited as Exhibit-5.

During cross-examination he denied the suggestion that he had not gone through the case diary properly and had submitted a false charge-sheet.

(13) P.W. 8 Md. Sahed Ali has deposed that in the year 2010, he went to the paddy field and saw deceased Malekastur lying in the field and nearby people surrounded the place of occurrence. Police came to the place of occurrence and prepared a seizure list which is exhibited as Exhibit 7 wherein, he put his signature. He has also stated that he saw the deadbody of Amir Ali at Bogalmara Police Outpost.

During cross-examination P.W. 8 has stated that he has not seen the occurrence himself and he had put his signature on the seizure list as police asked him to do so.

(14) P.W.9 Shri Biswajyoti Sharma, S.I. of police, who is the

Investigating Officer of Bihpuria P.S. Case No. 270/2010, has deposed that on 15.08.2010 he was serving as In-Charge of Bangalmora Police Outpost under Bihpuria Police Station and on that day the informant Abdul Kuddus lodged an FIR at the Bangalmora Police Outpost. He has also stated that on receiving of the said FIR he made a G.D. Entry No. 226 dated 15.08.2010 at the Outpost and forwarded the said FIR to the Officer-in-Charge of Bangalmora Police Outpost. He has also stated that after registration of Bihpuria P.S. Case No. 270/2010 under section 143/302/326 of the Indian Penal Code, he was entrusted with the investigation of the said case. He has further stated that after completion of the investigation finding sufficient materials against the accused persons (*including the present appellants*), he arrested all the accused persons and after completion of the investigation handed over the case diary to the Officer-in-Charge of Bihpuria Police Post. He also exhibited the sketch-map of the place of occurrence as Exhibit-8, the extract copy of G.D. Entry No. 226 dated 15.08.2010 as Exhibit-9, the seizure list wooden sheath (cover) of a 'kukri' was seized as Exhibit-7.

(14.1) During cross examination, P.W. 9 has stated that the occurrence took place in the paddy field, however, he did not visit the paddy field. He has also stated that he had not seized any cloths worn by the deceased at the time of incident. He has also stated that he found the deadbody of deceased Amir Ali and deceased Malekastur in the paddy field. He has also stated that he

did not seize blood stained wearing cloths of the injured Seikh Forid and Rohima Khatun.

(14.2) P.W. 9 has also stated that Abdul Kuddus (P.W. 2) did not state before him, during investigation, that while he was going to the shop, the accused Idrish Ali was ploughing in the paddy field of Amir Hasan and at that time other accused persons were sitting on the bank of the pond. He has also stated that Abdul Kuddus has also mentioned in his ejahar as to who provided him the information regarding the alleged incident. P.W. 9 has also stated that P.W.2 did not state before him that he came to know about the incident from his step mother. Rather, he (P.W. 2) stated before him (P.W.9) that his youngest daughter informed him about the quarrel which took place in the paddy field of her uncle.

(14.3) P.W. 9 has also stated during cross-examination that P.W. 3 Seikh Forid did not state before him that at the time of occurrence he was ploughing in the field and at that time his brother Malekastur was returning from Chariali, the accused Nur Mahammad gave a blow on his head from behind as a result of which he fell down and after that Nur Mahammad pressed the head of the deceased and Rohima Khatun caught hold of his legs and accused Md. Nazimuddin cut of the neck of his brother. Thereafter, when P.W. 3 rushed towards his father accused Amir Hasan assaulted him on his head and he became unconscious. P.W. 9 has also stated, during his cross-examination that P.W. 3 did

not state before him that when he regained his senses after 10-15 minutes he saw his elder brother Kuddus from the house and he saw blood oozing out of the head of his mother and on being asked his mother informed that accused Ruhul Amin assaulted her with a dao. P.W. 9 has also stated that during his cross-examination that P.W. 3 did not state before him that his elder brother Kuddus, later on took him, his father and mother to Bangalmora Police Outpost in a tempo but his father died on the way and his brother Kuddus took him and his mother to North Lakhimpur Civil Hospital for treatment.

(14.4) During cross-examination, P.W. 9 has also stated that P.W. 4 Mustt. Rohima Khatun did not state before him that occurrence took place within the campus of a residence. She also did not state before him that Malekastur asked accused Idrish Ali as to why he was ploughing in their paddy field, accused Nur Mahammad gave a blow on his head with a lathi and he fell down on ground and thereafter, Nur Mahammad caught hold of his head and accused Rohima Khatun (appellant no. 5) caught hold of his legs and against Md. Nazimuddin cut his neck with a knife and her husband Amir Ali at that place accused Amir Hasan assaulted him on his legs and accused Ruhul Amin cut her husband on head and waist. P.W. 9 has further stated though P.W. 4 Rohima Khatun did not state before him that accused Ruhul Amin assaulted her son Seikh Forid with a stick on his legs and neck and said accused also cut on her head.

(14.5) During cross-examination P.W. 9 has also stated that he could not find any intention or motive of the accused persons to commit the murder of the deceased, however, he found that there was a land dispute between the parties.

(15) The appellants were examined under section 313 of the Code of Criminal Procedure during which their stand was that the evidence for prosecution side is false and all of them pleaded their innocence.

(16) Ms. S. G. Baruah, learned counsel for the appellants has submitted that learned trial Court relied mainly upon the testimony of P.W. 3 and P.W. 4 to come to the finding of guilt of the present appellants, however, P.W. 3 and P.W. 4 gave different version of the stories when they gave their statement before the Investigating Officer under section 161 of the Code of Criminal Procedure as well as in their statement recorded under section 164 of the Code of Criminal Procedure, 1973, hence, their testimonies should not be relied upon.

(17) Learned counsel for the appellants has also submitted that apart from P.W. 3 and P.W. 4, no other witness is an eye- witness to the incident. As regards P.W. 3 and P.W. 4, who also claim to have been injured, the learned counsel for the appellants has submitted that no injury report of P.W. 3 and P.W. 4 were produced during the trial and on that ground itself, learned trial Court

acquitted the present appellants under section 326/325 of the Indian Penal Code. Hence, learned counsel for the appellants submits that as there are several contradictions and embellishment in the testimonies of P.W. 3 and P.W. 4 and the same may not be treated as reliable evidence and any conviction based on the said evidence is not safe and may be erroneous.

(18) Learned counsel for the appellant has also submitted that no weapon of offence was seized by the Investigating Officer during the investigation. Only a sheath of kukri was exhibited during the trial. However, learned counsel for the appellants has submitted that it leads to no conclusion as there is nothing to show from whom the said sheath of kukri was seized and for what purpose it was used. Learned counsel for the appellants has also submitted that the evidence of P.W. 9 shows that he failed to find out any motive on the part of present appellants to commit the offences involved in this case and absence of any motive only suggest towards the innocence of the present appellants.

(19) Learned counsel for the appellants has also submitted that P.W. 4 has stated in her deposition before the Court that the incident took place on a road across the field. However, in her statement recorded under section 164 of the Code of Criminal Procedure, she had stated that the appellants entered into their campus armed with sticks, dao, kukri etc. and this discrepancy shows that P.W.4 has not witnessed the incident of assault herself.

Learned counsel has submitted that as the place of occurrence itself appears to be doubtful from the testimony of P.W. 4, her testimony also becomes doubtful and accordingly should not be relied upon. Learned counsel for the appellants has also submitted that none of the other witnesses have deposed that they have seen P.W.3 and P.W.4 at the place of occurrence, which makes their very presence at the place of occurrence doubtful.

(20) On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor has submitted that there are two injured eye-witnesses in this case, namely, P.W. 3 and P.W. 4 and there is no reason for disbelieving their testimony merely because of minor contradictions as regards place of occurrence of offence in their testimony. She has cited a ruling of Hon'ble Supreme Court of India in "**Balu Sudam Khalde and Ors. Vs. The State of Maharashtra**" reported in **MANU/SC/0328/2023** wherein Hon'ble Supreme Court of India has observed as follows:-

"26. When the evidence of an injured eye-witness is to be appreciated, the under- noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the Accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.”

(21) Ms. S. Jahan, learned Additional Public Prosecutor has also submitted that as regards contradicting the testimony of P.W. 3 and P.W. 4 by referring to the previous statement made by them before the police under section 161 Code of Criminal Procedure, 1973 the defence side has not followed the proper procedure. While cross-examining both the said witnesses namely, P.W. 3 and P.W. 4, the attention of said witnesses were not drawn to their previous statements made before police under section 161 of the Code of Criminal Procedure, 1973 and therefore, same may not be used by the Court for disbelieving the testimony of said witnesses. In support of said contention, learned Additional Public Prosecutor has relied upon a ruling of Hon'ble Supreme Court of India in “**V.K Mishra And Another Vs. State of Uttarakhand And Another**” reported in **(2015) 9 SCC 588** wherein, Hon'ble Apex Court observed as follows:-

“19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his

previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to

the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.”

(22) Learned Additional Public Prosecutor has also submitted that there may be some lapse on the part of Investigating Officer in not collecting the injury reports of P.W. 3 and P.W. 4 from Lakhimpur Civil Hospital, however, the said lapse does not go into the core of the prosecution case as from the testimony of P.W. 2, P.W. 3 and P.W. 4 shows that P.W. 3 and P.W. 4 were also injured.

(23) We have considered the rival submissions of learned counsel for both sides.

(24) If we peruse the impugned Judgment, it appears that learned trial Court has mainly relied upon the testimony of P.W. 3 and P.W. 4, who are the eye-witness of this incident involved, to

come to the finding of the guilt of present appellants. The fact of death of Amir Ali and Malekastur is not disputed. The evidence on record mainly the evidence of P.W. 6, *i.e.*, the doctor who performed the post-mortem examination on the deadbody of Amir Ali and Malekastur, on 15.08.2010, *i.e.* the day on which they expired, shows that the cause of death of both the deceased were the injuries sustained by both the deceased which were ante-mortem in nature. If we look at the nature of injuries found on the dead bodies of both the deceased persons, there is no escape from the inference that the cause of death of both the deceased persons was homicidal in nature. On careful examination of the testimony of prosecution witnesses available on record, it appears that P.W. 3 Md. Seikh Forid and P.W. 4 Mustt. Rohima Khatun are the eye-witness to the incident of assault on both the deceased persons by the appellants.

(25) If we carefully peruse the testimony of P.W. 3, it appears that he has implicated appellant no. 5, Mustt. Rohima Khatun, appellant no. 4 Md. Nazimuddin and the juvenile accused Nur Mahammad for assaulting his brother Malekastur. From his testimony, it appears that though it was appellant no. 4 who hacked Malekastur with a dao, appellant no. 5, Mustt. Rohima Khatun grabbed his legs, while he was being hacked. Similarly PW-4, Rohima Khatun has also stated that appellant no. 4 Md. Nazimuddin hacked Malekastur with a knife on his neck while appellant no. 5, Mustt. Rohima Khatun grabbed his legs. Though,

the Investigating Officer failed to recover the weapon of offence, however, on perusal of the post-mortem report of the deceased Malekastur as well as the testimony of P.W.6, i.e., the doctor who conducted the post-mortem examination, it appears that the deceased Malekastur sustained multiple sharp cut injuries over his neck and mandibular region, which corroborates the testimony of P.W.3 and P.W.4.

(26) As regards assault on the deceased Amir Ali is concerned, both P.W. 3 and P.W. 4 have deposed that the appellant No.1 Amir Hasan assaulted the deceased Amir Ali with a lathi (stick) and appellant No.3 Ruhul Amin assaulted deceased Amir Ali with a dao. While P.W. 3 has deposed that appellant No.3 Ruhul Amin hacked deceased Amir Ali on his buttocks, P.W. 4 as deposed that appellant No.3 Ruhul Amin hacked her husband on his head and waist. This case also, though the weapon of offence could not be recovered, on perusal of the post-mortem report of the deceased Amir Ali as well as the testimony of P.W.-6, i.e., the doctor who conducted the post-mortem examination, it appears that the deceased Amir Ali sustained multiple sharp cut injuries including sharp cut injuries over sacrum and fracture of sacral bone which corroborates the testimony of P.W.3 and P.W.4.

(27) As regards the submission of the learned counsel for the appellants regarding the contradiction in the testimonies of P.W. 3 and P.W.4 is concerned, this apparent from their depositions that

attention of P.W. 3 and P.W.4 was not drawn to those parts of their previous statements (*statement made before the Investigating Officer under section 161 of the Cr.P.C*) which were intended to be used for the purpose of contradicting them. In fact, on perusal of the statement of P.W. 3 and P.W.4 under section 161 of CrPC, which is available on record, it appears that it is more or less similar to what they have deposed before the court during the trial. Therefore, as the defence side failed to follow the proper procedure as observed in “**V.K Mishra And Another Vs. State of Uttarakhand And Another**”(supra) , while trying to contradict P.W. 3 and P.W.4 by their previous statement, we are of the considered view that the defence side failed to elucidate any material contradiction in the testimonies of P.W.3 and P.W.4 so as to render it disbelievable. As regards submission of learned counsel for the appellants that P.W.4 mentioned different places of occurrence in her testimony before the court as well as in her statement made before the investigating officer under section 161 of the Cr.P.C. it is submitted that in the court while deposing as P.W.4 he stated that the incident occurred on the road of their land, whereas, before police she had stated that the incident occurred within the campus of their house. Here also while trying to contradict her, proper procedure as prescribed in **V.K Mishra And Another**(supra) was not followed. Otherwise also we are of the considered opinion that considering the fact that the road and the campus of house of the deceased are adjustment to each other, this contradiction is not a material contradiction which

renders the testimony of P.W. 4 unreliable.

(28) Thus, the evidence of P.W.3 and P.W.4 as discussed hereinbefore, which is corroborated by the testimony of P.W. 6, shows that appellant no. 4 Md. Nazimuddin and appellant no. 5, Mustt. Rohima Khatun caused death of deceased Malekastur. Similarly the aforesaid evidence also shows that appellant no. 1, Amir Hasan and appellant No.3 Ruhul Amin caused death of deceased Amir Ali. The evidence on record also suggest that death of both the deceased was caused by the above named appellants while they were member of unlawful assembly including Appellant Nos. 1,3,4,5 and the Juvenile accused Nur Muhammad with common object of killing the deceased persons.

(29) However, as regards appellant No.2 Md. Idrish Ali, as none of the prosecution witnesses have implicated him, we are unable to agree with the finding of learned trial court that mere presence of appellant No.2 Md. Idrish Ali at the place of occurrence would make him liable under section 149 of the Indian penal code for the alleged offence, even if no overt act has been attributed to him. We are of the considered opinion that as there is no incriminating evidence against the appellant No.2 Md. Idrish Ali, his conviction under section 149/302 of the Indian Penal Code is not warranted and liable to be set aside.

(30) For the discussion made and reasons stated in foregoing

paragraphs, the conviction under section 302/149 of the Indian Penal Code and sentence imposed there for, by the learned trial court, on the appellant no. 1, Amir Hasan, appellant No.3 Ruhul Amin, appellant no. 4 Md. Nazimuddin and appellant no. 5, Mustt. Rohima Khatun is hereby upheld and not interfered with. However, the conviction under section 302/149 of the Indian Penal Code and sentence imposed there for, by the learned trial court, on the appellant No.2 Md. Idrish Ali is hereby set aside he is set at liberty forthwith if not required to be in detained in connection with any other case.

(31) Let the case record of Sessions case No 05(NL)/2015 along with connected files be sent back In the Court of learned Sessions Judge, Lakhimpur along with a copy of this judgment.

(32) This appeal is accordingly disposed of.

JUDGE

JUDGE

Comparing Assistant