

GAHC010071132021



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

Criminal Appeal No. 110/2021

1. Altaf Ali,
aged about 57 years,
S/o Idrish Ali.

2. Manir Ali @ Manir Hussain,
aged about 51 years,
S/o Idrish Ali.

3. Sanowar Ali @ Sanowar Hussain,
aged about 37 years,
S/o Idrish Ali.

4. Anowar Ali @ Anowar Hussain,
aged about 37 years,
S/o Idrish Ali.

5. Jakir Hussain @ Jakir,
aged about 47 years,
S/o Idrish Ali.

6. Sariful Ali @ Sahidul islam,
aged about 32 years,

S/o Idrish Ali.

7. Idrish Ali,
aged about 83 years,
S/o Late Gulzar Ali

All are residents of village Kahikuchi,
PS- Barpeta, District- Barpeta,
Pin- 781311.

.....Appellants

-Versus-

State of Assam,
Represented by the P.P., Assam.

.....Respondent

Advocates for the appellants: Mr. SK N. Mohammad.

Advocate for the respondent: Ms. B Bhuyan, Additional
Public Prosecutor, Assam.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 13.03.2023

Date of judgment : 28.03.2023

JUDGEMENT AND ORDER (CAV)

(Michael Zothankhuma, J.)

Heard Mr. SK N Mohammad, learned counsel for the appellants. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State.

2. The appellants have put to challenge the judgment and order dated 10.02.2021, passed by the court of the learned Sessions Judge, Barpeta in Sessions Case No. 23/2014, by which the appellants have been convicted under Section 302 IPC read with Section 149 IPC. The learned Trial Court has thereafter sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each, in default, to undergo simple imprisonment for 6 (six) months.

3. The prosecution case in brief is that the informant, who is PW-1 and the father of the deceased Hafijul Ali submitted an FIR dated 29.04.2009 before the Officer-In-Charge Barpeta Police Station, stating that under the influence and provocation of Sl. Nos. 9, 10 and 11, Sl. Nos. 1 to 8 had trespassed into his house and assaulted his three sons, namely, Bilayet, Akbar and Hafijul Ali, which resulted in the death of Hafijul. The eleven persons mentioned in the FIR as the perpetrators of the crime are as follows:-

1. Altab Ali @ Altu, S/O Idrish
2. Manir Ali, S/O Idrish Ali
3. Sanowar Ali, S/O Idrish Ali
4. Anowar Ali, S/O Idrish Ali
5. Zakir Hussain, S/O Idrish Ali
6. Sarejul Ali, S/O Idrish Ali
7. Swahid Ali, S/O Idrish Ali
8. Swahidul Ali (Not sent up for trial),

S/O Kurpan Ali

9. Jalim Miya, S/O Late Saheed Ali

10. Idrish Ali, S/O Late Gunjar Ali

11. Kurpan Ali (Not sent up for trial),

S/O Late Sayed Ali

4. The informant further states in his FIR that when he tried to prevent the above accused persons from assaulting his sons, Sl. No. 5, Zakir Hussain threw a spear at him, which however missed. Hearing a hue and cry, neighboring people came to the place of occurrence, which resulted in the accused persons leaving the place of occurrence. The three sons of the informant were then taken to Barpeta Civil Hospital in injured conditions. However, as Hafijul Ali was in a critical condition, he was referred to Gauhati Medical College & Hospital, Guwahati. Hafijul Ali died on the way to Guwahati. Pursuant to the FIR, Barpeta P.S. Case No. 377/2009 under Sections 147/148/149/447/325/326/302/ 109 IPC was registered.

5. After investigation was completed, the Investigating Officer submitted a charge-sheet, having found a *prima facie* case against the appellants and one Abdul Jalil under Sections 302/147/148/149/323 IPC. Charge under Section 302 IPC was framed against the appellants and Abdul Jalil on 07.07.2012. Thereafter, separate charge under Sections 147/148/149/323 IPC was framed against all the appellants, including one Abdul Jalil on the same date. The appellants and Abdul Jalil pleaded not guilty and claimed to be tried.

6. Thereafter, the learned Trial Court recorded the evidence of 14 (fourteen) prosecution witnesses and after examining the appellants and Abdul Jalil under Section 313 Cr.PC, came to a finding that the appellants and Abdul Jalil were guilty of the offence under Section 302 IPC read with Section 149 IPC. The learned Trial Court thereafter convicted the appellants and sentenced them to undergo life imprisonment with a fine of Rs. 10,000/- each, in default, simple imprisonment for 6 (six) months.

7. The learned counsel for the appellants submits that while 7 (seven) appellants have filed the present appeal, Mr. Abdul Jalil, who had also been convicted and sentenced along with the present appellants vide the same impugned judgment and order, had filed Criminal Appeal No. 60/2021. He submits that as Mr. Abdul Jalil expired, Criminal Appeal No. 60/2021 has been closed on the ground that the appeal stood abated. He also submits that amongst the 7(seven) appellants in this appeal, the seventh appellant, i.e. Idrish Ali, has also expired. He accordingly submits that the present appeal would be confined only to the first 6(six) appellants, as the appeal in respect of the seventh appellant stands abated.

8. The learned counsel for the appellants submits that the evidence of the prosecution witnesses goes to show that there are glaring discrepancies with regard to the place of occurrence, inasmuch as PW-1 has stated that the incident occurred inside his house, while PW-2 (wife of PW-1), in her examination-in-chief had stated that the incident of assault had taken place in front of Bilal's house, Bilal being one of the three sons of PW-1. He further submits that in the cross-examination of PW-2, who is the wife of PW-1, she states that the incident of assault occurred on the road in front of the house of Jalil. On the other hand, the evidence of PW-8 is to the effect that the incident of assault occurred in the field of the accused.

9. The learned counsel for the appellants also submits that there are discrepancies with regard to the exact location of the injury sustained by the deceased on his head. He submits that PW-1 and PW-2 had stated that the appellant Altaf had hit the head of the deceased with a *dao*. The inquest report is to the effect that a deep injury about 4 inches long could be seen on the rear left side of the head of the deceased. However, the post-mortem examination report of the deceased would show that there was a clean cut injury over the occipital region of skull. He accordingly submits that there is discrepancy in the actual place of the injury on the head of the deceased.

10. The learned counsel for the appellants submits that though the learned Trial Court

had found all the appellants guilty of the offence of murder, on the ground that they were part of an unlawful assembly, for the prosecution of the common object of the assembly to kill the deceased and cause injuries to the 2(two) brothers of the deceased, the prosecution had failed to cite the 2(two) brothers of the deceased as witnesses. He submits that though the evidence of the prosecution witnesses is to the effect that injuries were caused to the brothers of the deceased by the appellants, which required the wounds to be stitched, no medical examination of the brothers of the deceased was done, in and around the date of the incident, i.e. 29.04.2009. He accordingly submits that in the absence of the 2(two) brothers of the deceased being made prosecution witnesses, keeping in view the fact that they were injured eye witnesses, and in the absence of any medical examination report of the injured 2(two) brothers, the learned Trial Court could not have come to a finding that the appellants were part of an unlawful assembly, guilty of the offence, committed in prosecution of a common object to kill the deceased.

11. The learned counsel for the appellants also submits that during cross-examination, PW-1 has stated that at the time of the incident some hundred people were present at the place of occurrence and both sides were involved in the assault. He submits that the selection of the appellants for the offence of assault amongst the hundred persons, was not justified and that there is nothing to show that Section 149 of the IPC can be attracted to the facts of this case.

12. The learned counsel for the appellants also submits that except for Altaf, who has been specifically named by the eye-witnesses as the person who assaulted the deceased with a dao, there is no evidence to show the involvement of the other appellants in the assault made against the deceased. The learned counsel for the appellants thus prays that the impugned judgment and order should be set aside in respect of the other appellants.

13. Ms. B. Bhuyan, learned Additional Public Prosecutor, on the other hand, submits that the evidences of PW-1, PW-2 and PW-4 shows the involvement of all the appellants in committing the deadly assault on the 3(three) sons of PW-1, which resulted in the death of

the deceased Hafijul Ali. She submits that PW-1, PW-2 and PW-4 being eye-witnesses to the appellants assault with deadly weapons, the learned Trial Court has rightly convicted the appellants under Section 302 read with Section 149 IPC. She also submits that when a number of assailants are members of an unlawful assembly, who proceed to commit an offence of murder, in pursuance to the common object of the unlawful assembly, it is not possible for witnesses to describe accurately the part played by each one of the appellants. However, the inference of common object can be drawn from various factors, such as the weapons by which the members of the common assembly were armed with, their movements, the acts of violence committed by them and the result thereof. She also submits that the account of the eye-witnesses being credible and trustworthy, there was no infirmity with the learned Trial Court convicting and sentencing the appellants under Section 304 IPC read with Section 149 IPC. In support of her submissions, the learned Additional Public Prosecutor has relied upon the judgments of the Apex Court in the case of *Abdul Sayeed -vs- State of Madhya Pradesh*, reported in (2010) 10 SCC 259 and *Gurmail Singh & Anr. -vs- State of Uttar Pradesh & Anr.*, reported in (2022) 10 SCC 684.

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

15. One of the issues that has to be decided is with regard to whether the discrepancies in the evidence of witnesses, regarding the difference in the place of occurrence of the assault, would be fatal to the prosecution case. Further, whether there was any discrepancy with regard to the exact location of the injury on the head of the deceased, keeping in view the inquest report and the Post-Mortem Examination report.

16. The other issue to be decided is with regard to whether the appellants have been arbitrarily picked up from amongst hundreds of persons, alleged to be present at the time of occurrence of the incident, keeping in view the evidence given by the PW-1 in his cross-examination. The other issue is with regard to whether Section 149 IPC is attracted to the facts of this case.

17. Let us now look at the evidence adduced. PW-1 is the father of the three sons, who were alleged to be assaulted by the appellants, which resulted in the death of Hafijul Ali. PW-1 states that the appellants Altaf, Munir, Sarju, Idris, Anowar, Sanowar, Zakir, Shahid and others assaulted his three sons Akbar, Bilat and Hafijul at around 9:30 a.m. 6 years ago. Altaf assaulted Hafijul on his head, hands and legs with a dao. The rest of the appellants stabbed Bilayet and they also assaulted Akbar, who is also the son of PW-1. The injured persons were taken to the Barpeta hospital, wherein Hafijul was referred to Guwahati. However, Hafijul succumbed to his injuries on the way to Guwahati.

PW-1 in his cross-examination states that the incident took place in his house and some hundred persons were present at the time of occurrence. Both sides were involved in the assault. He also states that the appellants Munir and Sahidul sustained injuries and the appellants had lodged a case against him on that very day. PW-1 also states that besides the injuries sustained by the deceased Hafijul, he also noticed the injuries sustained by his two other sons Bilayet and Akbar. He also states that the injury sustained by Bilayet and Akbar were stitched. PW-1 also denied the suggestion that he did not tell the police that the appellants had caused injuries to Bilayet and Akbar, by hitting them on their heads with a lathi (stout stick). PW-1 also states that he had enmity with the appellants, who are his nephews. However, the appellants Jalil and Idrish are his brother and brother-in-law respectively.

18. The evidence of PW-2, who is the wife of PW-1, is to the effect that her sons, deceased Hafijul and Akbar, went to the field to see the 'irri' (a kind of paddy) cultivation. But before they could reach the field, the appellants Altaf, Jakir, Monir, Sanowar, Anowar, Shahid, Idrish Ali and Jalil Mia armed with dao and ballam (a kind of spear) had chased them. Her sons ran towards her house and then the appellants fell upon upon them with dao and ballam. PW-2 states in her evidence that Altaf hacked the deceased Hafijul with a dao and Sanowar dealt blows on his head with a dao. PW-2 also states that Zakir stabbed her son Bilayet from behind. PW-2 also states that her injured sons underwent treatment for 14 (fourteen) days, while her son Hafijul succumbed to his injuries on the way to Guwahati. PW-2 also states that

PW-3, PW-4 and PW-8 had also arrived on the scene of assault and though they tried to stop the appellants from continuing with the assault, the appellants did not pay any heed to them. PW-2, in her examination-in-chief, also states that the incident of assault occurred on the road near the house of Bilayet. However, during cross-examination, PW-2 states that the incident occurred on the road in front of the house of Jalil.

PW-2 in her cross examination also states that at the time of the incident, her husband was sleeping in the house and that she was the only person who witnessed the incident. PW-2 also states that Altaf was her son-in-law and a case was pending against the appellants for torturing her daughter.

19. The evidence of PW-3 in her examination-in-chief is that she saw the injured brothers Hafijul, Akbar and Bilayet lying in a pool of blood with injuries on their persons. They were taken to the Barpeta Hospital and the deceased who was referred to Guwahati, succumbed to his injuries near Hajo, while going towards Guwahati. PW-3 in her cross-examination states that she did not witness the incident of assault.

20. The evidence of PW-4 is to the effect that on the day of incident, while he was washing his hands in the tube-wall of his house, he saw Altaf, Zakir, Monir, Sanowar, Anowar and Shahid armed with lathis and spears. They were going towards the house of PW-1. PW-4 asked them not to assault anyone, whereupon Monir Ali attempted to stab him. After that appellants entered the house of the deceased Hafijul, Altaf struck the deceased on his arm and head with a dao. Anowar and rest of the appellants assaulted Akbar with lathi and spear. Bilayet was also stabbed with ballam (a kind of spear). Zakir and Monir also stabbed Bilayet with a sharp weapon. The injured persons were taken to Barpeta hospital, while the deceased breathed his last on the way to Guwahati. In his cross-examination, PW-4 states that he witnessed the incident while he was washing his hands and legs in the tube-wall. PW-4 however states that he was not present when the incident of assault took place in Bilayet's house.

21. The evidence of the Doctor (PW-5), who conducted the Post Mortem examination on the deceased, is to the effect that there were clean cut injuries seen over the occipital region of the skull of the deceased. The size was 4"x1"x bone deep. In his opinion, death was due to hemorrhage and shock, as a result of injuries sustained and that the injuries may have been caused by a sharp cutting heavy weapon such as axe, dao etc.

22. The evidence of PW-6, who is another Doctor, in his examination-in-chief, states that he examined the two sons of PW-1, namely, Bilayet and Akbar on 29.04.2012, wherein he found no injuries on them.

It may be stated herein that while the incident of assault had taken place on 29.04.2009, the medical examination on the above two persons by PW-6 had been done 3 (three) years later, i.e. 29.04.2012.

23. The evidence of PW-7 is to the effect that PW-7 heard that there was a fight between two groups in which Hafijul, Bilayet and Akbar sustained injuries, which resulted in the death of Hafijul.

24. The evidence of PW-8 is to the effect that he knew both the informant (PW-1) and the appellants. He states that the incident occurred around 10:30/11:00 am in the field of the accused, without specifying the accused, as there were 8 (eight) accused persons. He further states that Akbar, Hafijul and Bilayet sustained injuries. While Bilayet and Akbar got treated at Barpeta Medical College & Hospital, Hafijul expired on his way to Guwahati. He also states that he did not see the incident, though he saw the injuries sustained by Akbar, Hafijul and Bilayet.

25. The evidence of PW-9 is to the effect that he was the VDP Secretary of Uttar Debradia village, wherein he was made the seizure witness, with respect to the seizure of one iron

spear, two pointed bamboo lathis and one dao, plus three bamboo lathis. The seizure was made from the house of the appellant No. 7, when appellant No. 7 was not present.

26. The evidence of PW-10 and PW-11 is that they put their signatures on the seizure list made by the Police.

27. The evidence of PW-12, who was serving as the Circle Officer, Barpeta is that he did inquest on the dead body of the deceased in the Barpeta Police Station and on examination, he noticed a deep injury about four inches long on the left back side and the wound had been stitched, though blood was coming out. Another injury was also seen on the right arm, which was also stitched.

28. The evidence of PW-13, who is the Sub-Inspector of Police is to the effect that he investigated the case and seized the weapons used in the assault on Akbar, Hafijul and Bilayet. He also sent the body for Post-Mortem examination. He states that he did not record the statement of Akbar and Bilayet under Section 161 Cr.PC. PW-13 also states that on his transfer, charge-sheet was submitted to the Court by another Police Officer of the Barpeta Police Station.

29. The evidence of PW-14 is that as the entire investigation had been done by some other Police Officer, who had been transferred, PW-14 was entrusted to submit the charge-sheet, which he duly did.

30. In the examination of the appellants under Section 313 Cr.P.C, they have given a blanket denial with regard to the crime in the questions put to them.

31. As can be seen from the evidence of PW-2 and PW-4, who are eyewitnesses to the crime, Altaf Ali had been seen hitting the head and arm of the deceased with a dao. The

Post-Mortem Examination and the evidence of PW-5 also shows that the deceased had died due to haemorrhage and shock as a result of injuries sustained on his person, which occurred on his skull and on his arm. The said aspect has also not been disputed by the learned counsel for the appellants. As such, we do not find any infirmity in the findings and conviction made by the learned Trial Court against Altaf Ali under Section 302 IPC. The next question is whether the other appellants are guilty of the offence under Section 302 IPC read with Section 149 IPC.

32. Though the evidence given by PW-1, PW-2, PW-3, PW-4 and PW-8 is to the effect that two brothers of the deceased Akbar and Bilayet had also sustained injuries due to the assault made on them by the appellants on 29.04.2009, there is no Medical Report/Certificate made against the injuries allegedly sustained by them. Further, the I.O has not made them prosecution witnesses, even though they would have been vital and material eye witnesses. Akbar and Bilayet allegedly being the injured eye witnesses, they could have given first hand accounts of the persons who allegedly assaulted them with sharp weapons and which required them to undergo treatment, including having their injuries stitched in Barpeta Hospital.

The very fact that they have not been cited as witnesses by the prosecution gives rise to a doubt as to whether they were assaulted at all and whether they had in turn fought with their assailants.

33. The evidence of PW-6 shows that Bilayet and Akbar were medically examined by him on 29.04.2012, wherein no injuries were found on them. It is surprising that Bilayet and Akbar would have undergone a medical examination for injuries, 3 (three) years after the incident of assault had taken place. There being nothing to show that Bilayet and Akbar needed medical attention on 29.04.2009, i.e. the date of incident, the same gives rise to an inference that the two brothers did not require any medical attention due to the assault, which took the life of Hafijul. It also raises a doubt as to whether Bilayet was stabbed with the Ballan (kind of spear).

34. Though PW-2 states in her evidence that Altaf hacked Hafijul with a dao and Sanowar dealt blows on his head with a dao, the other eye witnesses, i.e. PW-1 and PW-4 have not made any statement to the effect that Sanowar had hit the head of the deceased with a dao. As PW-2 has stated that PW-1 was sleeping at the time of the incident, PW-1 cannot be considered to be an eye-witness. Thus the question is as to whether the solitary evidence of PW-2 is credible and trustworthy sans corroboration by other evidence, with respect to whether Sanowar was rightly convicted under Section 302 IPC and Section 149 IPC.

35. With regard to the submission made by the appellants counsel that the location of the injury on the head of the deceased in the inquest report and the post mortem report is different, we find that there is no difference in the location of the injury on the deceased head, after going through the original inquest report which is in the Assamese vernacular and the Post-Mortem report. The injury on the head of the deceased was on the left side of the head.

36. With regard to the submission made by the learned counsel for the appellants that there is a discrepancy with regard to the place of occurrence of the assault in the evidence of PW-1, PW-2 and PW-8, we find that 6 (six) years have elapsed between the date of the incident and recording of the evidence of the witnesses by the learned Trial Court. As such, there could be some discrepancies in the exact location of the incident. It should also be remembered that the deceased and his brother Akbar were being chased by the appellants and the location of the assault could have spread over different areas/locations. The above being said, due to a lapse of 6 years and failing memory, we do not find anything abnormal in there being some discrepancies in the testimonies of the witnesses. We are of the view that minor discrepancies cannot affect the prosecution case unless the core of the prosecution case, is affected by such discrepancy. In this regard, it may be stated that the Apex Court in the case of *State of Uttar Pradesh –vs- Naresh & Ors.*, reported in (2011) 4 SCC 324 has held that normal discrepancies are bound to occur in the depositions of witnesses due to normal errors

of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence.

37. The question whether Section 149 IPC would be attracted to the case requires the identification of the appellants in a crowd of assailants. In the case of *Abdul Sayeed –vs- State of Madhya Pradesh*, reported in (2010) 10 SCC 259, the Apex Court has relied upon another decision in *Masalti –vs- State of Uttar Pradesh*, reported in AIR 1965 SC 202, wherein it has held that where a crowd of assailants who were members of the unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants.

It further held that in such cases, Court have to do their best while appreciating the evidence, by sifting through the evidence carefully and deciding which part of it is true and which is not. The Apex Court further held that it is natural that the exact version of the incident revealing every minute detail cannot be given by the eye witnesses.

38. In the case of *Gurmail Singh & Another –vs- State of Uttar Pradesh & Another*, reported in (2022) 10 SCC 684, the Apex Court has referred to another of its judgment in the case of *Surendra –vs- State of Uttar Pradesh*, reported in (2012) 4 SCC 776, wherein it has been held that the inference of common object has to be drawn from various factors, such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result.

39. With regard to the evidence of PW-1 that at the time of the incident some 100 people were present at the place of occurrence, it appears that the same is not in consonance with the evidence of PW-2, who states that no other person witnessed the incident and it was only her (PW-2), who witnessed the incident. PW-2 also states in her cross examination that at the time of the incident, her husband was sleeping in the house. Further, Altaf was her son-in-law and that a case was pending against the appellants for torturing her daughter. It may be

recalled that Altaf is the husband of the daughter of PW-2.

40. On considering the evidence of the witnesses, we are of the view that 100 people who were alleged to be present at the place of occurrence were not a crowd of assailants, but were only spectators. The appellants herein however stand on a different category than those 100 persons mentioned by the PW-1. We are of the view that the 100 persons mentioned by PW-1 are only spectators, who gathered due to the occurrence of the incident and that the appellants herein had not been selected from the 100 odd spectators, as members of the unlawful assembly. The question whether the appellants were all members of an unlawful assembly and had proceeded to commit an offence of murder does not appear to be borne out by the facts and circumstances that have cropped up in the case in hand. Firstly, the brothers of the deceased, i.e. Bilayet and Akbar have alleged to have been injured on 29.04.2009, which required them to have medical treatment. However, there is no medical report proving that they were injured on the date of the incident. They were not cited as witnesses by the prosecution, even though they were material witnesses to the crime in question.

41. In the case of ***Masalti vs. State of Uttar Pradesh***, reported in ***AIR 1965 SC 202***, the Apex Court has held that it is the duty of the prosecution to lay before the Court all the criminal evidences available to it, which is necessary for unfolding its case.

42. The evidence of PW-2 shows that PW-1 was asleep at the time of the incident and it was only PW-2 who saw the incident. PW-2 has stated that the appellants had chased her sons Hafijul and Akbar and that they had dealt blows upon her sons. When her son Bilayet went near them, Zakir stabbed him with a ballam. Altaf hacked Hafijul with a dao and Sanowar also dealt blows on his head with a dao. The evidence of PW-2 only speaks of Altaf and Sanowar attacking the deceased Hafijul with daos. The evidence given by PW-2 that the other appellants had attacked her sons is clouded with doubt, in view of the fact that her other sons, Bilayet and Akbar, were not cited as witnesses and neither has any Medical

Certificate been produced, to show that they had been given medical treatment on the date of incident. The only Medical Certificate showing that Bilayet and Akbar was medically examined was made 3 (three) years later, which is to the effect that there were no injuries on them. The evidence of PW-4 is that he saw Altaf hack Hafijul on his arms and head with a dao. The other appellants attacked Akbar with lathis and spear and stabbed Bilayet with Ballam. However as stated earlier, testimony of PW-4, with regard to the alleged injuries sustained by Bilayet and Akbar have not been proved. Also, PW-8 in his evidence, does not give any specific statement as to who had assaulted whom on the date of incident.

43. As such, the only evidence that can be relied upon is the evidence given by PW-2, which is corroborated by PW-4. We are of the view that the testimony of PW-2 that Sanowar had dealt blows on the head of the deceased with a dao cannot be ignored, even if the other witnesses have not said anything to that effect, as the Hon'ble Apex Court, in the case of ***Ali Mollah Vs. State of West Bengal(Supra)*** has held that conviction can be based on the testimony of a solitary witness, if the Courts finds him to be a wholly reliable witness, from a scrutiny of his evidence. We find the testimony of PW-2 to be wholly reliable and as such do not find any reason to interfere with the conviction of Sanowar. Though the Seizure Memo shows that one dao, one three pronged iron spear fitted to a bamboo handle and 5 (five) bamboos had been seized by the police, we find that the evidence does not show that the other appellants intended to commit the offence of murder and that there was no common object on the part of the other appellants to commit murder, except in respect of the appellant Altaf Ali and Sanowar. We are of the view that there was a motive for Altaf to have committed the offence of murder against his in-laws, keeping in view the fact that there was a criminal case filed against Altaf Ali, for torturing his wife, who was the daughter of PW-2. Accordingly, we are of the considered view that while Altaf Ali and Sanowar are guilty of the offence of murder, it was not the common object of the other appellants to kill the deceased.

44. The above being said, the framing of charge against the appellants has been done by the learned Trial Court under Section 302 IPC separately and under Sections 147/148/149 and 323 IPC separately. We are of the view that Section 149 IPC is attracted to the facts of

this case only in respect of Altaf Ali and Sanowar.

45. In view of the reasons stated above, we are of the view that the guilt of the appellants, except for appellant No.1 and No.3 has not been established beyond all reasonable doubt. We accordingly uphold the conviction of the appellant No.1 Altaf Ali and No. 3 Sanowar by the learned Trial Court. However, we are of the view that the conviction of the other appellants are not sustainable and accordingly, the impugned judgment and order, in so far as it convicts the other appellants, is set aside. Consequently, except for appellant No.1 Altaf Ali and appellant No.3 Sanowar Ali @ Sanowar Hussain, all the other appellants are acquitted on benefit of doubt, in respect of the charge under Sections 302/149 IPC. The respondents are directed to release the appellants, except for the appellant No. 1 and appellant No. 3, if they are in jail and if they are not required in any other case.

46. The appeal is partly allowed. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant